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apfm ASSOCIATION OF PROPERTY AND FACILITY MANAGERS

# newsletter

## EDITORIAL

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# Workshop-cum-Dialogue on Waste Recycling for Condominiums

*Contributed by Ms Ong Bee Leng,*
*Resource Conservation Department,*
*The National Environment Agency*

The next time you want to throw something into the rubbish bin, do pause a second and consider if it can be recycled instead. Every part you play for the environment counts. This is because the amount of solid waste in Singapore has increased six-fold over the past 30 years. This is a matter of great concern in a small city-state like Singapore. At this rate, we will need to add a new incineration plant every 5 to 7 years and a new landfill site every 25 to 30 years. This is definitely not sustainable given Singapore's limited land area. We need to put in our conservation efforts now before the situation becomes more serious.

On that note, some 80 people attended a Workshop-cum-Dialogue on "Waste Recycling For Condominiums" on 9 January 2004, jointly organized by the Association of Property And Facility Managers (APFM), Singapore Institute of Surveyors and Valuers (SISV), and the National Environment Agency (NEA) at the Environment Building. The participants consisted of managing agents, property consultants, public waste collection companies and recycling companies.

In his welcome address, BG (NS) Lam Joon Khoi, CEO of the NEA said that SISV and APFM are key partners of the NEA to introduce the recycling programme in condominium estates. Both Dr Amy Khor, Council Chairperson of SISV and Professor Lim Lan Yuan of APFM agreed and reiterated the need for such partnerships to strengthen the effectiveness of the recycling programme.

Mr Pang Loo Seng from M/s Chan Kok Hong Property Consultants Pte Ltd and Mr Swandi Sowaran Singh from M/s Jones Lang LaSalle Property Consultants Pte Ltd shared with the workshop participants, valuable lessons on their experience in rolling out waste recycling programme in condominiums.

The highlight of the workshop was a proposal to invite members of SISV and APFM to take a bold step of making a commitment to introduce the waste recycling programme to at least 90% of the condominium estates managed by them by 2005.

Said Dr Amy Khor: "I think it is timely to rethink our approach to waste management in condominiums. Instead of appointing a waste collection company just to collect waste, we should consider including other services in the contract such as providing separate collection of recyclables and reusable household items. This way, we will have an

*– con't on page 2*

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integrated waste management approach. It would also demonstrate the value-added service that SISV and APFM members provide to residents in condominiums. "

To encourage more recycling efforts in the domestic sector, the NEA had launched the National Recycling Programme (NRP) to HDB and landed property estates in April 2001. Under the NRP, residents enjoy the convenience of a door-to-door collection of recyclables every fortnight on pre-determined schedules.

Going beyond HDB and landed housing estates, the NEA is encouraging the management of condominiums and private apartment estates to introduce the recycling programme to the estates managed by them. Residents in such estates will then be able to participate and contribute towards the national recycling efforts. With greater awareness, more residents in condominiums can participate in the recycling efforts by putting recyclable waste into recycling bins instead of throwing them into trash bins.

To help managing agents and management councils plan and implement recycling programme for condominiums, the APFM, SISV and the NEA are collaborating to produce a "Practice Note on Waste Recycling" to provide essential information and guidelines.

*The "Practice Note on Waste Recycling" will be made available on the websites of APFM (www.apfm.org.sg), SISV (www.sisv.org.sg) and NEA (www.nea.gov.sg) within the next few months.*

# Duties and powers of council members

## The role requires commitment and comes with heavy responsibility

*This article was previously published in BT and was contributed by Knight Frank Estate Management*

*– By Jordan Neo*

UNDER the Provisions of the Land Titles (Strata) Act (LTSA), the management council as an elected group of owners possesses great powers to decide on issues related to the maintenance and management of strata sub-divided estates.

They are only constrained by restrictions that may be imposed by the management corporation under Section 64 of the LTSA. The decisions of the council are generally binding on the management corporation, which in law, can sue or be sued. With such powers, council members should be aware of what is expected from them in the discharge of their duties.

### DUTIES OF A COUNCIL MEMBER

A council member has a fiduciary duty to act honestly and exercise reasonable diligence in the discharge of his duties. He is also required by the LTSA to reveal any personal or family interest that may be in conflict with his duties. The council member may be subject to a fine of up to $5,000 or imprisonment not exceeding a year if he breaches the requirements.

