

A STUDY ON LEGAL FRAMEWORK FOR TERMINATION OF STRATA SCHEME IN MALAYSIA: CHALLENGES AHEAD

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ABSTRACT:

The purpose of this paper is to analyse the legal provisions on termination of strata scheme under the Malaysian strata law. The study uses semi qualitative legal analysis approach where the provisions of the related laws are examined to see the specific requirement for the termination of strata scheme and the challenges. In this process, a comparison of similar provisions will be made with other jurisdictions in particular, New South Wales, Australia and Singapore. This study analyses reported and unreported case law in order to see the common issues of objection in the process of termination. The findings show that there are specific provisions dealing with termination of subdivided properties in Malaysia where unanimous agreement is required. This state of law is different from the development in other jurisdictions, which provide for no unanimity requirement in strata termination. There is also latest change in the Strata Titles Act 1985 with regards to distribution of profits on termination of subdivision which is based on open market capital values of parcels while previously it was based on share units. The outcome of the study would help to prepare for future enhancement of the law and its implementation in Malaysia.

Key words:

Strata properties, termination of subdivision, collective sale, Strata Titles Act 1985.

INTRODUCTION

Building aging is common and the problems seem to be more in the case of strata properties where owners' rights and interests depend on conditions of building and the value of their properties. There are many reasons for a strata property to be in the state of aging albeit the long life span of the building, including the management and maintenance of the buildings. The Strata Titles Act 1985 has provision which addresses on the need for a law to end subdivided properties since its introduction in 1985. Nevertheless, the importance of such provisions is only recently felt as a number of strata properties have gone through their ageing stage. Having stated the situation, nevertheless, Malaysian properties are yet to go through a situation where properties are forced down to give way for redevelopment or urban development. It is observed that although there are provisions for termination of strata but the provisions in most of strata related laws such as the Strata Titles Act 1985 do not regulate the ways on how the agreement to the termination should be achieved. Based on that premise, it is argued in this paper that there will be problems in the process of making an end to the existing strata scheme which shall, to a certain extent delay the reconstruction of new buildings or other developments.

THE ISSUES

The issues regarding termination of strata schemes relate to the dilemma between the need to redevelop urban land for the benefit of the community and the state at large and the rights of the strata owners to hold their property rights free from any disturbance and interference. For the government, it is always a matter of concern that any decision affecting the rights of the community should be delicately handled for fear of losing votes from the voters. The owners may have dilemma whether they should spare more budget for the maintenance of the old buildings or choose to apply for termination of the scheme. As they are many stakeholders involve in the management of strata properties, they may have question as who has the right to apply for the termination of the scheme? And to whom should they apply?. In addition, there are also problems in determining the mode how the consensus is obtained from the affected parties such as the owners, charges and the management bodies. If the law allows for non-consensus, thus, the issue of what is the reasonable number or percentage of those who agrees and objects is also relevant. This paper looks at what is the current policy on this matter in Malaysia?. The practice in other jurisdiction shows that some countries allow for an outright sale of the property by a developer. The developer will value and offer each owner a competitive price for his unit and in consequence the developer is more free to redevelop the scheme. Although the owners through the management bodies may opt for strata renewal plan, the problems will arise in the case where some of the owners cannot contribute to the renewal plan especially on its financial term. How to address this issue?. In general, it could be said that termination of strata scheme is difficult unless all parties agree or at least the majority agrees and the justice for the minority is clearly addressed by the law or the court.

