

BUILDING MAINTENANCE AND STRATA MANAGEMENT ACT

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

STB No. 86 of 2016

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 **Sunblade** (MCST Plan No. 2874)

Between

1. Ong Bee Lian & Foo Seng Wong
2. Wu Chiu Lin
3. Pong Chee Keen Francis & Ho Swit Lin Monica
4. Tay Siew Choo & Low Chia Dong
5. Cui Ying & Yang Qing Hua
6. Lim Choo Seng & Pang Yon Moy
7. Seah Poh Hong & Aw Yong Cheng
8. Tan Kee Heng & Wong Siew Mei
9. Didy Soebagio & Indrawati
10. Go Kau Chai Johnny & Lim Gek Hiang Clara
11. Tan Lay Swan
12. Lau King Poh & Ong Bong Sian

... Applicant(s)

And

MCST Plan No. 2874

... Respondent(s)

FOUNDATIONS OF DECISION

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STB No. 86 of 2016

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 **Sunglade** (MCST Plan No. 2874)

Between

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... Applicant(s)

And

MCST Plan No. 2874

... Respondent(s)

20th March 2017; 5th May 2017; 23rd May 2017

23rd May 2017

Coram:	Mr Remedios F.G	(Deputy President)
	Dr Lim Lan Yuan	(Member)
	Mr Lawrence Ang	(Member)

1. Sunglade (Management Corporation Strata Title Plan No 2874) is a subdivided building with 475 strata lots located at 1 – 13 Serangoon Avenue 2 Singapore 556130. Twenty two (22) subsidiary proprietors (from 12 lots – 9 on the first floor and 3 on the thirteenth floor) applied for an order that they *be permitted to install coverings at their private enclosed spaces and roof trellises in accordance with the specifications described in resolution 10.1 passed at the 11th Annual General Meeting of Respondent on 29th May 2016 and in the design shown in the appendix thereto*. Additionally they have applied for an order for costs.
2. The Applicants informed that the orders were being sought pursuant to sections 101(1)(c) and 111 of the Building Maintenance and Strata Management Act Cap 30C (the Act).

BACKGROUND

3. At the 11th Annual General Meeting (AGM) on 29th May 2016, the following by-law was, by way of a Special Resolution, adopted as Additional By-laws of MCST Plan No 2874.

All Subsidiary Proprietors at ground floor (PES) and the top floor (Roof Trellis) who wish to install coverings must comply with the following conditions:

- i. *The width of the PES/Roof Trellis covering shall be no more than 2 metres from the external wall of the unit unless exempted by URA*
- ii. *The design of the PES/Roof Trellis covering must be of the approved design in Appendix A*
- iii. *The design of the PES/Roof Trellis covering must be certified by a qualified person at resident's own cost*
- iv. *The design of the PES/Roof Trellis must be submitted for approval by Urban Renewal Authority (URA), Building and Construction Authority (BCA) and other regulatory bodies as may be required at resident's own cost*

- v. *The PES/Roof Trellis covering will be removed at the Subsidiary Proprietor's own cost should there be a change of property ownership, unless the new owner undertakes the ownership and maintenance of the PES/Roof Trellis covering*
 - vi. *The Subsidiary Proprietor will be responsible for proper maintenance, including cleaning the top of the PES/Roof Trellis on a regular basis, failing which the Management will engage a cleaning contractor and recover the cleaning costs from the Subsidiary Proprietor concerned after due notice is given.*
4. Following the passing of the special resolution, the Applicants requested a meeting with the council and managing agent to discuss the installation of the coverings and followed up with a request for confirmation that they could proceed with the installation of the coverings. By way of an email on 9th September 2016, the Respondent replied that the requests were not approved. The reason for disapproval was:
- As discussed in the 4th council meeting, we regret to inform you that your application is not approved. It has been confirmed that the trellises are common property. In our opinion the covering of these trellises by Subsidiary Proprietors can be referred to S 33 – Exclusive Use By-Laws of the Building Maintenance and Strata Management Act. Hence, a resolution either by 50%, 75% or 90% needs to be passed in a general meeting as per S 33(1)(a)(b)(c).*
5. By way of a letter dated 14th September 2016, the Applicants' solicitors wrote to the Respondent and took the position that there was no legal basis for the rejection of the requests on the ground that:
- a. The strata title plan drawings of the Applicants lots clearly showed that the coverings would be within their lots;
 - b. The special resolution passed at the 11th AGM was sufficient to authorise installation of the coverings even if they are on common property;
 - c. It was incorrect that the installation of the coverings would constitute exclusive use of common property and even if the trellises were common property

