IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 280

Registrar's Appeal (State Courts) No 23 of 2022

Between

Prem N Shamdasani

… *Appellant*

And

Management Corporation Strata Title
Plan No 0920

… *Respondent*

In the matter of District Court Originating Summons No 177 of 2021

In the matter of Sections 124(1), 37(4) and 88(1) of the Building Maintenance and Strata Management Act (Cap 30C)

Between

Prem N Shamdasani

… *Plaintiff*

And

Management Corporation Strata Title
Plan No 0920

… *Defendant*

JUDGMENT

[Land – Strata titles – By-laws]
[Land – Strata titles – Building Maintenance and Strata Management Act]

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4 November 2022 Judgment reserved.

Goh Yihan JC:

Introduction

1 The appellant is the subsidiary proprietor of the property at 75 Meyer Road, Hawaii Tower, Singapore 437901 ("the Unit"). He carried out extensive renovation works at the Unit. Among other things, the appellant removed the sliding doors at the balconies of the living room and master bedroom. He also installed aluminium frame glass windows at the balcony edge. He finally intended to replace an air-conditioner condenser on the external wall of the building. However, these works had not been approved by the respondent, which is the managing corporation of Hawaii Tower. The respondent stopped these works, which I shall term the "Unapproved Works". The respondent says that these Unapproved Works not only affected the building's façade but also affected the structural integrity of the building.

2 Dissatisfied with the respondent's actions, the appellant sought an order from the District Court that the defendant be restrained from stopping the Unapproved Works. The appellant also sought damages from the defendant occasioned by the delay to the Unapproved Works. However, the learned District Judge ("DJ") dismissed all the appellant's claims. The appellant now appeals against the DJ's decision in *Prem N Shamdasani v Management Corporation Strata Title Plan No 0920* [2022] SGDC 161 ("the GD") except for her decision on damages. Mr Gregory Vijayendran SC ("Mr Vijayendran"), who was instructed for this appeal and who appeared on behalf of the appellant, confirmed at the hearing before me that the appellant was no longer pursuing his claim for damages of $31,223.33 with interest from the respondent. As such, the appeal centred solely on whether the respondent was justified in not allowing the Unapproved Works.

3 Having heard the parties on 3 October 2022 and taken some time to carefully consider the matter, I allow the appeal in its entirety except in relation to the question of damages since the appellant has not pursued that point in the present appeal. I explain the reasons for my decision in this judgment.

Background facts

Overview

4 The background facts are largely undisputed. Hawaii Tower is a 21-storey freehold residential condominium development ("the Development") comprising 135 units situated at 73 to 77 Meyer Road, Singapore. The Development was completed in 1984. The appellant has been living in the Development since June 1995. Apart from the Unit, the appellant also owns another unit in the Development at 77 Meyer Road. That other unit is tenanted.

For present purposes, this is what the façade of Stack 1 of Block 75 (where the Unit is located) looks like from a reasonable ground level:[1]