THE CURRENT PRACTICE OF TERMINATION OF STRATA OR SUBDIVIDED PROPERTY UNDER THE MALAYSIAN LAW

Strata properties in Malaysia are governed by several laws which include the Strata Titles Act 1985 (STA), the Strata Management Act 2013 (SMA) and the Housing Development Act 2002 (HDA). Prior to the introduction of the Strata Management Act 2013, the Building and Common Property Act (Management and Maintenance) 2007 has dealt specifically with management of the properties especially the common property but no mention is made on termination of the scheme. The Strata Titles Act 1985 has addressed the issue on termination of strata scheme since its introduction in 1985 with several amendments to facilitate for sustainable strata management. Despite the amendments, the laws remain inadequate in various aspects. This has resulted in 2007 amendments of the Strata Titles Act 1985 followed by the introduction of the Building and Common Property (Maintenance and Management) Act 2007. Both Acts address the issues associated with management and maintenance of strata schemes such as Strata Titles Board, management of properties before the issuance of strata titles and the introduction of computerized strata titles. In 2012, further changes sought to curb delay in the issuance of strata titles and introduced a two-tier management corporation, namely a main management corporation to maintain and manage common property enjoyed by all parcel owners and a subsidiary management corporation to maintain and manage the limited common property that is exclusively enjoyed by the limited parcels owners. The latest Act dealing with strata provides for the establishment of the Strata Management Tribunal ("Tribunal") to address strata management disputes. The Tribunal may of great help to ease disputes relating to end of strata

scheme. Despite various amendments for a better governance of strata properties, none involve the amendment or addition to existing laws on termination of strata except for 2013 amendment for Strata Titles Act 1985 (STA).

At a glance, minimal changes were made to the laws on termination of strata scheme indicates that there is not much problem on termination of strata scheme in Malaysia. Study on case law on strata title does not reveal any single case on dispute relating to termination of strata schemes. The answer to a question addressed to the officer in charge in the strata titles department of the Ministry of Land and Natural Resources indicates that there are cases of voluntary termination for strata scheme referred to the Ministry thus perhaps it is right to assume that there is no problem relating to termination of strata properties in Malaysia.¹ Study on the provisions of Strata Titles Act 1985 shows there are only 2 main provisions dealings with termination or variation of subdivision of subdivided building.² Tracing the development of the provisions, it shows that the latest amendment to the law involving S 57(4), which was amended by substituting for paragraph (e) provision concerning the method of distribution of profit by the management corporation before the termination of the subdivision. This scenario indicates that Malaysia does not foresee problem on this matter, as such, the approach is more relax and lack details as compared to other jurisdictions.

Section 56 of the STA allows for application to vary the existing strata scheme with similar effect with application to terminate strata scheme. Although any application to vary strata scheme may not terminate the whole scheme nevertheless, having such provision would allow the management bodies, or the proprietors or the registered charge to apply to court to make orders giving effect to such variation. Among others, the court may facilitate application to redesign, renovate or to re-determine the boundary of lots or parcel.

Section 57(1) of the STA provides for termination of subdivision of the subdivided properties initiated by the management corporation. Under the law, the management corporation where the building is destroyed or the parcel owners may seek to demolish the building or in the event where the building has been partially destroyed or there is only one proprietor for all the parcels may be directed by unanimous decision to take action to terminate the subdivision of the building and subject to any order of the court. Once effected, the subdivision of the building or the building and common property or limited common property shall be put to an end. The possible challenge at this stage is how to get unanimous decision from the parcel proprietors. Although the law provides that such termination may be effected by application to the court or by requisite resolution of the management corporation or the subsidiary management corporation the reality is always that it is difficult to obtain unanimous decision. Having provision that allows for Furthermore, there is no need for physical destruction of the properties.³

Section 57(7) allows for a management corporation or any proprietor or any registered chargee of the parcels to apply to court of competent jurisdiction to make an order directing the management corporation to take action to terminate the building notwithstanding the absence of unanimous decision. The basis for the court to make such order is if it satisfies that justice requires as such. To this date, no case was brought to court to challenge the status. Nevertheless, S. 4 of the STA defines unanimous decision as decision passed at a duly convened

¹ Halijah Abdul Hamid, Workshop on the Amendment to the Strata Title, 11th November 2013, Campus 2, INSPEN, Bangi.

² Section 56 and 57 of the STA

³ Teo Keang Sood [2012], Strata Titles in Malaysia and Singapore,

general meeting of a management corporation where at least a notice of 21 days specifying the proposed resolution has been given and against which no vote is cast. The order for termination takes effect when the Registrar makes a memorial of the notification in the register and informs the director of survey of his action. The effective termination of strata scheme takes effect on the making of a memorial in the register which result in the proprietors cease to be the proprietor of the parcels and the management corporation becomes the proprietor of the lot acting as the trustee for the former proprietors. The termination of the scheme will also convert the charge as a personal obligation of the chargor towards the chargee [S 57 (4) (a)]. Para (e) of the same provision has been amended and inserted with a provision that requires the management corporation to distribute any profits arising from any of the lots acquired by the body including any purchase money received from the transfer of any lots to the former proprietors proportionately based on the market capital values of the lots immediately after the strata comes to an end. The market value must be ascertained in a valuation report prepared and certified by a registered valuer.

