

## HIGH COURT SETS OUT APPLICABLE TEST UNDER S114 BMSMA FOR MCST TO GAIN ACCESS TO STRATA UNIT TO DETERMINE IF WORKS ARE NECESSARY

### Introduction

1. When subsidiary proprietors (SPs) in strata-titled developments want to renovate their unit, they are generally required to apply the management corporation (MCST) for approval and obtain such approval, before proceeding. It is also common that as a condition of approval, the SPs to agree to an inspection of the unit by the MCST after the completion of works.
2. Where SPs have undertaken work that affects the common property (including structural elements of the building) or breaches certain other provisions of the Building Maintenance and Strata Management Act 2004 (BMSMA), the MCST can enter into the unit to undertake remedial / rectification work and recover the cost of the remedial / rectification work from the SPs.
3. This is pursuant to Section 30 BMSMA, which empowers the MCST to undertake certain works inside the unit (and later recover the cost of the works from the SPs), and Section 31 BMSMA, which empowers the MCST to enter a unit to carry out those works. Works under Section 30 BMSMA include works to remedy interference with support or shelter provided for another lot or common property, or to rectify cracks in a floor or wall. No order of the Strata Titles Board or the Courts is required for the MCST to enter a unit to do these works.
4. However, MCSTs do not always know what work SPs do in their unit, and may have concerns that some of the works affect the common property or structural elements of the building, or breach a provision of the BMSMA. In a typical renovation, the MCST ascertains these things during the post-renovation inspection of the unit, but where the SPs refuse to allow such inspection, the MCST has to apply to the Strata Titles Board (STB) under Section 114 BMSMA for an order that the SPs grant the MCST access to a strata lot to *determine* if works under Section 30 BMSMA are needed.
5. Section 114(1) BMSMA provides that: “A Board may make an order requiring a subsidiary proprietor or an occupier of any lot or part of a lot to allow a management corporation ... access to the lot or part of the lot for the purpose of carrying out any work mentioned in section 30 or determining whether any such work needs to be carried out.” (Emphasis added)

10 October 2024

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6. In *The MCST Plan No. 2005 v Tan Wei Loong and another* [2024] SGSTB 2, the MCST of Highland Centre sought and obtained an order from the Strata Titles Board under Section 114 BSMA for access to a strata lot to *determine* if works under Section 30 BMSMA were needed, after the SPs refused to grant the MCST access to the unit for a post-renovation inspection. This was the first time an application has been made to the Strata Titles Board for such an order and the first time such an order has been granted.
7. The MCST was represented by Mr Daniel Chen and Mr Drashy Trivedi of Lee & Lee in the STB application where the order for access was obtained, as well as in an appeal to the High Court by the SPs which was dismissed (*Tan Wei Loong v The MCST Plan No. 2005* HC/TA 5/2024).

## Factual Background

8. The SPs applied for and obtained approval for renovation of their unit in August 2022. This included approval for the hacking of some non-structural walls.
9. On or about 26 August 2022, an employee of the MCST's Managing Agent went into the unit to inspect it when the SPs complained of a burst pipe. The employee remembered seeing most of the internal walls hacked
10. A professional engineer engaged by the MCST later opined that "*If some or all of those surfaces that the managing agent observed to have been hacked were actually hacked, then there is a risk that some structural elements of the building may have been hacked and damaged*".
11. The SPs had agreed to in their renovation application to give access to the MCST after completion of the renovation works for an inspection to be made. However, no such inspection was permitted by the SPs even though the renovation works were supposed to have been completed by March 2023.
12. Uncertain as to the precise nature of the works done by the SPs, whether the works had caused any damage to the common property or breached other provisions of the BMSMA, and whether section 30 BMSMA works were necessary, the MCST by its lawyers requested access to inspect the strata lot, However, the SPs refused to allow access. The MCST therefore applied to STB under Section 114 BMMSA for access to a strata lot to *determine* if works under Section 30 BMSMA were needed.

## Proceedings before the STB

13. The central issue before the STB was what the appropriate legal test was under Section 114 BMSMA for access to a strata lot to *determine* if works under Section 30 BMSMA were needed. Since this was the first time such an order was being sought, a novel formulation was required.
14. The MCST argued that the test should take references from cases from New South Wales, including *Owners' Corporation SP 70294 v Merlo* [2005] NSWCTTT 283, where a tribunal held that access should be granted where works were carried out in a unit, there may have been damage to common property but there was no evidence, and the owner's corporation (similar to MCST) was unable to determine from outside the unit whether there was such damage.

15. The SPs argued for a higher threshold similar to that in Anton Piller or Search Orders – requiring a strong prima facie case of unauthorized works based on probative evidence. The SPs argued for the high bar on the basis that the privacy of the SPs had to be respected.
16. The STB did not adopt either suggestion, holding instead that *“If the (MCST) can show that there is some concern over the areas within the (SP)s’ unit that may have impact or affect parts of the common property, the (MCST) should be entitled to inspect the Unit.”*
17. On the facts, STB held that the recollection of the employee of the Managing Agent was *“sufficient to constitute some probative evidence to form the basis for the request for access to the Unit”*, although it was unclear what this was found to be probative evidence of.
18. The Board concluded by stating that it was *“satisfied that the evidence led by the (MCST) is sufficient, with the low threshold required to trigger the operation of section 114 of the BMSMA and the Board is minded to grant the order sought”*.

## Appeal in the High Court

19. The SPs, dissatisfied with the STB’s decision, appealed to the High Court, chiefly on the basis that the STB did not make clear what test it had adopted and the level of proof required.
20. The SPs maintained that the strong prima facie case of unauthorized works based on probative evidence was needed for the test under Section 114 BMSMA.
21. The MCST responded that the STB had identified the test as being *“If the (MCST) can show that there is some concern over the areas within the (SP)s’ unit that may have impact or affect parts of the common property, the (MCST) should be entitled to inspect the Unit.”*, and that the level of proof was on a balance of probabilities.
22. The High Court did not accept the SPs’ formulation of the test, holding that setting the test at *“strong prima facie case”* sets the standard too strongly in favour of the individual subsidiary proprietor.
23. However, the High Court accepted that the Board failed to formulate correctly the test to be applied under the second limb of Section 114(1) of the BMSMA, since it dealt with the determination of whether works under Section 30 of the BMSMA are necessary, not whether common property is impacted or affected.
24. The High Court therefore held that: *“The test should be whether the management corporation applying for an order under the second limb of s 114(1) has established that it has reasonable concerns formed on a reasonable basis that it requires access to the lot in order to determine whether any work mentioned in s 30 of the BMSMA may need to be carried out. And the reasonable basis on which such reasonable concerns may be formed would have regard not only to specific articulatable facts that the management corporation can prove on the balance of probabilities but also to the reasonable inferences to be drawn from those facts.”* (the Reformulated Test)

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25. The High Court concluded that the Board had not made an error of law, even on the Reformulated Test, given the facts that were put before it, the evidence that was put before it and the reasonable inference to be drawn from that evidence. The High Court therefore dismissed the SP's appeal.

## Conclusion

26. This decision underscores the principle that MCSTs must be allowed to investigate potential breaches of the BMSMA when there is reasonable concern that works may have amounted to such breaches. The threshold for granting access is not as high as a “*strong prima facie case*,” but the MCST must demonstrate sufficient grounds to justify such inspection.

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