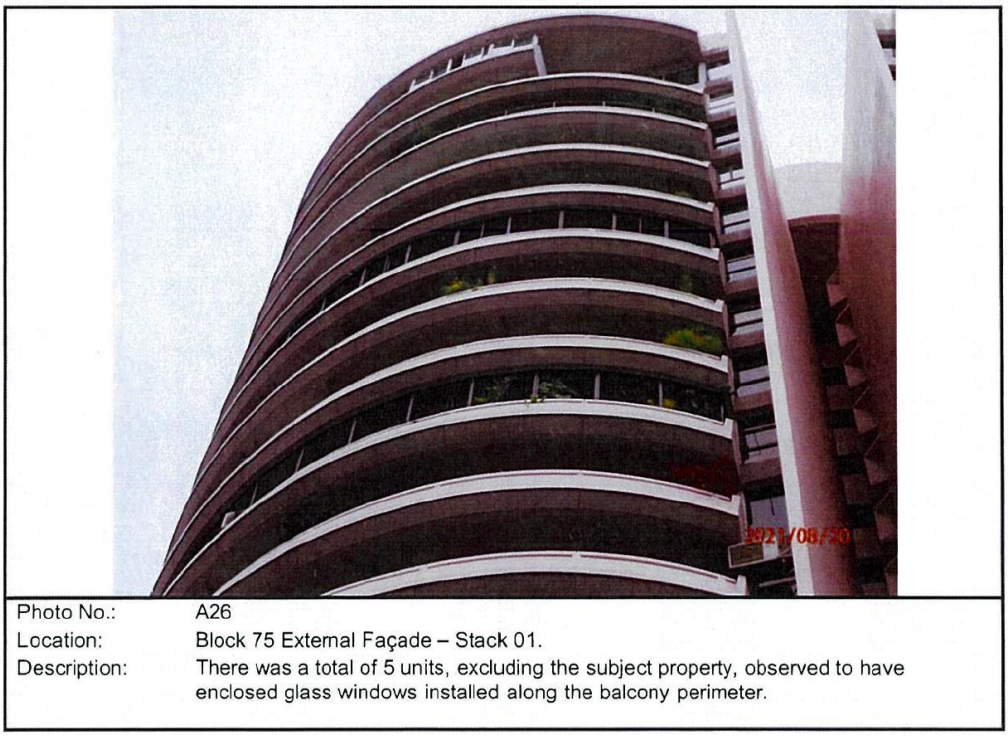


Photo No.:	A26
Location:	Block 75 External Façade – Stack 01.
Description:	There was a total of 5 units, excluding the subject property, observed to have enclosed glass windows installed along the balcony perimeter.

5 Importantly, the respondent had passed Additional By-Laws in 1990 and 2014 that are relevant to the present case. First, on 15 March 1990, the respondent passed the 1990 Additional By-Laws, of which Clauses 6.0 and 7.0 are relevant:[2]

> No. 6.0
>
> No air-conditioning unit shall be installed in or otherwise fixed to the common areas or any part thereof thereby affecting the general façade of the building except with the prior approval in writing of the Management Corporation.

[1] Affidavit of Chin Cheong dated 3 November 2021 at p 48.

[2] Affidavit of Tau Jia Wu dated 21 October 2021 at p 191.

> No. 7.0
>
> No balcony grilles shall be installed except with the prior approval in writing of the Management Corporation.

6 Second, on 15 November 2014, the respondent passed the 2014 Additional By-Laws, pursuant to s 32 of the Building Maintenance and Strata Management Act 2004 (2020 Rev Ed) ("BMSMA") at the general meeting held in November 2014. These 2014 Additional By-Laws therefore predate the appellant's application to renovate the Unit. While the 2014 Additional By-Laws were passed before the latest version of the BMSMA, nothing turns on this in the present appeal.

7 For present purposes, Part III of the 2014 Additional By-Laws provides, among others, as follows:

> 3. Plans for the renovation works are required to be submitted to the Management Corporation. If changes are required, updates to the plans should be submitted to the Management Corporation. The Management Corporation must approve all plans prior to the commencement of works.
>
> …
>
> 6. In applying for approval, the subsidiary proprietor or occupier and contractor undertake to abide by and be subjected to the terms and conditions as laid out in Appendix C.
>
> …
>
> 9. A Subsidiary Proprietor or occupier shall NOT at all times:-
>
> > a. make any alterations to the balcony glass doors, windows installed in the external walls of the subdivided building without having obtained the written approval of the Management Corporation.
> >
> > b. make any alterations or additions to any balcony of his lot without the approval in writing of the Management Corporation.
> >
> > c. hack off all or any part thereof of beams, slabs and columns.