installation of the coverings did not allow the Applicants to use them exclusively; the Applicants could not set up gardens or deck chairs on the coverings; and

- d. The coverings were intended to keep the Applicants and their families safe from killer litter. Pursuant to statutory by-laws under the Building Maintenance (Strata Management) Regulations 2005, the Management Corporation could not prevent the Applicants from installing coverings at the ground floor as a safety device.
6. In the ***Submission By Respondent*** (Form 18A), the Respondent informed *that the intention of the Respondent is to ensure that the purported approval granted to the Applicants by way of the Resolution is valid and regular. It is not to unreasonably prohibit the Applicants from installing coverings on the Trellises.*
7. It will be in order to note that the by-law, other than setting out the specifications and conditions that had to be complied with by subsidiary proprietors before coverings could be installed, did not permit or authorise the installation of coverings.
8. Following a mediation before the Board on 22nd February 2017, the dispute between the subsidiary proprietors of the ground floor lots and the management corporation was settled. The parties agreed that the installation of the coverings over the trellises by the subsidiary proprietors of the ground floor strata lots constituted an *installation of a safety device for the improvement of safety* and permission was given by the management corporation for the installation of the coverings.
9. The Board was unable to resolve the dispute between the subsidiary proprietors on the thirteenth floor and the management corporation and the matter was fixed for an arbitration hearing. When parties appeared before the Board for directions before the hearing, the Board was informed that it was not in dispute that the trellises were common property. The one and only issue for determination was whether the installation of the coverings over the trellises would amount to an exclusive use of common property. Directions were given for an arbitration hearing and when the written submissions were filed, the Applicants' position with regard to the issues was

changed. According to the Applicants, the issues for determination (AWS – paragraph 3) were:

- i. Whether installation of coverings over the trellises amounted to exclusive use of common property; (in the Applicants' Reply Submissions the issue was reframed and became *Whether the trellises are used for the installation of the coverings*)
- ii. If so, then *is this the sort of exclusive use that requires a by-law to be made pursuant to Section 33 of the Building Maintenance and Strata Management Act (BMSMA)*

APPLICANTS' SUBMISSIONS:

10. In connection with issue i) it was the submission of the Applicants that there would not be any exclusive use of common property in the installation of the coverings because the trellises would not be used in the installation of the coverings.
11. In connection with issue ii) it was the submission of the Applicants that s.33 of the Act is not applicable when exclusive use would not interfere unreasonably with the use and enjoyment of the common property by other occupiers or any other person entitled to the use and enjoyment of the common property. The Applicants submitted that under s.63(c) of the Act, subsidiary proprietors can use and enjoy common property in any manner or for any purpose as long as the manner of use and purpose of use does not interfere unreasonably with the use and enjoyment of common property by the occupiers of another lot or others entitled to use and enjoy the common property. In view of this right, the power of the management corporation under s.33 of the Act to make a by-law with regard to exclusive use and special privileges over common property was limited to granting exclusive use only in circumstances when such use interfered unreasonably with the use and enjoyment of common property by the occupier of another lot or other person entitled to the use and enjoyment of common property. It was submitted that the installation that the Applicants intended to execute would not interfere unreasonably with the use and enjoyment of common property by another occupier or other person entitled to use the common property and accordingly there was no requirement for the management corporation to make a by-law under s.33

in connection with the Applicants' installations. *Arthur Laurence Platt v Antonio Cosimo Ciriello and Lorenza Maria Ciriello [1999] QCA 33 (Arthur Laurence Platt)* was cited in support of the submission.

