

BUILDING MAINTENANCE AND STRATA MANAGEMENT ACT

**BUILDING MAINTENANCE AND STRATA MANAGEMENT
(STRATA TITLES BOARD) REGULATIONS 2005**

STB No. 92 of 2014

In the matter of an application under Section
101(1)(c) and 111 of the Building
Maintenance and Strata Management Act in
respect of the development known as
Watermark Robertson Quay (MCST Plan
No. 3414)

Between

Lee Lay Ting Jane

... Applicant

And

MCST Plan No. 3414

... Respondent

Coram: Mr Alfonso Ang (Deputy President)
Dr Tang Hang Wu (Member)
Mr Lee Coe (Member)

Counsel: (1) Mr Toh Kok Seng and Mr Daniel Chen (M/s Lee & Lee) for the Applicant
(2) Mr Chia Tze Yung Justin (M/s Harry Elias Partnership LLP) for the
Respondent

GROUND OF DECISION

1. The Applicant, Ms Lee Lay Ting Jane, is the subsidiary proprietor of two shop units at 7 Rodyk Street #XXX and #XXX Watermark Robertson Quay, Singapore 238215 ("the Units").
2. The Respondent is MCST Plan No. 3414, the Management Corporation of the development known as Watermark Robertson Quay (the "Development"), a mixed development consisting of 206 residential units and 8 shop units.

BACKGROUND

3. On 21 May 2012, the Applicant approached the then condominium manager, Mr Mark de Souza ("Mr de Souza"), to request for permission to carry out an upgrade of the electricity supply to her Units. The Respondent then forwarded the Applicant's request to the Development's Licensed Electrical Worker (LEW), Mr Ng Hai Hock ("Mr Ng") of NHH Consultants, who requested for additional documents.
4. Mr Ng also signed off on two CS/3 Forms on 7 June 2012, stating that he had 'checked the loading of the electrical installation of the [Applicant's] load requirement' and confirmed that the Applicant's request 'can be catered for from the rising/horizontal mains system/main switchboard of the building/complex, and the total approved load to the entire building/complex will not be exceeded'.
5. On 18 June 2012, NHH Consultants issued a letter to the Respondent stating that they had 'no objection' to the Applicant upgrading the Units' electricity supply from 63 Ampere Single Phase to 100 Ampere Three Phase.
6. Subsequently, by an email dated 27 June 2012, the Respondent informed the Applicant that they were unable to accede to her request to an upgrade of the electricity supply to her Units, as doing so would result in there not being 'any more spare for future use by the management for common area upgrading'.

7. On 27 June 2012, NHH Consultants issued another report confirming that they had no objections to the Applicant's request for the upgrading of the Units' electricity supply to 80 Ampere Three Phase. The report also stated that there would be another 'about 60A three phase still available for future upgrading' but the approval shall be subject to the Management Council's approval.
8. On 2 July 2012, NHH Consultants issued a third report, but this time, they stated that they had no objections to the Applicant's request to upgrade unit #XXX to 63 Ampere Three Phase and unit #XXX to 80 Ampere Three Phase. The report again stated that there would be another 'about 60A three phase still available for future upgrading' but the approval shall be subject to the Management Council's approval.
9. However, the Respondent later informed the Applicant by a letter dated 6 July 2012 that the Management Council had rejected her application after consideration of the 'limited spare electrical capacity for the development', as the Management Corporation had to 'reserve the spare power supply for future common areas upgrading / improvement works'.
10. The Applicant's solicitors wrote to the Respondent's solicitors re-stating the Applicant's request, but these were rejected both times.
11. Consequently, the Applicant applied to the Board seeking an order that the Respondent allow the Applicant's request to carry out upgrading of the electricity supply to the Units to 100 Ampere Three Phase.
12. The Applicant submits that there four main issues for the Board's consideration:
 - a. Whether electricity supply is part of the common property;
 - b. Whether consent is required for the Applicant's requested upgrade;
 - c. Whether this is a matter which requires a decision to be made at a general meeting of the Management Corporation; and
 - d. Whether the Respondent's refusal to consent to the Applicant's requested upgrade is unreasonable.