> d. raise existing floor level, e.g. to split the level of any portion of the existing floor either by adding concrete platform and/or timber platform.
>
> e. install awnings or other sun-shading devices or projections outside the unit, including the balcony.
>
> f. brick up or block up service ducts and/or pipes.
>
> g. re-locate windows,
>
> h. lay any type of flooring outside the flat, e.g. on common lobby or corridor area or staircase landing just outside the entrance of each flat.
>
> The Management Corporation may ask for any such works done to be rectified to the original. Such a requirement will apply even if the alterations were made by a prior Subsidiary Proprietor.
>
> …
>
> 12. Only window grilles of anodized aluminium in Amplimesh Code No 104 and/or 106 OR Invisible grille will be allowed to be installed subject to the prior written approval of the Management Corporation.
>
> …
>
> 17. During the progress of the renovation, additional and alteration works, the Estate Supervisor, management Council Members or the representatives of the Managing Agent reserve the right to conduct inspection of the unit concerned. …
>
> 18. If the by-laws or requirements placed by the Management Corporation from time-to-time are not observed by the Subsidiary Proprietor or his Agents or Contractors, the Management Corporation at its discretion may require all works in the unit to cease and stop all agents, contractors and workers from entering the condominium, or asking them to leave if they are already in the condominium.

The Appendix C referred to by Clause 6 of Part III of the 2014 Additional By-Laws comprises the prescribed "Application Form for Additional & Alteration Works", a summary of the relevant clauses from the 2014 Additional By-Laws, and extracts of the relevant clauses from the 2014 Additional By-Laws. Nothing in the present appeal turns on the contents of Appendix C, except in so far as

such content is replicated from the relevant clauses of the 2014 Additional By-Laws set out above.

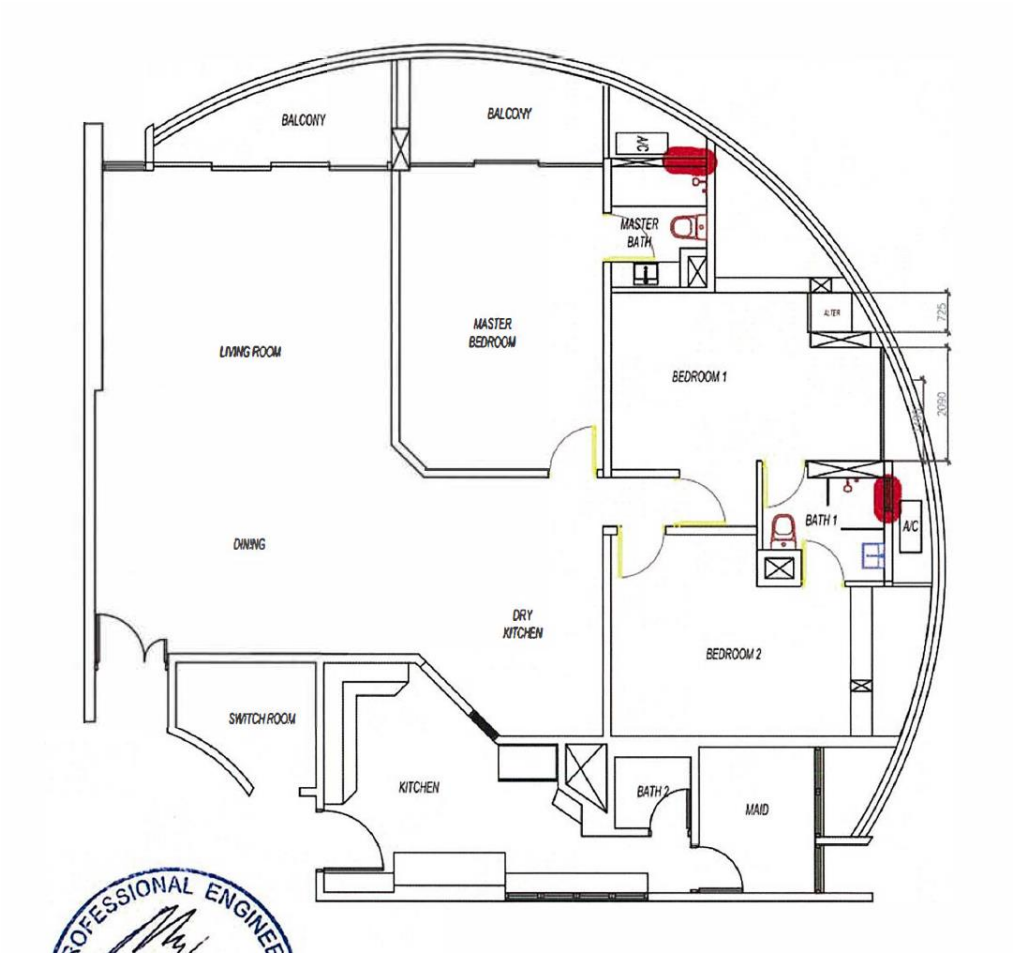
8 Rather than a strict chronological order, I organise my discussion of the background facts along the following themes: (a) the nature of the Unapproved Works, (b) the appellant's reinstatement works, and (c) the appellant's request for past renovation records.

