BUILDING MAINTENANCE AND STRATA MANAGEMENT ACT

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

STB No. 88 of 2019

In the matter of an application under sections 101(1)(a), 101(1)(c) and 111 of the Building Maintenance and Strata Management Act in respect of the development known as **Citylife @ Tampines** (The MCST Plan No. 4417)

Between

Lee Soh Geok

… Applicant

And

The Management Corporation Strata Title Plan No. 4417

… Respondent

GROUNDS OF DECISION

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… Respondents

20 March 2020

7 September 2020

Coram:	Mr. Alfonso Ang	(President)
	Dr. Tang Hang Wu	(Member)
	Mr. Ter Kim Cheu	(Member)

Mr Alfonso Ang and Dr. Tang Hang Wu:

Background Facts

1. Lee Soh Geok ("**the Applicant**") is the subsidiary proprietor of a unit in the condominium development known as Citylife@Tampines ("**the Development**"). The Respondent is The Management Corporation Strata Plan No. 4417 ("**the MCST**") of the Development. On 1 October 2019, the Applicant filed the present application against the Respondent.

Applicant's Case

2. The Applicant seeks the following orders against the Respondent:

"1. To remove existing fixed non-combustible aluminium composite panel covers installed within the estate, be they PES/RT or other units, and reinstatement works to be done on common property, given the slew of associated problems they created for fellow subsidiary proprietors (SPs) who live on upper floors in particular, and the tensions arose from associated conflicts exacerbating the social disharmony due to legacy issues mishandled by developers and its appointed managing agency Suntec Real Estate Consultants P/L since TOP 2016

2. To i) remove the existing non-combustible aluminium composite panel with slanted retractable awnings, recognised by STB panel of judges in previous similar cases as a necessary, reasonable and proportionate response to the "killer" litter problem after weighing the considerations of all affected parties and the two solution options.

<u>Important 12 Factors for Consideration</u>
Design Slant, Material Smooth Flow, Sheer Size
Heat, Noise, Cleanliness, Maintenance Ease & Frequency
Workmanship, Durability, Privacy, Safety, Costs

ii) specify specific TIMELINES for change implementation as well as 3-5yrs equipment replacement (or when mouldiness is spotted on material, whichever is earlier);

iii) establish specific RESPONSIBILITY of respective cleaning costs is to be borne by respective PES/RT SPs, made payable to MCST on a monthly basis and structured into automatic additional maintenance fees to eliminate further future disputes on ownership of maintenance costs & responsibilities.

iv) state specific FIXED (THRICE) WEEKLY PROFESSIONAL CLEANING SCHEDULE, given our location site near main traffic roads and huge construction site (Tampines North) from now till change replacement and thereafter where applicable;

v) assign prevailing MANAGING AGENCY as the appointed body to source for and coordinate regular professional cleaning.

vi) identify SPECIFIC UNIT AREA FOR WALL ATTACHMENT, i.e. on own unit's walls at the buffer (coloured red or green in pic) 11" x 11" or unit's side walls, as opposed to common property (blue).

3. To remove unauthorised personal water pipes installed along common property walls meant to facilitate water point in respective PES & DETERMINE AS WELL AS FORMALISE THE RATES OF FINES / PENALTIES TO AVOID RECURRING VOILATIONS. The estate cannot have ribbons of private pipes, worse rusty or mouldy running on common property exterior walls on all 14-15 floors per block from aircon ledges. Responsible SPs have taken the responsible way to lay the pipes through bedrooms

from their common/master toilets for balcony use. All patio SPs should do the same. No preferential treatment.

4. To remove unauthorised PRIVATE POTS, PLANTS, BICYCLES AND CCTVS ON COMMON PROPERTY placed by SPs & determine as well as formalise the rates of fines / penalties to avoid recurring violations. We cannot indulge in this hide and seek game without penalties by such repeated selfish encroachments without remorse, and worse with MCST Council Members flouting rules and rendering MA impotent at resolving such violations.

PIPES (29 Patio Units)

B51 - #XXX, #XXX, #XXX
B53 - #XXX, #XXX
B55 - #XXX, #XXX, #XXX, #XXX
B57 - # XXX, # XXX, #XXX, #XXX
B59 - #XXX, #XXX, #XXX, #XXX
B61 - # XXX, #XXX
B63 - #XXX, #XXX, #XXX, #XXX
B65 - #XXX, #XXX, #XXX
B67 - #XXX, #XXX, #XXX

BICYCLES *– B51, B55, B61, B63, B67*

PLANTS (27 Units)

B51- #XXX, #XXX
B53 - #XXX, #XXX, #XXX
B55- #XXX, #XXX, #XXX
B57 - #XXX, #XXX
B59 - #XXX, #XXX, #XXX, #XXX
B61 - #XXX, #XXX, #XXX
B63 - #XXX, #XXX, #XXX, #XXX
B65 - #XXX, #XXX, #XXX
B67 - #XXX, #XXX, #XXX

CCTV *(B55 #XXX * CORRECTLY INSTALLED) B 53 - #XXX B55 - #XXX*

5. To order payment collection from the respective 34 patio units to MCST 4417 for the professional cleaning services, aka CNY cleaning of trellis & extensions on private patios grounds during the period 14-17 Jan 2020, excluding UTILITIES (WATER & ELECTRICITY) APPLICABLE. The charges are $600 per unit per washing, excluding utilities (water & electricity) applicable. The increase in JAN 2020 UTILITIES BILL should be singled out and borne by them since no spring cleaning for the estate was conducted.

