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BUILDING MAINTENANCE AND STRATA MANAGEMENT ACT 2004

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

STB No. 28 of 2023

In the matter of an application under **section 111(b)** of the Building Maintenance and Strata Management Act in respect of the development known as **EuHabitat** (MCST Plan No. 4496)

Between

1. Xue Bin
2. Lin Qilong and Song Jing

... Applicant(s)

And

MCST Plan No. 4496

… Respondent(s)

GROUNDS OF DECISION

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… Respondent(s)

8 January 2024

27 February 2024

Coram:	Mr Remedios F.G	Deputy President
	Mr Chan Kim Mun	Member
	Ms Hazel Tang	Member

FOREGROUND

1. This is an application by the subsidiary proprietors of two adjoining lots in the development known as EuHabitat ("**Development**") for orders to be made against the management corporation ("**MC**") after they had:

   (i) constructed a glass canopy over the patios at the rear of their lots, and

   (ii) removed a glass panel separating the patios on the boundary at the rear of the two lots.

without approval from the MC. They then applied to the Board to order the MC to authorize the works that they had carried out.

2. The orders were sought under section 111(b) of the Building Maintenance and Strata Management Act 2004 ("**BMSMA**"). Under this section, the Board can, when an MC has refused to authorize a proposal for an improvement in or upon a lot which affects the appearance of any building comprised in the strata title plan, order the MC to give its consent when authorization had been refused unreasonably.

3. A subsidiary proprietor ("**SP**") is obliged to comply with the provisions of the BMSMA and by-laws relating to the subdivided building whenever he wants to carry out any renovation or other works in or upon his lot.

4. The SP has to ensure that the works do not obstruct the lawful use of common property by any person except on a temporary and non-recurring basis (By-law 3 of the Prescribed By-laws in the Second Schedule of Building Maintenance (Strata Management) Regulations 2005 ("**BMSMR**"), and in the event that common property has to be used in connection with the works e.g. an installation has to be attached or anchored on common property, this can only be done after a by-law pursuant to the resolution passed in accordance with section 33 of the BMSMA has been made. A by-law will, however, not be required if the installation is, inter-alia a locking or safety device to improve safety within the lot or a structure or device to prevent harm to children (By-law 5 of the Prescribed By-laws in the Second Schedule of the BMSMR).

5. Where common property is not involved in the works, approval is required from the MC before any work that affects the appearance of the building can be carried out (Section 37(3) of the BMSMA). The MC cannot, however, give approval for work that will detract from the appearance of the building or is not in keeping with the rest of the buildings and affect the structural integrity of any of the buildings (Section 37(4) of the BMSMA).

BACKGROUND

6. The applicants are Xue Bin, Lin Qilong and Song Jing. They are the SPs of two adjoining 3 storey town houses located at XXX and XXX Jalan Eunos. Xue Bin occupies No. XXX whilst Lin Qilong and Song Jing occupies No. XXX. There is a patio at the back of the two units and a glass panel separates the two patios. The glass panel extends from the external wall to the swimming pool next to the patio. The swimming pool is for common use and is shared by 8 lots.

7. The By-Laws of the Development provide:

"12. Owners/Residents must not under any circumstances, carry out any work which may affect the external façade of the building, ….

13. The façade of the building includes…open areas, and all other visible parts of the building which constitute…the external appearance of the building

20. Owners/Residents must not erect any additional structures or make any alterations in their residence without prior written approval of the Management."

Additionally, By-law 5(1) of the BMSMR provide:

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

8. On 8 July 2021, Xue Bin submitted an "*Application For Renovation To Premises*" to the MC. The works detailed in the "*Summary of Renovation Work"* included "*glass canopy".* There was no mention of the glass panel that separated his patio from Lin Qilong and Song Jing's patio. A perusal of the application form will reveal a cancellation marking over *"glass canopy"*. This was because Xue Bin had been informed that an installation of the glass canopy was not allowed.

9. Even though Xue Bin had been informed that the installation of the glass canopy was not allowed and had cancelled *"glass canopy"* in the application form, a glass canopy measuring 5600mm x 4000mm was installed and anchored to the concrete ledge on the wall of the two units i.e. there was an exclusive use and enjoyment of common property on the part of the applicants when the glass canopy was installed.

10. The glass panel separating the patios was removed sometime in July 2021.

11. Xue Bin was, on 15 July 2021 asked to remove the glass canopy.

12. At the Annual General Meeting ("**AGM**") of MCST Plan 4496 on 23 April 2022, a motion requisitioned by the applicants for retrospective approval for the installation of the glass canopy was defeated. 67.4696% of the attendees voted against the motion.

