

Legal Development on Management of Strata Disputes in Peninsular Malaysia

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Abstract

Strata living bring people of diverse interests, different cultures, values, ages and backgrounds under one roof. With that background, it is usual to have differences and disputes. While many would generally believe that problems can be resolved by people involved talking about their problem and fulfilling their expected responsibilities, more often than not, more formal measures are needed. This paper highlights some approaches to improve the way strata disputes are resolved with reference to the newly approved Bill of Strata Management 2013. Under the Strata Titles Act 1985 and Building and Common Property (management and Maintenance) Act 2007, when issues cannot be resolved informally, the laws offer a number of mechanisms to resolve disputes, including reference to the High Court for serious matters. However, there are demands and suggestions for alternatives to the current options and the government has taken initiative to review the laws to include among others, tribunal for strata to resolve dispute in strata properties. This paper traces problems on strata properties management from case law, identifies the limitations in the current system, and highlights the proposed improvement in the new Bill. The result shows that Malaysia still lacks consultation to gather input from strata owners, tenants, strata council members, strata associations, other stakeholders and the general public. Though there are new initiatives introduced in the new law, it is doubtful whether the improvements suit the needs of those involved in strata properties.

Key words: *Strata, dispute resolution, Strata Management 2012 (Bill), Strata Titles Act 1985, Building and Common Property (Maintenance and Management) Act 2007.*

Introduction

Living in stratified or strata properties is becoming a common life style in some of the cities of Malaysia. The scheme existed under the National Land Code 1965 (later amended), nevertheless, the law which specifically uses the term 'strata' was introduced only in 1985 to cater for multi storey buildings in response to urbanization taking place in Penang, Kuala Lumpur and Johor Bharu. Land scarcity, the increase of price of landed properties, the trend of new lifestyles in urban areas and better profit are among the reasons for housing developers to offer strata properties instead of landed property. The owner of "strata property" expects the government to treat him in the same manner as the owner of landed property where each lot issued with a title (deed) as proof of ownership.

The first strata titles legislation in Malaysia was enacted in 1985 known as the Strata Titles Act 1985 (STA, Act 318). Subdivision of building was provided earlier under the National Land Code 1965 (No. 56) and was referred to as subsidiary titles. Strata titled properties were originally developed as a way of allowing individuals to own a unit of a flat or an apartment within multi-level buildings. Under this scenario a person could buy and own 'property' that may be of a certain height in the sky and the property would be

recognized as of no less value than any landed property if not better. In Australia, prior to strata title, the most common way of buying into a high-rise building was to purchase shares in the company that owned the building - thus giving a right to occupy space within the property. (Bradbrook, MacCallum and Moore, 1991) Under the first legislation on STA, Act 318, there was no express provision governing matters concerning disputes. Probably, it was expected that fewer problems would occur as the number of strata properties was not alarming. The previous reports recorded a number of high complaints involving the rights and interests of strata properties between purchasers and developer especially in the case of property without title and where dispute occurred between owners and the Management Corporation or the Managing agent concerning maintenance of properties. Furthermore, most of the problems were probably resolved amicably or by referring to the contract entered into by the parties in the sale and purchase agreement. In 1990, the STA 1985 (via Act No 753), although there was no provision in the Act for alternative dispute resolution, the management could resolve problems of non-payment of maintenance fee by attachment of property of owners in arrears (section 53 and Form 7). In addition, the State Authority is given power to fine those who fail to comply with the provisions of the Act, an amount determined by the Act or the Regulations but if there is no provision as such, he can be fined of not more than RM2000.00. Section 40(1)(2) of the STA gives the right to the owner and the MC to seek damages for losses arising from breach of contract by the parcel owner through court referral. Obviously, no other means of resolving disputes appear in the STA 1985 but litigation.

Another amendment to STA 1985 was made in 1996 via Act 951. One of the improvements relate to the problem of long delay in getting strata title; the developer is required to submit application for strata title even when the land are still under qualified title. It also allows for strata title to be issued for single storey building if they formed part of the mixed project which comprised of multi-storey and single storey projects. Again, the amendment did not formally cater for any dispute, nevertheless, parties may seek help from the Ministries dealing in case of any problem arising.