13. The Respondent submits that the application should be dismissed for the following reasons:
- a. There is insufficient electricity supply in the Development to meet the Applicant's requested upgrade;
 - b. The unutilized electricity supply forms part of common property;
 - c. The Respondent is not in a position to approve the Applicant's request as such approval would be tantamount to granting the Applicant exclusive use and enjoyment or special privileges in respect of the common property;
 - d. The Board has no jurisdiction to make an order under Section 101(1)(c) Building Maintenance and Strata Management Act ('BMSMA') by virtue of Section 101(6) BMSMA; and
 - e. The Respondent's refusal was not unreasonable pursuant to Section 111 BMSMA.

CONSIDERATIONS

14. In considering whether the Respondent had improperly refused the Applicant's request, the following are relevant:
- a. Whether the electricity supply constitutes common property;
 - b. Whether the Respondent's consent is required for the Applicant's request and/or whether this is a matter which requires a decision to be made at a general meeting of the Management Corporation; and
 - c. Whether there is sufficient spare electrical capacity for the Applicant to carry out the upgrading of the Units' electricity supply.

APPLICANT'S CASE

Whether the electricity supply constitutes 'common property'

15. The Applicant submitted that the electricity supply did not constitute 'common property' of the Development. In support of this, it was submitted that the electricity is paid for by the respective subsidiary proprietors to the electricity provider. Nevertheless, the

Applicant conceded that the electricity would have to pass through switchboards, meters, cables and pipes, all of which are part of the common property.

16. The Respondent argued that the unutilized electricity supply clearly fell within the definition of 'common property' in Section 2(1) of the BMSMA, as it was not comprised in any lot or proposed lot and was used or capable of being used or enjoyed by occupiers of two or more lots or proposed lots.

Whether the Respondent can approve the Applicant's request and/or whether this is a matter which requires a decision to be made at a general meeting of the Management Corporation

17. The Respondent contends that the Respondent would not be in a position to approve the Applicant's request if the unutilized electricity supply is deemed to be common property, as such approval would be tantamount to granting the Applicant exclusive use and enjoyment or special privileges in respect of the common property.
18. It followed that the Applicant would have to satisfy Section 33 BMSMA, namely that a requisite resolution has to be achieved at a general meeting of the Development.
19. The Respondent further contended that even if the Respondent could approve the Applicant's request, the Applicant required a special resolution to procure an upgrade of the capacity of DB-Shop-1 / DB-Shop-2.
20. The Respondent contends that as the unutilized electricity supply is common property, the Board does not have jurisdiction to make an order under Section 101(1)(c) BMSMA by virtue of Section 101(6) BMSMA.
21. The Applicant on the other hand acknowledged that given the fact that the electrical supply has to pass through the switchboards, cables and conduits which form part of common property, the Applicant required the Respondent's consent to upgrade her electricity supply. The Applicant argued that pursuant to Section 29(1) BMSMA, the Respondent had a duty to 'control, manage and administer the common property for the benefit of all the subsidiary proprietors...'. It was further contended that Section 101(1) BMSMA provided that the Board may make an order for the settlement of a dispute with

respect to the exercise or performance of, or the failure to discharge its duty under Section 29(1) BMSMA.

Whether there is sufficient spare capacity for the Applicant's requested upgrade

22. The Applicant contends that there is sufficient spare electrical capacity for an upgrade of the electricity supply to the Units to 100 Ampere Three Phase. The Respondent disputes this, and is of the view that there is simply no spare electrical capacity in the Development.
23. Both parties called witnesses to give evidence in this regard. We consider the evidence below.

BOARD'S VIEWS AND DECISION

Whether the electricity supply constituted part of the 'common property' of the Development

24. The Board has been invited by the Respondent to make the holding that electricity supply to the Development constitutes 'common property' as defined by the BMSMA. Certain legal consequences will flow if the unused electricity supply is regarded as 'common property'. In order for the Respondent to succeed in this respect, the Respondent has to cross two legal hurdles. First, the Respondent must establish that the unused electricity supply to the Development is, as a matter of law, a property right. Second, even if unused electricity supply is a property right, this right must be fall within the definition of 'common property' as defined by the BMSMA.
25. The first issue whether unused electricity supply to the Development is a property right is an extremely tricky question. As Gray and Gray in *Elements of Land Law*, (OUP, 2009), para 1.5.1 observed '[f]ew concepts are quite so fragile, so elusive and so frequently misused as the notion of property.'
26. The starting point for the definition of property is the case of *National Provincial Bank v Ainsworth* [1965] AC 1175, 1247 – 1248 where Lord Wilberforce said (cited with approval by the Court of Appeal in *Toh Eng Lan v Foong Fook Yue and another appeal* [1998] 3 SLR(R) 833):

"Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties and have some degree of permanence or stability."