The nature of the Unapproved Works

Overview

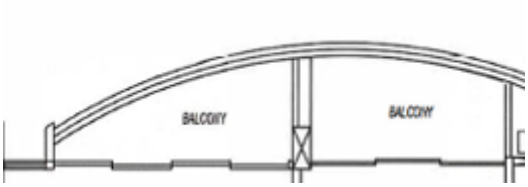
9 On 29 January 2021, the appellant applied to the respondent to carry out extensive renovation to the Unit. The appellant's application was accompanied by an attachment with a description of the works to be carried out. There was a total of ten work items. These did not include the Unapproved Works, which deserve further explanation. In this regard, it would have been helpful had a floorplan of the Unit been more clearly referred to in the affidavits. This would have helped the court visualise and contextualise what may be difficult to understand through a written description. For example, the description of "the replacement of the air-conditioner condenser unit placed on the external wall" begs several questions. Where is this external wall relative to the Unit? How does the wall feature against the external façade? Indeed, I eventually located the floorplan in the appellant's second affidavit (which had been appended for a tangential purpose). This is then a floorplan of the Unit:[3]

[3] Second Affidavit of Prem N Shamdasani dated 3 November 2021 at p 19.



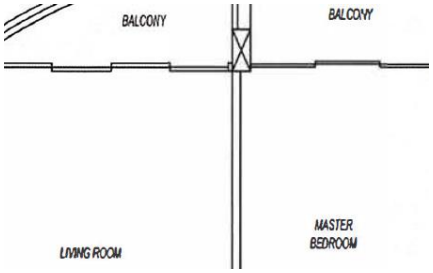
10 It becomes much easier to visualise and contextualise the Unapproved Works by reference to this floorplan.

(a) First, the appellant had installed aluminium framed glass windows behind the approved window grilles along the balcony edge. This, I understand to refer to the two curved windows at the top of this floorplan, where the two balconies are referred to:



For convenience, I will term this work item as the "Aluminium Glass Windows Installation".

(b) Second, the appellant had removed the sliding doors of the living room and master bedroom. This, I understand to be the sliding door between the areas marked "Balcony" and "Living Room"/"Master Bedroom" in the floorplan. More specifically, the sliding doors, which have been removed, are represented by the jagged line between the areas just mentioned:



For convenience, I will term this work item as the "Sliding Doors Removal".

