

Disclosing Personal Data of COVID-19 Patients to Other Residents – A Discussion on Management Corporation’s Powers or The Lack of It

for LexisNexis Resource Hub – COVID-19



INTRODUCTION

The raging Covid19 pandemic not only threatens health and safety but also causes various complications to numerous aspects of human life. As such, it is capable of giving rise to considerable socio-legal impacts. Now, more than ever, we are increasingly asking ourselves whether something is permissible in law; or what are the effects of the certain laws. We look to our politicians, community leaders and chairpersons of regulatory bodies for guidance. The new norms that we now adopt, begs the discussion on what is legal and what is illegal.

This article is intended to analyse the powers of Joint Management Bodies¹ and Management Corporations² to disclose personal details such as names or unit numbers of Covid-19 patients to other residents (whether expressly requested by other residents or whether disclosed by the management body on its own accord). For ease of discussion, reference will be made to the management corporation alone. And when speaking of management corporations in this article, it is the duties, powers and conduct of its executive arm i.e. the management committee, that is called in discussion.

MANAGING THE STRATA COMMUNITY DURING THE COVID19 PANDEMIC

Managing strata developments includes a wide range of undertakings such as property development, common facilities management, waste management, management of technical, accounting and administrative staff, space management, safety and risk management, visitors’ management and also management of the prospective investment in property.

Compared to the management system practiced in other countries especially in Singapore, Hong Kong or in Australia, the approach adopted in the management of high-rise residential property in Malaysia is outdated and still far behind. In Malaysia, property managers have a free hand in managing properties under their care, thus the management practiced is based on their own guideline and standard since there is no standard guideline on property management.³

¹ A joint management body (JMB) is established at the first AGM of the JMB which must be convened within 12 months from the date of delivery of vacant possession of a parcel to a purchaser: Section 17 of the Strata Management Act 2013.

² A management corporation (‘MC’) is established after the opening of a book of the strata register; it shall have perpetual succession and a common seal and which may sue and be sued: Section 17(3) and (4) of the Strata Titles Act 1985.

³ Associate Professor Dr Tiun Ling Ta Ph.D. (Demography), ‘Managing High-Rise Residential Building in Malaysia: Where Are We?’, published at 2nd NAPREC CONFERENCE, INSPEN.

While we presently find ourselves in the height of struggle deciphering misinformation pertaining to Covid19, a worrying trend emerges in Malaysian property management scene where some politicians, leaders of authoritative bodies and NGOs are in a frenzy of misquoting the provisions of the law and erroneously citing Acts of Parliament in circulars, notices and newspaper articles. This is particularly true in regard to the laws that govern the rights and duties of strata dwellers in integrated development that shares common facilities. Although most of it are inadvertent, some of such instances could have been avoided. Various issues concerning the rights and liabilities of proprietors and the extent to which management corporations can exercise control over such rights and liabilities are up for debate while we navigate these uncertain times. For example:

- a) Can management corporations impose a fine on those who refuse to wear face masks in common areas?
- b) Can management corporations compel residents to take Covid19 tests?
- c) Can management corporations waive late payment charges?
- d) Must management corporations grant proprietors temporary moratoriums?
- e) Can residents move-in or move-out when their lease expires? and
- f) Can management corporations disclose personal details such as names and unit numbers of Covid19 patients to other residents?

The pandemic could not have come at a worse time for this area of law, presently the Strata Management Act 2013 is in dire need of reform. Gauging from the Hansards, the enactment of the Strata Management Act 2013 involved wide-ranging involvement and contributions from surveyors in comparison to litigation lawyers.⁴ It is submitted that, future amendments of the Act must involve law practitioners as this will ensure the rights and liabilities of proprietors and the powers and duties of management corporations can be legislated effectively. None of the examples of issues cited above fall within the expertise of surveyors or valuers. *These are legal questions.*

POWERS OF THE MANAGEMENT CORPORATION

The management corporation or subsidiary management corporation is merely a statutory creation, being a body corporate having perpetual succession.⁵ It is trite law that a body created by a statute only has powers granted expressly or by implication in that statute.