27. However, it must be noted that *Ainsworth* has come under trenchant judicial and academic criticism (see for example Gray, 'Property in Thin Air' (1991) 50 Cambridge LJ 252 at p 292–293 (this article has been cited by Chan Seng Onn J in *Lee Kien Meng v Cintamani Frank* [2015] SGHC 109)). An illustration of such criticism may be found in the following passage by Susan Gray and Professor Kevin Gray in *Elements of Land Law*, (OUP, 2009), para 1.5.29:

"The difficulty with this orthodox understanding of proprietary quality is, of course, that it is riddled with circularity: the definition of proprietary character becomes entirely self-fulfilling. If naively we ask which entitlements are 'proprietary', we are told that they are those rights which are assignable and enforceable against third parties. When we then ask which rights these may be, we are told that they comprise, of course, the entitlements which are traditionally defined as 'proprietary'. It is radical and obscurantist nonsense to formulate a test of proprietary quality in this way."

28. The Board is more impressed with the definition of the irreducible features of property offered by Susan Gray and Professor Kevin Gray in *Elements of Land Law*, (OUP, 2009), para 1.5.32. According to Gray and Gray the following are three key features which lie irreducibly at the core of the definition of property ownership:

- (i) immunity from summary cancellation or extinguishment
- (ii) presumptive entitlement to exclude others
- (iii) entitlement to prioritise resource values.

29. Based on the three key features, the Board is of the view that the unused electricity supply to the Development may be regarded as a property right. First, the right to electricity supply is immune from summary cancellation or extinguishment. As long as

the Respondent met its contractual obligations with the provider of the electricity supply, SP Services Ltd, SP Services Ltd does not have the right to summarily cancel the power supply. Second, the Respondent has a presumptive entitlement to exclude third parties of the Development from this electricity supply. Finally, the Respondent is entitled to prioritise the resource value of this electricity supply.

30. However, even if the unused electricity supply may be characterized as proprietary in nature, this right must still come within the definition of 'common property'. 'Common property' is defined by section 2 of the Building Maintenance Strata Management Act ('BMSMA') as follows:

(a) in relation to any land and building comprised or to be comprised in a strata title plan, **such part of the land and building —**

- (i) not comprised in any lot or proposed lot in that strata title plan; and
- (ii) used or capable of being used or enjoyed by occupiers of 2 or more lots or proposed lots; or

(b) in relation to any other land and building, **such part of the land and building —**

- (i) not comprised in any non-strata lot; and
- (ii) used or capable of being used or enjoyed by occupiers of 2 or more non-strata lots within that land or building; (emphasis added)

31. Thus, section 2 of the BMSMA provides that before something may be regarded as 'common property' the thing concerned must be regarded as forming such part of the land and building. There are two further pre-requisites to the definition of 'common property'. First, it must not be comprised in any lot in the strata plan. Second, it must be used or capable of being used or enjoyed by occupiers of two or more lots. Intangible property rights may in the proper circumstances be regarded as part of 'common property'. It has been held by Judith Prakash J in *Frontfield Investment Holding (Pte) Ltd v MCST Plan No. 938* [2001] 2 SLR(R) 410 that an easement over land of a third party was also considered to be part of the common property. Prakash J in *Choo Kok Lin and*

another v MCST Plan No 2405 [2005] 4 SLR (R) 175 at [44] rationalised her previous holding in *Frontfield* as follows:

"That holding was based on the definition of "land" in the Act which made it clear that "proprietary rights of land includes natural rights to air, light, water and support and the right of access to any highway on which the land abuts. An easement is not tangible and yet it has long been recognised by the common law as being part of a parcel of rights which a purchaser acquires when he purchases a parcel of land which enjoys an easement over an adjacent parcel".