(c) Third, the appellant had intended to replace the air-conditioner condenser unit placed on the external wall. Mr Vijayendran and Mr Leo Cheng Suan ("Mr Leo"), who appeared for the respondent, confirmed that because the appellant had already removed his existing air-conditioner condenser unit and not installed his new one, there are no photographs of this particular work. Be that as it may, the parties pointed

me to photographs in the record which showed how the replacement air-conditioner condenser unit would have looked like, had it been installed. For example, this photograph below, which, while not showing the air-conditioner condenser of the Unit, shows a similar example one storey above the Unit:[4]

Photo No.:	A27
Location:	Block 75 External Façade – Stack 01.
Description:	There was a total of 5 units, excluding the subject property, observed to have enclosed glass windows installed along the balcony perimeter.

Similarly, there are other photographs in the record which show similar air-conditioner condenser units in other units within the Development,[5] of which I reproduce one:

[4] Affidavit of Chin Cheong dated 3 November 2021 at p 49.

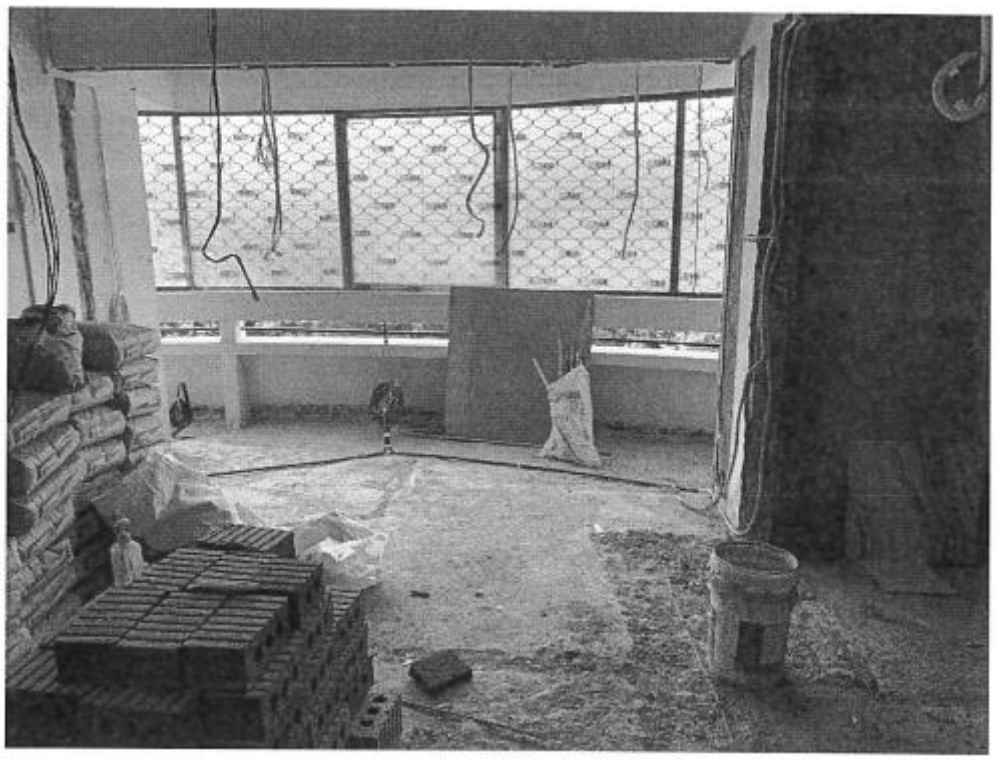
[5] Agreed Bundle of Documents, Vol I at pp 255 and 256.

For convenience, I will term this work item as the "Air-Conditioner Condenser Replacement".

The Aluminium Glass Windows Installation and the Sliding Doors Removal

11 The first two Unapproved Works, *viz*, the Aluminium Glass Windows Installation and the Sliding Doors Removal, had come about in the following manner. After the appellant's application to commence renovation, Mr Loh Kok Leong ("Mr Loh"), the respondent's condominium manager, verbally approved the application on 29 January 2021 itself.