It was only in 2001 that the STA 1985 was amended to include provisions for the establishment of Strata Titles Board (section 67A-X) to resolve disputes within the management of Management Corporation. By having this Board, all disputes between parcel owners and the MC can be resolved without going to the court.

Dispute Management

It was announced by the Minister of the Ministry of Housing and Local Government (Seminar on Strata Properties Time Bomb; More Solutions or Problems, Sunway Putra Hotel, Kuala Lumpur, 22 January 2013) that his Ministry received around 15,000 complaints on various matters pertaining to strata properties after the introduction of the Building and Common Property (Maintenance and Management) Act 2007. It was earlier reported in the Malaysian Bar website that the reluctance of the parcel owners to pay monthly charges for the maintenance of the common areas and other contributions to the developer, with the parcel owners having no say in the amount of the monthly charges and the standard of service provided are among the major complaints on strata properties. Some of these problems were resolved when the Building and Common Property (Maintenance and Management) Act 2006 was introduced, as this Act establishes a Joint Management Body (JMB) which has the power to determine the amount of monthly charges, prior to the formation of the MC.

Other problems relate to payment of quit rent for the master title, which is registered in the name of the developer or the Management Corporation, low collection of monthly fee as well as abuse of power by the developer and the management. All these problems seem to raise tension among the owners and the management including the developer, and yet the law lacks the mechanism on how to resolve the tension. An improvement was made to the STA 1985 (Dec 1, 2000) to allow for the establishment of Strata Titles Board (STB) with a view to deal with disputes and other matters. (Section 67 STA). Under the law, every state in Malaysia is required to establish a Strata Title Board to handle problems on strata properties. The STB has been seen as a positive initiative as it is a specialized tribunal to deal with disputes between parcel

proprietors and Management Corporation and among the parcel proprietors themselves. Since the procedures are simple, it provides speedy settlement at a low cost. It is supposed to be effective as any person who contravenes an order made by the Board to do or refrain from doing a specified act shall be liable on conviction to a fine not exceeding RM10,000 or imprisonment for a term not exceeding two years or to both. It is also provided that the decision of the Board is final and no appeal shall lie to the High Court except on a point of law. Neither is there an automatic stay of execution when notice of appeal is filed. (Roger Tan, 2012).

It is sad to note that all states in Peninsular Malaysia have not established a formal Strata Titles Board except for Penang, which was later dissolved to give way to another change to strata law i.e. the Building and Common Property Act 2007 (Maintenance and Management). Nevertheless, the authors' interview revealed that there was a satisfactory result for the earlier establishment of STB in Penang since the Board has managed to hear a few disputes; such avenues provide relief to strata owners. (Tiun Ling Ta, 2013) It is observed that there was actually no reported failure for the working of the STB as far as Penang is concerned. (The Sun, 2007). As far as the STA 1985 is concerned, the provisions for STB merely pay lip-service. Nevertheless, the court in *Gurney Tower Management Corporation & 3 Others v Commissioner of Building Penang, Penang Municipal Council & Other* [[2011] 6 CLJ 583; [2010] 1 LNS 1821] ruled that in the absence of a Strata Title Board, the Commissioner of Building (COB) has power to adjudicate on issues of management of stratified buildings as provided under section 3 of BCPMMA (Act 663). The setback is that the jurisdiction of the COB is put within the job scope of the head of the Local Council who is actually overburdened with duties. Market commentators pointed out that such a role "would be too large for a single person to handle" as the duties of a COB are wide and very demanding. Lawyer Lee Kim Nor, who was involved in the drafting of the Building and Common Property (Maintenance and Management) Act 2007, said the role of a COB requires him or her to be "legal officers, law enforcers, mediators at residents' meetings, registrars, record keepers, defect investigators and even debt collectors". As a legal advisor, the COB must determine the service charge of a property, ensure the building is insured, audit the Building Management Fund, enforce house rules and even advise on late payment interest for maintenance and service charges. (NST, 29/9/2007)