### DISCHARGE OF DUTIES BY THE MC

Research shows that the expectations of owners and occupiers of an estate can indirectly affect the commitment and performance of its management council. Generally, owners who are well informed about their rights under the LTSA are also more interested in participating in the affairs of the management corporation. Their increased involvement often leads to higher expectations from the council. This may result in stronger commitment in the discharge of duties by council members.

### REQUIREMENTS OF COUNCIL MEMBERS

A council member should also be a subsidiary proprietor or the legal owner of a unit in the estate. There is no prescribed requirement on qualification and experience, although a development with higher office content tends to have more professionals in the council. Professionals by virtue of their training and experience may be more effective in directing the affairs of the estate and producing results. On the other hand council members who are strongly opinionated but less well informed could adversely affect decision-making and protract council meetings.

### COMMITMENT OF COUNCIL MEMBERS

Besides technical knowledge, the attitude of council members is also of importance. Their availability and willingness to contribute as team players are vital for their effective contribution. Apart from attending evening meetings, which may last until early morning, a devoted council member of a condominium may also sacrifice personal time tracking policy implementation to help the council achieve its objectives. Often, such efforts are neither noticed nor recognised and it may be a discouraging experience for a dedicated council member to receive a strong dose of questioning at an Annual General Meeting.

### FUNCTIONING EFFECTIVELY AS A COUNCIL

Most of the conflicts within a council arise out of differences in opinion. Many of the issues are similar to those experienced in voluntary non-profit organisations. Some council members may be concerned about their liability for failing to discharge their duties under the LTSA. Essentially the council should try to think and function as a team, drawing on each other's strengths.

To promote a harmonious relationship, there should be a culture of give-and-take. It is necessary to develop personal rapport among council members so that difficult issues can be resolved with minimal conflict. Bonding can be achieved if members spend some time on informal interaction outside the meetings. An effective chairman can make a significant contribution to the overall success of his council.

However, the existence of a strong cohesive council can sometimes be detrimental to the management of a condominium. If it becomes an exclusive 'club', it could deter the admission of new council members, who could potentially bring fresh ideas for the running of the estate. If there are rival teams competing for the management council, a show-down may occur resulting in a change of the entire council. This may cause disruption to the effective management of the estate.

### JOINING FOR THE WRONG REASONS

Although most individuals join the council with a genuine intention to serve, it is not uncommon to find members who join more for personal reasons or simply out of curiosity. Some join the council to socialise or to find out more about what is happening in the estate. Usually such persons would not be able to contribute effectively as council members. However they may not cause serious problems except for failure to attend regular meetings as their enthusiasm wanes. They may gradually fade into the background or adopt a passive approach and fail to contribute to the council's overall success.

A more serious concern is fraud, where the culprits are not only personally liable but also bring disrepute to the entire council.

### OVERPOWERING MEMBER

A major shareholder, a forceful chairman or council member may be such an overpowering personality that it affects the efficiency of a council. The behaviour could be due to the desire to protect or further self-interests in the estate.

However, such owners tend to focus their efforts on controlling major decisions while allowing the council a free hand to manage day-to-day matters. Council members must be conscious of the decisions they are agreeing to and not be swayed after following matters perfunctorily.

### COUNCIL'S PERFORMANCE

It is difficult to evaluate the performance of a council in the absence of clear goals set by the management corporation at an Annual General Meeting (AGM). Due to poor attendance most AGMs are instead focused on micro decisions such as the amount of maintenance contribution to be levied. An incoming council may want to specify clearly defined goals and work towards achieving them so that their achievement can be acknowledged at the following AGM. Such goals may provide a useful agenda for a council to focus on during council meetings.

### CONCLUSION

The management council is entrusted with a heavy responsibility of looking after an estate. Although it could enlist the help of a managing agent, it would continue to play a vital role in the effective management of the estate. In order not to be distracted by side issues, the council would do well to stay focused so that key objectives can be attained.

