BUILDING MAINTENANCE AND STRATA MANAGEMENT ACT

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

STB No. 36 of 2020

In the matter of an application under Section 101 of the Building Maintenance and Strata Management Act in respect of the development known as **Skies Miltonia** (MCST No. **4407)**

Between

The Management Corporation Strata Title Plan No. 4407

… Applicant(s)

And

1. **Manohar K D Nanwani / Seema Manohar Nanwani**
2. **Kishin Doulatram Dadlani**

... Respondent(s)

GROUNDS OF DECISION

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... Respondent(s)

22 December 2020

Coram: Mr Remedios F.G (Deputy President)

Mr Loh Kwi Leong (Member)

Mr Rajaram Ramiah (Member)

Introduction

1 This is an application by MCST Plan No. 4407 ("the management corporation") for the subsidiary proprietors of Blk 37 #XXX and #XXX ("the respondents") in the development known as Skies Miltonia to restore the common property that is being occupied by their tenant to its original condition. The areas of common property that the applicant wants the Board to order the respondents to restore to its original conditions are identified in paragraph 30 of the applicant's written submissions ("AWS") viz "…*occupation of the walkway and the roof and wall through the installation of the advertising signboards and awnings*…"

Background

2 Skies Miltonia is a development comprising 420 units in 8 blocks of 13-storey buildings, 10 townhouses and 1 single storey block. The single storey block is Blk 37. It is a standalone single storey building approved as two shop units with a walkway in front of the shops. There is no dispute that the shops and walkway are within the strata plan of the development and that the walkway is common property under the control and management of the management corporation. The general public has access to the walkway in front of the shops and can make purchases in the shops but cannot access the residential blocks because at each end of the two shops there are card access side gates permitting entry and exit to the residential blocks. There is a jogging track behind the two shops and the shops have back doors leading to the residential blocks. At the midpoint of the two shops, the walkway adjoins a planter/garden walkway that allows for access by residents to the main road.

3 Manohar K D Nanwani/ Seema Manohar Nanwani are the subsidiary proprietors of the shop unit at Blk 37 #XXX and Kishin Doulatram Dadlani is the subsidiary proprietor of the shop unit at Blk 37 #XXX.

4 On 1 July 2018 when the management corporation was being administered and managed by the 1st management council, a "Temporary Occupation Licence Agreement" ("the licence agreement"), which inter alia permitted the respondents to have, together with their tenants and licensees "*the continued use of the common walkway space"* outside the two shops (the space on the walkway was marked out) subject to a payment of an annual licence fee of $960 for a period of one year, was granted by the management corporation. The licence agreement was signed by Lee Kee Liew @ Victor Lim *Chairman, for and on behalf of Management Corporation Strata Title Plan No 4407* and the two respondents. It was renewable yearly (without an end date) upon payment of the licence fee within two months of the expiration date of the preceding period. In effect, there was a right to renew for an indefinite period of time.

5 Since the granting of the licence agreement the shops have been rented to tenants of the respondents and with effect 1 January 2020 the shops were rented to Daniel Tan Boon Huat for six years for him to operate a 24 hours supermarket/mini-market. Refrigerated cabinets and drink dispensing machines are placed on the common walkway in front of the shops and signboards and three awnings have been installed on the external walls of the shops. The awnings were installed after submission, by the respondents of a general layout plan for works to be carried out, was approved by the management corporation on 8 October 2019 and the signboards were installed after an application had been submitted, by the respondents and approval was received from the management corporation on 17 October 2019. The tenant, according to the applicant, installed *"perplex sheet shelters in*

the backyard of the two shops" to provide shelter for his goods when the shops were rented to him.

6 The granting of the licence agreement, approvals for installation of the awnings and signboards all took place between 23 September 2017 and 22 November 2019 when the management corporation was being managed by the 1st and 2nd management councils.

7 On 23 November 2019, the 3rd management council was elected, and council members were not aware of the licence agreement until after assuming office. On 26 June 2020 the application in this case was filed. It is the case for the applicant that with the consent and approval of the respondents the tenant has exclusively used and enjoyed common property without having a by-law made pursuant to a resolution under section 33 of the Building Maintenance and Strata Management Act Cap 30C ("the Act").

