

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA

In the matter of an application for mandates in the nature of Writs of Certiorari and Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 309/2012

Park Street Residencies Management Corporation,
No. 66, Park Street, Colombo 2.

PETITIONER

Vs.

1. Beauno Anslem Fernando,
24, Alfred Place, Colombo 3.
2. Expo Property Developers (Pvt) Limited,
144/3, Pickerings Road, Colombo 13.
3. Condominium Management Authority.
4. G. U. Upawana,
4(A) K. A. H. Upali
- 4(B) R. K. Jayaweera
General Manager,
Condominium Management Authority.
5. G T S Perera.

3rd to 5th Respondents at
National Housing Department Building,
Sir Chittampalam A Gardiner Mawatha,
Colombo 2.

6. Colombo Municipal Council,
Town Hall, Colombo 7.

7. G A L D Ganepola.

7(A) I D Weerasinghe ,
The Registrar of Lands,
Colombo Land Registry, Colombo 7.

8. S Krishnapillai
Licensed Surveyor & Leveller,
48 1/1, Nandana Gardens,
Bambalapitiya, Colombo 4.

9. Hon. Attorney General,
Attorney General's Department,
Hultsdorp, Colombo 12.

RESPONDENTS

Before: Arjuna Obeyesekere, J

Counsel: Mangala Niyarepola with Kushini B. Guneratna for the
Petitioner

Ms. Udeshi Senasinghe, State Counsel for the 3rd – 5th
Respondents

Ranil Samarasuriya for the 6th Respondent

Argued on: 10th September 2018

Written Submissions: Tendered on behalf of the Petitioner on 12th October 2018 and 14th June 2019

Tendered on behalf of the 3rd – 5th Respondents on 23rd November 2018

Tendered on behalf of the 6th Respondent on 21st November 2018

Decided on: 20th December 2019

Arjuna Obeyesekere, J

The Petitioner has filed this application seeking *inter alia* the following relief:

- a) A Writ of Certiorari to quash the decision of the 4th Respondent dated 20th August 2012 marked 'P29', dismissing a complaint made by the Petitioner; and
- b) A Writ of Mandamus to compel the 3rd Respondent, Condominium Management Authority and the 4th Respondent, the General Manager of the said Condominium Management Authority, to act in terms of the express provisions of the Condominium Management Authority Law No. 10 of 1973 (as amended) and/or the Apartment Ownership Law No. 11 of 1973 as amended, and hold a full and fair inquiry into all complaints raised by the Petitioner against the 1st and 2nd Respondents.

The Petitioner in this application is the Management Corporation¹ of a condominium property by the name of 'Expo Victoria Towers' situated at Park

¹In terms of Section 20B(1) of the Apartment Ownership Law, "The owners of the condominium parcels shall, by virtue of this Law, upon registration of the Condominium Plan or the Semi Condominium Plan be a body corporate with perpetual succession and a common seal and shall be called 'the Management Corporation'.

Street, Colombo 2. The Petitioner states that the 1st Respondent, who is the Managing Director and/or Chairman of the 2nd Respondent had engaged in widespread promotional campaigns from or around 2004 to promote the sale of units in the said condominium property. The said property, which has been described as a medium rise building consisting of several features set out in the brochure annexed to the petition marked 'P3', included 32 residential apartments/units with parking facilities. The Petitioner states that the ground floor of the building consisted of an entrance lobby which has been represented to the owners of the apartments as a common element of the building, and is the subject matter of the dispute between the Petitioner and the 1st and 2nd Respondents.

The 2nd Respondent, in its capacity as the developer of the said condominium property, had constructed and sold apartments/units of the said property to members of the Petitioner. Many members of the Petitioner, acting on the representations made to them by the 1st and 2nd Respondents and relying on the contents of 'P3', had entered into Sale and Purchase Agreements with the 2nd Respondent. A sample Sale and Purchase Agreement dated 1st September 2005, has been annexed to the petition marked 'P4'.

The Petitioner states that in the said agreement 'P4', the 2nd Respondent had given the following specific undertaking to adhere and comply with the approved building plan, the apartment plan and other documentation attached thereto.

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"Clause A:

The construction of the said Apartment shall be in accordance with the said building Plan, building description and specifications set out in the aforesaid documents marked A, B, C and signed and agreed on by the parties hereto which shall form part and parcel of this Agreement.