12. It will be in order to note that it will be necessary to make a determination on issue ii) only if the answer to issue i) is not in the Applicants' favour. If the Applicants are correct that common property will not be used in the installation of the coverings, the situation would be that the Applicants intend to install coverings in and within their lots. These would be acts that are not in any way unlawful and/or prohibited by any of the provisions of the Act. It is not clear as to why they would want the management corporation to grant permission for such and there was no submission as to where and how the Board had the power to make an order requiring the management corporation to give permission for such. There is no provision in the Act that empowers the Board to order the management corporation (or any person) to give permission to do an act that is not unlawful in any way and which does not require permission from anyone before it can be done.

RESPONDENT'S SUBMISSIONS:

13. It was the submission of the Respondent that the installation of the coverings was a claim to exclusive use of the trellis; that the covering would be attached to the external wall of the building and would alter the common property; that it constituted "*exclusive use*" because such installation benefits the Applicants to the exclusion of other occupiers.
14. The Respondent's submission in connection with issue ii) was that s.63(c) of the Act was mutually exclusive of s.33 of the Act and has no bearing on exclusive use. It was also the submission of the Respondent that a by-law under s.33 of the Act had to be passed before the Respondents could install covering over the roof trellises

DECISION:

15. It is not in dispute that the coverings are to be installed over the trellises. In the Agreed Facts, it is set out that *it will be 130cm above the existing trellis and at the far end it will be actually touching the existing trellis*. At the point where it touches the trellis, it does not appear to be the case that the covering was anchored to or was resting on the trellis. The diagram showed that the “*touching*” was a silicon seal between the covering and the trellis.
16. Whilst a finding can be made that the trellises will not be used in the installation of the coverings, there is no dispute that the coverings will be anchored to the wall of the building. The Applicants submitted that the wall was within the Applicants’ lot and was not common property. The Respondent submitted that the wall was maintained by the management corporation and was common property.
17. The submission of the Applicants that the exterior wall was not common property because it was within their lots, was based on the definition of “common property” in s.2 of the Act where it is set out that it means *such part of the land and building – (i) not comprised in any lot or proposed lot in the strata title plan* i.e. any land and building within the boundary of the lot cannot be common property because it was *comprised* in the lot. In *MCST Plan No 367 v Lee Siew Yuen* [2014] SGHC 161 (*Lee Siew Yuen*), the management corporation submitted that defective beams were within the lot and thus are not part of the common property as defined under the Act. Tan Siong Thye J, in *Lee Siew Yuen*, determined that *comprised* in the definition did not mean situated i.e. it is not correct that any land and building situated within the boundary of a lot cannot be common property. The submission of the Respondent that the exterior wall of the lot was common property because it was maintained by the management corporation was based on the duty of the management corporation under s.29(1)(b) of the Act to maintain and keep common property in a state of good and serviceable repair.

18. Perusing the definition of “common property” in the Act, it will be noted that there is no mention of the wall in the definition. However, in the 2003 version of the Land Titles Strata Act prior to revision in the Building Maintenance and Strata Management Act 2004, “common property” was *inter alia* defined as follows:

(c) unless otherwise described specifically as comprised in any lot in any strata plan and shown as capable of being comprised in such lot, includes –

(i) foundations, columns, beams, supports, walls, roofs, lobbies, corridors, stairs, stairways, fire escapes, entrances and exits of the building and windows installed in the external walls of the building;

19. When the definition of common property as framed in the Act was adopted, this was for the purpose of simplifying the definition and was not meant to exclude from the definition of common property the specific structures listed in the previous edition of the Land Titles Strata Act. See *Lee Siew Yuen*; and *Sit Kwong Lam v Management Corporation Strata Title Plan No 2645 [2017] SGHC 57 (Sit Kwong Lam)*.

