CASE UPDATE

HIGH COURT PROVIDES GUIDANCE ON SUBSIDIARY PROPRIETORS' INSTALLATION OF STRUCTURES AT PRIVATE ENCLOSED SPACES, ROOF TERRACES AND BALCONIES

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Introduction

1. "Common Property" is defined in Section 2(1) of the Building Maintenance Strata Management Act ("BMSMA"), while Section 33 of the BMSMA empowers management corporations to make by-laws for the exclusive use or enjoyment of the whole or any part of the common property upon conditions specified.

2. Residential units within strata titled developments commonly include spaces within the strata boundaries of the units, namely private enclosed spaces ("PES") at the ground floor, roof terraces at the top floors, and some open balconies.

3. The High Court in *Wu Chiu Lin v The Management Corporation Strata Title Plan No. 2874* [2018] SGHC 43 has provided guidance on the installation of structures at such spaces by subsidiary proprietors, in its application of the definition of common property, and exclusive use of such spaces.

Background

4. The development known as Sunglade consists of various strata units, some with PES at the ground floor, and some with roof terraces. Each of the PES and roof terraces had, within the strata boundaries of the respective lots, a trellis structure which was marked on the strata title plan as part of the common property.

5. At an Annual General Meeting of the Management Corporation on 28 May 2016, the general body passed a special resolution to make a by-law stating the "*approved design*" for the installation of coverings over all PES trellises and roof trellises, subject to certain conditions. The resolution was passed by a majority of 83.06% of the votes cast by share value.

6. However, the Management Corporation subsequently rejected applications for the installation of such coverings on the ground that the trellises were common property and therefore such coverings would amount to exclusive use of common property, which required the passing of a 90% resolution if such exclusive use was for a period exceeding three (3) years.

7. In an application to the Strata Titles Board in STB No. 86 of 2016, subsidiary proprietors of a total of twelve (12) strata units within Sunglade ("the Applicants") sought orders from the Strata Titles Board that they be permitted to install coverings over their respective PES trellises and roof trellises in accordance with the conditions stated in the by-law made on 28 May 2016. Of the twelve (12) units, three (3) were penthouse units with roof terraces (including the Appellant's), and nine (9) were ground floor units with PES or balconies.

8. After mediation, the Management Corporation conceded that installation of the coverings at the PES and balconies of the nine (9) ground floor units constituted the installation of a safety device for the improvement of safety within the said strata lots under Paragraph 5(3) of the Second Schedule of the Building Maintenance (Strata Management) Regulations 2005, and consented to an Order by the Strata Titles Board that the subsidiary proprietors of these nine (9) ground floor units be permitted to install the coverings.

9. The Management Corporation made no similar concession for the three (3) penthouse units and the application by the subsidiary proprietors of these penthouse units proceeded for hearing. The Management Corporation stated its position as follows:

"It should be stated that the intention of the Respondent is to ensure that the purported approval granted to the Applicants by way of the Resolution is valid and regular. It is not to unreasonably prohibit the Applicants from installing coverings on the trellises. The Respondent recognizes that 83.06% of the general body voting at the 11th AGM had voted in favour of the Resolution.

The Respondent recognises that a majority of the general body had voted in favour of the Resolution at the 11th Annual General Meeting to allow the subsidiary proprietors of the ground floor and top floor strata lots to install coverings on the Trellises above their respective strata lots.

In view of the fore-going, the Respondent seeks the Board's guidance and welcomes the determination by the Board on the crux of the dispute (i.e. whether the trellises constitute common property and whether the installation of coverings over the Trellises by the subsidiary proprietors would constitute exclusive use pursuant to Section 33(1) of the BMSMA) and will stand guided by the Board's decision."

10. Following directions given by the Board, there was an Agreed Statement of Facts followed by Further Agreed Facts and Documents. Parties were directed to file written submissions and the Board directed as follows:-

"For the hearing, the issue identified is whether the installation of the coverings over the trellises will amount to exclusive use of common property".

11. On 23 May 2017, the Strata Titles Board dismissed the application by the subsidiary proprietors of the three (3) penthouses on the grounds that:

a. The by-law, other than setting out the specifications and conditions that had to be complied with by subsidiary proprietors before coverings could be installed, did not permit or authorize the installation of the coverings;
b. While the trellises were not used in the installation of the coverings, the coverings will be anchored to the wall of the building;
c. This wall is an exterior wall and is part of the common property;
d. There is exclusive use of common property when the coverings are installed over the trellises; and
e. A by-law pursuant to a 90% resolution pursuant to Section 33 BMSMA would be required.

The Appeal

12. The Appellant appealed to the High Court against the decision of the Strata Titles Board. The Management Corporation was unrepresented and did not take a position in the appeal.