13. By way of a letter dated 20 July 2022 from the lawyers appointed by the MC, a demand was made for the glass canopy to be removed and the common property that the glass canopy was installed and/or affixed on be reinstated to its original state.

14. In February 2023, the MC filed an application in the State Courts (DC/OA 38/2023) for orders for, inter-alia, the applicants to remove the glass canopy over the patios and reinstate the glass panel between the patios.

15. On 6 April 2023, lawyers for the applicants sent a letter to the MC. The applicants referred to the application for approval to install the glass canopy in January 2022 and rejection by the MC. The request for approval was repeated and made it clear "*that the request here is made under section 37(4) of the BMSMA".* The applicants then went on to request for approval for the removal of the glass panel. Inter-alia, the applicants informed that the installation of the glass canopy and removal of the glass panel "*do not detract from the appearance of the buildings* and *the glass canopy was installed and the glass panel removed to protect the children who live at or visit the units".*

16. As to how the installation of the glass canopy and removal of the glass panel could protect the children, the applicants said that the patio would be slippery when wet and the children could slip and hit the glass panel. Removal of the glass panel would prevent this and installation of the glass canopy would reduce occasions of the ground being wet from rain. Additionally, removal of the glass panel would reduce chances of children climbing over the glass panel and falling, and the installation of the glass canopy would prevent children on the patio being injured by objects falling from above and tennis balls "*flying*" from the nearby tennis court.

17. On 4 May 2023, the applicants filed STB Application No. 28 of 2023 and applied for the following orders:

"*1. That the Management Corporation of EUHabitat ("Management Corporation") authorizes the Applicants to install the glass canopy that covers the shared private enclosed space between the unit owned by the 1st Applicant and the unit owned by the 2nd and 3rd Applicants.*

2. That the Management Corporation authorizes the Applicants' removal of the glass panel that separates the shared private enclosed space between the unit owned by the 1st Applicant and the unit owned by the 2nd and 3rd Applicants.

3. That the Management Corporation pays the Applicants cost of this application."

18. The applicants applied for DC/OA 38 of 2023 to be stayed in the State Courts and obtained an order in their favour.

19. In relation to STB Application No. 28/2023, the applicants have in Section D of Form 8 informed that the orders were applied for under section 111(b) of the BMSMA.

EVIDENCE AND SUBMISSIONS

20. Oral and documentary evidence were tendered, and submissions were made in support of and opposition to the application.

21. The matter for determination was whether the Board should order the MC to authorize the applicants *"…to install the glass canopy that covers the shared private enclosed space…* and*…removal of the glass panel that separates the shared private enclosed space…"*

22. The Board was conscious that there was, pending in the State Courts in DC/OA 38/2023 an application by the MC for the Court to order the applicants to remove the glass canopy and reinstate the glass panel, and there was before the Board evidence and submissions that were relevant to the matter in DC/OA 38/2023. The Board will, in these grounds of decision, be dealing with evidence and submissions that are relevant to the application to the Board.

THE APPLICATION FOR THE BOARD TO ORDER THE MC TO AUTHORIZE THE INSTALLATION OF THE GLASS CANOPY.

23. In the written submissions tendered by the applicants to the Board, the applicants did not dispute that there was exclusive use and enjoyment of common property when the glass canopy was installed "*such that the MCST would not have the power to approve the installation".* The glass canopy was anchored to the ledges of the two lots i.e. common property was used exclusively by the applicants when the glass canopy was installed and continues to be used. There was no doubt that the common property was going to be used for more than three years and as such a by-law pursuant to a 90% resolution was required under section 33(1)(c) of the BMSMA. The necessary by-law had not been made and the applicants conceded *that the MCST would not have the power to approve the installation*.

24. SPs can, pursuant to By-law 5(3) of the BMSMR, inter-alia, install a safety device to improve safety within the lot; and any structure or device to prevent harm to children. It was the submission of the applicants that it was installed to *protect the children within their lots*. According to the applicants, it would prevent tennis balls from flying into their lots; protect occupants from being hit by items falling out of the windows or over the ledge of the patios; shelter against rain which would cause the floor to be wet and slippery and cause children to slip and fall not only on the floor but also into the swimming pool.