32. Prakash J's decision in *Choo Kok Lin v Management Corporation Strata Title Plan No 2405* [2005] 4 SLR (R) 175 considered the tricky question whether unconsumed Gross Floor Area allocated to a particular development could be considered 'common property'. It is worth quoting in *extenso* from this decision at [45 - 47]:

"45 Despite my recognition that land, and therefore, common property, can include intangible rights, I do not think that unconsumed GFA is capable of constituting land. First of all, the common law does not recognise the concept of GFA. It is not something that has grown out naturally from the ownership and use of land. GFA is a concept that has been invented by the planning authorities in order to control and administer the usage of land in accordance with the currently prevailing policy applied by such authorities. Secondly, to an extent, the GFA of a development is determined by the amount of development charge that a developer is prepared to pay, although of course, there may be guidelines as to the maximum permissible GFA in any particular case. All I am pointing out is that there is no pre-designated GFA for any particular plot by which I mean a GFA which has to be assigned to that plot regardless of the size of the GFA applied for by the developer and the amount that the developer is willing to pay. As a tool of planning policy, the GFA does not have an inherent connection with any particular plot. It is a creature of a completely different nature from an easement which the Act itself describes as a "natural right". Thirdly, the Act itself has not statutorily included GFA in the definition of "land" for the purposes of the Act.

46 As unconsumed GFA cannot be "land", *a fortiori* it cannot be common property...

47...With respect, I agree that GFA does not belong to anyone and is not a right of such a nature that it is capable of being owned by anyone. As the appellants submitted, GFA is simply an administrative tool. As such, it was solely up to the URA to increase or decrease the GFA for any particular parcel of land and to decide what it would do if construction on the land resulted in it being built up beyond the GFA".

33. Based on the wording of section 2 of the BMSMA and *Choo Kok Lin*, the Board is of the view that the unused electricity supply is not properly regarded as 'common property' for the following reasons. First, section 2 of BMSMA presupposes that in most cases 'common property' is a tangible proprietary right. The section refers to 'common property' as being "such part of the land and building". It is very difficult to stretch the words of the statute i.e. "part of the land and building" to include unused electricity supply. Second, Prakash J's decision in *Frontfield* that an easement enjoyed by the residents of a strata lot over a third party's land should be regarded as 'common property' may be distinguished from the present case. As the learned Judge perceptively pointed out, section 4 of the Land Titles Act (which is applicable in the context of the BMSMA) defines land as "natural rights to air, light, water and support and the right of access to any highway on which the land abuts". An easement being an ancient right which has been always been regarded as proprietary in nature 'fits' comfortably within the definition of section 4 of the Land Titles Act. In contrast, unused electricity supply to the Development is not included within the definition of land in section 4 of the Land Titles Act.
34. Even though the Board is of the view that the unused electricity supply is not regarded as 'common property' within the definition of section 2 of the BMSMA, this does not mean that the Respondent's right to allocate the electricity supply is completely unfettered. The Respondent must manage the right to allocate the electricity supply as a responsible management corporation with reference to their legal duties to the subsidiary proprietors. The standard of conduct expected of Management Corporation will be articulated below.

35. Despite the fact that the unused electricity supply is not regarded as common property, the Board is of the view that given that the electricity supply is supplied by switchboards in the Development, which form part of the common property, the Applicant would require the Respondent's consent in carrying out her request. There is no real dispute with regard to this legal proposition as the Applicant accepts that the Respondent's consent is required.

Whether the Board has jurisdiction to make an order in the present case and/or whether this is a matter which requires a decision to be made at a general meeting of the Management Corporation

36. The Board accepts the Applicant's counsel's submission that under Section 29(1) of the BMSMA, it is the duty of a Management Corporation to control, manage and administer the common property for the benefit of all the subsidiary proprietors, and that the Respondent's refusal to grant the Applicant's request in the present case would fall under Section 101(1)(c), which provides that the Board may make an order for the settlement of a dispute with respect to the exercise of a duty conferred or imposed by the BMSMA. The Applicant's submission is not inconsistent with the Board's holding that the unused electricity supply is not regarded as 'common property'. In order for the Applicant to upgrade the electricity supply to her Units, she must make necessary adjustments and connections to the relevant electrical switchboards and cables. These electrical switchboards and cables are undoubtedly 'common property' and within the purview of the Respondent. Thus, the Respondent must exercise its discretion judiciously in relation to the Applicant's access to the relevant electrical switchboards and cables in order to upgrade the electricity supply to the Applicant's Units. In other words, the Respondent's discretion must be exercised consistently with the Respondent's legal duty to control, manage and administer common property for the benefit of all the subsidiary proprietors. It must be noted that the Applicant's request to access and make the relevant adjustments to the relevant electrical switchboards and cables in order to upgrade the electricity supply to her Units does not amount to exclusive use of common property because other subsidiary proprietors are not deprived of the use of these electrical switchboards and cables.