13. In the appeal, the Appellant raised the following points of law:

    a. The Strata Titles Board, having decided that the only issue for determination *was "whether the installation of the coverings over the trellises would amount to an exclusive use of common property"*, and having found in favour of the Applicants on this point after hearing submissions, namely that the trellises were in fact not used in the installation of the coverings, erred in law in nevertheless dismissing the application;

    b. The Strata Titles Board erred in law when it premised its decision on the understanding that the Respondent *"did not permit or authorize the installation of the coverings*" when it is undisputed and in fact agreed by both the Applicants and the Respondent that at the 11th Annual General Meeting ("AGM") on 28 May 2016, the Respondent had by a 83.06% vote permitted and authorized the installation of the coverings;

    c. The Strata Titles Board erred in law in holding that the wall within the Applicants' lots to which the coverings would be attached was part of common property, given that it was clearly comprised within the Applicants' strata lots, not marked as common property, and when no evidence was adduced by the Respondents that the wall was part of the common property.

    d. The Strata Titles Board erred in law in holding that the installation of coverings within the Applicants' lots, anchored to the wall within the Applicants' lots, constituted exclusive use of the said walls, when this was never the Respondents' case, was not an issue that the Board decided on 22 February 2017 needed to be determined and was never argued by the Respondents (until their Reply Submissions dated 7 April 2017).

    e. The Strata Titles Board, having agreed that it is not necessary for a subsidiary proprietor to procure a by-law for the exclusive use and enjoyment of common property when this use will not unreasonably interfere with the use and enjoyment by others, and in the absence of any evidence that the coverings would unreasonably interfere with the use and enjoyment of common property by others, erred in law in holding that a by-law for the exclusive use and enjoyment of common property was required for the installation of the coverings.

    f. The Strata Titles Board erred in law in failing to consider and address the other alternative arguments and submissions by the Applicants including but not limited to the fact that the Respondents had unreasonably refused to allow the Applicants' improvement when:

        i) The Respondents had allowed the subsidiary proprietors of all ground floor units to build the same structure over the trellises in their Private Enclosed Space (PES); and

        ii) The Respondents had taken no action against at least 6 or 7 other subsidiary proprietors who had, without approval, built structures over their rooftop trellises.

14. After hearing submissions from the Appellant on 14 August 2017, the High Court reserved judgment. On 28 February 2018, the High Court dismissed the appeal.

The Point of Law Issue

15. The High Court agreed with the Appellant that the appeal did raise points of law within the meaning of Section 98(1) BMSMA such that there was a sound basis for the High Court to consider all of the grounds raised by the Appellant.

The Validity of the Trellis By-Law Issue

16. The High Court held that the Strata Titles Board was correct to premise its decision on the understanding that the trellis by-law had not in fact permitted the Appellant to install the coverings over the roof trellises. The High Court opined that *"it would be absurd for the Board to ground any analysis in respect of the STB application on the assumption that the trellis by-law passed was already a valid authorization for the installation of the coverings, given that the very question that the Board had been tasked with answering was whether such by-laws had been validly passed"*.

The Excess of Jurisdiction Issue

17. The High Court did not think that the Strata Titles Board was acting in excess of its jurisdiction. The High Court felt that:

a) The issue framed by the Board was broad enough to encompass not only a finding regarding whether the trellis per se is common property, but also a finding regarding whether the wall to which the covering would be attached is common property; and

b) In any event, the Management Corporation ultimately made the submission that the installation of the coverings over the trellises amounted to exclusive use and enjoyment of the Applicants' external walls in its final set of written submissions on 7 April 2019, about a month before the oral hearing, so it should have been open to the Appellant to deal with this issue.

The Exclusive Use and Enjoyment of Common Property Issue

18. The High Court considered this fourth issue to be arguably the pith and marrow of the dispute.

19. Firstly, the High Court referred to the wall to which the covering would be attached as an *"external wall"*.

20. Secondly, although the High Court accepted that the coverings were installed at a location and height within the Applicants' strata lots and that unlike the trellis structures the walls were not demarcated as common property, the Court held that external walls are clearly meant to be construed as common property. The Court referred to the decision in *Management Corporation Strata Title Plan No. 367 v Lee Siew Yuen and another* [2014] 4 SLR 445 and commented that *"the mere fact that the external wall of a strata title lot is physically located within the boundaries of the lot in question cannot ipso facto lead to the conclusion that the external walls in question to which the coverings are to be permanently attached does not constitute common property*". On the Appellant's argument that that part of the wall was not demarcated as common property (as compared to the trellis structure), the Court held that although it should follow as a matter of common sense that areas demarcated as common property should be considered common property, it does not follow that areas not demarcated as common property cannot be considered common property as there could be a variety of reasons why some areas might not have been so demarcated.