6. To claim all costs for this STB case submissions and deliberation while we as responsible SPs to fellow residents, embark on this lowest cost method ($500 for application, $150 per arbitration, $300 per hearing, miscellaneous printing costs etc) made available by MND/BMSMA to seek proper fair professional closure on this controversial matter for ourselves and this estate (since TOP 2016), based strictly on the

merits of this case, forgoing alternative costly external legal aid and expect similar legal cost restraint from MCST to let our professional panelist of judges assigned by STB determine the solutions."[1]

Respondent's Case

3. The Respondent's case may be summarised as follows:

"*4.* ***(Replacement of Fixed Awnings with Retractable Awnings)*** *The Respondent is entitled to decide on the design of awnings in the development, and has decided that they should be fixed awnings. It does not matter whether an alternative design might be a necessary, reasonable and proportionate response to killer litter, or otherwise better in some way. Approval was given by the Developer, but even if it was not, the Respondent cannot prevent the subsidiary proprietors from installing the fixed awnings since they are safety devices.*

"5. ***(Proposed Guidelines for Awnings)*** *The Board will not micromanage management corporations or interfere in their decisions by imposing such minute guidelines as the Applicant desires. She is attempting to circumvent the decision-making processes of the Respondent by asking the Board to have her suggestions set in stone as rules for the development.*

*6.(**Water Pipes**) These were approved by the developer and installed before the Respondent's constitution. Since the Respondents have been advised that they are unlikely to succeed in legal proceedings against the subsidiary proprietors, they are entitled to exercise their discretion not to do so.*

*7. (**Fines and Penalties**) Management Corporations have no power under the Building Maintenance and Strata Management Act (Cap 30C) ("BMSMA") to impose fines and penalties for breaches of by-laws, and the Board cannot grant the Respondent such powers when it is not provided for under the BMSMA."*[2]

The Law on the Installation of Awnings in Strata Developments

4. There are several issues in relation to the installation of awnings in the present case:

(a) whether a special resolution or 90% resolution is required to enact the necessary by-law allowing for the installation of awnings;

(b) if the requisite resolution is not obtained, whether there is a statutory provision within the statutory scheme which allows subsidiary proprietors to install awnings if safety concerns are established; and

[1] Applicant's Closing Submission
[2] Respondent's Closing Submission.

(c) whether the management corporation should be ordered to prescribe retractable awnings when fixed awnings have already been installed.

A. Whether a 90% Resolution is Required

5. Section 33(1)(c) of the BMSMA stipulates that a 90% resolution is required to make by-laws conferring on subsidiary proprietors the exclusive use and enjoyment of or special privileges in respect of the whole or any part of common property exceeding three years. In *Wu Chiu Lin v Management Corporation Strata Title Plan* (*"**The Sunglade**"*) [2018] 4 SLR 975, Chan Seng Onn J held that common property included external walls of a strata development. Therefore, a by-law allowing a subsidiary proprietor who wished to install coverings over roof trellises has to be passed by a 90% resolution because the installation of coverings over the roof trellises involved the conferring of exclusive use and enjoyment of or special privileges exceeding three years in respect of common property. This decision has been followed by the Board in *Ahmad bin Ibrahim and 21 others v The MCST Plan No. 4131* (*"**The Belysa**")* [2018] SGSTB 8 at [26] and *Rosalina Soh Pei Xi v Hui Mun Wai and The Management Corporation Strata Title Plan No 4396* [2019] SGSTB 5 ("***Suites@Newton***").

B. Whether there is a Statutory Provision which Allows for the Installation of Awnings Due to Safety Concerns

6. However, even if the necessary 90% resolution is not obtained, the statute contemplates that awnings may be installed due to safety concerns. Section 32(2) of the BMSMA provides:

> "*by-laws prescribed by regulations shall be the by-laws for every parcel comprised in a strata title plan in respect of which a management corporation is constituted on or after 1st April 2005,* ***and no by-law made under this section or section 33 shall be inconsistent with any such prescribed by-law***." (emphasis added)

7. Therefore, by-laws prescribed by regulations or what is known as statutory by-laws are by-laws for every parcel comprised in a strata title plan. It is important to note that section 33 of the BMSMA is subject to section 32(2) of the BMSMA. In other words, any by-laws made pursuant to section 33 may not be inconsistent with the statutory by-laws.

8. The Second Schedule to the Building Maintenance (Strata Management) Regulations 2005 ("**BMSMR 2005**") contains these statutory by-laws. Paragraph 5(1) of the Second Schedule provides that:

> *"5.—(1) A subsidiary proprietor or an occupier of a lot shall not mark, paint, drive nails or screws or the like into, or otherwise damage or deface, any structure that forms part of the common property except with the prior written approval of the management corporation."*

9. Paragraph 5(1) of the Second Schedule of the BMSMR 2005 is qualified by paragraph 5(3) ("**by-law 5(3)**") which provides:

> *"(3) This by-law shall not prevent a subsidiary proprietor or an occupier of a lot, or a person authorised by such subsidiary proprietor or occupier from installing —*
>
> *(a) any locking or other safety device for protection of the subsidiary proprietor's or occupier's lot against intruders or to improve safety within that lot;*
> *(b) any screen or other device to prevent entry of animals or insects on the lot;*
> *(c)* ***any structure or device to prevent harm to children; or***
> *(d) any device used to affix decorative items to the internal surfaces of walls in the subsidiary proprietor's or occupier's lot."* (emphasis added)

10. The resultant position is that the statutory by-laws do not prevent a subsidiary proprietor from installing "any structure or device to prevent harm to children". The statutory force of this by-law is derived from section 32(2) of the BMSMA which takes precedence over section 33 of the BMSMA. This is consistent with first principles because although strata titles are mini democracies, there are matters such as safety concerns which should be regarded as more important than majority rule. Dr Cathy Sherry, explains perceptively in her monograph, *Strata Title Property Rights[:] Private Governance of Multi-Owned Properties* (Routledge, 2017) at 218:

> *"The majority may act in ways that are harmful to others, including children, even to the point of making decisions that are inimical to their physical safety…Left to their own devices, bodies corporate have not protected children and so the legislature needed to step in*."

