LEGAL UPDATE

FROM AIRCONS TO ZIPTRACKS – EXCLUSIVE USE OF COMMON PROPERTY

Introduction

1. The sight of awnings and air conditioner compressors installed outside individual units is a common sight throughout residential condominiums and commercial strata title developments throughout Singapore. It might therefore come as a surprise to many, that the question of whether a subsidiary proprietor of a strata titled development may install awnings and air conditioner compressors outside his unit is still not quite settled at law. This is the result of different approaches taken by different tribunals and courts in recent years, on whether this constitutes exclusive use and enjoyment of common property.

Use and Enjoyment of Common Property vs Exclusive Use and Enjoyment of Common Property

2. Section 33(1) of the Building Maintenance and Strata Management Act 2004 ("**BMSMA**") provides as follows:

Exclusive Use By-laws

33.— (1) Without affecting section 32, with the written consent of the subsidiary proprietor of the lot concerned, a management corporation may make a by-law —

(a) pursuant to an ordinary resolution, conferring on the subsidiary proprietor of a lot specified in the by-law, or on the subsidiary proprietors of the several lots so specified, for a period not exceeding one year —

(i) the exclusive use and enjoyment of; or
(ii) special privileges in respect of,

the whole or any part of the common property, upon conditions (including the payment of money at specified times or as required by the management corporation, by the subsidiary proprietor or subsidiary proprietors of the lot or several lots) specified in the by-law;

(b) pursuant to a special resolution, conferring on the subsidiary proprietor of a lot specified in the by-law, or on the subsidiary proprietors of the several lots so specified, for a period which exceeds one year but does not exceed 3 years and cannot be extended by exercise of any option of renewal to exceed an aggregate of 3 years —

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the whole or any part of the common property, upon conditions (including the payment of money at specified times or as required by the management corporation, by the subsidiary proprietor or subsidiary proprietors of the lot or several lots) specified in the by-law;

(c) pursuant to a 90% resolution, conferring on the subsidiary proprietor of a lot specified in the by-law, or on the subsidiary proprietors of the several lots so specified, for a period which exceeds 3 years —

(i) the exclusive use and enjoyment of; or
(ii) special privileges in respect of,

the whole or any part of the common property, upon conditions (including the payment of money at specified times or as required by the management corporation, by the subsidiary proprietor or subsidiary proprietors of the lot or several lots) specified in the by-law; or

(d) amending, adding to or repealing a by-law made in accordance with paragraph (a), (b) or (c), as the case may be.[1]

3. The BMSMA does not provide a definition of what constitutes "*exclusive use and enjoyment*" of common property for the purposes of s 33 BMSMA. The plain meaning of "*exclusion*" in the Oxford Learner's Dictionaries is "*the act of preventing somebody/something from entering a place or taking part in something*".[2]

4. Logically, there should be a difference between "*use and enjoyment*" and "*exclusive use and enjoyment*" of common property. To amount to "*exclusive use and enjoyment*" of common property, the use and enjoyment should operate to the exclusion of other subsidiary proprietors or the management corporation from doing something that they have been doing or would have been able to do. Where there is "*exclusive use and enjoyment*" of common property, the requisite resolution (ordinary, special or 90%) under s 33 BMSMA to be obtained depends on the period of exclusivity (up to one year, up to 3 years or exceeding 3 years).

5. If a subsidiary proprietor uses a particular part of the common property which the management corporation and no other subsidiary proprietor would want to use or would be able to use, this should be mere "*use and enjoyment*" of common property, and not "*exclusive use and enjoyment*" of common property. In such a case, consent of the management corporation ("**MCST**") must still be obtained. If the MCST refuses to consent, then the issue is whether the refusal is so unreasonable such that the Strata Titles Board ("**STB**") or Court may make an order under s. 111 BMSMA to order the MCST to consent to the use.[3]

[1] Building Maintenance and Strata Management Act 2004 ("**BMSMA**"), s 33(1).
[2] http://www.oxfordlearnersdictionaries.com/
[3] BMSMA, s 111.

6. An example of "*exclusive use and enjoyment*" in a residential development would be where a childcare centre situated on the ground floor of a strata-titled development cordons off a portion of the common property playground for its own use, to the exclusion of the MCST and other residents who can no longer use that part of the playground. Another example of "*exclusive use and enjoyment*" in a commercial development would be when a ground floor shop is allowed to use part of the common lobby to operate a café.

7. Whether there is "*exclusive use and enjoyment*" of common property should be a question of fact in every case.

Decisions that Considered the Exclusive Use and Enjoyment Issue

8. The meaning of "*exclusive use and enjoyment*" was first considered by the High Court in *Poh Kiong Kok v Management Corporation Strata Title Plan No 581* [1990] 1 SLR(R) 617 ("*Pandan Valley*"). The MCST of Pandan Valley had a parking scheme where every subsidiary proprietor was allocated a specific lot exclusive to him. Mr Poh was allocated a lot, which he considered to be inferior, and excluded from parking in any of the other 780 lots.