25. In *Mu Qi and another v Management Corporation Strata Plan 1849* [2021] SGHC 180, the High Court noted that a series of cases held that awnings (the glass canopy in this case would qualify as an awning) are safety devices under By-law 5(3) of the BMSMR. The cases were in relation to protection against "*killer litter*" i.e. objects falling from or thrown out of lots above a lot at the lower level and causing injury to the occupiers at the lower level. The applicants are occupiers of two townhouses. There were no lots above their lots. There was in this case no validity for a submission that the glass canopy was a protection against "*killer litter*" in relation to items falling out of the windows or over the ledge of the patios. The applicants are occupiers of two townhouses and the Board agrees with the submission of the MC that *any object thrown from above can only come from the applicants' own households or their visitors.* The Board does not agree that By-law 5(3) of the BMSMR will allow for the installation a glass canopy as a protection against killer litter originating from the applicants' lots. Rain will also not qualify as "*killer litter*" and the Board also does not agree By-law 5(3) of the BMSMR will allow for the installation of a glass canopy to prevent rain from causing the floor to be wet and slippery.

<u>Protection against tennis balls:</u>

26. It was the evidence of Xue Bin that tennis balls "*often fly with great force into our units".* It was also the evidence of Xue Bin that between 17 September 2023 and 22 November 2023, a net that had been fixed over the glass canopy caught 13 tennis balls and it was the submission of the applicants that they had on a balance of probabilities

proved that the glass canopy was a structure that was installed to protect the children within their lots.

27. The tennis court has a fence that is over 4 meters high and the nearest point of the fence to the applicants' patio is 14.16 meters. It was the evidence of Tan Chee Yang (R3) who was the MC's condominium manager that before 6, 8 and 17 March 2023, there were no complaints in relation to tennis balls flying into any of the lots in the Development. The complaints were filed in March 2023 by the third applicant, Song Jing.

28. It is to be noted that complaints in relation to tennis balls were made only after the MC had commenced proceedings in the State Courts for an order for the removal of the glass canopy and reinstatement of the glass panel. It is also to be noted that when the applicants first submitted a request for the MC to approve the installation of the glass canopy on 25 January 2022 – this was after the glass canopy had been installed and applicants had been informed that it had to be removed (see page 134 of the AEIC of Teo Lip Min (R2)). The reason for the request was that it was to be an installation over their private space and they had "*4 young daughters frequently go out under the space to play and we need cover to ensure their safety in case rainy or dropping items".* It is to be further noted that at the 5th AGM of the MCST on 23 April 2022, Xue Bin had, when proposing a resolution for the installation of the glass canopy, given the reason that the installation was "*to protect children from fallen objects when playing at the area."*

29. The very first time that the applicants had raised protection from the tennis balls as a reason for the installation of the glass canopy was on 6 April 2023 and this was in a letter by the lawyers for the applicants to the lawyers for the MC in relation to DC/OA 38/2023.

30. As pointed out earlier, SPs can, pursuant to By-law 5(3) of the BMSMR, inter-alia install a locking or other safety device to improve safety within the lot and, any structure or device to prevent harm to children. The glass canopy in this case was not installed by the applicants as a protection against tennis balls from the tennis court. The reason for the applicants' installation of the glass canopy was as a protection against rain and killer litter.

31. The Board will not make an order for the MC to authorize the installation of the glass canopy because there was in this case no danger of killer litter, and a shelter to prevent rain from causing the floor to be wet and slippery and cause children to slip and fall not only on the floor but also into the swimming pool will not qualify as a locking or other safety device to improve safety within a lot or a structure or device to prevent harm to children.

THE APPLICATION FOR THE MCST TO AUTHORIZE THE REMOVAL OF THE GLASS PANEL

32. The application for the order was on the basis that the glass panel was not common property, and it was the submission of the applicants that it was unreasonable for the MC not to have, under section 37(4) of the BMSMA, authorized the removal. The MC did not agree that the glass panel was not common property.

33. The BMSMA provides for parties to apply for orders for the settlement of disputes and rectification of complaints in relation matters specified in the BMSMA. An applicant who applies for an order from the Board will have to satisfy the Board with evidence and legal submissions relevant for the making of the order applied for. It did not appear that it was the case for the applicants that their submissions that the glass panel was not common property was relevant to the order that they were seeking from the Board. In paragraph 40 of the Applicants' Submission (A2), the applicants informed that the application for an order from the Board was made "*if the Board does not agree"* (that the glass panel is not common property) "*and is of the view that prior authorization from the MCST was needed…."*

34. As it was the case for the MC that the glass panel was common property, it was necessary that a finding be made on this point.