11. The interpretation that the statutory by-law takes precedence over the general authority of the collective is supported by Dr Sherry's writings on the New South Wales' statutory regime which is similar to Singapore's statute. Dr Cathy Sherry, writing on the New South Wales framework in *Strata Title Property Rights[:] Private Governance of Multi-Owned Properties,* (Routledge, 2017) at 219:

> *"There seems to be some confusion among strata managers and executive committees about the appropriate function and ambit of by-laws. Many residential schemes in Sydney use the New South Wales' model by-laws which prohibit the driving of screws through common property without body corporate consent. However, the model by-law exempts an owner, or person authorised by the owner, installing 'any structure or device to prevent harm to children'* ***As a result, an owner can install barriers or nets to protect children,*** **without** ***body corporate permission.*** *In the Second Reading Speech for the Strata Schemes Management Bill 1996 (NSW), the Minister for Fair Trading, Mrs Lo Po said that:*
>
> > *The bill takes special account of circumstances where children live in strata schemes ... security measures taken to ensure the safety of children, for*

> *instance falling from balconies, will be automatically permitted. The body corporate will not be able to prevent an owner or someone authorised by the owner from taking these measures [if] an appropriate standard and in keeping with the appearance of the building."'*
>
> *It seems clear that the model by-law was intended to remove safety devices for children from the general authority of the collective, and to vest it in individual owners, that is, parents".* (emphasis added)

12. The position that the prescribed by-law 5(3)(c) allows for the installation of a structure or device on common property in order to prevent harm to children without approval of the Management Corporation appears to be endorsed in *Sit Kwong Lam v Management Corporation Strata Title Plan No 2645* ("***The Ardmore Park***") [2018] 1 SLR 790. Menon CJ in *The Ardmore Park* at [72] interpreted paragraph 5(3)(c) of the Second Schedule of the BMSMR 2005 in the following manner:

> "*…Reading the exception in by-law 5(3)(c) in a consistent way, we were of the view that it must similarly be limited to the situation where a subsidiary proprietor erected a structure or device on common property in order to prevent harm to* children while they were within his lot. (emphasis in the original)"

13. The position that awnings may be installed if there are safety concerns was implicitly accepted by Chan Seng Onn J in *The Sunglade* [2018] 4 SLR 975 at [90] who observed:

> *"First, it is wrong for Ms Wu to assert that the subsidiary proprietors of the penthouse units should be entitled to install coverings over the roof trellises just because the other subsidiary proprietors occupying the ground floor units had been entitled to install coverings over the PES trellises. The Management Corporation clearly stated that it was not objecting to the installation of coverings over the PES trellises only because it agreed that such an installation constituted the installation of safety devices for the improvement of safety within the ground floor units as provided for by the prescribed by-law reflected in para 5(3) of the Second Schedule to the Regulations (see [13] above). The same clearly cannot be said of the installation of coverings over the roof trellises, given that the penthouse units are not being afflicted with the problem of killer litter that the subsidiary proprietors of the ground floor units have been having to endure".*

14. If the Management Corporation in *The Sunglade* was not entitled to take the position that coverings could be installed due to the problem of "killer" litter without a 90 % resolution, Chan J would surely have said so. The position that a subsidiary proprietor is entitled to install an awning when there is a "killer" litter problem has also been accepted by the Board in *The Belysa* [2018] SGSTB 8 and *Pang Loon Ong and Ors v The MCST Plan No 4288* ("***D'Leedon***") [2019] SGSTB 6.

15. Another issue is whether section 37A of the BMSMA which was enacted in 2019 precludes this Board from holding that a subsidiary proprietor may install awnings if there is a 'killer' litter problem. Section 37A of the BMSMA provides as follows:

> **37A.**—(1) A subsidiary proprietor of a lot in a building on a parcel comprised in a strata title plan may install safety equipment on the lot, or as part of any window, door or opening on the lot which is facing outdoors, despite any other provision of this Act or the regulations or any by-law of the parcel which otherwise prohibits the installation of such safety equipment.
>
> (2) A subsidiary proprietor of a lot in a building who installs safety equipment under this section must —
>
> (*a*) repair any damage caused to any part of the common property or limited common property (as the case may be) by the installation of the safety equipment; and
>
> (*b*) ensure that the safety equipment is installed in a competent and proper manner and has an appearance, after it has been installed, in keeping with the appearance of the building.
>
> (3) In this section, "safety equipment" means —
>
> (*a*) any of the following features to prevent people from falling over the edge of an outdoor-facing balcony or terrace or a window or door or an opening which is outdoor-facing:
>
> (i) a window grille or screen;
>
> (ii) a balustrade, railing or fence;
>
> (*b*) any device capable of restricting the opening of a window or door or an opening which is outdoor-facing;
>
> (*c*) any screen or other device to prevent entry of animals or insects on the lot;
>
> (*d*) an intruder alarm or monitoring system; and
>
> (*e*) any lock or other security mechanism that is designed to protect occupiers of the lot against intruders to the lot.