In *Amber Court Management Corp & Ors (suing in their capacity of Council Members of Amber Court Management Corp Management Committee) v Hong Gan Gui & Anor*,⁶ Badariah Sahamid JCA in dismissing the appeal held the management corporation is not empowered to transact business or to acquire and deal

⁴ Bill citation DR 32/2012 – Introduced by Chor Chee Heung (Minister of Housing and Local Government). First reading was on 24 September 2012, second reading was on 26 September 2012 and third reading was on 26 November 2012.

⁵ Supra. See footnote 3 (see also section 17A (5) of the Strata Titles Act 1985).

⁶ [2016] 2 MLJ 85.

with property to acquire revenue or income. Its powers were primarily for the maintenance and enjoyment of common property by parcel proprietors. Thus, upholding the learned JC's decision that a management corporation as a creature of statute, cannot of its own volition extend its jurisdiction to matters falling outside its own competence. Its powers and duties are therefore, defined and limited by the SMA.

At the heart of the decision is the proposition that, the management corporation is *neither a trading nor a non-trading corporation* and for that reason it, cannot sustain a claim in defamation as other trading or non-trading corporation. We shall revisit this in succeeding points.

The authority that the general body exercises, is exercised on behalf of all proprietors for their common benefit in relation to their common property. Its powers are limited to regulating control over maintenance and management of the subdivided building/land and the common property in the strata scheme. In *Muhamad Nazri bin Muhamad v JMB Menara Rajawali & Anor*,⁷ the Federal Court succinctly held that:

As a creature of statute, the powers of the JMB are limited and circumscribed by the SMA 2013 which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its establishment, or may be fairly regarded as incidental to, or consequential upon, those things which the legislature has authorized. *What the SMA 2013 does not expressly or impliedly authorize is to be taken to be prohibited.* (Emphasis added.)

Section 59 of the *Strata Management Act 2013* provides the duties and powers of a management corporation which includes its duties to properly maintain and manage the building, to prepare and maintain a strata roll which contains, inter alia, the names and addresses of every registered proprietor and to comply with all by-laws relating to a subdivided building, its land and common property. The duties, powers and business of the management corporation are to be exercised by a management committee elected at its annual general meeting.⁸

MANAGEMENT CORPORATIONS: DUTIES IN HANDLING PERSONAL DATA WITH REGARDS TO ITS EXPRESS OR INCIDENTAL POWERS GRANTED BY THE SMA

Management corporations carry out duties and functions as set out in the SMA and in carrying out its statutory duties it can, and often do, collect personal data such as names of proprietors, contact details, NRIC numbers, copy of strata title, names of visitors to proprietors' parcel, email address, proprietors' vehicle numbers, details of parcel share units, emergency contact and their details, the name and address of the lawyer who acted for the proprietor in the sale and purchase of the parcel and even thumbprints. Come to think of it, that is a huge amount of data collection. However, *the management corporation's powers to collect or deal with personal data is limited and restricted to the course of performing their duties and functions under the SMA*. The management corporation for instance, has no business collecting marriage certificates,

⁷ [2020] 3 MLJ 645.

⁸ Section 56 of the SMA 2013.

bank statements or school report cards! For example, the management corporation is required to collect and collate details of share units, floor area, recent address and contact details and the sale and purchase agreement solicitor's name and address for the purposes of preparing and maintaining a strata roll.⁹ This is a mandatory duty of the management corporation failing which the SMA imposes a fine or imprisonment or both.

These data may be abused by property managers or management staff or the management committee members. Although the SMA and the regulations therein do not clearly spell out the remedies available to proprietors, such abuse can subject the property managers or management staff or the management committee members to various liabilities under applicable areas of law.

THE LACK OF POWER TO DISCLOSE PERSONAL DETAILS TO OTHER RESIDENTS IS PREMISED ON THE STRATA MANAGEMENT ACT 2013 ITSELF

Turning now to the crux of this article, whether management corporation can disclose personal details such as names, unit numbers, race or ethnicity of Covid19 patients *to other residents*, verbally (including through its agents) or through notices. It is the purported quest to take extra precautions by other residents in the strata scheme, that often push management corporations to release personal data of Covid19 patients or survivors.