In the circumstances, the real players are the staff at the Commissioner of Building office which is headed by officers who in many aspects lack knowledge and experience in managing problems relating to strata. A visit to Penang COB (Zakaria Nayan, 2013) shows that administratively, the office only has one officer and as far as enforcement is concerned, the jobs are shared with the enforcement division. During an interview with the COB Kuala Lumpur, it was revealed that apart from being overburdened, they also lack expertise in handling complaints from the public, in which some of the complaints require investigations and skill in mediation and arbitration. They admitted that there are trainings provided, but they are inadequate. The authors were also informed that COB does provide training to those involved in strata management but the number of training is limited, once or twice a year covering only around less than 400 people while the number of schemes in K Lumpur alone is more than 4000. A similar situation happens in Penang. In fact, briefing or updates on new law or policy organized by private organization normally cost a handsome sum which sometimes put the MC or JMB in a dilemma to spend their money for that purpose. In Australia free online course are available to the public. (New South Wales Fair Trading).

The latest development in strata laws as proposed in the Strata Title Management Bill 2012 shows a serious effort to improve matters pertaining to maintenance and management of the building after a few years of implementation of a specific law dealing with maintenance and management received a lot of complaints from the stakeholders.

Prevention is better than cure. This proverb proposes a strategy which everyone should consider when dealing with problems. In relation to this, dispute avoidance is seen as a practical dispute management in dealing with human problems. In strata management where the owners and the tenants are expected to live in harmony and work as a team, disputes are therefore very unwelcome. Without due attention they can be exponentially damaging. Thus, it is necessary to create awareness and to establish ways to minimize the chances of them occurring in the first place and, if that doesn't work, to plan strategies to manage them

effectively once they occur. The process of dispute avoidance starts with education. The whole community of strata residents must realize the importance of living in harmony, cooperation, having the spirit of brotherhood and tolerance. The process must involve everyone, the developer, the management corporation, the joint management body, the managing agent and more importantly, the owner and the residents in the blocks.

Effective dispute avoidance requires management at all levels and field staff to be trained and required to act on trust and good faith in the management of the building. Management staff who are trained in facilitated techniques and good communication skills are less likely to enter into conflicts. They are more likely to ensure that operations are well understood and to confidently advise upon and assist in managing disputes. It is good to have experienced senior persons within an organisation with appropriate skills and authority to ensure disputes are dealt with effectively especially in dealing with complex or escalating disputes.

It is also advisable to develop communication avenues such as group blogs or websites, group meetings, face-to-face meetings, facilitated strata and building development/planning sessions to bridge gap, remove mistrust and antagonism between the parties. Based on that premise, each organization should have dispute management plan in which a standard of working operation should be devised and made known to those living and managing the strata. In this respect, the Ministry in-charge through the COB must provide guidelines and find a mechanism to ensure compliance by all parties. For that matter, there is a need to devise incentive or merit base plan, so that all parties can see the benefit of adopting or ignoring the rules. For example, any strata scheme that complies with all the guidelines shall be entitled to a certain kind of incentives from the government in terms of tax incentive etc. Monetary benefits are always found to be attractive.

Voting right restriction is a punishment for those who fail to pay maintenance charges. Another important weakness in the current administration of strata is lack of enforcement. Even though, there are provisions in the Act 663 penalizing those who fail to pay maintenance fees or other charges (Sections 53 and 53A), nonetheless, there is no case reported that show the enforcement of the penalty. Thus again it just pays lip service.

Dispute Resolution Methods

The Joint Management Body or the Management Corporation (MC) must receive proper training on building management as well as skills on management of human beings. It is too ideal to put a high expectation on the Committee to lead a property management body without any professional background or experience. The issue pertaining to whether Malaysia should regulate to having registered and qualified personnel to manage property in Malaysia is valid but the process for acquisition of the recognition should be flexible thus allowing for the unqualified but experienced property manager to qualify themselves through certain processes to be determined and agreed by all parties. Any policy should, at the end consider the interest of the public rather than confining it within the purview of certain interest groups.