16. We are of the opinion that section 37A of the BMSMA does not exclude the position that an awning may be installed when there is a 'killer' litter problem even if there is no 90 % resolution. As the Board said in *D'Leedon* [2019] SGSTB 6 at [17] – [18]:

> *The definition of "safety equipment" in section 37A of BMSMA does not appear to include awnings. Does the amendment mean that Parliament had by implication excluded the management corporation's power to prescribe guidelines in relation to awnings to counter a "killer" litter problem? This Board is of the view that a careful analysis of the statutory framework will show that section 37A of the BMSMA did not affect a management corporation's ability to prescribe guidelines*

> *with respect to awnings if there is a "killer" litter problem. Section 37A of the BMSMA deals with the specific issue of "safety equipment" and not "any structure or device to prevent harm to children" mentioned in paragraph 5(3)(c) of the 2nd Schedule to the BMSMR 2005. The omission to deal with these other structures or devices in section 37A did not, in this Board's view, signal an intention by Parliament to abolish the subsidiary proprietor's rights to install these items to protect their children. In other words, section 37A of the BMSMA did not preclude a subsidiary proprietor from installing any structure or device on common property to prevent harm to a child while the child is within his or her lot and the management corporation may prescribe guidelines in relation to the installation of such devices or structures. This interpretation is fortified by paragraph 5(4) of the 2nd Schedule to the BMSMR 2005 which provides:*
>
> *Any such locking or safety device, screen,* other device or structure *must be installed in a competent and proper manner and must have an appearance, after it has been installed, in keeping with such guidelines as the management corporation may prescribe regarding such installations, and with the appearance of the rest of the building. (emphasis added)*
>
> *Thus, it is clear that management corporations may prescribe guidelines in relation to awnings which may fall within the definition of "other device or structure" when there is a "killer" litter problem.*

17. The final issue is whether subsidiary proprietors who have installed fixed awnings with the approval of the management corporation due to a "killer" litter problem may be asked to take down the fixed awnings and install retractable awnings. The short answer is no. As the Board said in the *Suites@Newton* [2019] SGSTB 5 in the context of an Applicant seeking a Respondent to replace his fixed awning with retractable awning:

> *"this Board is of the view that it is far too late in the day for the Applicant to seek this order. An argument for review may possibly be made if the MC had prescribed fixed awnings instead of retractable awnings before a subsidiary proprietor had acted on the MC's prescription. However, matters assume a different complexion when a subsidiary proprietor had acted on the MC's representation. There must be some finality to the MC's everyday decisions. In other words, the policy of finality of the MC's decision is overriding in the present case".*

Application of the Law to the Facts on the Awnings on the Ground Floor

18. It is undisputed that 90 % approval for the fixed awnings was never obtained at various Annual General Meetings. Nevertheless, we are satisfied that the Respondent has shown that there was a "killer" litter problem before the fixed awnings were installed.

19. The evidence shows that some of the subsidiary proprietors had applied to the Urban Redevelopment Authority ("URA") to install the fixed awnings through their contractor,

Spacedor Marketing Pte Ltd. The Urban Redevelopment Authority granted planning permission to Spacedor Marketing Pte Ltd to install these awnings on 7 July 2016. However, it seems that the installation of the awnings was initially stopped by the developers. This is found in an email from Javen Lim to *inter alia* the developer on August 1, 2016 where he wrote:

> "*I am one of the PES unit owners staying at Blk 55 #XXX. I would like to respond to your recent decision of stopping us from building our own roof extension. We have:-*
>
> *1) About 35 photos of killer litters (sic) that hit directly at our PES today and this is NOT even the complete list.*
> *2) 4 videos of specific units having their workers, maids, family members, kids throwing things, sweeping dirt down from their house which directly impact us.*
> *3) Past email correspondences, text messages, witnesses from verbal communications between us and Developer/Management over the roof extension*
>
> *…I can flood everyone with the photos and videos that I have on hand. I am doing this for my family. When it comes to safety for (sic) my family, I will NOT backed (sic) down"*[3]

20. In Javen Lim's email dated August 1, 2016, he alleged that the developer had previously given the approval to install the awnings. He wrote:

> *"We sincerely hope that Developer/Management can HONOR(sic) your approval and let us proceed…I will attached (sic) some photos and videos that I have for you to support us and HONOR (sic) your approval".*

21. In another email written by Bruce Lee to the developer dated August 20, 2016, Mr Lee wrote:

> "*I heard a bang sound on my roof extension awhile and a long metal piece landed on the common area as attached. Subsequently the same domestic helper of the same unit at level 4 came to retrieve it. I checked with her about the dropped water bottle yesterday…."*[4]

22. These are only two instances of the problem of 'killer' litter highlighted by the subsidiary proprietors. There are other emails by Joannes Lee dated May 10, 2016, Lily Low dated August 6, 2016,[5] Fabian Foo dated August 10, 2016,[6] Daniel Chen dated May 10, 2016[7] and Szeyun dated June 16, 2016[8] complaining about the 'killer' litter problem.

[3] Affidavit of Evidence-in-Chief of Lee Seng Leong at page 19
[4] Affidavit of Evidence-in-Chief of Lee Seng Leong at page 29.
[5] Affidavit of Evidence-in-Chief of Lee Seng Leong at page 34.
[6] Affidavit of Evidence-in-Chief of Lee Seng Leong at page 35.
[7] Affidavit of Evidence-in-Chief of Lee Seng Leong at page 37.
[8] Affidavit of Evidence-in-Chief of Lee Seng Leong at page 38.