35. In section 2(1) of the BMSMA, "*common property*" is inter-alia defined as follows:

"(a) in relation to any land or building ...such part of the land and building -

(i) not comprised in in any lot or proposed lot ...; and

(ii) used or capable of being used or enjoyed by the occupiers of two or more lots or proposed lots;"

36. The glass panel in this case was on the Certified Strata Plan shown to be physically located within the boundary of the applicants' two units. In a report by Lau Hua Peng (R1), a registered land surveyor engaged by the MC, it was described as "*a shared glass panel/railing between Nos XXX and XXX defined by an invisible strata boundary line at site".* It did not, in the Applicants' Submissions (A2) at paragraph 18 appear that the applicants were disputing that there was compliance with (a)(i) of the definition of "*common property*" in that it was not comprised in any lot or proposed lot. However, in the Applicants' Reply Submissions (A4), it was submitted that there was no compliance with (a)(i) of the definition because *"the glass panel was indeed comprised in the Applicants' lots in the strata plan*" i.e. the glass panel was located on the two lots that belonged to the applicants. The first limb of the definition requires that for a part of land and building to be common property, it must not be comprised in any lot or proposed lot i.e. not in any one lot or proposed lot. There was no validity for a submission that (a)(i) of the definition was not complied with because the glass panel was situated in the two lots owned by the applicants. None of the three applicants had

contended or could rightly contend that the glass panel was in any one of their two lots as it was a glass panel that was shared between two lots.

37. The applicants then submitted that the glass panel was not common property because there was no compliance with (a)(ii) of the definition as it "*was not part of the townhouse building".* It was submitted that it was not a part of the building because it was in the patio which was an open area.

38. It was not clear as to why an open area of a building cannot be common property. In *Sit Kwong Lam v MCST Plan No 2645* [2018] SGCA 14 at [52], the Court of Appeal held that the BMSMA did not envisage a third category of property in strata developments which constituted neither private nor common property i.e. there is, under the BMSMA, only common property and private property. Property that is not common property would be private property and vice versa. The Court of Appeal also at [59] held 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 SPs of the development. The applicants cannot dispute that the glass panel was not comprised in any one of their two lots i.e. it was not private property. It was clearly intended to be used by the occupiers of two lots as a boundary between the two lots viz No. XXX and No. XXX and was part and parcel of the fabric of the building. The glass panel was and is common property.

39. Submissions were made by the parties in relation to the MC's refusal to authorize removal under section 37(4) of the BMSMA. Section 37(4) is concerned with improvements "*in or upon his lot*" i.e. with improvements to an SP's lot and is not applicable where common property is involved. Following amendments made to the BMSMA with effect from 1 February 2019, specific types of structures and features listed in section 2(1)(c) have been defined as common property "*whether or not comprised in a lot"*. The High Court in *Soo Hoo Khoon Peng v MCST Plan No 2906* [2023] SGHC 355 noted that section 37 could be triggered if works are carried out on common property that is located within an SP's lot.

40. Whilst it is not the Board's finding that the glass panel is located within any one of the applicants' two lots, the Board will, for the purpose of completeness, deal with the submissions.

41. Section 37 of the BMSMA is as follows:

"(1) Except pursuant to an authority granted under subsection (2), a subsidiary proprietor of a lot that is comprised in a strata title plan must not effect any improvement in or upon the lot for the subsidiary proprietor's benefit which increases or is likely to increase the floor area of the land and building comprised in the strata title plan.

(2) A management corporation may, at the request of a subsidiary proprietor of any lot comprised in its strata title plan and on the terms it considers appropriate, by 90% resolution, authorise the subsidiary proprietor to effect any improvement in or upon the subsidiary proprietor's lot mentioned in subsection (1).

(2A) To avoid doubt, subsections (1) and (2) do not affect the operation of the Planning Act 1998, or any requirement under that Act for written permission for any improvement in or upon a lot which increases or is likely to increase the floor area of the land and building comprised in the strata title plan.

(3) Except pursuant to an authority granted under subsection (4) by the management corporation or permitted under section 37A, a subsidiary proprietor of a lot that is comprised in a strata title plan must not effect any other improvement in or upon the lot for the subsidiary proprietor's benefit which affects the appearance of any building comprised in the strata title plan.

(4) A management corporation may, at the request of a subsidiary proprietor of any lot comprised in its strata title plan and upon such terms as it considers appropriate, authorise the subsidiary proprietor to effect any improvement in or upon the subsidiary proprietor's lot mentioned in subsection (3) if the management corporation is satisfied that the improvement in or upon the lot —

(a) will not detract from the appearance of any of the buildings comprised in the strata title plan or will be in keeping with the rest of the buildings; and

(b) will not affect the structural integrity of any of the buildings comprised in the strata title plan.