Under the STA Act 318 and the Act 663, the MC has a duty to refer disputes or problems to the Strata Titles Board and recourse to Magistrates Court on points of law. Under section 53(2) and section 53A, the MC also has the authority to recover arrears of debt by attachment of any moveable property belonging to the defaulting party. Nothing is mentioned about other options of dispute resolutions. Unlike Malaysia, mediation is mentioned as a preferred way to resolve disputes in Australia and even parties are advised to talk about their problem. If anyone opts to refer disputes to Consumer, Trader and Tenancy Tribunal in New South Wales, parties must generally attempt mediation before lodging an application. Nevertheless, it is noted that negotiation is always the first step in trying to resolve a disagreement. It's the cheapest option and maintains working relationships.

Alternative dispute resolution refers to a collective term used to describe methods of resolving disputes which are alternatives to litigation and arbitration and which usually offer a less expensive solution. In Malaysia, it is suggested that those who involve in strata living may opt for a few options to resolve disputes (Shukri, 2010) such as :

a) Resolving dispute by talking the problem with the other party is seen as the best practice and should be a preference for everyone who wants to continue living under the same roof. Nevertheless, without having a proper standard of practice (SOP) determined by the JMB or the MC, parties in dispute may find it difficult to start the initiative. It is important to note that resolving strata dispute often involves more than a decision as to who is right or wrong. It is about how to bring both parties to understand the situation and be willing to remedy and accepting the remedy. Dispute handling procedures should be structured and be made a pre-condition before formal conciliation or mediation.

b) Mediation: Mediation is a voluntary, private dispute resolution process in which a neutral person helps the parties to reach a negotiated settlement. Although discussing the problem is effective for harmonious living, but when the disputing parties are unable to find any acceptable solution, it is advisable to get an independent but neutral party to mediate the dispute. The role of the mediator is to guide the parties in dispute to achieve their own solution. If the management or the parties cannot find any mediator, the COB may provide the list of the qualified persons to act as mediator.

In view of the above, the establishment of the Strata Titles Board (STB) (Under the STA Act 1985 amended in 2000), (in which among others, its role is to arbitrate disputes between parties) is seen as a right step towards managing dispute. This Board is a statutory body which consists of panel members who are lawyers and experienced practitioners in the building industry. (Shukri,2010) If any mediation fails, the dispute can be referred to the STB for arbitration. The decisions of the STB are final. After such a decision, an appeal can only be made to the High Court on question of law. Nevertheless, not all disputes can be referred to the STB and only those prescribed in the STA can be referred to the STB. Section 67 of STA (A-X) provides the jurisdiction of the STB which includes settling disputes on cost or repairs, or satisfying a complaint in respect of defect in a parcel and common property; invalidating proceedings of meetings which are against the Act, and annulling any resolution if voting rights are denied or due notice of business is not given. The STB also has power to revoke any purported by-law or amend a by-law that affects parcel proprietors, vary the rate of interest for late payment and requiring an MC to make or pursue an insurance claim in respect of damage to the subdivided building. The STB also can give consent to owners affecting the common property and compelling an MC to supply information or documents to an applicant who is entitled to have access to them.

In the absence of STB, most of the complaints go to the Commissioner of Building. Under the job scope of COB also it is also stated that COB has a role to give advice and mediate disputes by attending to complaints from purchasers on defects and poor maintenance as well as the management of common property.(Shukri,2010)

Literatures on the subject suggest various options for managing disputes. Disputes differ in terms of their levels and any plan of dispute management must consider the differences which in the end determine the expense and finality of outcome. It is usual to expect that the modes of resolving dispute must be practical, low in cost and acceptable by parties in dispute. It is suggested that any COB office needs to have a proposed plan for ADR and train their staff to keep up with the no-end demands from the industry.