23. Joannes Lee wrote to the developer on May 10, 2016:

> "*At about 10.30 am or thereabouts, the plaster ceiling workmen heard a loud thud and informed me.*
> *To my astonishment, I found this sharp cut aluminium channel on my front Patio steps…Thank God no one was hit/injured by it*."[9]

24. Lily Low wrote on August 6, 2016:

> "*It has come to my attention that a piece of "metal stick" fell into the uncovered PES of my neighbour at Blk 57 #XXX this morning. There was ongoing renovation works of the upper level units. Can you imaging the consequences if the metal piece hit and pierce someone."*[10]

25. Fabian Foo wrote on August 10, 2016:

> *"Please advise me who is going to be responsible for my family and our neighbors'(sic) family lives, if something drop onto them at the open space patio again…Are you waiting for bloody injuries or even death in the patio before making the final decision?"*[11]

26. It appears that the developer had approved the installation of the awnings for some of the subsidiary proprietors. For example, in an email sent from Szeyun to the developer dated June 16, 2016, she wrote:

> "*Yesterday Kevin at #XXX found a piece of broken wood chip with nails attached that had fallen onto our trellis cover. A photo is attached….*
>
> *…If we did not have this trellis cover, the wood chip might have seriously injured my family who might have been outside right under the trellis.*
>
> *Therefore I would also like to thank the management who acted fast and approved of our request to install a trellis cover. If it took longer, someone would already have been injured. My trellis was only erected less than 2 weeks.*"

27. There is also evidence that the developer gave approval for the installation of the awnings and prescribed the structure which ought to be installed in the form of an email from the address info@citylifeattampines.com to 'william zhang' dated 22 August 2016. However, it should be noted that in the same email, it was written in point 7 of the email:

> *"If the Management Corporation (when formed) decides that they are not agreeable to the PES Cover, you shall remove the said PES Cover at your own cost and expense".*

[9] Affidavit of Evidence-in-Chief of Lee Seng Leong at page 37.
[10] Affidavit of Evidence-in-Chief of Lee Seng Leong at page 34.
[11] Affidavit of Evidence-in-Chief of Lee Seng Leong at page 35.

28. In the present case, the Respondent as the Management Corporation is not insisting on the awnings to be removed. The Respondent's position is that all twenty-four fixed awnings at the private enclosed spaces were installed in 2016 by the owners before the Respondent as the Managing Corporation was even constituted on 20 April 2017. Section 2 of the BSMSA provides:

> *"initial period", in relation to a management corporation or subsidiary management corporation, means a period starting from the day on which the management corporation or subsidiary management corporation, as the case may be, is constituted (except pursuant to a comprehensive resolution under section 78(2)(b)) and ending —*
>
> *(a) 12 months later; or*
>
> *(b) on the day when the first annual general meeting of the management corporation or (as the case may be) subsidiary management corporation is held, whichever first occurs"*

Thus, section 49(1) of the BSMSA is not engaged because this section deals with restrictions of the management corporation's power during the initial period when the management corporation was formed on 20 April 2017. In the present case, the awnings were installed prior to the formation of the management corporation. This position is maintained in the Respondent's Closing Submissions and at the trial.[12] As shown above, this position is supported by the evidence before us.

29. Thus, the present case raises the tricky issue on works done prior to the formation of the management corporation. In other words, how should the installation of awnings be analysed prior to the formation of the managing corporation? Judith Prakash succinctly explains in *Choo Kok Lin and another v Management Corporation Strata Title Plan No 2405* [2005] 4 SLR(R) 175 at [28] – [29] on the nature of works done prior to the formation of the management corporation as follows:

> "*…in my judgment, the by-laws in this case would only have taken effect on 7 April 2000 when the strata title plan for Kentish Lodge was registered and the MCST came into existence…This interpretation also accords with common sense as the two by-laws alleged to have been breached are by-laws that provide that subsidiary proprietors must obtain the approval of the MCST before carrying out the types of works specified in those by-laws. The appellants were not subsidiary proprietors when they did the works and there was no MCST to whom they could have applied for approval. The foregoing does not mean that prior to 7 April 2000 the appellants or other purchasers of units in Kentish Lodge were entirely free to do whatever they liked with their units. In the sale and purchase agreement that the appellants made with the developer, there was a clause (cl 21) that bound the appellants to comply*

[12] See Transcript Friday, 20 March 2020 on page 32. Counsel stated at line 14 "*It's before the initial period, it's in 2016, the MCST was constituted in 2017. "Initial period" has a technical meaning, it doesn't just mean the period before the 1st AGM. It refers to the period* ---"

> *with the restrictions in Schedule A to the sale agreement from the date they took possession of the units until the MCST took over management of the condominium. Schedule A contained restrictions that were similar to the by-laws set out in the First Schedule of the Act. In particular, cl 2(m) of Schedule A provided that the purchaser was not to "mark, paint, drive nails or screws or the like into, or otherwise damage or deface any structure that forms part of the common property without the approval in writing of the [developer]". The developer could, therefore, have forbidden the appellants to carry out any erections or installations that would have damaged or defaced the common property. When the developer received the appellants' request for approval of their intended works, the developer chose to sit on the fence and decline either to approve or specifically disapprove the works. If the developer had rejected the works outright, the appellants would not be in their present position. In any case, even if the appellants were in breach of contract because they did not get specific approval from the developer before proceeding with their works, that breach could only be acted on by the developer and the MCST could not have relied on it in its action before the district judge. Breach of the appellants' contractual obligations under the sale and purchase agreement could not be considered breach of the by-laws as those were not in force at the time the acts constituting the breach took place".*

30. Therefore, following from *Choo Kok Lin,* the owners who installed the works prior to the formation of the management corporation "were not subsidiary proprietors when they did the works and there was no MCST to whom they could have applied for approval". If they installed the works without the developer's consent, this might have put them in breach of their sale and purchase contract with the developer. However, even if they were in breach of contract, the Respondent as the Management Corporation could not rely on this breach of contract because it was not privy to the sale and purchase agreement. We note in this case that we have seen evidence of approval of the installation of the awnings with respect of some of the units by the developers.