The Vendor shall have the right to make alterations including structural alterations to the building Plan marked 'X' in the event the Vendor's Contractors/ Consultants advising the Vendor that such alterations are essential and necessary for the perfect and safe construction of the Condominium provided such alterations do not contravene any by-laws, Statutory Laws or Regulations.

PROVIDED HOWEVER

The Vendor undertakes as far as possible to adhere to and comply with the approved building plan marked 'X' and the Apartment Plan herein before referred to as specifications mentioned hereto and which the purchaser/s acknowledge/s as having been seen and examined before signing this agreement but the Vendor shall have the right to make such further changes, alterations and/or deviations from the said specifications and plans as shall be required by the local or any state authority or on advise by the Vendor's Contractor/Architect, who is of the opinion that such changes/deviations/ alterations are essential for the safe and perfect construction of the building/apartment. The Purchaser/s shall not be liable for such costs of such changes/alterations and/or deviations."

The Petitioner states that after the completion of the construction of the building, many of its members took possession of the said residential apartment/units from mid 2006, even though they had not obtained the title deeds to their respective apartments from the 2nd Respondent.

The Petitioner states that in 2011, it obtained from the 6th Respondent, the Colombo Municipal Council, a copy of the Certificate of Conformity dated 21st July 2006, annexed to the petition marked 'P6' issued to the 2nd Respondent by the 6th Respondent. The Petitioner states that upon a perusal of 'P6', it transpired that the 2nd Respondent had amended the approved building plan, which a majority of the members of the Petitioner had relied upon at the time of entering into their respective Sale and Purchase Agreements. The Petitioner states further that the said amended plan, annexed to the petition marked 'P7', continued to depict the main common element on the Ground Floor as an "Entrance Lobby", which is in line with what was represented to the purchasers in their Sale and Purchase Agreements. To that extent, the Petitioner has no issue with 'P7'.

The Petitioner states that the 2nd Respondent had subsequently obtained approval for yet another building Plan dated 26th August 2008 annexed to the petition marked 'P8', which had replaced the entrance lobby, which, according to 'P7' was the main common element on the ground floor, to a "retail shop". The Petitioner states that the said change was done without the approval/consent of the owners or members of the Petitioner Corporation. The Certificate of Conformity (COC) dated 6th October 2008, issued by the 6th

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Respondent to the 2nd Respondent, annexed to the petition marked 'P9', reflects the said amendment.²

The Petitioner states that subsequently, the 3rd Respondent had issued a Certificate for Common Amenities and Common Elements of the Building/ Buildings of Condominium Property annexed to the petition marked 'P16', dated 30th December 2008 to the 2nd Respondent for 33 residential units, one corporate office and *one retail shop* at No. 66 Park Street Colombo 02.

Aggrieved by the decision to grant approval to the amended building plan 'P8', the Petitioner had complained to the 3rd Respondent by letter dated 14th March 2012, marked 'P18'. The Petitioner states that they had made three further written complaints, dated 27th June 2012 marked 'P22', 29th June 2012 marked 'P23' and 7th August 2012 marked 'P24' to the 3rd Respondent relating to a number of issues with the 1st and 2nd Respondents. The main complaint of the Petitioner however remained the conversion of the entrance lobby to a retail shop contrary to the representations made at the time the apartments were sold, thereby depriving the apartment owners of an area which had been identified as a common element.

Provision with regard to the holding of an inquiry is found in Section 9(1) of the Condominium Management Authority Law, which reads as follows:

"The Authority, may on its own motion, or on the application of a majority of the members of the management corporation or corporation or of not

² 'P9' contains a note at the end which states that, "This Certificate of Conformity is issued considering the letter of Indemnity dated 02.10.2008 and the letter of undertaking dated 01.10.2008 submitted by the Developer."

less than one-third of the owners of the Condominium Parcels of the Condominium Property or Semi Condominium Property, hold an inquiry, or direct a person authorized in writing in that behalf, by the Authority by order to hold an inquiry into the activities and financial stability of the management corporation."

In terms of Section 9(3), "Where an inquiry is held under subsection (1) the Authority or the person authorized by the Authority to hold the inquiry shall alter due inquiry make order as regards the management corporation and shall communicate the order of the inquiry to all the owners of the condominium Parcels of the Condominium property or Semi Condominium Property."

The Petitioner states that the 3rd Respondent had appointed the 5th Respondent to conduct an inquiry into the said complaints, and the said inquiry had accordingly been held on 14th August 2012. The 4th Respondent, the General Manager of the 3rd Respondent, by his letter dated 20th August 2012 annexed to the petition 'P29' had informed to the Petitioner the outcome of the inquiry. 'P29' reads as follows:

"Your kind attention is drawn to the inquiry conducted by the Condominium Management Authority regarding the above matter.