37. The Board does not agree with the Respondent's counsel's submission that the Applicant's request would be tantamount to granting 'special privileges to increase her usage of the unutilized electricity supply over the other subsidiary proprietors'. As the upgrade of the Applicant's electrical supply is to come from the Development's spare electrical supply, the other subsidiary proprietors will not be deprived of their existing electricity supply. The Board also found that the Applicant's request did not amount to a request for 'exclusive use' of common property. As demonstrated above, the unused electricity supply to the Development cannot be regarded as 'common property'. Thus, the Board found that Section 33 and 101(6) of the BMSMA did not apply in the present case, and the matter is not one to be decided which requires a decision at a general meeting.
38. In any case, the Board has jurisdiction under Section 111 of the BMSMA to make an order that the Respondent consent to the Applicant's request if it so finds that the Respondent has unreasonably refused the request.

Whether there was sufficient spare electrical capacity in the Development

39. The Board found the Respondent's arguments for refusing the Applicant's request to be inconsistent. For example, the position taken by the Respondent at various times, i.e. in 2012, 2014 and 2015 was inconsistent. Initially, the Respondent had taken the view that there was insufficient spare electrical capacity within the Development to upgrade the Applicant's Units' electricity supply in 2012. In 2015, the Respondent's position was that there simply was no spare capacity available at all.
40. The Board noted that the evidence relating to the sufficiency of spare electrical capacity of the Development given by Mr Ng, Mr Tay Oon Tiong, the current Building LEW of the Development since 2013 ("Mr Tay") and Mr Lim Sui Yong, the Applicant's LEW ("Mr Lim"), was unanimous. All three witnesses, when asked if there was sufficient spare electricity capacity to effect the Applicant's request, agreed that in their professional capacity as engineers, there was indeed enough spare electrical capacity to do so.

41. As explained by Mr Lim, electrical engineers must consider the 'diversity factor' i.e. not all the appliances will be switched on at full capacity at the same time. Mr. Lim elaborated in para 7 of his Affidavit of Evidence in Chief dated 5 June 2015 as follows:

'Diversity is in existence in any operating system simply because not all the loads connected to the supply system are operating simultaneously and not all are simultaneously operating at their maximum ratings. With the concept of "diversity factor" one will understand why the main intake breaker ampere rating at a distribution board ("DB") does not equal to the sum of all the branch breakers amperes due to this time interdependence, i.e. diverseness in real time application.'

42. Mr Lim cited examples of developments in which he had approved electrical upgrades which exceeded the building's existing design capacity. He noted that these were possible given the operation of the 'diversity factor' and recognised engineering practice.
43. Mr Lim added that if he was to 'mathematically' calculate the sum of the individual maximum electrical demands, that 'no upgrading on earth can be done'. His views were consistent with those of Mr Tay and Mr Ng, who both took the view that there was in fact sufficient spare electrical capacity to effect the Applicant's request.

Whether the Respondent's decision to reject the Applicant's request may be challenged

44. Both the Applicant and Respondent have submitted that the Board would have the jurisdiction to interfere if the Respondent's refusal to allow the Applicant's request was unreasonable. It must be noted that the Applicant and Respondent differ in their submissions as to what constitutes unreasonable behavior. Notwithstanding this apparent agreement of the law between the Applicant and Respondent, the Board is not bound by a concession of law which may be regarded as erroneous. As Richard Malanjum CJ said in *NV Multi Corp Bhd & Ors v Suruhanjaya Syarikat Malaysia* [2010] 5 MLJ 573 at [16]:

"It has been said that no court is bound to decide a controversy upon an erroneous concession of law made by one of disputants before it, more so when a question of

statutory interpretation is involved. The most odd of results would follow if a contrary rule is to be applied"