31. The next question is this: whether the awnings must be taken down when the Management Corporation was formed on 20 April 2017 because a 90 % resolution pursuant to section 33(1)(c) of the BMSMA was not obtained? As explained above, section 33 of the BMSMA is subject to section 32(2) of the BMSMA. In other words, any by-laws made pursuant to section 33 may not be inconsistent with the statutory by-laws. Since the statutory by-law, namely by-law 5(3)(d) does not prevent a subsidiary proprietor from installing "any structure or device to prevent harm to children", we are of the opinion that the ground floor units may maintain the awnings due to the problem of "killer" litter.

32. Finally, we are of the opinion that it would be disproportionate to ask the ground floor subsidiary proprietors to remove the fixed awnings and replace them with retractable awnings given that the awnings have been installed since 2016. As the Board said in the *Suites@Newton* [2019] SGSTB 5 at 46 in the context of an Applicant seeking a Respondent

to replace his fixed awning with retractable awning: "*[a]n argument for review may possibly be made if the MC had prescribed fixed awnings instead of retractable awnings".* In the present case, it would be entirely disproportionate to ask the ground floor units to remove the fixed awnings which been installed since 2016 and replace them with retractable awnings in response to a "killer" litter problem.

33. We note that at the trial there was some reference to penthouse units which have fixed awnings. This was not something which was pursued by the Applicant in her initial application in Form 8 which refers to awnings causing problems for subsidiary proprietors who live on the upper floors. The reference to problems caused to subsidiary proprietors in the upper floors is repeated in the Applicant's closing submission. We find that it would be unfair to pursue an application against the penthouse units in the present case because to do so would be tantamount to taking the Respondent by surprise. The Respondent had proceeded with the current application on the basis that the issue was against the ground floor units and had not prepared the necessary evidence in relation the penthouse units. We decline to say anymore in relation to the penthouse units.

34. Therefore, we dismiss the Applicant's prayer for the Board to make an order for the fixed awnings to be removed and replaced with retractable awnings.

Guidelines for Cleaning of Awnings

35. The Applicant has also asked the Board to *inter alia* state the frequency of when retractable awnings (when installed) should be replaced, cleaned and prescribe the method of cleaning. In addition, the Applicant has also invited the Board to apportion the cleaning costs to be borne by the respective subsidiary proprietors to be made payable to the Respondent automatically as additional maintenance fees.

36. We decline to make this order as we are of the view that the Board's role is not to micromanage the running of strata developments (see *Ker Lee Ping v MCST Plan No. 3822* [2017] SGSTB 6). Furthermore, there is no power in the statute to levy additional maintenance fees on the affected subsidiary proprietors in such circumstances.

Removal of Water Pipes Installed Along Common Property

37. The Applicant seeks an order that the Respondent remove the water pipes which had been installed along common property walls which serve 21 ground floor units.

38. The Respondent's position is that 18 units had verbal approval by a lady named Joyce who was the manager in 2016 to install the water pipes. Presumably, Joyce was working for the developer and the pipes were installed before the Management Corporation was constituted. Unfortunately, the Respondent does not have a comprehensive record of the approval in relation to these water pipes.

39. Like the fixed awnings, these water pipes were installed before the formation of the management corporation. It is undisputed that after the formation of the management corporation, a 90 % resolution was not obtained in relation to these water pipes. As mentioned above, section 33(1)(c) of the BMSMA stipulates that a 90% resolution is required to make by-laws conferring on subsidiary proprietors the exclusive use and enjoyment of or special privileges in respect of the whole or any part of common property exceeding three years. Since these water pipes traverse over common property, they could properly be characterised as giving the affected subsidiary proprietors special privileges in respect of part of the common property. Unlike the fixed awnings, no safety considerations are associated with these water pipes. Thus, by-law 5(3) is not engaged and the by-law does not operate to allow the subsidiary proprietors to maintain these pipes.

40. We therefore order the Respondent to take the necessary steps to remove the water pipes within 6 months of this judgment. If within this period of 6 months, the necessary resolution of 90 % is obtained then removal of the pipes will not be necessary.

Unauthorised Pots, Plants, Bicycles and CCTV on Common Property

41. The Applicant has asked the Board to order the Respondent to remove unauthorised pots, plants and bicycles and CCTV placed on the common property by subsidiary proprietors. Further, the Applicant has asked the Board to order the Respondent to fine offending subsidiary proprietors.

42. The Respondent's position is that it has done its best to ask the subsidiary proprietors to remove the unauthorized items on common property. When the Applicant made complaints, the Respondent managed to get the subsidiary proprietors to clear those offending items. Unfortunately, the subsidiary proprietors will then start putting these items out again. The Managing Agent's Residential Manager, Muhammad Hashim Bin Lazim, has given evidence that the Respondent will act again when necessary.[13] Therefore, we decline to make any orders in relation to this claim. As stated above, it is not the role of the Board to micromanage the minutiae and day to day operations of a strata development.

43. We also decline to order the Respondent to impose fines against offending subsidiary proprietors. This claim is misconceived as management corporations do not have the statutory powers to impose fines upon subsidiary proprietors for breaches of by-laws (see *Management Corporation Strata Title Plan No 2746 v Boon Kee Battery Service* [2012] SGSTB 2).