9. At that time, the relevant provision was s 41(8) of the Land Titles Strata Act (Cap 158, 1988 Rev Ed) ("**LTSA**"), which required a unanimous resolution to make a by-law for exclusive use, instead of the current 90% resolution under s 33(1)(c) BMSMA for a period exceeding 3 years.[4]

10. The High Court agreed with Mr Poh and held that in the absence of an exclusive use unanimous resolution under s 41(8) LTSA, the MCST had no right to exclude Mr Poh (or any subsidiary proprietor) from parking in any of the lots, and that all subsidiary proprietors may park in any lot on a "*first come first served basis*".[5]

11. In *Wu Chiu Lin v MCST Plan No. 2874* [2018] 4 SLR 966 ("*Sunglade*"), the issue was whether awnings sought to be installed by subsidiary proprietors in their private enclosed spaces ("**PES**") and balconies would constitute exclusive use and enjoyment of common property under s. 33 BMSMA. The High Court, upholding the finding of the STB, held that absent a 90% exclusive use resolution under s. 33 BMSMA, Ms Wu was not allowed to build an awning in her balcony despite the following: -

    (a) the MCST had at an AGM by way of a special resolution made a trellis by-law approving the installation of the awnings at the PES and balconies with an approved design for all subsidiary proprietors;[6]

    (b) the MCST had before the STB relented and consented to let the subsidiary proprietors of ground floor units proceed to install awnings in their PES on the basis that they constituted a safety device;[7]

    (c) there was evidence that several other units like Ms Wu's had installed awnings at their balconies and the MCST had taken no action for many years;[8]

[4] *Poh Kiong Kok v Management Corporation Strata Title Plan No 581* [1990] 1 SLR(R) 617 *("Pandan Valley*"), at [11].
[5] *Pandan Valley*, at [20]
[6] *Wu Chiu Lin v MCST Plan No. 2874* [2018] 4 SLR 966 ("*Sunglade*"), at [6].
[7] *Sunglade*, at [12] – [13].
[8] *Sunglade*, at [87] – [91]

(d) the MCST made clear to the STB that they recognized that 83.06% of the general body voted in favour of the awnings, that their intention was simply to seek guidance and ensure that the purported approval granted to the subsidiary proprietors to install the awnings was valid and regular, and not to unreasonably prohibit them from installing them;[9] and

(e) the MCST was unrepresented and did not take a position in the appeal before the High Court[10].

12. This strict interpretation of s 33 BMSMA in *Sunglade* was followed by the High Court in *MCST Plan No. 508 v Loh Sook Cheng* ("*Loh Sook Cheng*").[11] Mdm Loh sought several orders from the Court including, *inter alia*, that she be allowed to install two air conditioning compressors just outside the rear exterior wall of her unit, an upgrade to her unit's electrical supply and ancillary plumbing works for the installation of fire hose reels, in particular the connection of the fire hose reel to the existing water meter, and changing the piping size of existing water meter, in compliance with SCDF and other regulatory requirements.

13. The District Court allowed the application on, *inter alia*, the following grounds: -

(a) As a finding of fact, the works did not confer on Mdm Loh exclusive use and enjoyment or special privileges in respect of the common property to the exclusion of other subsidiary proprietors[12] and

(b) many other subsidiary proprietors including the Chairperson and Secretary of the MCST had installed air conditioning compressors at various parts of the common property outside their respective units, and there were also piping and cable ducts outside the units of several other subsidiary proprietors, all done without the need for a 90% exclusive use resolution under s 33 BMSMA.[13]

14. However, the High Court overturned the District Court's decision in relation to these works, noting that the installation of the air conditioning compressors, running of additional electric cables and the additional water pipe, were permanent structures installed on common property for the sole benefit of Mdm Loh, and concluded that these works would deprive other subsidiary proprietors from using and enjoying those parts of the common property. Hence, in the absence of a 90% exclusive use resolution under s 33 BMSMA, the District Court's orders in relation to the air conditioning compressors, electrical supply upgrade and ancillary plumbing works were set aside.

15. This decision is difficult to understand. Mdm Loh was simply trying to carry out electrical and plumbing works, and install air conditioning compressors, just like other subsidiary proprietors (including the Chairperson and Secretary of the MCST) who had similar pipes, cables and compressors on common property, all without any 90% exclusive use resolution. Mdm Loh was not seeking to deprive or exclude any other subsidiary proprietor or the MCST from carrying such works. In fact, the location for the installation of the compressors was proposed to Mdm Loh by the MCST.[14]

[9] *Sunglade*, at [11].
[10] *Sunglade*, at [2]
[11] *MCST Plan No. 508 v Loh Sook Cheng* ("*Loh Sook Cheng*") (HC/RAS 13 of 2020, unreported)
[12] *Loh Sook Cheng v Management Corporation Strata Title Plan No 508* [2020] SGDC 159 ("*Loh Sook Cheng*"), at [17].
[13] *Loh Sook Cheng*, at [23].
[14] *Loh Sook Cheng*, at [35]

Decisions that did not consider the Exclusive Use and Enjoyment Issue

16. In *Choo Kok Lin and anor v Management Corporation Strata Title Plan No. 2045* [2005] 4 SLR(R) 175 ("*Kentish Lodge*"), the subsidiary proprietors erected, amongst other things, air-conditioning compressors on the external wall above their landscape/air well area without the MCST's consent.[15] The High Court dealt with this as a case of use and enjoyment of common property without the MCST's consent. The issue was whether the compressors should be ordered to be removed.