12 On 3 February 2021, the renovation began with hacking works. In the course of the works, the appellant's contractor removed the sliding doors at the balconies of the living room and master bedroom. This can be seen in the photograph below. Compared against the floorplan, the sliding doors would have been where the rectangular opening that occupies about three-quarters of the photograph, from left to right:[6]



As can be seen, the sliding doors are some distance away from the balcony edge.

13 In addition, the contractor also hacked "the half-walls within [the Unit]". More specifically, the contractor "hacked an opening on the master and

[6] Affidavit of Tau Jia Wu dated 21 October 2021 at p 165.

common bathroom reinforced concrete wall below the window, which is part of the building façade".[7]

14 The appellant has said that he removed the sliding doors at the balconies so that he could install aluminium framed glass windows along the balcony edge. Apparently, the plan to install the glass windows had only materialised after the renovation application had been approved by Mr Loh on 29 January 2021. The appellant's explanation for why he had not sought further approval before starting work was that he "inadvertently forgot to update the renovation form" that he had earlier submitted.[8] The appellant has maintained this reason for the present appeal.[9]

15 On 26 February 2021, the respondent stopped all works at the Unit. It also prevented the appellant's contractor from accessing the Unit. Mr Loh informed the appellant that the respondent objected to the removal of the sliding doors at the balconies of the living room and master bedroom, as well as the installation of the aluminium framed glass windows behind the existing window grilles. This was because these works would affect the façade of the Development.

16 The appellant could not make sense of the respondent's objections. This was because he was simply doing what he had done to the balconies of two of the bedrooms in the Unit some 18 years ago. Indeed, the appellant had renovated the Unit on two previous occasions. He had carried out the following works without the respondent objecting: (a) affixing an air-conditioner condenser unit

[7] Affidavit of Tau Jia Wu dated 21 October 2021 at paragraph 9.

[8] Affidavit of Prem N Shamdasani dated 13 September 2021 at paragraph 10.

[9] Appellant's Written Submissions at para 11.

on an external wall some 25 years ago, (b) installing window grilles in the balcony some 24 years ago for the living room, master bedroom and two other bedrooms, and (c) removing the balcony sliding doors and installing aluminium framed sliding glass windows at the balconies of two of the bedrooms some 18 years ago. However, the respondent did not have any record of the appellant's application for approval to do these works.

17 Be that as it may, to restart the renovation, the appellant then asked Mr Loh if the respondent would be amenable to him installing foldable and frameless glass curtains to the balcony of his living room and master bedroom ("glass curtains"). According to the appellant, the glass curtains would be less visible from the outside as they did not have any frames. However, Mr Loh informed the appellant that the respondent would likewise not allow the glass curtains. Instead, for the renovation to continue, the respondent would require the appellant to first carry out reinstatement works. It was then that the appellant formally wrote to the respondent to seek its consent for the removal of the sliding doors and the installation of the glass curtains behind the window grilles.

18 On the evening of 26 February 2021, the appellant emailed Mr Loh, seeking the respondent's approval to install glass curtains to the balconies of the living room and master bedroom. The appellant explained that he would like to do this to (a) make the premises "dengue-safe" for his elderly relatives who visited him and spent time at the balcony, and (b) to keep out the construction noise and dust from the nearby constructive site at Meyer Rise.

19 On 2 March 2021, Mr Loh replied that the respondent did not approve the request to install glass curtains as this was deemed to be changing the building façade. The appellant continued to press his case. He emphasised that the glass curtains which he intended to install behind the existing grilles are

frameless and would not detract from the appearance of the building. It would also provide an additional barrier against haze. In addition, there were numerous other units in the Development that had windows installed at their balconies. The respondent remained unmoved and maintained its disapproval of these works.

The Air-Conditioner Condenser Replacement

20 The third of the Unapproved Works, *viz*, the Air-Conditioner Condenser Replacement, had come about in the following manner. While the renovations were going on in the first instance, the appellant decided to replace the old air-conditioner condenser that he had previously affixed to the external wall of the Unit some 25 years ago. The appellant informed Mr Loh of this decision verbally. Mr Loh apparently told the appellant that this work would be approved, provided that the water discharge from the condenser pipe is rerouted into the Unit.