20. Tan Siong Thye J in *Lee Siew Yuen* at [33] pronounced:

The purpose behind the definition of common property under s 2(1) of the BMSMA is to exclude from common property those objects that are solely constructed within the subsidiary proprietor’s unit for the enjoyment of the subsidiary proprietor only

The exterior walls of the building are not solely constructed within the subsidiary proprietor’s unit for the enjoyment of the subsidiary proprietor only. They are part of the external façade of the building and are maintained by the management corporation.

21. Common property would accordingly be used in the installation of the coverings in this case. In *Mark Wheeler v The MCST Plan No 751 and Anor [2003] SGSTB 5 (Mark Wheeler)*, a retractable awning/canopy was installed on the external wall. The Board in that case found that attaching any fixture to the external wall for the better enjoyment of one’s own lot would be use of common property and that whilst the attachment does not bar others from accessing the wall, the attachment was a claim to exclusive use of that part of the wall. In *Sit Kwong Lam*, the Board found that the

installation of an air conditioning vent on the external wall of the subsidiary proprietor's unit did constitute exclusive use and enjoyment or conferment of special privileges because it would prevent the portion of the common property wall where it was installed from being used and enjoyed by other occupiers and subsidiary proprietors.

22. It is the finding of the Board that there will, in this case, be exclusive use of common property when the coverings are installed over the trellises.
23. The submission of the Applicants with regard to issue ii) is that there are two classes of "exclusive use" of common property. The first is *the sort of exclusive use that requires a by-law to be made pursuant to s.33 of the Act* and the second *viz exclusive use in accordance with s.63(c) which would not require the making of a by-law under s.33*. The submission was that there was no power to make a by-law with regard to the second *viz exclusive use that did not interfere unreasonably with the use and enjoyment of common property by others*.

BUILDING MAINTENANCE & STRATA MANAGEMENT ACT

Exclusive use by-laws

33. — (1) *Without prejudice to section 32, with the written consent of the subsidiary proprietor of the lot concerned, a management corporation may make a by-law —*
- (a) *pursuant to an ordinary resolution, conferring on the subsidiary proprietor of a lot specified in the by-law, or on the subsidiary proprietors of the several lots so specified, for a period not exceeding one year —*
 - (i) *the exclusive use and enjoyment of; or*
 - (ii) *special privileges in respect of,*
- the whole or any part of the common property, upon conditions (including the payment of money at specified times or as required by the management corporation, by the subsidiary proprietor or subsidiary proprietors of the lot or several lots) specified in the by- law;*

- (b) *pursuant to a special resolution, conferring on the subsidiary proprietor of a lot specified in the by-law, or on the subsidiary proprietors of the several lots so specified, for a period which exceeds one year but does not exceed 3 years and cannot be extended by exercise of any option of renewal to exceed an aggregate of 3 years —*
- (i) *the exclusive use and enjoyment of; or*
- (ii) *special privileges in respect of,*
- the whole or any part of the common property, upon conditions (including the payment of money at specified times or as required by the management corporation, by the subsidiary proprietor or subsidiary proprietors of the lot or several lots) specified in the by-law;*
- (c) *pursuant to a 90% resolution, conferring on the subsidiary proprietor of a lot specified in the by-law, or on the subsidiary proprietors of the several lots so specified, for a period which exceeds 3 years —*
- (i) *the exclusive use and enjoyment of; or*
- (ii) *special privileges in respect of,*
- the whole or any part of the common property, upon conditions (including the payment of money at specified times or as required by the management corporation, by the subsidiary proprietor or subsidiary proprietors of the lot or several lots) specified in the by-law; or*
- (d) *amending, adding to or repealing a by-law made in accordance with paragraph (a), (b) or (c), as the case may be.*

Duties of subsidiary proprietors and other occupiers of lots

63. *A subsidiary proprietor, mortgagee in possession (whether by himself or any other person), lessee or occupier of a lot shall not —*

- (c) *use or enjoy the common property in such a manner or for such a purpose as to interfere unreasonably with the use or enjoyment of the common property by the*