(4A) Where the management corporation for a strata title plan is satisfied that an improvement in or upon a lot comprised in the strata title plan is effected in contravention of subsection (1) or (3), the management corporation may, by written notice given to the subsidiary proprietor of the lot (whether or not the subsidiary proprietor is responsible for the contravention) require the subsidiary proprietor to carry out and complete, at the subsidiary proprietor's own cost, any works or alteration to the lot to remedy the breach within a reasonable time specified in the notice.

(5) In this section, in relation to any land and building comprised in a strata title plan, "floor area" has the meaning given by the Planning (Development Charges) Rules."

42. The basis of an application for the Board to, under section 111 of the BMSMA, order the MC to authorize an improvement which affects the appearance of the building must be that the appearance of the building has been affected by the improvement and the MC's approval is necessary and the MC has unreasonably withheld such approval.

43. The request to the MC for removal of the glass panel was made in a letter dated 6 April 2023. The reason for the request was that the "*removal would protect the children*". It was located next to the swimming pool and children could slip and fall and hit the glass panel when the patio is wet. There was also a concern of children falling into the

swimming pool when climbing around the glass panel to go over to the adjoining patio to play. In a letter dated 28 April 2023, the MC replied that it did not have the power under section 37(4) of the BMSMA on the basis that the removal "*now detracts from the appearance of the townhouse building cluster since all the other townhouse units have glass panels except for your clients' units."*

44. It was also the submission of the MC that its refusal to grant approval for the removal was justifiable. The MC referred to by-laws that prohibited works that, inter-alia, affected the external appearance and submitted that "*the subsidiary proprietors had undisputedly placed paramount interest in maintaining aesthetic uniformity."*

45. The applicants submitted that the MC did have power to authorize because the removal did not cause the appearance of the applicants' units to detract from the appearance of the other townhouse buildings or was not in keeping with the rest of the buildings because, according to the applicants, the removal did not result in a lack of uniformity when looking at the townhouses as a whole and that it was unreasonable for the MC not to approve because it had been removed on the basis that it was a "*safety hazard*".

46. The applicants had removed the glass panel on the basis that it had improved safety in the two lots. An application had been made to the MC for approval and approval was not given as the MC was of the view that it did not have the power to give an approval because the removal "*now detracts from the appearance".* It was the submission of the applicants that the decision of the MC that it did not have the power to give approval was wrong. The High Court in *MCST Plan No 940 v Lim Florence Marjorie* [2018] SGHC 254 at [85] noted that the MCST can give approval for improvement works on a lot only when it is satisfied that the statutory criteria in sections 37(4)(a) and 37(4)(b) are met and at [87] decided …."*The decision whether the statutory criteria in ss 37(4)(a) and 37(4)(b) are met is within the purview of the management corporation and not the courts."*

47. It is not the case that SPs do not have any recourse when they consider that the decision of the MC as to whether or not it has the power to grant an approval is wrong. In *Prem N Shamdasani v MCST Plan No 920* [2022] SGHC 280, the High Court expanded on how a decision of the management corporation under section 37(4) can be challenged and pointed out that a challenge could be made under section 88(1)(a) of the BMSMA in the case where the MCST has willfully refused to consider a request or its decision that it had no power because removal detracts from appearance was "*objectively indefensible"*; and when the challenge is not on the grounds that the MCST was wrong when it decided that the statutory criteria had not been met and hence had no power to grant approval but in circumstances when it had power to grant and refused to do so a challenge can be made under section 111(b) of the BMSMA when the refusal was "*capricious or irrational"*.

48. The applicants' request for approval for removal, even though it was made after the glass panel had been removed was considered by the MC and it decided that it had no

power to give approval because the removal "*detracts from the appearance of the townhouse building cluster since all the other townhouse units have glass panels except for your clients' units."*

49. The challenge of the applicants on the decision of the MC that it had no power to give approval is a challenge under section 88(1)(a) of the BMSMA. Even though the Board does not have powers to make orders under section 88(1)(a), the Board cannot but note that a finding cannot be made that the MC had not considered the request or that its decision was objectively indefensible. It is also the finding of the Board that it was not unreasonable to disapprove the removal when the removal had clearly caused the appearance of the patios of the applicants' two lots to be different from the patios of all the other townhouses which had glass panels separating the patios of adjoining lots. The decision was not a decision that was capricious or irrational.

THE BOARD'S DECISION

50. The applicants' applications are dismissed. The Board will hear parties' submissions on costs.

Dated this 27th day of February 2024

Mr Remedios F.G
Deputy President

Mr Chan Kim Mun
Member

Ms Hazel Tang
Member

Ms Michelle Yap (M Yap Law) for the Applicants.
Mr Christopher Yeo and Ms Fiona Oon (Legal Solutions LLC) for the Respondent.