21 On 16 April 2021, after the respondent stopped all works on 26 February 2021, Mr Loh informed the appellant's contractor that the air-conditioner condenser would not be allowed to be installed on the external wall. Instead, it had to be installed within the Unit. The respondent's reason was that the installation of the new air-conditioner condenser on the external wall poses a hazard to residents. Further, the respondent demanded that the appellant also remove his existing air-conditioner condenser, that is, the one he had intended to replace. However, by this time, the appellant had already removed his old air-conditioning condenser unit.

22 Just as the respondent's reason for disapproving the Aluminium Glass Windows Installation and the Sliding Doors Removal did not make sense to the

appellant, so too did this explanation in relation to the Air-Conditioner Condenser Replacement. This is because the appellant was doing what he had done 25 years ago. Also, the appellant pointed to other units in the Development which had their air-conditioner condensers installed on the external wall in a similar manner. The respondent remained unmoved.

23 Thus, the respondent has maintained its disapproval of the Unapproved Works comprising the Aluminium Glass Window Installation, the Sliding Doors Removal, and the Air-Conditioner Condenser Replacement. This has resulted in the appellant's application to the DJ and the present appeal before me. Having set out the way the Unapproved Works had come about, I turn now to how the parties attempted to resolve the deadlock through the appellant promising to undertake reinstatement works. I should add, however, that after the appellant dropped his appeal in relation to his claim for damages, nothing in the present appeal turns on these reinstatement works.

The appellant's reinstatement works

24 As a result of the respondent's stoppage of the appellant's renovation, the appellant's contractor could not carry out any works between 26 February 2021 and 18 March 2021. Eventually, Mr Loh informed the appellant that he could resume work if he carried out certain reinstatement works as set out in an email dated 18 March 2021 as follows:[10]

> 1) To redo flooring to living and master bedroom and balconies including electric work and plumbing work before can install the new sliding door at the living room and master bedroom.
>
> 2) To reinstate master and common bathroom wall below existing window to original by End April 2021.

[10] Agreed Bundle of Documents, Vol I at p 41.

> 3) To reinstate living master bedroom sliding aluminium door to original position, colour and design by End April 2021.
>
> 4) The Management shall order to cease all works if item 2 and 3 are not completed by End April 2021.

25 However, the appellant did not carry out the reinstatement works. The respondent therefore stopped the works in the Unit again on 10 May 2021. From the limited correspondence adduced in evidence, the DJ found that the appellant had not carried out the reinstatement works even up to 21 May 2021. Indeed, in the respondent's solicitor's reply of 21 May 2021, a further deadline of 4 June 2021 was extended to the appellant to complete the reinstatement works.

26 It appears that a critical issue between the parties was the reinstatement of the master and common bathroom reinforced concrete wall below the window which was part of the building façade. This is item 2 in Mr Loh's email dated 18 March 2021. The appellant's contractor had "hacked an opening on the master and common bathroom reinforced concrete wall below the window, which is part of the building façade"[11] because the appellant wanted to install a "window door" in its place to improve the ventilation in the Unit. The appellant knew this was not part of the approved works. But he went ahead with it as he thought the "window door" would not be visible from the external façade due to the half-height wall at the balcony ledge with window grilles installed.

27 In this regard, the respondent had become concerned that this wall was a structural wall as it was supported by rebars. The appellant obtained the endorsed certification of a professional engineer to support his claim that the hacking of the wall would not affect the structural integrity of the building.

[11] Affidavit of Tau Jia Wu dated 21 October 2021 at paragraph 9.

However, as the DJ found, the certification pertained to an internal wall and not the reinforced concrete wall below the window.