17. Balancing all the circumstances, and especially since there were other subsidiary proprietors which had similarly installed their compressors on common property and that the MCST did not consider the appearance of the condominium to be adversely affected by the existence of the compressors, the Court decided not to order the removal of the compressors.[16]

18. Strikingly, it appears not to have been argued that such an installation would amount to "*exclusive use and enjoyment*" of common property. Otherwise, the case would have been disposed of on the ground that there was no exclusive use resolution under the then s 41(8) of the LTSA.

19. In *Prem N Shamdasani v Management Corporation Strata Title Plan No 920* [2022] SGHC 280 ("*Hawaii Tower*"), the Appellant had carried out renovation works including, *inter alia*, the replacement of the air conditioner compressor on the external wall of the building. However, these works had not been approved by the MCST.

20. The High Court held that the MCST ought to have approved the renovation works, including the replacement of the air conditioner compressor, as it did not detract from the appearance of the building since there were six other units with similar air conditioner compressors on the external walls which the MCST could not do anything about.[17]

21. Again, it does not appear to have been argued that the installation of the air conditioner compressor would amount to "*exclusive use and enjoyment*" of common property. Otherwise, the case would also have been disposed of on the ground that there was no exclusive use resolution under s 33 BMSMA.

22. It is not surprising that in *Kentish Lodge*, *Hawaii Tower* and numerous cases over the years, it had not been considered that the installation of air conditioning compressor units outside your own window, balcony or unit would amount to "*exclusive use and enjoyment*" of common property requiring an exclusive use by-law under s 41(8) LTSA and now s 33 BMSMA. The same can be said as regards many things installed on common property e.g. house signage on the wall outside one's unit, blinds affixed to balcony walls and electrical, water and telecommunication cables running along the common corridor into one's unit.

23. Amongst the over 4,000 MCSTs in Singapore, one will be hard pressed to find any MCST who has thought it necessary to pass a 90% resolution to make a by-law to approve the installation of such air conditioning compressors, electrical, water and telecommunication cables on common property.

[15] *Choo Kok Lin and anor v Management Corporation Strata Title Plan No. 2045* [2005] 4 SLR(R) 175 ("*Kentish Lodge*"), [6] – [16].
[16] *Kentish Lodge*, at [59].
[17] *Prem N Shamdasani v Management Corporation Strata Title Plan No 920* [2022] SGHC 280 ("*Hawaii Tower*"), at [152] – [153].

24. In his book, Prof Teo Keang Sood states that the right of a subsidiary proprietor to have reasonable use and enjoyment of common property in such situations is a matter of convention, custom and common sense:

    "In relation to the use and enjoyment of common property, there are frequently encountered instances of de facto exclusive use of the common property. For example, a door mat placed outside the front of a lot/parcel is effectively a claim to exclusive use of that common property area. The same applies to security doors that open outwards and letterboxes on common property that are allocated to individual subsidiary/parcel proprietors. The right of a subsidiary/parcel proprietor to have exclusive use of such areas does not have any basis in law but is simply a matter of convention, custom and common sense."[18]

25. This common right of use of common property can be justified in law on the basis that they do not amount to "*exclusive use and enjoyment*" of common property under s. 33 BMSMA.

Different Tests Applied Depending on whether Works carried out

26. The High Court, in *MCST Plan No. 1378 v Chen Ee Yueh Rachel* [1993] SGHC 283 ("*Emerald Mansion*"), was asked to grant a mandatory injunction to compel a subsidiary proprietor to remove certain additions and alterations carried out without the MCST's approval including, *inter alia*, windows enclosing the front balcony of the strata lot, on the basis that it would adversely affect the façade of the building.

27. Although the Court held that the sliding windows affected the overall appearance of the building, the Court declined to grant the mandatory injunction as it would cause hardship to the subsidiary proprietor without any real corresponding benefit to the MCST.[19] This was because the object of uniformity could not be achieved owing to the presence of seven other units in the building which had either metal grills or glass windows covering the balcony which the MCST accepted it could not do anything about.[20]

28. In *Kentish Lodge*, the High Court was also asked to grant a mandatory injunction requiring the subsidiary proprietor to remove air-conditioning compressors erected on common property without the MCST's approval.[21] Following *Emerald Mansion*, the Court in *Kentish Lodge* also declined to grant the order sought as it would bring no benefit to the MCST.[22] The Court held that the MCST did not consider that the appearance of the condominium had been adversely affected by the existence of the compressors. This was especially so since there were other subsidiary proprietors which had similarly installed their compressors on common property.[23]

29. However, in *Sunglade* and *Loh Sook Cheng*, where the subsidiary proprietors did not proceed to carry out the installations without approval but sought the MCST's approval before carrying out the installations, the High Court took a different approach.

[18] *Strata Title in Singapore and Malaysia (7th Edition) 2023 LexisNexis* at [10-43]
[19] *MCST Plan No. 1378 v Chen Ee Yueh Rachel* [1993] SGHC 283 ("*Emerald Mansion*"), at [19]; [23].
[20] *Ibid.*
[21] *Kentish Lodge*, at [4].
[22] *Kentish Lodge*, at [59].
[23] *Ibid*.