Ordering the Patio Units to Pay for Cleaning Cost of their Awnings

44. The Applicant has requested that the Board order the subsidiary proprietors of the ground floor units who have installed the fixed awnings to pay the Respondent $ 600 per unit per

[13] Affidavit of Muhammad Hashim Bin Lazim

washing of their awnings by the development's current cleaning contractor, Primec Engrg Pte Ltd. This complaint is premised on the fact that the current cleaning contract with Primec Engrg Pte Ltd with the Respondent provides for free cleaning services of the fixed awnings of the subsidiary proprietors. Significantly, the Applicant is not seeking to challenge the validity of the cleaning contract.[14]

45. We decline to make the order sought by the Applicant. First, while we find that the provision of free cleaning of private awnings of subsidiary proprietors unusual, the evidence before us did not show that the Respondent had rejected a lower quote in favour of Primec Engrg Pte Ltd. Second, there is no provision in the statute that allows for the Respondent to levy extra charges on the subsidiary proprietors in these circumstances. Finally, the affected subsidiary proprietors are not before this Board. Hence, the Board cannot make an order against a non-party to these proceedings and levy an extra charge.

46. In the premises, we dismiss all the Applicant's claims save the complaint in relation to the water pipes. For the water pipes, we order the Respondent to take the necessary action to remove the water pipes within 6 months of this judgment.

47. The Board having read the submission on costs notes that the Respondent has asked for costs of $18,000 plus disbursement if they are substantially successful in the proceedings. The Applicant whilst not stating the costs has asked that she be paid disbursement amount to $3426.80.

48. The Applicant has failed substantially in the application and costs should follow the event. The Board orders that the Applicant pays the Respondent a sum of $9000 and bears the STB fee of S$450 (S$150 being fee for the 3rd mediation/ directions hearing on 4 February 2020 and S$300 being fee for the hearing on 20 March 2020). Most of the issues should have been resolved at mediation but for the refusal of the Applicant. It would be unfair that no costs be ordered against her on the ground of her public spirit in commencing the action as all subsidiary proprietors would be made to contribute to the costs of the legal defence of her claim.

Dated this 7th day of September 2020

Mr Alfonso Ang
President

Dr Tang Hang Wu
Member

[14] Transcript of Hearing on 20 March 2020 page 91.

Minority Opinion (the "**Opinion**"):

As my Opinion is a minority one, I would state the Opinion briefly.

I agree with the Grounds of Decision of President Mr Alfonso Ang and fellow member Dr Tang Hang Wu (the "**Majority**"), of the Board, except the following:

(a) That it was not open to the Board to make a finding on the issue of fixed awnings installed on the penthouses of the Development;

(b) That the Applicant's prayer 1 for the Board to make an order to remove the fixed awnings installed on the ground floors and penthouses of the Development be dismissed; and

(c) Costs.

I set out below the reasons for my disagreements.

Jurisdiction Issue

1. I disagree with the view of the Majority that it would be unfair to pursue an application against the penthouse units as to do so would be tantamount to taking the Respondent by surprise.

2. At the trial, the Applicant was asked to clarify whether her prayer 1 would include fixed awnings installed on the penthouse units. She replied in the affirmative. She said that the reference to "PES/RT" in her prayer 1 would include fixed awnings installed on the penthouses. The Applicant and the witness for the Respondent, Mr Lee Seng Leong, then proceeded to give evidence on this issue, which was not controverted. In fact, they both agreed that the fixed awnings installed on the penthouses were installed on the common property without the necessary 90% resolution required under section 33(1)(c) of Building BMSMA but that there was no concern about killer litter problem. The Counsel for the Respondent did not raise any objection at the trial.

3. In the *Sunglade* [2018] 4 SLR 966 at paragraph 54, Chan Seng Onn J noted with approval the decision of the *TMM Division Martina SA* case that "*the court may consider not only the pleadings and their contents, but also any issue that surfaces in the course of the arbitration and that is known to all the parties to the arbitration, even if such issue has not been pleaded.*"

4. I therefore do not think the Board would be acting in excess of its jurisdiction by determining the issue of fixed awnings installed on the penthouses.

Installation of fixed awnings on the ground floors and penthouses

5. "A man's home is his castle". Similarly, the common property of a condominium, which is beneficially owned by all the subsidiary proprietors ("SPs") of the condominium, is the

castle of the SPs. Any act which seeks to infringe or encroach on the common property has to be explicitly authorised under the BMSMA.

6. The BMSMA prescribes a statutory framework for the conferring on SPs the exclusive use and enjoyment of or special privileges in respect of the whole or any part of the common property in sections 49(1)(b), 33 and 101(6). The objective of the framework is to protect the common property from unlawful encroachment and to give to the SPs of a condominium the right to determine by an appropriate resolution under section 33(1) of BMSMA whether any proposed encroachment of the common property should be allowed.

7. Section 49(1)(b) prohibits a MCST during the Initial Period to alter any part of the common property or to erect any structure thereon unless it is authorised by a special resolution. I agree with the Majority that section 49(1)(b) is not applicable to the present case.

8. Section 33(1)(c) stipulates that a 90% resolution is required to make by-laws conferring on SPs the exclusive use and enjoyment of or special privileges of the whole or part of the common property exceeding 3 years. It was not disputed by the parties that the SPs of the Development who installed fixed awnings on the ground floors and the penthouses did not obtain the 90% resolution.