There are advantageous and disadvantageous of various types of ADR and they require consideration for appropriate situations to opt for the mechanisms. It is observed that the effectiveness depends on case to case having considered the suitability and readiness of the parties involved in the process. In strata management, the mission of dispute resolution is basically to put the parties together under one roof. Thus the way in which strata title disputes are resolved should not be for the sake of making a decision as to who is the winner and who is the loser. Parties to a dispute must still live together under the same roof. The settlement must, where and if possible, restore and build relationships. (Bertus de Villiers, 2011).

Experience has shown that ADR mechanisms such as conciliation and mediation are more appropriate than litigation or full scale arbitration in resolving the vast majority of disputes. There are many advantages of arbitration over litigation which can be summarized as simple procedures with confidentiality assured. The process is not adversarial and often does not require involvement of legal practitioners; emphasis is placed on preserving the relationship between the parties, and where this is not possible, ending the relationship fairly; aims for win-win solution, fast, safe, the process enables the disputants to reach a mutually agreeable solution, rather than having one imposed, with the result that there may be a greater commitment to abiding by the solution.

The Tribunal under the Strata Management Bill 2012.

Realizing there is a need for better option of ADR as well as the calls for cheaper and faster dispute management, the new law was enacted with some background studies on best practices in other jurisdictions including Singapore and Australia. Although Malaysia may be a little bit late in introducing the Strata Titles Tribunal (the Tribunal), its better late than never. The previous discussion has shown proof of unresolved disputes as well as the expectation of parties having problems with strata properties. The new Strata Management Bill 2012 has detailed provisions on the Tribunal covering 25 provisions providing for definition section, the establishment provision, its jurisdiction, the members, the staff, terms of office and allowances, persons entitled to file claim, the sitting of Tribunal, right to appear at hearings, proceeding to be open to public, negotiation for settlement, treatment of parties, rules and procedures, the hearing, appointment of experts, awards, reference to High Court on point of law, criminal penalty for failure to comply with the award as well as the power of the Minister to make Regulations in respect of Tribunal. The Fourth Schedule of the Act details out the jurisdictions of the Tribunal, and if the disputes fall outside the scope, the parties have to refer it to the court.

Having mentioned the above, there are still dissatisfactions as regards to some of the new proposed ways to manage strata property. There are still complaints with regards to the term 'property manager' or 'building manager'. There are worries that there will be a monopoly of the industries by certain groups of professionals. As a result, the government had to change some of the concepts after the second reading of the Bill in the parliament. On this point, Malaysia still lack public consultation practices. In British Columbia, the changes to the Strata Property Act initiated in 2011 aimed to improving accountability in strata corporations were developed through a consultation process that included focus group meetings and an ongoing dialogue with strata experts and organizations. This public input culminated in an online survey carried out in March 2011 to get feedback directly from strata owners and the public. The results of the survey then were then made public.

In Australia, public consultation is common prior to changes in any law or policy. The consultation documents are made available to the public. After the consultation period ends, all responses received will be publicly available from the government agencies' website. A similar process was also done in Singapore where the Ministries concerned will post document for public consultation and the feedback will go directly to the agencies. For example, the Building and Construction Authority have called for public feedback on the review of the Building Maintenance and Strata Management Act. The public consultation was carried out by an independent third party consulting firm. The survey was done online where the public and interested stakeholders were invited to participate. In Malaysia such effort is new. For instance it was carried out in reviewing the National Land Code 1965 which results are yet to be made public.

Conclusion

Fast developments in the law relating to strata properties show there are inadequacies. In this paper it is shown that there is lack of implementation and enforcement on what have been determined to be the law. The lacking is administrative as well legal in nature. The root cause may relate to human factors. To address these loopholes, the new bill has provided for establishment of a Tribunal. Nevertheless, disputes in strata sometimes require more than a simple claim in a Tribunal or court. The Tribunal and litigation should

always be regarded as the last, but not the very least resort. Educating people for strata living culture and expectation is more important than living with lifestyles in strata. Guidance may be provided by the management with regard to the process of avoiding and resolving disputes. Final say or award must appear to be effective. Penalty provisions and their enforcement are still necessary. Alternative dispute resolution is relevant in strata living as life in a diversified culture and ethnics bound for differences.

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