45. *NV Multi Corp Bhd* has been applied by the Singapore Court of Appeal in *Paragon Finance in Yong Kheng Leong v Panweld Trading Pte Ltd* [2013] 1 SLR 173.
46. What then is the standard which a Management Corporation's decision is subject to review by the Board? In order to discern the standard of review, it is important to revert to first principles. Since a Management Corporation cannot hold property for itself absolutely, it must follow that the Management Corporation holds property on trust for the subsidiary proprietors collectively. This is consistent with the general principle articulated in the decision of the New South Wales Court of Appeal in *Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270. In *Thoo*, the court said that a Management Corporation held the common property on a statutory trust for the owners as a whole and owed general duties and statutory duties to the owners. It could be said that the right to allocate the unused electricity supply is a right held by the Respondent on trust for the subsidiary proprietors collectively. Therefore, the Respondent's duty in this respect is akin to a trustee making a decision with regard to trust property.
47. Chao Hick Tin JA in *Foo Jee Seng v Foo Jhee Tuang* [2012] 4 SLR 339 succinctly sets out the following principles governing the exercise of a trustee's discretion in relation to trust property:
 - (i) "the discretion exercised by the trustees should, as a rule be respected" [51];
 - (ii) "where the discretion is vested in a trustee, that duty has to be exercised properly. The court cannot intervene unless the discretion is either improperly exercised, or not exercised at all" [53];
 - (iii) the "beneficiaries cannot dictate the way a trustee should exercise his discretion" [54]; and

- (iv) while there is no obligation to follow the beneficiaries' wishes, the trustee cannot completely disregard the beneficiaries' wishes and their objective needs and interests [54].

48. Chao JA in *Foo v Foo* accepted the authority of *Re Beloved Wilkes' Charity* (1851) 3 Mac & G 440; 42 ER 330 that the court's supervision will be confined to the "honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at". It must be noted that Chao JA did not state a final view as to whether reasonableness of the trustees' exercise of discretion is a criteria for interference beyond noting *Dundee General Hospital Board of Management v Walker* [1952] 1 All ER 896, 901 where Lord Normand doubted that reasonableness was an appropriate benchmark for interference.

49. The trustee is also under a duty to take into account relevant considerations and ignore irrelevant considerations in making decisions. As Chao JA observed in *Foo v Foo*:

"In our judgment, we think that the 1st Respondent [the trustee] has failed to take into account in arriving at his decision not to effect the sale of the Property at this time, considerations which he should have taken into account and/or he has taken into account considerations which he should not have taken into account (*eg*, it was the Testator's intention to retain the Property as an ancestral home...)" at [67]

50. The Board is of the view that the observations of the Court of Appeal in *Foo v Foo* is also apposite in the context of a Management Corporation making decisions in relation to unused electricity supply. Therefore, we agree with the Respondent's submission that the test of review of a Management Corporation's decision pursuant to sections 101(c) of the BMSMA cannot be "a simple test of reasonableness". The Board cannot be the final arbiter of every decision which a subsidiary proprietor regards as unreasonable. To hold otherwise could potentially paralyze the decision making process of the Management Corporation and inundate the Board with multiple challenges by disgruntled subsidiary proprietors.

51. Nevertheless, we are of the view that the Respondent is incorrect to say that the Board may only intervene if the Respondent's decision was tainted with prejudice, malice or

indifference. As seen in *Foo v Foo*, a court may also intervene in the decision of a trustee if the trustee had taken into account an irrelevant consideration and/or ignored a relevant consideration.

52. In determining whether the Respondent's decision is proper, the Board has to take into account the interests of both the Applicant and the other subsidiary proprietors. The Board has considered carefully the evidence put forward by both parties. There was a clear consensus amongst the experts at trial that there was sufficient spare electrical capacity within the Development to cater to the Applicant's request.
53. The Respondent had erred in adding the individual supply components together in a linear fashion in reaching the conclusion that there would be insufficient spare electrical capacity. Due consideration has to be given to the diversity factor, which is the ratio of the sum of the individual maximum loads of various subdivisions to the maximum demand of a complete system. By virtue of this, buildings can often accommodate electrical upgrades which surpass their original design capacity. In this regard, the Respondent has failed to take into account a relevant consideration i.e. the diversity factor in arriving at the decision to reject the Applicant's request to upgrade the electrical supply to her Units. It must be noted that there was no real dispute between the experts about whether there was sufficient electricity supply to meet the Applicant's request. Even the Respondent's expert thought as a professional engineer there was sufficient capacity to meet the Applicant's request. By ignoring the Respondent's own LEW's opinion, the Respondent has failed to take into account a relevant consideration.
54. At trial, Mr de Souza gave evidence for the Respondent. When asked about the Council's reasons for rejecting the Applicant's request in his examination-in-chief, he admitted that the Council was concerned that if such a request was granted, the shop units would operate 24-hour businesses, like a pizza delivery. This, he said, would adversely affect the residential units which are situated directly above the shop units. Security would also be a cause for concern as delivery people would be loitering around at all times of the day.
55. The Board noted that the considerations raised by Mr de Souza at trial were never communicated to the Applicant. While there is generally no duty to give reasons to the

Applicant, the Board thinks that it is good practice to do so (see *Chia Sok Kheng Kathleen v MCST Plan No 669* [2004] 4 SLR(R) 27 at [38]). However, a Management Corporation is not entitled to take into account an irrelevant consideration when coming to a decision. In any case, the Board is of the view that such concerns can be managed by the passing of relevant by-laws to prevent disruption to the residential units which are situated above the Applicant's Units. The Respondent failed to raise any other reasons for rejecting the Applicant's request. As such, the Respondent had taken into account an irrelevant consideration in refusing the Applicant's request.