# TAXATION OF MANAGEMENT CORPORATIONS

*By Mr Leung Yew Kwong,*
*the former Chief Valuer and*
*Chief Legal Officer in IRAS*

Since the decision of the Income Tax Board of Review ("the Board") in the case of The Management Corporation Strata Title No. XYZ v Comptroller of Income Tax (1993) 2 MSTC 5155, the Comptroller of Income Tax has accepted that the taxation of management corporation is governed by section 11(1) of the Income Tax Act which reads as follows:

"Where a body of persons, whether corporate or unincorporated carries on a club or similar institution and receives from its members not less than half of its gross receipts on revenue account (including entrance fees and subscriptions), it shall not be deemed to carry on a business; but where less than half of such gross receipts are received from members, the whole of theincome from transactions both with members and others (including entrance fees and subscriptions) shall be deemed to be receipts from a business, and the body of persons shall be deemed to be receipts from a business, and the body of persons shall be chargeable in respect of the profits therefrom."

### MANAGEMENT CORPORATION AS CLUB

Essentially, the Board held that the management corporation which is constituted under the provisions of the Land Titles (Strata) Act is a "body of persons" that "carries on a club or similar institution" within the meaning of section 11(1) of the Income Tax Act. This is because the words "body of persons" are defined in section 2(1) of the Income Tax Act to mean "any body . corporate" and the management corporation is a body corporate. Further, the Board held that the management corporation was a "club" even though it was formed pursuant to a statute and not voluntarily. For this proposition, the Board cited the Australian High Court case of Bennett v Cooper (1948) 76 CLR 570 with approval and where Dixon J said at page 580:

" . in most attempts to state the characteristics of a club prominence is given (a) to the nature of the objects for which the members are associated in a body, (b) to the contribution of

members to a common fund to meet expenses and (c) to the existence of rules governing the mode in which persons may be chosen for admission for membership."

With the management corporation characterized as a "club", the subsidiary proprietors are likened to members of a club. They have chosen to join the "club" by purchasing a unit in the development and thereby becoming the subsidiary proprietors.

Once it is decided that the management corporation falls within the provision of section 11(1), the formula in section 11(1) then governs the taxation of the management corporation. Essentially, section 11(1) sets out the circumstances under which the management corporation is deemed to carry on a business. It provides that:

1.. where a "club or similar institution" receives from its members not less than half of its gross receipts on revenue account (including entrance fees and subscriptions), it shall not be deemed to carry on a business;

2.. but where less than half of such gross receipts are received from members, the whole of the income from transactions both with members and others (including entrance fees and subscriptions) shall be deemed to be receipts from a business and the profits therefrom are chargeable to tax.

Most management corporations will fall within limb (a) above as the greater part of its gross receipts on revenue account is likely to come from maintenance charges payable by the subsidiary proprietors or its "members". As such, the management corporation is not deemed to carry on a business. Consequently, the maintenance charges are not to be deemed to be business income and are therefore not taxable. The reference to "business income" has a direct relationship with section 10(1)(a) of the Income Tax Act which charges "profits and gains from a business" to tax.

### MUTUALITY PRINCIPLE

It may be noted that the provision in section 11(1) modifies the application of the common law principle of mutuality which governs the taxation of clubs and trade associations. Under the mutuality principle, where a number of persons contribute towards a mutual concern, any surplus after deducting expenses of the concern that is returned to the persons, is not considered as their income: see the Privy Council case of Walter Fletcher v Income Tax Commissioners [1972] AC 414. This principle was thought to be a logical extension of the proposition that a person cannot make a profit by paying or trading with himself.

The statutory modification of the mutuality principle in section 11(1) however introduced the majority concept to the composition of the gross receipts. If less than half of the gross receipts are from members, the whole amount of the gross receipts is treated as business income. Consequently, the club will not even be able to benefit from the tax exemption for the part of the "income" received from members under the common law principle of mutuality. On the other hand, if not less than half of the gross receipts are from members, the whole amount (including that part of business receipts received from non-members) is not treated as business income and thus not taxable. It can therefore be seen that 50% mark of the gross receipts is the statutory dividing line by which the club may win all or lose all.

### NON-BUSINESS INCOME

However, even where the gross receipts from the operation of the management corporation are not to be treated as its "business income" (which would otherwise fall under section 10(1)(a) of the Income Tax Act), the management corporation may still have other sources of income that may be subject to tax. For example, it may have interest income falling under section 10(1)(d) and rental income falling under section 10(1)(f).