30. In *Sunglade*, there was evidence of coverings put up by subsidiary proprietors of six or seven other units similar to Ms Wu's, all without approval and no action was taken for many years.[24] This was in addition to the ground floor units who were allowed put up the coverings. Nevertheless, the High Court took the view that "*two wrongs do not make a right*" and that the obligation is on the subsidiary proprietor to obtain a 90% exclusive resolution under s 33 BMSMA.[25]

31. In *Loh Sook Cheng*, the external wall of the building was installed with many air conditioning compressor units put up by other subsidiary proprietors including the Chairperson and Secretary of the MCST. There were also piping and cable ducts running outside of the units of several subsidiary proprietors. The District Court took the view that a party who has come to Court to seek approval of works involving the common property should be in no worse a position than a subsidiary proprietor who had proceeded to undertake the same works without authorisation and for which the MCST is seeking a mandatory injunction.[26]

32. The High Court in *Loh Sook Cheng*, in reversing the decision of the District Court, stated that the court in the exercise of its discretion may wish to consider the even-handedness of the MCST in dealing with the subsidiary proprietors in cases involving the grant of a mandatory injunction. However, in a case where a subsidiary proprietor applies to court to compel the MCST to consent to works, it must be determined whether the works may be consented to by the MCST and that this answer does not change because other subsidiary proprietors might have acted in breach of s 33 BMSMA.[27]

33. The unfortunate result from the different approaches taken is that it may give the impression that you may be better off proceeding to carry out the unauthorized works first instead of seeking proper approval before carrying out the works.

34. As stated by the High Court in *Sit Kwong Lam v Management Corporation Strata Title Plan No 2645* [2017] SGHC 57 ("*Sit Kwong Lam*"), where the works had already been carried out, the Court must approach the issue as if the work in question had not been carried out instead of accepting the work as a *fait accompli*. The court must freshly consider the merits of the application without attributing any weight whatsoever to the fact that resources have already been expended on carrying out the work, since it was undertaken without sanction.[28]

35. Similarly, the same test should be applied where the works had not been carried out. A law-abiding party who has come to Court to seek approval of works involving the common property before undertaking the works should not be penalized and be in a worse position than a subsidiary proprietor who proceeds to undertake the same works without authorisation and against whom the MCST is seeking a mandatory injunction.

[24] *Sunglade*, at [91].
[25] *Ibid*.
[26] *Loh Sook Cheng*, at [20].
[27] *MCST Plan No. 508 v Loh Sook Cheng* ("*Loh Sook Cheng*") (HC/RAS 13 of 2020, unreported) at [12]
[28] *Sit Kwong Lam v Management Corporation Strata Title Plan No 2645* [2017] SGHC 57 ("*Sit Kwong Lam*"), at [123].

Prescriptive or Descriptive Provision

36. Even if the works amount to "*exclusive use and enjoyment*" of common property, it should not follow that an exclusive use resolution must necessarily be passed before such "*exclusive use and enjoyment*" can be allowed. Whilst the MCST "*may*" make a by-law pursuant to a 90% resolution conferring on a subsidiary proprietor "*exclusive use and enjoyment*" of common property for a period exceeding 3 years, in which case the subsidiary proprietor's "*exclusive use and enjoyment*" of the common property during that period is protected by the by-law, it should not follow that without such by-law and 90% resolution, the subsidiary proprietor cannot have any such "*exclusive use and enjoyment*".

37. Section 33 BMSMA is a descriptive provision rather than a prescriptive provision. In other words, s33 can be used by the subsidiary proprietor as a "*shield*" but it should not be used as a "*sword*".

38. In *Chan Sze Ying v Management Corporation Strata Title Plan No 2948 (Lee Chuen T'ng, intervener)* [2020] SGHC 88 ("*Chan Sze Ying*"), the High Court had to consider Paragraph 3A(1) of the First Schedule of the BMSMA ("Para 3A") which reads as follows: -

    "*3A.— (1) A general meeting of a management corporation or a subsidiary management corporation may be adjourned for any reason if a motion to adjourn the meeting is passed at the meeting*."[29]

39. Having regard to the use of the word "*may*" in Para 3A, and the exclusionary language used in other provisions of the First Schedule (such as "*shall*" and "*must*"), the Court held that Para 3A is a descriptive rather than prescriptive provision, and that there is nothing in the language of Para 3A to displace the residual power at common law to adjourn meetings. Accordingly, the Court rejected the plaintiff's argument that the adjournment of an AGM was invalid in the absence of a motion for the same.[30] This decision was affirmed by the Court of Appeal.[31]

40. Another instance of the Court taking a similar approach would be the case of *The Management Corporation Strata Title Plan No 3436 v Tay Beng Huat and another* [2019] SGDC 208 ("*The Infiniti*"). The District Court dismissed the MCST's argument that the placement of a shoe cabinet along the common corridor amounted to "*exclusive use*" or "*special privileges*" which was unlawful unless there was a by-law under s 33 expressly allowing it. Instead, the District Court held that s 33 is an empowering provision and should not be read as a restrictive provision that renders unlawful anything that might be considered "*exclusive use*" so long as the MCST has not expressly permitted it. The District Court added that the latter interpretation "*would render unnecessary and otiose the fine balance between the potentially competing rights of subsidiary proprietors in respect of the common property that the by-laws in the Second Schedule endeavour to achieve*."[32]

[29] *Chan Sze Ying v Management Corporation Strata Title Plan No 2948 (Lee Chuen T'ng, intervener)* [2020] SGHC 88 ("*Chan Sze Ying*"), at [44].
[30] *Chan Sze Ying*, at [45].
[31] *Chan Sze Ying v Management Corporation Strata Title Plan No 2948 (Lee Chuen T'ng, intervener)* [2021] 1 SLR 841
[32] *The Management Corporation Strata Title Plan No 3436 v Tay Beng Huat and another* [2019] SGDC 208 ("*The Infiniti*"), at [12].