9. In Wu Chiu Lin v MCST Plan no 2874(2018) 4 SLR, the *Sunglade***,** Chan Seng Onn J at paragraph 45 cited with approval the observation of Prof Teo Keang Sood, *Strata Title in Singapore and Malaysia* (LexisNexis, 5th Ed. 2015), that "*in view of the explicit requirements set out in section 33 for the conferment of exclusive use or special privileges in respect of common property, it follows that there is no other method to attain the same end*." Chan J also stated in the Sunglade at paragraph 46 that he was also fortified by the outcome reached in the decision of Poh Kiong Kok v MCST Plan No 581(1990) I SLR(R) 617 that the parking scheme was of no legal effect unless a by-law was made pursuant to an unanimous resolution as mandated by section 41(8) of the Land Titles (Stata) Act, which corresponds to section 33(1) of BMSMA. In other words, there was no way out: where the necessary 90% resolution as mandated under section 33(1)(c) was not obtained, the installation of the fixed awnings on common property would be unauthorised and had to be removed. In the present case, as no 90% resolution was obtained for the installation of the fixed awnings on the ground floors and on the penthouses, such installations would contravene section 33(1)(c) and hence unauthorised under the BMSMA.

10. The view of the Majority that regulation 5(3) of the BMSMR 2005 made under section 32(2) of the BMSMA overrides or provides an exception to section 33(1)(c) is, in my view, misconceived. It is trite law that any subsidiary legislation made under an Act which is inconsistent with a provision of the Act would be *ultra vires* and invalid (see *MCST Plan No 901 v Lian Tat Huat Trading Ltd* (2018) SGHC 270 at paragraph 30).

11. Hence, if regulation 5(3) is intended to override or provide an exception to the requirement of the 90% resolution mandated under section 33(1)(c), it would be *ultra vires* and invalid. But regulation 5(3) is, in my view, not so intended. It is a saving provision. It is intended to be a shield and not a sword. It seeks to save any act prohibited under regulation 5(1) if such act is authorised by law. It is not intended to create new rights or powers, such as a power to override or provide an exception to section 33(1)(c).

12. The Respondent did not make any by-laws under section 33(1)(c) relating to the installation of fixed awnings on the ground floors and penthouses; and rightly so, as obtaining the 90% resolution mandated thereunder was a pre-requisite to making the by-laws. Otherwise the Respondent would be putting the cart before the horse. Such by-laws are only a means for the implementation of the 90% resolution so obtained and not an end itself. Hence, the issue of regulation 5(3) overriding by-laws made under section 33(1)(c) does not arise.

13. I would therefore allow prayer 1 of the application and order the removal the fixed awnings installed on the ground floors and penthouses of the Development. I order the Respondent to take the necessary steps to remove such fixed awnings within 6 months of this Judgment. If within this period of 6 months, the necessary resolution of 90% is obtained, then removal of such awnings would not be necessary.

14. In the event that the resolution of 90% is not so obtained, I would suggest that the Respondent considers obtaining a 90% resolution under section 33(1)(c) to install slanted retractable awnings as replacements for the fixed awnings as proposed by the Applicant in her application. I note that in past cases decided by the Board, it was stated that retractable awnings would be a necessary, reasonable and proportionate response to the SPs' safety concerns or the killer litter problem.

15. The Applicant also sought in her prayer 2 of the application an order from the Board to replace such fixed awnings with slanted retractable awnings. I would decline to make such an order. Section 101(6) of BMSMA prohibits a Board to exercise its power to make any order under 101(1) where such power may only be exercised by a resolution under the BMSMA. The 90% resolution in section 33(1)(c) is such a resolution. Hence any order of the Board made under section 101(1) in contravention of section 101(6) would be *ultra vires* and invalid. The intention of section 101(6) is to ensure that a Board does not, wittingly or otherwise, make an order which would deprive the SPs of their rights to decide by a 90% resolution under section 33(1) whether or not to allow any SP to encroach on any part of the common property.

16. In my view the order of the Majority dismissing the said prayer 1 would implicitly contravene section 101(6). The order would be tantamount to the Board exercising a power prohibited by section 101(6) to allow the fixed awnings installed on the ground floors and on the penthouses to be retained without the necessary 90% resolution mandated under section

33(1)(c). In my view this is wrong as section 33(1)(c) mandated that it is for the SPs, not the Board, to decide by a 90% resolution whether or not to allow such installation.

Conclusion

17. I share the safety concerns of SPs living on the ground floors of the Development. The issue of installation of awnings had caused much resentment and disharmony not only in the Development but also in other condominiums in Singapore. But the solution is not for such SPs or the Respondent to take the law into their own hands but to comply with it or face the consequences. The rights of such SPs to install fixed awnings for safety reasons have to be balanced with the rights of the overwhelming majority of SPs to use and enjoy the common property which they beneficially owned. Hence the due process prescribed under section 33(1)(c) has to be complied with. It should be borne in mind that where the necessary 90% resolution under section 33(1)(c) is obtained by the SPs concerned to exclusively use and enjoy any part of the common property of the Development, the overwhelming majority of SPs of the Development would permanently forfeit their rights to the use and enjoyment of such common property.

18. The statutory framework stated in paragraph 6 above is intended to strike such a balance. It does not provide any exception for safety measures. If it is deemed desirable to do so, it is for Parliament, not the Board or the Respondent, to provide for such exception, like the issue of safety equipment which is now regulated under new section 37A of BMSMA enacted in 2019.

Costs

19. I would not make an order on costs. In my view, the application of the Applicant is meritorious. In my Opinion, she has succeeded in her primary prayers 1 and 3 for the removal of the unauthorised fixed awnings installed on the ground floors and penthouses and the water pipes installed along the common property. Her public spiritedness in bringing the application and arguing her case in person before the Board to redress what she believed or perceived to be mismanagement by the management of the Development are in my view most commendable.

Dated this 7th day of September 2020

Mr Ter Kim Cheu
Member

Ms Lee Soh Geok (in-person) for the Applicant.
Mr Daniel Chen (M/s Lee & Lee) for the Respondent.