*occupier of any other lot (whether that person is a subsidiary proprietor or not)
or by any other person entitled to the use and enjoyment of the common property;*

24. In *Arthur Laurence Platt*, the Court of Appeal in Queensland considered a dispute under the Building Units and Group Titles Act 1980 where there were provisions similar to s.33 and s.63(c) of the Act. Minority owners in a development made use of the common property by placing display stands, signs, tables and chairs outside their shops; an advertisement sign at the roof level; and a parking sign that sought to appropriate/secure exclusive use of the parking lot. Applications were made for orders/directions to stop the respondents' usage of the common property. The dispute went before a referee who found that: i) placing of display stands or tables outside the shops was an expected and reasonable use of common property; ii) the advertising sign did not dominate the roof level so as to obscure the signs of the appellants and others; and iii) the parking sign did not seek to appropriate/secure exclusive use of the parking lot. The matter then went before the Building Unit Appeal Tribunal. The magistrate who constituted the tribunal found that i) placing of the display stands and tables outside the shops did amount to exclusive use of common property ii) the advertising sign on the roof was an exclusive and unauthorised use of the exterior of the building; and iii) the parking sign was an attempt to exercise exclusive use that was unauthorised. The decision of the tribunal was reversed by the High Court *inter alia* because the magistrate had made his decision without having first made a factual determination as to whether or not the use made by the respondents had unreasonably interfered with the right of another to use it. The decision was reversed and the matter remitted back to the tribunal (the magistrate) to make a determination on this *i.e* to determine if there was unreasonable interference with the rights of others to use the common property.
25. In the High Court, the judge (Derrington J) remarked: *It seems to me that he (the magistrate) found that each obstruction on the common property amounted to exclusive possession, that it was therefore unlawful and that there was no need to consider it further.* Derrington J's view was that exclusive possession of common property not authorised by a by-law was not necessarily unlawful. It is when and if the

usage is challenged that the question will be posed as to whether it interferes unreasonably with the use or enjoyment of common property by the occupier of another lot or other person entitled to the use and enjoyment of common property

26. In the Court of Appeal, the majority viz Macpherson J. A. and Ambrose J agreed with Derrington J.
27. The decision of the majority was that although (s.63(c) of the Act) did *not in so many words expressly confer a right to use common property in a manner or for a purpose that does not unreasonably interfere with the exercise of similar rights by others, it is implicit if not explicit in those provisions that they have that effect. They assume the existence of a right to use and enjoy the common property provided that it does not interfere unreasonably with the right of others to do likewise.* It was noted that whenever any proprietor of a lot makes use of common property for a reasonable purpose from time to time he will often be making exclusive use of it while doing so.
28. It was the view of Pincus J.A. that, subject to the power of the body corporate to confer a right of exclusive use, the law did not permit one tenant in common to do anything which could properly be described as an absolute exclusion of other tenants in common from the whole or any part of the common property.
29. It should be noted that it was not the decision of the majority in *Arthur Laurence Platt* that the power of (the management corporation under s.33 of the Act) to make a by-law with regard to exclusive use and special privileges over common property was limited to granting exclusive use over common property that interfered unreasonably with the use and enjoyment of the common property by the occupier of another lot or other person entitled to the use and enjoyment of common property.
30. At any point of time when common property is being used, *e.g.* walking along a path or setting up paraphernalia for games on a playground, there would be an exercise of exclusive use of the part of the common property that is being occupied or used. As long as the rights of other occupiers and others who are entitled to use that part of the common property are not being interfered with unreasonably, a subsidiary proprietor

who is using common property in the manner described, can continue using the common property. Even when the use will not unreasonably interfere with the rights of others, there is no right to an indefinite and unlimited use. At any point of time when the use unreasonably interferes with another's right to use e.g. cleaners, employed by the management corporation need to clean the path or the playground, the subsidiary proprietor cannot continue with his exclusive use of the common property. In *Arthur Laurence Platt*, the matter was referred back to the tribunal to make a factual determine as to whether the rights of others to use the common property would be or was interfered with. It will not be out of order to conclude that the tribunal's original decision would stand in the event that a finding was made that the rights of others would be interfered with.