It must be emphasised here that, the management corporation or its agents are required to notify infectious disease with the least practicable delay, the officer in charge of the nearest district health office or government health facility or police station or notify the nearest village head under s 10 of the *Prevention and Control of Infectious Diseases Act 1988*.¹⁰ This article does not propose to question or discuss such requirements for disclosure.

It is submitted that, generally in Malaysia there is no awareness or a culture that fosters the protection of personal data. By nature, most Malaysians are an inquisitive lot. It is therefore observed that there is no real attempt to develop and implement policies and control the proper handling and management of personal data by management corporations. This was hardly even debated adequately when the SMA was enacted. This is an essential area to be considered when proposals for reform are put forth and again it hoped that legal practitioners, rather than surveyors, estate agents or property managers will lead the way to introduce the necessary safeguards against abuse of personal data by management corporations and its property managers.

It follows that as a creature of statute, the powers of the management corporation are limited and circumscribed by the SMA as discussed above. In a nutshell, what the SMA 2013 does not expressly or impliedly authorise is to be taken to be prohibited.¹¹

⁹ Section 72 of the SMA.

¹⁰ Act 342

¹¹ *Supra* footnote 8.

The management corporation, therefore, cannot disclose personal details of residents infected with Covid19 and undergoing quarantine; either during the recovery period or even after full recovery, because such powers are:

- (a) not expressly stated in the SMA;
- (b) is not necessarily and properly required for carrying into effect the purposes of its establishment as envisaged by the SMA; or
- (c) cannot be fairly regarded as incidental to, or consequential upon, those things which the SMA has authorised.

It is submitted that s 59(2) of the SMA begins with 'The powers of management corporation shall be as follows: ...'. The word 'shall' used in a statute, has a compulsory meaning, and in its common and ordinary usage, unless accompanied by qualifying words which show a contrary intent, always refers to the future; but it may be used in the sense of 'must' of which it is a synonym. As used in statutes, the word is generally mandatory; although it is not always imperative but may be consistent with an exercise of discretion.¹²

Therefore, it is correct to hold that the provision imposes an obligation couched in mandatory terms on the management corporations to exercise *only* those powers expressly stated therein or which can be inferred by implication, taking into account the intention of the legislature gathered from the whole statute. In contrast, if s 59(2) was drafted using the phrase 'the powers shall include ...', then perhaps it can be argued that the statutory powers of the management corporation are non-exhaustive.

In *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd*¹³ where Gopal Sri Ram JCA (as he then was) observed that:

On settled principles of statutory interpretation, it is clear that when an Act of Parliament employs the expression, '*includes to define some other word or expression, the intention is to leave the meaning of the expression defined open ended.* By contrast, when the word means is employed to define something, there is a rebuttable presumption of statutory interpretation that Parliament intends to restrict the meaning of the expression defined. (Emphasis added.)

While it may be not necessary to list the familiar unpleasant reactions that patients may endure when personal details are released, it is imperative to draw attention to the fact that the unpleasant treatments, stigma and isolation could have a huge impact on the mental well-being of the Covid19 survivors and their families. Also, a more disastrous consequence is where residents (for fear of such stigma and shunning) will hesitate to wilfully and timely report an infection to enable the management corporation to take the necessary steps to safeguard and sanitise the common areas.

¹² Words, Phrases & Maxims – Legally & Judicially (LexisNexis).

¹³ [2002] 2 MLJ 707 at p 714.

Though law and morality have distinct fields of operation, yet it must be borne in mind that law reflects, at any given time, the moral standards of the community it governs.¹⁴

The management corporation ought to morally undertake the necessary steps to assure itself and its property manager who is the data intermediary¹⁵ in this case, remain ethical, responsible, compassionate and empathetic towards Covid19 patients. The good faith must extend to ensure that suitable non-disclosure of personal data agreements with the data intermediaries such as the property manager, security guards and cleaners must be entered into by the management corporation to safeguard the proprietors' rights to protect and secure personal data.