Equating Exclusive Use and Enjoyment with Permanence

41. In *Loh Sook Cheng*, the Court held that the installation of the compressors amounted to "*exclusive use and enjoyment*" as they were permanent. The Court distinguished *The Infiniti* on the grounds that the shoe cabinet was not permanent.

42. However, usage can be permanent and yet not amount to exclusive use as no other subsidiary proprietor or the MCST has been excluded from similar use of common property e.g. air-conditioning compressor outside one's window, or electrical wires and plumbing pipes running along the common property into one's unit. On the other hand, usage can be temporary yet amount to exclusive use and enjoyment e.g. exclusive use of three lanes of the swimming pool during the evening to conduct swimming lessons.

43. It is a question of fact in every case whether there is "*exclusive use and enjoyment*". If there is "*exclusive use and enjoyment*", then the "*permanence*" of the use (i.e. the duration of use), should determine the type of resolution required under s 33 i.e. ordinary, special or 90% resolution.

Other Control Mechanisms in the BMSMA

44. It is necessary to stress that a descriptive interpretation of s. 33 does not imply that a subsidiary proprietor will be entitled to do whatever he or she likes on or to the common property, without regard to the rights of other subsidiary proprietors and the management corporation. As stated by the High Court in *Sit Kwong Lam*, "*whether or not an installation results in exclusive use only goes to whether a by-law conferring such exclusive use is required under s 33 of the Act. Just because an installation does not result in exclusive use of common property does not automatically mean it was authorised or permitted. The absence of exclusive use does not ipso facto create an entitlement to install works on common property*."[33]

45. There are provisions in the BMSMA and regulations made thereunder that carefully balance the rights and obligations of subsidiary proprietors and occupiers. Section 63 BMSMA sets out the duties of subsidiary proprietors and other occupiers of lots. They are not allowed to use or enjoy the common property in such a manner or for such a purpose as to interfere unreasonably with the use or enjoyment of the common property or any other lot by other subsidiary proprietors and occupiers.[34] Section 37 BMSMA prohibits a subsidiary proprietor from effecting any improvements in or upon his lot which would have the effect of increasing the gross floor area of the building, detracting from the appearance of the building, or affecting the structural integrity of the building, without first obtaining an authorisation to do so from the MCST.[35]

46. The prescribed by-laws under the Second Schedule of the Building Maintenance (Strata Management) Regulations 2005 ("**BMSMR**") restrain various specific misuses of common property, such as uses that amount to a noise nuisance to other subsidiary proprietors, an obstruction of the use of common property, or involve damage or defacement to the common property, and so on.[36]

[33] *Sit Kwong Lam*, at [120].
[34] BMSMA, s 63.
[35] BMSMA, s 37.
[36] See generally: Building Maintenance (Strata Management) Regulations 2005, Second Schedule.

Mere Use and Enjoyment of Common Property

47. Where there is no "*exclusive use and enjoyment*" of common property, such that an exclusive use resolution under s 33 BMSMA is required, but mere "*use and enjoyment*" of common property, then the issue is whether the MCST should consent to the works.

48. Where the MCST consents to the works, we should be slow to enter the fray and stop the works. The subsidiary proprietors themselves are the best people to decide what to allow for their estate. During the Second Reading of the Building Maintenance and Strata Management Bill, the Minister for National Development had this to say: -

"Sir, this Bill seeks to provide for more effective management and maintenance of strata developments, recognising differences in interests amongst stakeholders. Our thrust is to provide flexibility by empowering MCs to make decisions, and therefore encourage self-regulation. This will then allow Government to reduce its involvement in the affairs of the MCs."[37]

49. In the case of *Sunglade*, a supermajority of 83.06% of the general body voted to approve the awnings. The MCST stated their intention was simply to seek guidance and ensure that the purported approval granted to the subsidiary proprietors to install the coverings was valid and regular, and not to unreasonably prohibit them from installing them.[38]

50. In most MCSTs, it is close to impossible to secure a 90% resolution. It is odd that a 90% resolution must be passed under s. 33 of the BMSMA for a subsidiary proprietor to be allowed to put up awnings, air-conditioning compressor, carry out some plumbing works or upgrade his electrical supply, considering that a lower threshold suffices for far more serious endeavours. Only a special resolution (75% vote) is required to install, remove or replace any facility (gym, swimming pool, playground etc)[39] and this has been reduced to an ordinary resolution (50% vote) for the installation or removal of fixed EV chargers.[40] Only 80% support from the subsidiary proprietors is required for an application to the STB or the Court for the entire development to be sold against the objection of the remaining 20%.[41]

51. Where the MCST does not consent to the works, the issue is whether taking into account all relevant factors, the MCST has been unreasonable, in which case the STB or the Court may decide to make an order that the MCST consents to the works, as was done by the STB in *Lee Lay Ting Jane v MSCT Plan No 3414* [2015] SGSTB 5 ("*Watermark Roberson Quay*") under s 111 BMSMA and the Court in *Hawaii Tower* under s 88(1) BMSMA.