21. The High Court opined that *"a wall that is outward-facing and visible from the outside of a strata lot should indeed be considered a part of the development that is used or capable of being used or enjoyed by occupiers of two or more strata lots, such that it falls within the second limb of the definition of "common property" under s 2(1) of the Act".* The Court added that *"the second limb of the definition of "common property" under s 2(1) of the Act is evidently meant to be construed in a very broad fashion, such that even prospective intangible forms of interaction by subsidiary proprietors with a particular area of a development that may result in them deriving some form of benefit will be sufficient for that area to satisfy the second limb"*.

22. The High Court held that *"following the installation of the coverings, the enjoyment of other subsidiary proprietors of parts of the external walls of the penthouse units would be affected. This would thus constitute a use of parts of the external walls by the Applicants who install the coverings to the exclusion of the other subsidiary proprietors".*

23. The High Court held that s 33(1) and s 63(c) are provisions that contain separate and independent obligations to be fulfilled. The Court concluded that *"while the Applicants' installation of coverings over the roof trellises might not amount to an unreasonable interference of the use or enjoyment of others of the external walls of the penthouse units, it would still be necessary for the Applicants to request for the Management Corporation to make a by-law pursuant to s 33(1) authorizing them to use and enjoy the external walls of the penthouse units, given that the installation of the coverings amount to the use and enjoyment of the external walls to the exclusion of others"*.

The Unreasonable Refusal to Consent Issue

24. Finally, the High Court found that the Management Corporation did not unreasonably refuse to consent to the Applicants' proposal.

25. The High Court considered that the Board's finding that the installation of coverings over the roof trellises would indeed constitute an exclusive use and enjoyment of common property would ipso facto constitute good reason for the Management Corporation's refusal to consent to the Applicants' proposal to install the coverings in the absence of a valid by-law.

26. As regards the argument that the ground floor units were allowed by the Management Corporation to install the coverings, the Court pointed out that the Management Corporation had agreed that *"such an installation constituted the installation of safety devices for the improvement of safety within the ground floor units as provided for by the prescribed by-law reflected in para 5(3) of the Second Schedule to the Regulations*" but *that "the same clearly cannot be said of the installation of coverings over the roof trellises, given that the penthouse units are not being afflicted with the problem of killer litter that the subsidiary proprietors of the ground floor units have been having to endure"*.

27. The Court added that *"while the Management Corporation should certainly endeavor to enforce the rules regarding the exclusive use and enjoyment of common property uniformly among all the subsidiary proprietors in the Development, the solution cannot possibly be to eschew the enforcement of the rules just because there are some who have defied them. This would make a mockery of the existing legal framework governing the exclusive use and enjoyment of common property enshrined within the Act".* The Court added that *"two wrongs do not make a right".*

Implications of the Decision

28. There are a number of implications from this decision.

29. Firstly, where a court or tribunal identifies the issue to be decided and directs parties to make submissions on the issue, the scope of the issue identified must be carefully considered. Where one of the parties subsequently makes a submission that is arguably outside the scope of the issue that has been identified to be decided, the other party should address it regardless.

30. Secondly, subsidiary proprietors who carry out works, or intend to do so, with the express consent of the Management Corporation, even if the said consent is by way of a by-law passed by the Management Corporation at a general meeting, must ensure that the by-law was validly made. If it transpires subsequently that the by-law was not validly made, then the consent was not validly given, and there was in fact no approval for the works.

31. Thirdly, walls physically located within the strata lots, in the PES, roof terraces and balconies, can be considered "*external walls*" and part of the common property, if they are outward-facing and visible from the outside of the strata lot. A number of difficulties arise from this:-

    a. Management corporations may have to maintain these walls and keep them in a state of good and serviceable repair, even if they are located within the individual strata lots;

    b. Management corporations may be liable for losses resulting from a failure to maintain such walls adequately, such as any water seepage into strata lots from these walls;

    c. Subsidiary proprietors cannot mark, paint, drive nails or screws into such walls without the prior written approval of the management corporation; and

    d. The installation of structures such as awnings (whether fixed or retractable), air conditioning compressors, laundry racks, lights or other similar fixtures on such walls will require an exclusive use by-law under Section 33(1) BMSMA.

32. Finally, the ruling that any use and enjoyment of common property which is exclusive in nature requires a by-law under Section 33(1) BMSMA, even if the usage or enjoyment does not interfere unreasonably with another person's usage or enjoyment of the common property, will give rise to practical difficulties. Apart from structures and fixtures on the walls of the PES, roof terraces and balconies, subsidiary proprietors commonly install structures and fixtures on walls outside their unit, such as lights, doorbells and decorative items. There may be a shoe cabinet placed on the common corridor outside the unit or a welcome sign affixed onto the wall beside the main door. All these now require the subsidiary proprietors to obtain a by-law under Section 33(1) BMSMA. Where the use or enjoyment will exceed 3 years, as is often the case, a 90% resolution is required. This level of consent is disproportionately high, considering that even for fundamentally important matters that affect all subsidiary proprietors, such as collective sales, a lower level of consent is sufficient.

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