NO REFERENCE SHOULD BE MADE TO THE PERSONAL DATA PROTECTION ACT 2010

The Personal Data Protection Act 2010 ('the PDPA')¹⁶ is intended to regulate the processing of personal data of data subjects, *in commercial transactions* with data users and it provides for matters connected therewith and incidental thereto. This PDPA provides protection to data subjects' personal data, thereby safeguarding the interests of such individual and it applies to any person who processes and any person who has control over or authorizes the processing of, any personal data in respect of commercial transactions.¹⁷

The *management corporation is not a commercial entity* and its dealings with proprietors are not commercial in nature. To lend support, reference is made to *Amber Court Management Corp*¹⁸ where the Court of Appeal affirmed that the management corporation is *neither a trading nor a non-trading corporation*.

The cardinal rule of interpretation is that clear and unambiguous words of the statute will prevail. Based on the plain wordings, also taking into account the obvious intention of parliament inserting the words 'commercial transactions' in the enactment and reading the PDPA as a whole, it is certainly fair to presume the *PDPA does not apply to management corporations*.

The fact is optimal restrictive enactment to prevent management corporations from divulging personal details of patients to other residents does not exist in any legislation as of now. There are also no reported cases on point in our jurisdiction to suggest that the PDPA applies to management corporations.

¹⁴ *MA Sujjan*, Interpretation of Contract (1st Ed, 1985) at p 55 et seq.

¹⁵ In Singapore, their Personal Data Protection Act 2012 defines a data intermediary as 'an organisation which processes personal data on behalf of another organisation but does not include an employee of that other organisation'.

¹⁶ Act 709.

¹⁷ Section 2 of the PDPA 2010.

¹⁸ *Supra* footnote 7.

It therefore follows that, any reference to the PDPA to infer that management corporations cannot disclose personal data of residents is a careless guesswork. Citing wrong principles of law and reference to non-existent provisions of the statute has become a trend during this Covid19 pandemic. This is particularly true in regard to the laws that govern the rights and duties of strata dwellers.

Moreover, the data intermediaries such as the property managers may take steps to coerce consent by circulating consent forms to Covid19 patients and their families to sign so that their personal data can be dealt with by the management. Such misguided management practice can have far reaching repercussions and could led to unnecessary litigations. In order to preclude all misapprehension, it may be well to add, that a party, who relies upon a right or power, is bound to quote the relevant provisions of the law accurately. Otherwise one is only entitled to state that the laws are unclear or that there are none or that it is a matter for the court to interpret and apply.

CONCLUSION

The SMA and the regulations therein do not grant any powers to management corporation to disclose personal details of Covid-19 patients to other residents, save and except to government authorities¹⁹ for the purpose of contact tracing or other lawful reasons. Therefore, the management corporation when faced with some residents' request for disclosure of personal details or the unit number of Covid19 patients, must be guided by duties and powers vested in it under the SMA. Each management corporation's powers are given to it purely to regulate the rights of a small body of private individuals inter se in relation to a piece of private property which they own in common, i.e. the common property of their subdivided building. The authority that the general body exercises, is exercised on behalf of all proprietors for their common benefit in relation to their common property. Its powers are limited to regulating control over maintenance and management of the subdivided building/land and the common property in the strata scheme.

Where there is a material prejudice that could be caused to the minority group of residents, then the unreasonable request of the majority for personal details must give way. Here, the minority's right to peacefully recover in their own homes while under quarantine or the right to return to their homes from hospital after treatment without being subjected to shunning and social stigma, must take precedent over the will of the majority.

A consultative guideline for management corporations on this subject must be formulated with all stakeholders and it is strongly proposed that such discourse involve legal practitioners.

¹⁹ Supra, see footnote 11.

In light of the constantly changing circumstances, this is a general overview and should not be treated as legal advice. The information presented is correct to the date of its publication.

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