[37] Singapore Parliamentary Debates, Official Report (19 April 2004) vol 77 at cols 2743-2744
[38] *Sunglade*, at [11].
[39] BMSMA, s 29(d)
[40] BMSMA s 34A
[41] See: Land Titles Strata Act 1967, Part 5A.

The case of Mark Wheeler

52. Most of the cases that held that there was "*exclusive use and enjoyment*" of common property, including *Sit Kwong Lam*, cited and followed the case of *Mark Wheeler v The Management Corporation Strata Title Plan No. 751 and Another* [2003] SGSTB 5 ("*Mark Wheeler*") and hence a discussion of this case would be helpful.[42]

53. In *Mark Wheeler*, the subsidiary proprietor installed an awning above the balcony of the entrance to his unit, without the MCST's approval.[43] Based on the facts of the case, the STB did not consider the MCST's refusal to grant consent unreasonable, considering the following:[44]

    (a) This was the only unit that put up an awning;

    (b) The installation was in breach of the MCST's by-laws;

    (c) There were issues of liability;

    (d) The awning detracted from the Spanish theme of the development; and

    (e) Resolutions to approve the installation were defeated at the AGM.

54. Although it is true that the STB also accepted the MCST's submission that the installation of the awnings amounted to "*exclusive use*" which required a unanimous vote at the material time, it is quite clear from the judgment that the STB treated the case primarily as one of "*use and enjoyment*" of common property. Hence, the STB deliberated on whether the MCST had consented to the installation and whether its refusal to grant consent was reasonable. If the STB had conclusively determined that it was a case of "*exclusive use and enjoyment*" of common property, the lack of consent from the MCST, let alone a unanimous resolution, would have been fatal to *Mark Wheeler's* case.

55. Interestingly, the STB in *Mark Wheeler* commented that treating a situation like this as one of "exclusive use" requiring a unanimous vote may make living in a condominium unworkable: -

    "*Where the interference with the common property is temporary or when the exclusive use by the subsidiary proprietor does not interfere with the use of the common property by other subsidiary proprietors or affect their enjoyment of their own lots then it is arguable that living in a condominium would be unworkable if such interference called for a unanimous vote*".[45]

56. Nevertheless, the STB said that it was bound by *Poh Kiong Kok's* case and held that the installation of the awning would amount to exclusive use of common property which required unanimous resolution.[46] The STB added that "*Although the result is that life in a condominium may be made even more awkward and even difficult, it is for the legislature to respond to the difficulties*".[47]

[42] See: Sit Kwong Lam, at [122] – [127].
[43] *Mark Wheeler v The Management Corporation Strata Title Plan No. 751 and Another* [2003] SGSTB 5 ("*Mark Wheeler*"), at [13] – [21]; [28].
[44] *Mark Wheeler*, at [54] – [68].
[45] *Mark Wheeler*, at [44].
[46] See: *Mark Wheeler*, at [47], citing *Poh Kiong Kok v Management Corporation Strata Tide Plan No, 581* [1990] 1 SLR(R) 617.
[47] *Mark Wheeler*, at [49].

57. In *Sit Kwong Lam*, the principal dispute was over the meaning of "*common property*" and whether the works were installed on common property. There was no consent from the MCST to the works. The High Court went on to hold that the works amounted to "*exclusive use*" of common property but this is arguably well justified on the facts of this case:

    (a) The ledges were intended to be accessed from the external façade by the MCST for maintenance purposes;[48]

    (b) The flat roof was accessible to all subsidiary proprietors via a common staircase;[49]

    (c) No other person did what this subsidiary proprietor did;

    (d) By doing what he did, the subsidiary proprietor basically misappropriated these areas for his own "*exclusive use*", depriving the MCST and other subsidiary proprietors from using these areas which they would otherwise have been able to use;[50] and

    (e) The subsidiary proprietor had acknowledged that these amounted to "exclusive use" of common property, sought to get approval at the AGM but failed. He managed to secure only between 26 to 30% of the votes.[51]

58. Even if there had been no "exclusive use", considering the above, it would not have been unreasonable for the MCST to refuse to consent to the works, which amounted to "use and enjoyment" of common property which required MCST consent.

Approach Taken in Australia

59. Singapore's strata legislation borrowed heavily from Australian provisions. Although there have been significant legislative changes over the years, there are some provisions that remain almost identical. For these provisions, it will be useful to consider the approach taken by Australian tribunals and courts.

60. In *Platt v Ciriello* [1999] QCA 33 ("*Platt*"), the appellants were the majority proprietors in a strata development who objected to the respondents and their tenants using common property for various purposes, such as the placement of display stands, erection of a sign claiming exclusive use of certain car parking spaces, and so on.[52] To appreciate the nature of the arguments in Platt and the Queensland Court of Appeal's decision, it is necessary to spell out the relevant provisions of the Queensland equivalent of the BMSMA then in force, the Building Units and Group Titles Act 1980 ("**BUGTA**").