56. Given the circumstances, the Board found that the Respondent's refusal of the Applicant's request was improper because the Respondent had failed to take into account a relevant consideration (that there was spare capacity and the LEW's opinion) and taken on board irrelevant considerations (the fear that the Applicant would tenant her Units to a pizza delivery).
57. Even if the Board is wrong with regard to the standard of review of the Respondent's conduct, the Board is of the view that Respondent's refusal of the Applicant's request is regarded as unreasonable in that the Respondent's conduct is tainted by prejudice, malice and indifference (see *Chia Sok Kheng Kathleen v MCST Plan No 669* [2004] 4 SLR(R) 27 at [37]). This line of argument is based on section 111 of the BMSMA which provides that the Board has the jurisdiction to intervene if the Management Corporation had unreasonably refused to consent to a proposal by that subsidiary proprietor to effect alterations to the common property. As Kan Ting Chiu J said in *Chia Sok Kheng Kathleen v MCST Plan No 669* [2004] 4 SLR(R) 27 at [34]:

"When a management corporation receives an application affecting the common property, it should exercise its discretion for the benefit of all the subsidiary proprietors. That means that the interests of the applicant subsidiary proprietor as well as the interests of the other subsidiary proprietors are to be taken into account. The discretion should be exercised responsibly. Applications should be dealt with consistently without favouritism or bias, but flexibility should be retained to take into account changing circumstances. Policies adopted should not be regarded as edicts set in stone".

58. Since the Applicant's request to upgrade would affect some electrical switchboards and cables which are common property, the proposal would fall within the ambit of section 111 of the BMSMA. While the Board does not think that the Respondent acted with prejudice and malice, the Respondent's conduct may be characterized as being indifferent. Since there is clear evidence that there was sufficient electricity supply, the Respondent's refusal to allow the Applicant to upgrade her electricity supply is regarded as being indifferent in the face of objective evidence. Furthermore, a Management Corporation's decision is not regarded as properly exercised if it was actuated by extraneous considerations (see *Chia Sok Kheng Kathleen v MCST Plan No 669* [2004] 4 SLR(R) 27 at [55]). In this regard, the Respondent's refusal to allow the Applicant to upgrade the electricity supply was partly motivated by extraneous considerations i.e. the fear that she would tenant her Units to a pizza delivery business.

CONCLUSION

59. The Board recognises that all buildings are built to a specified design capacity. However, some flexibility has to be afforded to take into account individual subsidiary proprietor's needs. The Board is mindful that these considerations have to be balanced against the other subsidiary proprietors' interests and the Board's discretion has to be exercised sensibly. Where the Management Corporation has concerns about the impact that an applicant's request might have on the other subsidiary proprietors, the Management Corporation should also consider whether the passing of appropriate by-laws might be an appropriate solution.
60. The Board should only interfere where the decision of a Management Corporation is clearly improper and/or unreasonable. In the present case, the Board found that the Respondent's refusal of the Applicant's request was improper and/or unreasonable. The Applicant had purchased her Units with the intention of letting them out to tenants. Given the consensus amongst the witnesses for both parties that there was in fact sufficient spare electrical capacity to cater to the Applicant's request, the Respondent had failed to take this on board as a relevant consideration. Instead, the Respondent had taken into account extraneous factors which are irrelevant in refusing her request.
61. In view of all of the above, the Board orders that:-

- a. The Respondent permits the Applicant to upgrade the electricity supply of her units to '3 phase 100 ampere';and
- b. The Board after hearing parties on cost orders the Respondent to pay the Applicant cost fixed at \$18,000.00 and disbursement to be agreed by parties.

Dated this 6th day July 2015.

MR ALFONSO ANG
Deputy President

DR TANG HANG WU
Member

MR LEE COO
Member