Respondents' submissions

The walkway

8 In paragraphs 5(a) and 6 of the respondents' written submissions ("RWS"), the respondents submitted there was no encroachment/obstruction on the part of the respondents of common property. The licence agreement was issued and endorsed by the management corporation to allow for tenants of the shops to place items for sale within yellow boxes that were marked on the common walkway and if there was any encroachment of common property, this was committed by their tenant and not by them. *MCST Plan No. 561 v Pontiac Land Pte Ltd [1992] SGHC 190* ("*Pontiac Land*") and *MCST Plan No. 901 v Lian Tat Huat Trading Pte Ltd [2018] SGHC 270* ("*Lian Tat Huat Trading*") were cited in support of the submission.

The signboards

9 The signboards are installed on the external walls of the two shops. Whilst there was no dispute that the shops are comprised within the strata title plan, it was the submission of the respondents that the external walls of the shops are not common property. They pointed out that the shops did not face the residential blocks and submitted that they are not capable of being enjoyed by occupiers of two or more lots in the development; that they are standalone detached units and designed to be separate and different from the rest of the development; and are only used by respondents and do not form part of the walls of the residential blocks. It was also submitted that "*the external wall of the 2 shop units are comprised in the respondents' lots in that it is an integral part of the lots. Therefore, the applicants have failed to satisfy limb (a) of the definition of "common property" whereas common property is defined as only part of the land and building not comprised in any lot*". It will be in order to note that whilst the respondents submitted that the

external walls were an integral part of the lots and as such were comprised in the respondents' lots, the strata title plan approved by the Chief Surveyor with areas demarked as common property or otherwise when the strata title application for registration was made under section 9 of the Land Titles (Strata) Act Cap 158 was not submitted in evidence. And it was not the submission of the respondents that the external walls of the respondents' lots were comprised in the lots because they were marked as such in the strata title plan.

10 It was also the submission of the respondents that in view of the fact that approval had been given for the installation of the signages, the management corporation cannot retract its consent and compel the respondents to remove them. *Rosalina Soh Pei Xi v Hui Mun Wai and MCST 4396 [2019] SGSTB 4* ("*Suites@Newton*") was cited in support of the submission.

The awnings

11 The respondents submitted that the awnings were attached to walls that are not common property and were safety devices intended to prevent water accumulating on the walkway and seeping into the shops leading to floors becoming slippery and a hazard to users of the shops and common walkway. The awnings were also a protection against items falling from height (killer litter) viz the residential blocks and injuring anyone on the walkway.

Decision of the Board

The common walkway

12 It will be in order to first determine the nature of the licence agreement. In the licence agreement, the licensee (the respondents) are informed that the common walkway space (licensed area) outside the two shops is common property and that the licensee "…*and/or your tenants and licensees shall have continued use of the common walkway space…"* conditional upon the payment of an annual fee. As noted earlier it was renewable yearly (without an end date) upon payment of the licence fee within two months of the expiration date of the preceding period. The terms of the licence agreement provided the respondents with a right to renew for an indefinite period. Accordingly, the licence agreement purported to grant the respondents and their tenants continued use of the walkway for an indefinite period of time.

13 A management corporation can, under section 33 of the Act make a by-law conferring on a subsidiary proprietor exclusive use and enjoyment of; or special privileges in respect of the whole or any part of common property pursuant to a resolution, dependant on the period of time when exclusive use and enjoyment is conferred. In this case the licence agreement purported to confer exclusive use and enjoyment of a portion of the walkway

for an indefinite period of time and a 90% resolution would have been required under section 33(1)(c) of the Act. There was no dispute that the management corporation had not in this case made such a by-law.

14 Refrigerated cabinets and drink dispensing machines are placed on the common walkway in front of the shops by the respondents' tenant. It is not in dispute that it is not the case that the whole of the walkway is being used and that subsidiary proprietors and other occupiers can walk along and access the parts of the walkway that are not used and occupied by items belonging to the respondents' tenant. This does not detract from the fact that the tenant is, without a by-law made under section 33 of the Act, exclusively using and occupying portions of the walkway for his business.