It is to be noted that section 11(1) which deems the gross receipts of the management corporation as not to be "business income", does not go so far as to exempt the interest and rental income from tax. These items of income will remain taxable for the management corporation.

# A QUESTION OF SECURITY

The recent decision by Justice Choo Han Teck in Tech Pacific (S) Pte Ltd v Pritam Kaur & Isetan (Singapore) Pte Ltd [2003] SGHC 242, has brought to light the crucial issue of building security. The salient facts of this case were that a burglary had taken place at the premises rented by the Plaintiff company at a building known as Seiclene House. The burglars were never caught. All that was known of the method of the burglary was that they entered the premises by cutting the aluminium roller shutters and breaking the locks. What was also interesting was that the company's alarm system had either not been armed or not armed properly, as the alarm did not notify the company's manager when the lock was broken, as it was supposed to. The company commenced this action against both the landlord and the security agency that provided the security services at Seiclene House for a failure to prevent the burglary.

Against the landlord, the company alleged that the terms of the lease provided for security services. The company also argued that both the landlord and the security agency had a "duty of care" to prevent the burglary. The court held that the terms of the lease did not oblige the landlord to provide security services. Even if it did, the scope of such security services was not specified. On the issue of "duty of care", the court held no such duty existed.

This commentary analyses the learned judge's decision in respect of its impact on landlords and management corporations. It is no exaggeration to say that security is now of primary importance since the tragic events of September 11th. While this case concerned a burglary, in other cases it may have consequences more tragic than a mere loss of goods.

## THE SERVICE CHARGE

The first point of note is that there seems now to be a clear interpretation of the usual "service charge" clause found in most tenancy agreements. Tenancy agreements may typically provide that a service charge will be imposed for cleaning, lighting, upkeep, maintenance and repairs of the common areas and services supplied and used in the building. Unless it is expressly included in the "service charge" clause that security services are to be provided, the landlord need not worry about the clause being read widely to include security services. But if the "service charge" clause does include security services, it may open the door slightly for tenants to argue that implied in this clause is the obligation to provide adequate and reasonable security arrangements to prevent theft. Justice Choo left this door slightly ajar when he said, obiter, that there would be no reason to imply terms as to what form of security services a landlord was to provide, "unless the principal term is clear" (emphasis ours). It is foreseen that a contentious point between the landlord and tenant will be how clear the principal term has to be. Will it have to spell out in precise detail the exact mode of the security arrangements, e.g., the number of guards, the number of patrols, the duration of these patrols and the areas of patrol? Security operations are usually confidential so it may not be practical to have a detailed description of the security arrangements in the tenancy agreement. It therefore appears that even if parties agree to include a provision for security services, there may be difficulties when it comes to drafting the actual terms.

## DUTY OF CARE

The court held that a landlord generally is not responsible for loss or damage of goods that are kept in a tenant's premises as the tenant has exclusive control and occupation of the leased premises. Significantly, the company in this case had their own security alarm system. The fact that the company's employee failed to arm the alarm was a culpable omission on the part of the company and made it more difficult for the company to prove that the landlord had been negligent.

Nevertheless, Justice Choo again left some room for a tenant to show that in certain circumstances a stricter interpretation of the duty of care could be justified. The court felt that the company had failed to produce sufficient evidence to persuade it that the landlord owed the tenant a duty to prevent unauthorised persons from entering the common property so as to commit the theft at the tenanted premises. While the court did not give any illustrations explicitly, one can think of several examples. What if higher service charges were paid in consideration of stricter security measures? Or where goods were kept at premises that were substantially under the control of the landlord. Or where the landlord had misrepresented to the tenant that a high level of security would be maintained in order to induce the tenant into entering into the lease and the tenant had relied on this representation. What if the theft had occurred on common property instead of within the leased premises? This list is by no means exhaustive.