31. Under s.33 of the Act, a management corporation is given a power to make a by-law conferring on a subsidiary proprietor the exclusive use and enjoyment of, or special privileges in respect of the whole or any part of the common property. It is a provision that enables a management corporation to confer exclusive use and enjoyment of, or special privileges over any part of the common property. When exclusive use has been conferred under this section the subsidiary proprietor who has been conferred the exclusive use can use it for his own lawful purposes and no one can use or access it without his permission. It would be as if he was the sole proprietor of that part of the common property. The whole or part of common property over which exclusive use has been conferred under the section will, in effect, cease to be common property that can be used and enjoyed by other subsidiary proprietors. It will be in order to repeat that s.33 is an enabling provision and not a directory or a mandatory provision. The management corporation is not directed or mandated to confer the rights prescribed in the section in any set of circumstances. Where the management corporation has exercised the power under the section and conferred exclusive use and enjoyment of, or special privileges over any part of the common property on a subsidiary proprietor, no other subsidiary proprietor or other occupier can, as mentioned earlier, without his assent, make use of that part of the common property for any purpose.

32. Unlike s.33, s.63(c) of the Act is not a provision where power is given to any person or any party to confer rights or privileges on another party. It is a provision that spells out what a subsidiary proprietor cannot do with regard to common property and accepting the decision of the majority in *Arthur Laurence Platt* assumes *the existence of a right to use and enjoy the common property provided that it does not interfere unreasonably with the right of others to do likewise*. It does not in any way qualify or limit the duties and powers of the management corporation or the rights of other subsidiary proprietors or other occupiers over common property. The section cannot be read to prevent a management corporation from exercising powers under s.33 of the Act. As long as a management corporation has not exercised powers under s.33 to confer on a subsidiary proprietor exclusive use and enjoyment of or special privileges over a part of the common property, that part will be available to all subsidiary proprietors and occupiers to use and enjoy in accordance with s.63(c) of the Act. There is no conflict between the two provisions. It could be in order to submit that that it is not necessary for a subsidiary proprietor to procure a by-law for the exclusive use and enjoyment of common property when his use will not unreasonably interfere with the use and enjoyment by others, but there can be no merit in a submission that a management corporation cannot exercise its powers under s.33 of the Act over a part of the common property which can be used by a subsidiary proprietor without unreasonably interfere with another's use and enjoyment of that part of the common property. There is nothing in the section to suggest that the power is limited in any way. Common property is defined in s.2 of the Act and under s.33 of the Act, a management corporation can make a by-law conferring exclusive use and enjoyment over the whole or any part of the common property.
33. The Applicants, in this matter, are applying for an order from the Board for the Respondent to permit them to install coverings over the trellises. There is no dispute that the coverings are intended to be permanently installed and whilst their coverings are in place, they would be using common property exclusively. Accordingly, an order granted by the Board would equate to the Board ordering the Respondent to permit the Applicants to have right to exclusive use of the common property for an unlimited period of time. There is no provision in the Act that allows for a management to

confer on a subsidiary proprietor exclusive use and enjoyment of common property other than by making a by-law in accordance with s.33 of the Act. In this case, a by-law pursuant to a 90% resolution would be required. Under s.101(6) of the Act, the Board cannot make an order with respect to such exercise or performance of or failure to exercise or perform a power, duty or function where the power duty or function may be exercised or performed pursuant to a (in this case) 90% resolution.

34. In view of all our findings, the applications are dismissed.
35. The Applicants will pay costs fixed at \$6000.

MR REMEDIOS F.G
Deputy President

DR LIM LAN YUAN
Member

MR LAWRENCE ANG
Member

Mr Toh Kok Seng & Mr Daniel Chen (Lee & Lee) for the Applicants
Mr Subir Singh Grewal & Ms Jacqueline Teo (Aequitas Law LLP) for the Respondent