15 It was the submission of the respondents that no order should be made against them because it was their tenant, and not the respondents who were responsible for the wrongdoing. In *Pontiac Land* the management corporation's application for an order against a subsidiary proprietor in relation to encroachment of common property was dismissed because the facts showed that it was the tenant who had without knowledge and consent of the subsidiary proprietor encroached on common property. In *Lian Tat Huat Trading*, the court was called upon to decide on the liability of the defendant subsidiary proprietor for damages arising out of a breach, committed by the tenant of the subsidiary proprietor, of a by-law in respect of encroachment of common property. In addition to the by-law in respect of encroachment of common property, there was a by-law that provided that:

> "*Any subsidiary proprietor or occupier who or whose tenant or licensee in respect of his lot, encroaches and continues to encroach upon the common property shall be liable to pay to the management corporation upon demand damages…*"

The tenancy agreement between the defendant subsidiary proprietor and his tenant required that the tenant comply with the rules, regulations, requirements and by-laws of the management corporation. The tenant was repeatedly warned by the subsidiary proprietor to remove unauthorised items and fixtures from the walkway and when he failed to comply, the subsidiary proprietor commenced proceedings in the State Courts for an order of possession against him. Dedar Singh Gill J C (as he then was) when deciding on the claim of the management corporation for damages against the defendant subsidiary proprietor in respect of the breach committed by the tenant dismissed the claim. The claim was dismissed because under section 32(10) of the Act which provides that where there has been a breach of any by-law the management corporation is entitled to seek relief in court from any person bound to comply with the relevant by-law, *the only party that the management corporation was entitled to sue in respect of encroachments of the common property was the party who was bound to comply with the obligation not to encroach on the same.*

16 It is clear from the above that the two cases cited do not support the submission of the respondents that no order should be made against them because it was their tenant, and not they who were responsible for the wrongdoing. There was in this case no dispute that the tenant was with the approval and consent of the respondents exclusively using and occupying portions of the walkway with items belonging to the tenant. It was definitely not the case that it was the management corporation, and not the respondents who was permitting the tenant of the respondents to occupy and use the walkway in connection with the tenant's business. The licence agreement that was granted by the management corporation was an agreement between the management corporation and the respondents. It was an agreement whereby approval was given for the respondents "*and/or tenants/licensees"* to have continued use of common property. It was the stand of the respondents when they, following service of the application in this case, filed Submission by Respondent (Form 18A – paragraph 15) that under the licence agreement, the respondents and their tenants *were authorised to occupy and use the walkway…* and they have never ever denied that the tenant was using and occupying portions of the walkway with their consent and approval. They had also applied for approval for awnings and signboards to be installed on the lots that were to be used for the tenant's business. For reasons not conveyed to the Board, the respondents had elected at the arbitration hearing, not to rely on their initial stand.

17 In view of the fact that the respondents have not been conferred with exclusive use and enjoyment of common property, and their tenant is exclusively using and enjoying common property with their approval and consent, it is wholly in order for an order to be made for them to restore the walkway that is occupied and used by their tenant to its original condition.

The signboards

18 The Board is of the view that there is absolutely no merit in the submission that the external walls of the shops are not common property. In *Wu Chiu Lin v Management Corporation Strata Title Plan No 2874 [2018] SGHC 43 ("Sunglade")* the subsidiary proprietor was seeking to install a covering over the trellis of her penthouse unit by way of an attachment to the external wall of her unit. Chan Seng Onn J decided that the external walls of a penthouse unit in the development constitute "common property". In arriving at his decision he referred to the definition of common property in sections 3 (a) and (c) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) where "walls" and "roofs" were specifically listed in the definition of common property and pronounced (at 70):

> "*It is clear from the foregoing definition that external walls are clearly meant to be construed as being not comprised in any lot shown in a strata plan unless otherwise described specifically as comprised in any lot in a strata title plan."*

It was also his finding that:

> "*While this definition of "common property" was replaced by the passing of the Building Maintenance and Management Bill (No 6 of 2004) – with the 2004 version of the Act coming into force on 1 April 2005 – the simplification of the definition of "common property" in 2004 was not meant to exclude from the definition of "common property" the specific structures listed in the earlier iteration of the definition of "common property".*"

19 The current definition of common property in the Act includes examples of various parts of the land and building that are common property. Among the examples is the following:

> *"An external wall, or a roof or façade of a building which is used or enjoyed, or capable of being used or enjoyed, by occupiers of 2 or more lots, proposed lots or non-strata lots."*

20 The respondents do not dispute that the two shop units are within the strata title plan. The fact that they are external walls on a standalone block and are not a part of the walls of the other blocks and face away from the other blocks behind will not make them different from the walls of all the other blocks that serve the purpose of separating the inside from the outside and which the respondents do not dispute to be common property. They are part of the envelope of the building and considered an integral component of the building fabric.