## MANAGEMENT CORPORATIONS AND PROPERTY MANAGERS

Under current law, where do management corporations (MCs) and managing agents stand? The starting point would be to look at the statutory duties under the Buildings and Common Property (Maintenance and Management) Act (Cap. 30) (BCPMMA) and the Land Titles (Strata) Act (Cap. 158) (LTSA). Under section 68 of the LTSA, managing agents would have similar responsibilities as MCs depending on the scope of duties delegated to them. Section 9(b) of the BCPMMA, provides that the monies paid into a maintenance fund can be used for, amongst others, security services for the occupiers of the flats in a development. As this sub-section was merely intended to allow the MCs to recover the cost of providing security services from the maintenance fund, it would be a stretch to argue that security services were mandatory as a result of this section.

MCs should of course be aware that they are responsible for the maintenance of the common property of the building. Should theft or burglary cause loss to common property, the MC may be liable for failing to take adequate measures to protect the property. This duty is owed to the subsidiary proprietors under section 33(2)(a) of the LTSA where an MC may sue or be sued in respect of any matter affecting common property, read together with section 48 of the same act which governs the duties of MCs generally. Under section 48(1), an MC shall control, manage and administer the common property for the benefit of all subsidiary proprietors. Thus, subsidiary proprietors may argue that it is implied that security is necessary for the effective administration of the common property.

But what is not clear is the question of whether it would be a breach of this duty in allowing trespassers to enter the common property so as to have access to the individual units to commit theft or other offences. Tenants are not always aware of the actual security arrangements implemented by landlords for the common areas of the building. As Justice Choo noted, the level and mode of security is very much a commercial issue, depending on the status or wealth of the building's tenants. It is not uncommon to find landlords and property agents marketing leases on the basis of the quality of security available. It remains to be seen if such representations may form the basis for the court deciding that a duty of care is owed to tenants. It may also be argued that because tenants themselves have various "intelligent" forms of security measures that are specific to their own unit, such as the use of smart cards, coded entry systems or keypads and even fingerprint recognising systems, there is even less of a duty owed by the landlord.

## CONCLUSION

It remains to be seen whether a different set of facts may distinguish themselves from this case and result in the court becoming more sympathetic towards tenants. For now, what is clear is that a tenant should arm his premises with an appropriate security system as the landlord may not be held responsible for an occurrence of theft.

*Edwin Sim*
*Partner*
ALBAN TAY MAHTANI & DE SILVA

# Using Technology as a Business Enabler

*Herbert Wee,*
*Regional Manager of Management*
*Reports International Pte Ltd*

As the economic condition improves along with the increases in customer expectations, companies are looking at their related operational efficiencies. This along with the need to provide more accurate and timely forecast will fuel the need for technology support.

While most companies' uses technology for the back office operations like Email, Office Productivity, etc, the Real Estate operations mostly survive having spreadsheets or word documents providing the linkage between tenants to their real estate operations.

We see this trend changing, slowly but surely more and more companies are starting to embrace the use of Technology to overcome operational inefficiencies.

One of the key challenges is to shift the perception of technology as an expense item to one that provides the competitive advantage for the property manager to have detailed information about their tenants anytime and any formats, to proactively work with tenants for future activities or pre-empting any trouble tenants.

The demand to turn information into intelligence will accelerate. The need to incorporate workflow technologies into business systems will increase to allow automation of roles, rules and routing of information to improve productivity and reduce or eliminate lost opportunities.

To improve productivity, lower administration costs, and improve tenant retention, real estate companies will embrace technologies that help place transaction-processing activities closer to source.

The trend in the industry is to consolidate all the relevant information onto a database, such as the tenant details, tenant agreements (including terms and conditions of contract), rent details, maintenance agreement, etc, while the operations might still be de-centralized as personnel could be off-site or transiting within the various properties.

Reports can be generated at any point of time, providing you

a.. Comparison between budget versus actual revenue
b.. Comparison between difference portfolios
c.. Ability to forecast revenue and expenses based on historical records
d.. Manage or Update details of tenants including its rents
e.. A overview of the current portfolios

Real Estate companies will increase their expectation that, in order to increase productivity and improve tenant satisfaction, more of their employees will be positioned to respond and react anywhere at anytime.

Cost of Technology includes not only initial investment but also the cost to implement, train and maintain that technology and all associated personnel costs. As new technologies emerge early implementers bear the burden of higher costs. Pressure exists to lower those costs to affordable levels.

Now is the time to embark on the study of an effective system to enable your business into the new millennium. We must ensure the sustainability of such an activities with proven and supported technologies.

## APFM MESSAGE BOX

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