CASE UPDATE

OWNERS ALLOWED TO RETAIN MEZZANINE ATTICS CONSTRUCTED AT THE SUMMIT CONDOMINUM IN THE 90s

Introduction

1. Section 37(1) read with Section 37(2) of the Building Maintenance and Strata Management Act 2004 ("BMSMA"), which together with the rest of the BMSMA came into force on 1 April 2005, prohibits improvements upon a strata lot which increase or is likely to increase floor area, unless authorised by a 90% resolution of the Management Corporation.

2. What is the position on such works if carried out before 1 April 2005? This was the issue before the High Court in the case of *MCST Plan No. 1788 v Lau Hui Lay William and Anor* [2023] SGHC 284.

3. Owners of a unit in The Summit Condominium, a residential development, constructed mezzanine attics within the unit by around April or May 1993, long before the entry into force of the BMSMA on 1 April 2005. This was even before the Management Corporation of the Condominium ("the MCST") came into existence in November 1993.

4. Obviously, no 90% resolution of the MCST was passed to approve the mezzanine attics since the MCST did not even exist, and this was over a decade before Section 37(1) and Section 37(2) of the BMSMA came into a force.

5. The MCST, which claimed to have discovered the mezzanine attics at the unit in August 2017, commenced proceedings in the High Court against the Owners for, *inter alia*, an order that the Owners remove the mezzanine attics.

6. The Honourable Justice Lee Seiu Kin dismissed the MCST's claim in *MCST Plan No. 1788 v Lau Hui Lay William and Anor* [2023] SGHC 284.

7. The successful Owners were represented by Mr Daniel Chen and Mr Enzel Tan of Lee & Lee.

11 October 2023

For any queries relating to this article, please contact:

Daniel Chen
Partner, Litigation and Dispute Resolution Department
danielchen@leenlee.com.sg

Authors:

Daniel Chen
Enzel Tan

Lee & Lee
25 North Bridge Road
Level 7
Singapore 179104
Tel: +65 6220 0666

For more legal updates, please visit the News & Publication Section of Lee & Lee's website at www.leenlee.com.sg, or follow Lee & Lee's Facebook page at www.facebook.com/leenlee.com.sg/ and Lee & Lee's LinkedIn page at https://lnkd.in/g6bNfv8G.

No Cause of Action

8. The Honourable Justice Lee Seiu Kin dismissed the MCST's claim on the basis that it had no cause of action against the Owners.

9. In this regard, the Honourable Judge considered two (2) possible causes of action put forth by the MCST:

    a. Breach of Sections 9 and 10 of the Planning Act 1987; and

    b. Breach of Section 37(1) of the BMSMA.

Planning Act

10. There was no dispute that the Owners had contravened Sections 9 and 10 of the Planning Act 1987, which amounted to an offence under the same Act, because they had not obtained the written permission of the competent authority for the "development" of land (which the construction of the mezzanine attics amounted to).

11. However, the Honourable Judge agreed with the Owners that this previous contravention did not provide a cause of action to the MCST in this case. This was because the contravention of Sections 9 and 10 of the Planning Act 1987 amounted to a criminal offence, while the claim before the Court was a civil proceeding.

12. For completeness, the Honourable Justice also held that there was no continuing contravention of the 1998 Planning Act (the later version of the Planning Act) by the Owners. This was because the Owners had paid a penalty and a development charge to the Urban Redevelopment Authority ("URA"), following which URA granted the Owners permission to retain the mezzanine attics. The Honourable Judge held that with the granting of such permission, the earlier contravention by the Owners of 9 and 10 of the Planning Act 1987 would no longer be actionable under law, even by the URA.

Section 37 BMSMA

13. It was undisputed that the BMSMA only came into force on 1 April 2005 and that there was no equivalent provision to Section 37 of the BMSMA in the statutes pre-dating the BMSMA.

14. However, the MCST argued that the Owner's application to URA for permission to retain the mezzanine attics constituted "effecting" an improvement under Section 37 BMSMA, with the result that the "effecting" of the improvement without approval by a 90% resolution under Section 37(2) BMSMA, was an actionable breach of Section 37(1) BMSMA.

15. However, the Court held that the MCST's interpretation of "effecting" was "not one that the ordinary meaning of the text could bear" as:

    a. The ordinary meaning of the word "effect" read in its statutory context is "clear and unambiguous". It simply contemplates the "performance of specific actions to bring about an intended result". Thus, the word "effect" in section 37 BMSMA refers "solely to the effecting of physical works in or upon a subsidiary proprietor's lot". Therefore, if the installation of the mezzanine attics was "started and completed at a time when the BMSMA

had not yet entered into force, then the effecting of this improvement in or upon the lot would not be in breach of s 37(1) of the BMSMA".

b. The MCST's interpretation of section 37(1) was "riddled by inconsistencies" as it would lead to an outcome where a subsidiary proprietor who had carried out works which increased the floor area of his lot prior to the entry into force of the BMSMA would only be in breach of section 37(1) if he takes the step of applying to the URA for written planning permission after the BMSMA has entered into force.

16. For the above reasons, the Honourable Justice concluded that Section 37 BMSMA did not apply.

About Lee & Lee

Lee & Lee is one of Singapore's leading law firms being continuously rated over the years amongst the top law firms in Singapore. Lee & Lee remains committed to serving its clients' best interests, and continuing its tradition of excellence and integrity. The firm provides a comprehensive range of legal services to serve the differing needs of corporates, financial institutions and individuals. For more information: visit www.leenlee.com.sg.

The following partners lead our departments:

Kwa Kim Li Managing Partner kwakimli@leenlee.com.sg	Quek Mong Hua Litigation & Dispute Resolution quekmonghua@leenlee.com.sg	Owyong Thian Soo Real Estate owyongthiansoo@leenlee.com.sg
Tan Tee Jim, *S.C.* Intellectual Property tanteejim@leenlee.com.sg	Adrian Chan Corporate adrianchan@leenlee.com.sg	Louise Tan Banking louisetan@leenlee.com.sg