21 The respondents submitted that the walls of the 2 shops were not capable of being used or enjoyed by the occupiers of two more lots because they faced outwards and away from the residential area. The Court of Appeal in *Sit Kwong Lam V Management Corporation Strata Title Plan No 2645 [2018] SGCA 14* ("*Sit Kwong Lam*") pronounced:

> "*58 The second limb of the definition provides that a common property must be "used or capable of being used or enjoyed by occupiers of 2 or more lots or proposed lots". In our judgment, this was to be interpreted broadly. The words "use" and "enjoy" are not defined in the BMSMA, but as pointed out by the STB (at [25] of its grounds of decision), the plain meaning of the word "use", as provided in the Oxford Learners Dictionary, is to "take, hold or deploy (something) as a means of accomplishing or achieving something", whereas "enjoy" means "to get pleasure from something". There was, in our judgment, no reason not to read the words "use" and "enjoy", in the second limb of the definition of "common property", in accordance with their ordinary dictionary meanings.*

> *59 In our judgment, based on their plain meanings, the word "enjoy" has a wider ambit than the word "use". We agreed with the STB that any area or installation that could affect the appearance of a building in a strata development, or that was part and parcel of the fabric of the building, could, by its mere presence, be "enjoyed" by some or even all subsidiary proprietors of the development. Indeed, there was no need for the area or installation to be physically accessible by the subsidiary proprietors (or any of them) in order to be "enjoyed" by the said proprietors.*"

22 The external walls in this case are areas or installations that can affect the appearance of a building and are part and parcel of the fabric of the building. By its mere presence it can be enjoyed by some or even all the subsidiary proprietors of the development. The external walls are common property.

23 The fact that the management corporation had given approval for the installation of the signboards does not detract from the fact that the respondents have not been conferred with exclusive use and enjoyment of common property in accordance with the provisions of the Act. The approval granted when the management corporation was being managed by the management before members of the 3rd management council were elected was not valid.

24 With respect to the submission that since approval had been given for the installation of the signages, the management corporation cannot retract its consent and compel the respondents to remove them, it was noted that in *Suites@Newton* a subsidiary proprietor who was distressed over inter alia noise emanating from a fixed awning installed by her neighbour in the flat below filed an application for the fixed awning to be removed. The awnings were installed after approval had been given by the management corporation on the basis that it was necessary due to "killer litter". It was the finding of the Board that the awning was installed because there was a "killer litter" problem. After finding that the management corporation had given approval for a fixed awning because there was a killer litter problem, the Board referred to the decision of the Board in *Pang Loon Ong and Ors v MCST Plan 4288 STB 21 of 2019* ("*D'Leedon*") where the Board found that a management corporation had the power and was indeed under an obligation to prescribe guidelines in relation to awnings where there is a killer litter problem. The Board then proceeded to consider whether it should review the management corporation's decision in connection with the fixed awnings and order the management corporation to prescribe retractable instead of fixed awnings. It was in these circumstances that the Board said that:

> *"46…it was 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 in MC's everyday decisions…*"

25 *Suites@Newton* does not support the submission of the respondents that the management corporation after giving approval for the installation of signboards which have, in this case nothing to do with safety and was not in accordance with the provisions of the Act with respect to conferring exclusive use and enjoyment of common property, cannot retract its approval and compel removal of the signboards. The management corporation did not, when it approved the installation of the signboards, in this case have the power to approve and confer on the respondents and their tenants the right to exclusively use and enjoy the whole or any part common property without a by-law being made under section 33 of the Act.

The awnings

26 Awnings are installed over the walkway in front of the shops. They are attached to the walls of the shops and the extension over the walkway is supported by support poles with bolts and nuts screwed into the walkway. The installations have resulted in exclusive use of common property. Approval had been given by the management corporation for the installations, but there was no conferment of exclusive use in accordance with the provisions of the Act.

27 It was inter alia the submission of the respondents that the awnings have been installed as a safety feature in accordance with paragraph 5 of the Second Schedule to Building Maintenance (Strata Management) Regulations 2005 ("BMSMR 2005"). Under paragraphs 5(3)(a) and (c) subsidiary proprietors or occupiers of lots can install:

> *"(a) any locking or safety device for the protection…against intruders or to improve safety within the lot;*
> *…*
> *(c) Any structure or device to prevent harm to children"*

28 It was the submission of the respondents that the awnings were installed to i) prevent water seeping into the shops and causing the floors to be slippery and a hazard to people in the shops; and ii) as a protection against "killer litter" viz items falling from the tall residential blocks.