[48] *Sit Kwong Lam*, at [44].
[49] *Sit Kwong Lam*, at [24].
[50] *Sit Kwong Lam*, at [105].
[51] *Sit Kwong Lam*, at [18].
[52] *Platt v Ciriello* [1999] QCA 33 ("*Platt*"), at p 1 – 2.

61. Section 30(7)(a) of the BUGTA states: -

"*With the written consent of the proprietor or proprietors of the lots concerned, a body corporate may, pursuant to a resolution without dissent make a by-law —*

(a) conferring on the proprietor of a lot specified in the by-law, or on the proprietors of the several lots so specified —

(i) the exclusive use and enjoyment of; or
(ii) special privileges in respect of,

the whole or any part of the common property, upon conditions (including the payment of money at specified times or as required by the body corporate, by the subsidiary proprietor or subsidiary proprietors of the lot or several lots) specified in the by-law…"[53]

62. Further, Section 51(1)(c) of the BUGTA states: -

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

(c) use or enjoy the common property in such a manner or for such a purpose as to interfere unreasonably with the use or enjoyment of the common property by the occupier of any other lot (whether that person is a proprietor or not) or by any other person entitled to use and enjoyment of the common property."[54]

63. From the above, it is apparent that ss. 30(7) and 51(1)(c) of the BUGTA are *in pari materia* with ss. 33(1) and 63(c) of BMSMA 2004.

64. The appellants in *Platt* argued before the court below (the Queensland Supreme Court) that the respondents' uses of common property amounted to an exclusive use and enjoyment of common property, which was in breach of the BUGTA since no "exclusive use" by-law had been passed under Section 30(7).[55]

65. However, this argument was dismissed by Derrington J, on the basis that the question for determination was not whether the respondents' uses of common property involve a use that is exclusive within the meaning of Section 30(7), but whether they amount to a use of common property in a manner or for a purpose that unreasonably interferes with the entitlement of others to the use and enjoyment of common property under Section 51(1)(c): -

"*The measure prescribed by the statute itself is simply whether the use or enjoyment of the common property is had in such a manner or for such a purpose as to interfere unreasonably with the use or enjoyment of it by the occupiers of other lots or any other person entitled to use and enjoy it. Accordingly, absent any by-law on the point, if a unit-holder were exercising exclusive possession of a part of the common property that did not transgress that standard, then no prohibition of it appears in the Act; but if there is a by-law granting exclusive possession, then an aggrieved party could not later challenge it on this ground. It should be remembered that simply by standing in common property a person would be, albeit temporarily, exercising*

[53] Building Units and Group Titles Act 1980 ("BUGTA"), s 30(7).
[54] BUGTA, s 51(1)(c).
[55] *Platt*, at p 1 – 2.

exclusive possession of the space that he occupies; so the mere fact of exclusive possession cannot be the test." [56]

66. On appeal, the Queensland Court of Appeal by a 2:1 majority (Pincus J.A. dissenting) upheld the decision of Derrington J. The Queensland Court of Appeal also expressly rejected the prescriptive reading of Section 30(7)(a) advanced by the appellants, and affirmed a descriptive reading of the same: -

"*The body corporate… is invested by s. 30(7)(a) with the power, pursuant to a resolution without dissent, of making a by-law conferring on a proprietor the exclusive use and enjoyment of the whole or part of the common property. … What s. 30(7)(a) does not say, at any rate in express terms, is that without such a by-law a proprietor may not make exclusive use of common property without interfering unreasonably with the entitlement of others to use it as well*."[57]

67. Similar principles had also been stated in *Waller v The Owners of 'Tranby on Swan' – Strata Plan 2232* (1996) NSW Titles Cases 80-037 ("*Waller*"). The District Court of New South Wales held that in each individual instance where exclusive use was being made of the common property, the question must be asked whether that particular use was unreasonably interfering with the use and enjoyment of the common property by the other subsidiary proprietors.

68. Other than *Waller*, the descriptive interpretation in *Platt* has also been followed and applied in numerous other Australian cases in subsequent years e.g. the Supreme Court of South Australia decision in *Piazza & Anor v Strata Corporation 10147 Inc & Anor* [2020] SASCFC 27 ("*Piazza*"), the New South Wales Supreme Court decision of *Frankel v Paterson* [2015] NSWSC 1307, as well as decisions by the adjudicator for the Queensland Body Corporate and Community Management Commissioner, such as in *Poinciana Park* [2020] QBCCMCmr 201 and *Ridge Court* [2003] QBCCMCmr 131.