Other implications are the former proprietors shall continue to be a member of the corporation, maintaining the same status quo as to voting rights, management corporation continue to hold and manage the lot for the benefit of the former proprietors, the former proprietors may by unanimous resolution direct the management corporation to transfer the lot to any one or more of the former proprietors or to any other person or body and the management corporation shall also distribute any profits arising from its proprietorship of the lot to the former proprietors according to the proportion of their share units.⁴ [S. 57 (d)(e)].

It could be seen that by virtue of section 57(7), the court has power, if justice of the case requires based on application from the management corporation, a parcel proprietor or the registered chargee of a parcel to make an order directing the management corporation to take action to terminate the scheme even if there is no unanimous resolution. Similarly the court also has the power to prohibit the management corporation from taking action to terminate the scheme notwithstanding a direction given by unanimous resolution [S 57(7)(a)(i)(ii)]. This shows that the court is free to decide on the basis of what is just and equitable for the parties in any application for termination of strata scheme.

Unlike Singapore, Malaysian law lacks details in many aspects. Apart from the requirement for 100% agreement or consensus, Malaysia strata law also does not mention about the parties that should be notified by notice in accordance with Rules of Court of the application to terminate strata scheme. ⁵ Similarly, under the Singapore law, the court has jurisdiction, when it thinks appropriate, to make order for termination of the scheme instead of entertaining application for variation of the scheme.⁶ Nevertheless, the problem may arise when the proprietors do not agree for termination while court is of the view that termination is more appropriate than variation. The Malaysian law is silent on this matter which means that the court has no jurisdiction to make such order.

⁴ Section 57(d)(e) of the Strata Titles 1985 (Act 318)

⁵ Section 77(3), LTSA

⁶ Section 78, LTSA

THE LAW AND PRACTICE OF TERMINATION OF STRATA SCHEME UNDER THE SINGAPORE LAWS

Unlike Malaysia, Singapore policy on variation⁷ or strata termination scheme system does not have a unanimity requirement, but allows the minority to file objection for any disagreement. In addition to LTSA, the Building and Strata Management Act also addresses for the termination of strata schemes.⁸ Under the laws, a certain percentage or numbers of the proprietors may put their application for termination of strata to the Strata Title Board⁹. The law requires for a 90% majority¹⁰ where the building has been occupied for less than 10 years, and 80% where it has been occupied for more than 10 years. The differences of percentage seem to be more in line to principles of justice.

A proprietor or a mortgagee may object to the application for termination of the scheme within 21 days of the application being made. The system also allows the parties to find agreement among themselves. For example, after receipt of the objection, the Strata Titles Board (the Board) has power to mediate matters between the objectors and the applicants. Where the mediation is unsuccessful, or 60 days of mediation elapse (whichever occurs first), the Board must order that the sales process cease.

The proprietors may make an application to the High Court, and the High Court must approve the application unless it is satisfied that: an objector will receive less than what he/she has paid for the lot after taking into account stamp duty, legal fees and shared costs due to the collective sale are deducted from the proceeds; or that the proceeds of sale for any lot received by an objector will be insufficient to discharge a mortgage in respect of that lot. The High Court has a discretion to require compensation be paid to objectors up to a capped amount of 0.25% of the proceeds of sale, or \$2000, whichever is higher. However, this can only occur with the consent of the applicants.

Both laws on strata in Singapore i.e. the LTSA and BMSMA provide termination of strata scheme through application by the management corporation (MC) under certain circumstances. Under the BMSMA, a management corporation may, by a consensus resolution agree that the strata scheme to be terminated when the MC constituted under the same strata resolves for comprehensive resolution¹¹ subject to conditions as provided under section 84(2) of the BMSMA. The termination will take effect upon registration of the application by the Registrar with the entry of memorial by the Registrar. In addition, the LTSA also has provisions on appointment of liquidators in the case of winding up of the MC pursuant to the termination of strata scheme.¹²

⁷ Section 77 of the Land Titles and (Strata) Act, Cap 158 (LTSA).