At the inquiry it was revealed that Expo Victoria Property Developers (Pvt) Ltd has not encroached part of the lobby violating the approved plan No. (Ref No: ME/PBS/BA/11/08 dated 26th August 2008³) approved by the Colombo Municipal Council.

³ Marked 'P8'.

Accordingly complaint of 14th March 2012 made by Expo Victoria Towers Management Corporation is hereby dismissed.”

The Petitioner states that it obtained from the 3rd Respondent, a copy of the proceedings of the said inquiry conducted on 14th August 2012, which has been annexed to the petition marked 'P32'.

The complaint of the Petitioner to this Court is two fold.

The first complaint, which is borne out by the proceedings 'P32', is that the Inquiry Officer proceeded on the assumption that the 6th Respondent had allocated a separate assessment number for the said retail shop, which the Petitioner claim is erroneous. The 6th Respondent has in fact very specifically submitted in its written submissions that a separate assessment number – i.e. No. 68 – has not been allocated to the said retail shop. Thus, it is clear to this Court that the Inquiry Officer has made a fundamental error when considering the complaint of the Petitioner and has acted on material which had not been substantiated.

What is significant however is the second complaint of the Petitioner, which is that 'P29' does not contain any reasons for the decision of the 3rd Respondent. This Court has re-produced in its entirety, the decision of the 3rd Respondent, which, as submitted by the learned Counsel for the Petitioner, does not give the Petitioner the reasons as to why the Inquiry Officer decided to dismiss the complaint of the Petitioner.

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In Jayantha Liyanage vs Commissioner of Elections⁴, the Supreme Court held as follows:

"Any act of the repository of power, whether administrative or quasi-judicial, is open to challenge if it is in conflict with the governing Act or the general principles of law of the land or is arbitrary and unreasonable that no fair minded authority could ever had made it. The recording and giving of reasons therefore ensures that the decision of the repository of power is reached according to law and not on the basis of caprice, whim or fancy. A person seeking to register his party as a recognized political party is ordinarily entitled to know the grounds on which the Commissioner of Elections has rejected his claim. If the decision of the Commissioner of Elections is subject to appeal or judicial review, the necessity to give reasons is greater, for without reasons, firstly, the persons aggrieved by the decision of the Commissioner of Elections would not be in a position to formulate the legal basis on which he could challenge such decision by way of appeal or judicial review. Secondly, the appellate authority would not have any material on which it may determine whether the facts were properly ascertained, the relevant law was correctly applied and the decision was within the parameters of the Commissioner of Elections."

The above position was reiterated by the Supreme Court in Sumedha Jayaweera vs Professor Dayasiri Fernando and others⁵ where it was held as follows:

⁴ SC Appeal No. 96/2011; SC Minutes of 17th December 2014.

⁵ SC (FR) 484/2011; SC Minutes of 16th January 2017; Sripavan, CJ.

"Giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of a sound system of judicial review. Reasoned decision is not only for the purpose of showing that the citizen is receiving justice, but also a valid discipline for the administrative body itself. Conveying reasons is calculated to prevent unconscious, unfairness or arbitrariness in reaching the conclusions. The very search for reasons will put the authority on the alert and minimize the chances of unconscious infiltration of bias or unfairness in the conclusion. The duty to adduce reasons will be regarded as fair and legitimate by a reasonable man and will discard irrelevant and extraneous considerations. Therefore, conveying reasons is one of the essentials of justice (Vide S. N. Mukherjee Vs. Union of India (1990) 4 S.C.C. 594; A.I.R. 1990 S.C. 1984)"

In the above circumstances, this Court issues a Writ of Certiorari quashing the decision contained in '**P29**' due to the failure on the part of the 4th Respondent to adduce reasons for its decision. This Court also issues a Writ of Mandamus directing the 3rd Respondent to conduct a fresh inquiry into the complaints of the Petitioner, afford the Petitioner and all parties including the 1st and 2nd Respondents an opportunity of placing all relevant material before them, and if necessary to lead oral testimony and thereafter pronounce its decision, with reasons for such decision. The said Inquiry shall commence as expeditiously as possible and shall be concluded within a period of four months from today. This Court makes no order with regard to costs.


Judge of the Court of Appeal