69. In *Piazza*, the Supreme Court of South Australia held that mere occupation of common property is not necessarily exclusive, and what constitutes "*exclusive occupation*" for the purposes of Section 26(4) of the Strata Titles Act 1988 is ultimately a question of fact: -

"*Unit holders in strata corporations are generally characterised as having a right to share common property in a way which is reasonable and, for that purpose, may make arrangements as between themselves as to the sharing of that space. … Occupation at any one point in time by one unit holder is not necessarily exclusive nor unreasonable. Mobile items may be shifted to make room for others by agreement or unilateral action. The limits on the rights of a tenant in common to act unilaterally against the use of another, and the delineation between ordinary uses and the taking of exclusive possession, or other acts of ouster, are fact sensitive*."[58]

70. On the facts of *Piazza*, the Supreme Court of South Australia found that the construction of a monopole by a unit holder amounted to an "*exclusive occupation*" of common property, for reasons such as (i) the fact that the unit holder in question had entered into an agreement with a telecommunications provider, Optus, to construct and maintain the monopole, which precluded other unit holders from entering into their own arrangements for the construction of a monopole

[56] See: *Platt*, at p 22.
[57] *Platt*, at p 22.
[58] *Piazza & Anor v Strata Corporation 10147 Inc & Anor* [2020] SASCFC 27 ("*Piazza*"), at [43].

in the same space, and (ii) the fact that removal of the monopole would be physically and legally fraught, and the likely subject of a legal challenge from Optus.[59]

71. In the STB decision of *Foo Siang Yean (Fu Xiangyuan) and Ors v The MCST Plan No. 2245* [2023] SGSTB 2 ("*Oleander Towers*"), the STB observed that a competing characterization would be to take a purposive approach to the statute and regard that the fixing of an awning to the external wall does not constitute exclusive use of the external wall but should instead be construed as a form of alteration to the common property. The STB pointed out that the New South Wales Civil and Administrative Tribunal, in *Fong v The Owners Strata Plan No. 82783* [2022] NSWCATCD 56 ("*Fong*") had recently suggested that anchoring an awning to an external wall is not even a form of alteration to the common property other than incidentally.[60] The Court in *Fong* held that the owner's association (the equivalent of MCST in Australia) had unreasonably refused to consent to the replacement of an existing pergola and attached awning, and therefore ordered the owners association to make a common property rights by-law proposed by the subsidiary proprietor for the said works.[61]

72. However, the STB in *Oleander Towers* nonetheless held that it was bound by the decision of the Singapore High Court in *Sunglade* and held that the affixation of awnings on the external walls of the unit required a 90% resolution under s 33 BMSMA.[62]

Conclusion

73. The decisions in *Kentish Lodge* and *Sunglade*, and the cases following either authority, would therefore appear to be inconsistent with each other. A decision of a higher court to resolve this inconsistency would be most helpful to practitioners on the ground, district courts and tribunals resolving disputes on these matters.

74. In the recent decision of *Soo Hoo Khoon Peng v The MCST Plan No. 2906* [2023] SGDC 162 ("*Stevens Loft DC*"), the District Court held that the installation of a screen (a ziptrack blind system) at the balcony within the subsidiary proprietor's lot constituted exclusive use and enjoyment of common property which required a 90% resolution.[63]

75. On appeal, the High Court, in *Soo Hoo Khoon Peng v The MCST Plan No. 2906* [2023] SGHC 355 *("Stevens Loft HC*") opined that it is not always the case that such an installation would amount to exclusive use and enjoyment which requires a 90% resolution just because persons standing outside would be obstructed from viewing this part of the common property. The High Court was of the view that the question of how common property may be used or enjoyed must hinge on the property's location within the development as well as the role(s) that the property plays given that location.[64] This must be a question of fact in every case.

[59] *Ibid*.
[60] *Foo Siang Yean (Fu Xiangyuan) and Ors v The MCST Plan No. 2245* [2023] SGSTB 2 ("*Oleander Towers*"), at [3].
[61] *Fong v The Owners Strata Plan No. 82783* [2022] NSWCATCD 56, at [98].
[62] *Oleander Towers*, at [3].
[63] *Soo Hoo Khoon Peng v The MCST Plan No. 2906* [2023] SGDC 162, at [110].
[64] *Soo Hoo Khoon Peng v The MCST Plan No. 2906* [2023] SGHC 355, at [12].

76. In *Loh Sook Cheng*, Mdm Loh actually brought an appeal to the Court of Appeal.[65] Before the Court of Appeal, Mdm Loh argued that *Sunglade* ought to be over-ruled while the MCST argued that *Kentish Lodge* ought to be over-ruled.

77. The appeal was fixed for hearing but twice adjourned on the day of hearing for various reasons. Eventually, Mdm Loh decided to sell her unit, thus rendering her proposed works moot. Mdm Loh applied to withdraw the appeal with no order as to costs. This was resisted by the MCST which argued that costs should follow the event and that the MCST ought to be entitled to costs.

78. In a written note, the Court of Appeal granted Mdm Loh leave to withdraw the appeal. It is unfortunate that the Court of Appeal did not have the opportunity to fully consider the appeal and provide clarity on this issue of *"exclusive use and enjoyment"* of common property.

79. Interestingly, the Court of Appeal on its own volition ordered the MCST to pay Mdm Loh reasonable disbursements in the appeal to be taxed if not agreed. The minute sheet stated that "*the court considers that the appeal itself was not without merits, and that the conduct of the respondent was unreasonable*".

80. It is not clear on what grounds the Court of Appeal considered Mdm Loh's appeal to have merits. In a subsequent related case, the High Court[66] commented that the conduct of the two ex-council members was *"nothing short of abysmal"*.[67]

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[65] CA/CA 6 of 2021
[66] *Cheung Phei Chiet v Jujun Tanu & another* [2023] 5 SLR 1011
[67] *Cheung Phei Chiet v Jujun Tanu & another* [2023] 5 SLR 1011 at [14], [25] - [26], [249]