⁸ Section 84 of the Building Maintenance and Strata Management Act, 2010 (BMSMA)

⁹ A Board established under the Building Maintenance and Strata Management Act

¹⁰ The effective date for the calculation is from the date of the issue of the latest Temporary Occupation Permit (TOP) (or Certificate of Statutory Completion (CSC) if no TOP)].

¹¹ Section 84(1) BMSMA

¹² See Sections 82, 84 of the BMSMA.

TERMINATION THROUGH COLLECTIVE SALE

The practice under the Singapore strata law only allows for a collective sale to a developer. This practice has the advantage where the developer may have a better capital to redevelop the scheme as compared to the group of the strata proprietors who may have problems to raise the fund for redevelopment. Without any sufficient capital the proprietors are prone to face insolvency problem that may aggravate the existing problems of high maintenance cost for ageing buildings. Looking from the other side of the coin, it is also necessary to consider the interest and the rights of the majority share owners whom are looking forward to rebuild their properties either own their own initiatives and capital or on joint-venture with the developer who is willing to pump in the capital based on certain agreed terms and conditions. Looking at both scenarios, it is learnt that there are other jurisdictions, which provide some guidance for terminating a scheme without unanimous resolution.

THE LAW AND PRACTICE IN THE NEW SOUTH WALES, AUSTRALIA

It is reported that there are about 30% of residential strata schemes in Sydney attain the age of more than 30 years old¹³ However, according to Land and Property Information NSW records, only 826 schemes have been terminated since the strata legislation was enacted – a mere fraction of the 70 000 schemes in NSW. One of the reasons may be linked to the facts that the law and practice seem to adopt a difficult process for strata termination.

The law in the New South Wales¹⁴ provides that a strata scheme can only be terminated by two methods:

- by order of the Supreme Court; or
- by application to the Registrar General, which must be supported by a unanimous resolution of the owner's corporation.

In short, in New South Wales, the owners of a strata scheme must be unanimous to terminate, sell or redevelop the strata scheme. It is always contended that the strata title law reforms will lay down a process for collective sale / renewal where the owners can proceed to terminate the strata scheme by a 75% majority vote. Voting is to be one vote per strata lot. While a 75% majority vote is what is required for a shareholder resolution to wind up a company, a 90% threshold which applies to compulsory share acquisitions in a public company takeover might be more suitable.

This policy is designed for strata buildings where the cost of repairing or maintaining the building is more than the cost of re-building, or where the land is re-zoned to high rise (allowing more than 3 storeys) which means that the land value is greatly increased, making it ripe for redevelopment. It is a fact that unanimous resolution is difficult to obtain from the owners corporation especially in large strata schemes where there may exist various competing interests among the different group of stakeholders in strata properties. It is also a new proposed change

¹³ <http://www.corrs.com.au/publications/corrs-in-brief/termination-of-strata-schemes/> retrieved 13 August 2014.

¹⁴

in New South Wales that unanimity requirement should be put off. It is suggested in the proposal for strata law amendment to:

- introduce two levels of approval with, for example, 80% approval required for schemes of 5 lots or more and 75% approval for schemes with 4 lots or less; or
- calculate on a sliding scale based on the age of the building, for example, 100% agreement for schemes less than 20 years old, with the threshold dropping by 10% for every decade i.e. schemes 20 years or older requiring a 90% majority.

THE LINGERING ISSUE

Looking at the overall concern on termination of strata scheme, there is a need for balancing the right of the minority owners who may wish to preserve their right to his unit to the rights and interest of those who are considering for redevelopment of the scheme either for the purpose of urbanization or dilapidation. Although compulsory acquisition may appear to be one of the solutions but it requires adequate compensation to be paid to the unit owners. And, the most likely scenario is that unit owners may disagree with the amount of compensation payable for their lots.