29 Regarding protection against "killer litter" the applicant submitted that the nearest tall residential block was 50 metres away from the two shops. The Board is of the view that it is highly unlikely that there was any danger from "killer litter" in the case. In the highly unlikely event that there was a danger from killer litter, the awnings would provide protection to users of the walkway i.e. people using common property and would not

improve safety inside the shops. Paragraph 5 of BMSMR 2005 does not allow a subsidiary proprietor or an occupier of a lot to install a safety device on common property for the purpose of improving safety on common property. Responsibility of such installation would lie with the management corporation.

30 With regard to the prevention of water seeping into the shops, the evidence of Victor Lim was that sometime in 2016 the respondents had sought approval from the developer to install awnings to prevent water collating on the walkway and the two shops. Approval was not given, and the developer informed that the "*main contractor will construct a curb".* The curb was not constructed and instead "*a small scupper drain was built to reduce the flooding".* In *Sit Kwong Lam v MCST Plan No 2654 STB 40 of 2015*, the Board considered the nature of devices that a subsidiary proprietor or occupier can install under paragraph 5(3) of BMSMR 2005:

> *"34. It is clear that a subsidiary proprietor is allowed to install on common property any locking or safety devices for protection of his lot against intruders; or to improve safety within his lot. The subsidiary proprietor is also allowed to install any structure or device to prevent harm to children.*
>
> *35. In the Oxford Advanced Learner's Dictionary a "device" is defined as "an object or a piece of equipment that has been designed to do a particular job". A locking or safety device in By-law 5(3) of the prescribed by-laws would be an object or a piece of equipment that has been designed for or can be used for the protection of the subsidiary proprietor's lot against intruders or improve safety within the lot or prevent harm to children.*
>
> *36. It was the submission of the Applicant that the aircon ventilation unit and timber flooring were erected in the interests of the Applicant's or occupiers' welfare, health and/or safety. It was also the submission of the Applicant that his children had respiratory tract allergies and the installation of the aircon ventilation unit was necessary to promote cleaner air circulation within his unit.*
>
> *37. As noted above, the by-law allows a subsidiary proprietor to install a locking or safety device for the protection against intruders or improve safety within the lot. Whilst timber flooring may prevent floors from becoming overly slippery when wet and an aircon and ventilation system can improve air quality the Board cannot find that the aircon ventilation unit and timber flooring are locking or safety devices for the protection of the Applicant's lot against intruders. They are also not devices that could improve safety within the Applicant's lot.*"

31 An awning is a structure that is designed for protection against sunlight and rain. In many condominiums such are installed by unit owners/occupiers as a protection for users of the

PES against "killer litter" from the units above. It is not a locking or safety device designed or intended to prevent water seeping into the respondents' premises and causing the floor to be slippery and hazardous to the occupants. It is not, in this case a locking or safety device that can be installed in accordance with paragraph 5 of BMSMR 2005.

32 In view of all our findings it will be appropriate that the order sought by the applicant should be granted. With regard to the time for the respondents to do the necessary we noted that during mediation when the Board was attempting to assist the parties to arrive at a settlement of the dispute, there was a discussion with regard to the convening of a general meeting for the purpose of making a by-law whereby the respondents could be conferred with exclusive use and enjoyment of; or special privileges in respect of the portion of the walkway and walls used. Settlement was not achieved because of disagreements between the parties in connection with the terms for the convening of the meeting. The Board considered that this was not a case where subsidiary proprietors had in defiance of rules, regulations or by-laws of the management corporation occupied and used common property. Rather it was a case where there was occupation and use with approvals that were granted in a manner that was not in accordance with the Act. There was no evidence that the approvals were granted in a manner that was not open or not aboveboard and the Board was of the view that some time can be allowed for the respondents if they are inclined to do so, to requisition for an extraordinary general meeting for the purpose of making a by-law whereby they can be conferred with exclusive use and enjoyment of common property in accordance with the Act. Accordingly it is ordered that, subject to the respondents being conferred with exclusive use and enjoyment of; or special privileges in respect of common property in accordance with the provisions of the Act, the respondents are to restore the common property occupied and used by their tenant to its original condition on or before 24th March 2021.

33 It is also ordered that all fees payable to the Strata Titles Boards are to be borne by parties equally and there will be no order for costs.

Dated this 13th day of January 2021

MR REMEDIOS F.G
Deputy President

MR LOH KWI LEONG
Member

MR RAJARAM RAMIAH
Member

Mr Tng Kim Choon (M/s KC Tng Law Practice) for the Applicant.

Ms Teh Ee-von (M/s Infinitus Law Corporation) and Mr Prakash Mulani (M/s M & A Law Corporation) for the Respondents.