Under the Australian law, there are provisions, which allow lot owners to commence proceedings in the CTTT to vary the in decisions made by the owner's corporation.

Section 183A of the Management Act provides that the CTTT can make orders in relation to charges payable by the owners corporation under the agreement for the services of the caretaker are unfair; or deal with the agreement in the circumstances where the terms are found to be harsh, oppressive, unconscionable or unreasonable. In respect of termination of strata scheme, it is reasonable to believe that the Tribunal will have broad power to deal with amount of compensation payable to the unit owners in termination of strata cases. It is perceived that "friendly" deals with developers would be prohibited. Having mentioned the above, unit owners still need to agree to the termination. In Australia "The Castle" effect remains as the unresolved issue in relation to termination of strata schemes.

Fraud on a power

The NSW Court of Appeal has affirmed the decision that bodies corporate can be in breach of the Corporations Law doctrine (*Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46). In the case it was argued that a change to the unanimity requirement would amount to a fraud but has no basis. The doctrine of a fraud on a power requires the ostensibly valid execution of a power by a majority, accompanied by some underlying motive, which results in the minority suffering a detriment. If the statutory mechanism is amended to allow a majority to terminate a strata scheme, and the majority exercises the power, they will be exercising the power for its proper purpose. Hence, there would be no issue of an underlying motive.

Constitutional Perspectives of strata management and ownership

Unit owners may claim that there is a provision in the constitution or at common law, which will protect them from having their homes taken away. However, despite the outcome in *The Castle*

(and any general "vibe") it appears clear that the proposed amendments are not unconstitutional.

It is well accepted that State governments have supreme law-making power, subject only to relevant limitations imposed by the Commonwealth Constitution. These limitations include the fact that the States could not, for example, pass a law that interferes with freedom of interstate trade and commerce in breach of section 92 of the Constitution. While the Constitution includes a guarantee of compensation for acquisition of property (i.e. section 51 (xxi)), the High Court has confirmed that this guarantee does not apply to State laws.

The only way to argue that the proposed new strata laws are invalid is when one argues that the State governments are not in fact supreme. For instance, it can be argued that the State governments cannot pass laws that are inconsistent with fundamental common law rights. This argument was proven as unsuccessful in *Durham Holdings Pty Ltd v State of New South Wales* (2001) 205 CLR 399. In that case, the New South Wales government passed a law acquiring the applicant's coal interests, without paying full compensation. The applicant raised a point of argument that right to compensation in acquisition of personal property is a fundamental common law right, and the New South Wales government could not pass a law which contradict such fundamental right.

The High Court unanimously rejected this argument on two grounds, which are relevant in the context of the proposed new strata laws:

- First, the Court refused to acknowledge that the guarantee of compensation for acquisition of property is a fundamental common law right; and
- Second, the Court did not accept that the NSW government was restricted from enacting laws that are inconsistent with fundamental common law rights in any event.

Given these matters, there is no point for arguing that the proposed new strata laws are a breach of a constitutional guarantee, or a fundamental common law right.

The problems as shown by various literatures including case law reports in Singapore and New South Wales, Australia will reflect a similar scenario for strata properties management at present and the future. The existing law that offers termination with unanimous dissolution or by court but lack details may open for problems in the future.

CONCLUSION AND RECOMMENDATION

There is a need for a proper and clear mechanism to allow for older or ageing strata schemes to be terminated and renewed more readily and conveniently. The unanimous resolution may be difficult thus creates more problems and time constraint. The choices of 90% or 80% or 75% should be given to the Commissioner of Building and courts depending on the case. Furthermore, guidelines on redevelopment, renewal, renovation and variation should be available. Having said that, the practice of in other jurisdiction shows that it is appropriate to call for termination of strata simply because the majority favors it, and presumably because the owners can make more profit from the practices or termination. It is obvious that the current law on termination of strata can be thwarted by simply one person who objects or being reluctant.

It is also obvious from the practice of other jurisdiction especially Australia on public participation or involvement of various parties representing the public in determining the policy. This is yet to be seen happening in Malaysia especially in strata management. It is high time for Malaysia to learn from other jurisdiction and move in tandem with the development and changes to prepare for the challenges ahead.

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