28 Eventually, the Building and Construction Authority ("BCA") inspected and determined that the wall was structural. The BCA therefore directed the appellant to reinstate it. The appellant duly reinstated the wall with a professional engineer's endorsement obtained on 1 November 2021, as required by the BCA.

The appellant's request for past renovation records

29 Given the appellant's feeling that he was being unfairly targeted by the respondent, he verbally requested from Mr Loh the records of all the owners who had made renovation applications since November 2014. This was because he had observed that various units in the Development had installed window grilles and glass windows. This meant that the building had no uniform façade to begin with. He also observed that the other owners had installed their air-conditioner condensers on the external wall without the respondent taking any action against them. Above all, as already mentioned, the appellant wanted these records to satisfy himself that the respondent's current disapproval of the Unapproved Works was not unfairly targeting him.

30 Despite the respondent's earlier refusal to allow the appellant access to the records, the respondent relented once the appellant engaged solicitors who wrote to the respondent on its obligation under s 47(1) of the BMSMA. Upon his inspection, the appellant observed that there are currently a total of 19 units in the Development (excluding the Unit) which had also installed windows at their balconies. The 19 units comprised five units in Block 73, 11 units in Block 75, and three units in Block 77.

31 More significantly, despite being able to access the records all the way back to 1995, the appellant did not find any records of the previous renovations that he had carried out to the Unit about 18 years ago when he removed the balcony sliding doors and installed aluminium framed glass windows in two of the bedrooms of the Unit. There was also no record of him seeking approval for the installation of his air-conditioning condenser on the external wall which he said was done in 1996.

32 Thus, the DJ found that the appellant's inspection of the past renovation records revealed that he had not obtained the requisite approvals for the renovations he had carried out many years ago. However, with respect to the DJ, it is entirely plausible that the appellant had applied to carry out those renovations, but the respondent had lost the records. Indeed, Mr Vijayendran confirmed before me that the appellant's position was that he had applied to carry out those renovations in the past. There were also at least three other units in the Development with missing records of renovation applications for which no explanation has been afforded. Given this fact, I am of the view that the DJ was not correct in finding that the appellant had not made any application for the renovations carried out many years ago.

The parties' general cases on appeal

33 Having set out the background facts, I turn to explain the parties' general cases on appeal. The appellant's general case is that the respondent has been unreasonable in refusing to approve the Unapproved Works. In this regard, the respondent is bound to consider ss 37(3) and 37(4) of the BMSMA in the authorisation of the Unapproved Works. In consideration of those provisions, the appellant submits that it would be unreasonable for the respondent to withhold consent for the Unapproved Works since the uniformity of the building

could no longer be preserved and there is thus no benefit to be gained by the respondent. In particular, the appellant contends that:

(a) First, the Unapproved Works do not affect the appearance of any building within the Development within the meaning of s 37(3) of the BMSMA ("s 37(3)").

(b) Second, and in any event, the Unapproved Works do not detract from the appearance of any of the buildings and is in keeping with the rest of the buildings within the Development within the meaning of s 37(4)(*a*) of the BMSMA ("s 37(4)(*a*)").

(c) Finally, the respondent had impliedly approved or acquiesced to similar works in the past and ought to be restrained from ordering or directing the appellant to remove and/or reinstate the Unapproved Works.

34 Like the position it took below, the respondent says that the appellant's appeal should be dismissed. In essence, the respondent contends that it is entirely justified in its actions against the appellant for the following reasons:

(a) First, the appellant did not include the Unapproved Works in the renovation application on 29 January 2021. There was likewise no application for the hacking of the reinforced concrete wall of the master and common bathrooms.

(b) Second, the appellant therefore did not obtain the respondent's written approval with respect to the Aluminium Glass Windows Installation and the Sliding Doors Removal. This is in breach of the 2014 Additional By-Laws.

(c) Third, by carrying out the Sliding Doors Removal, the appellant had breached the respondent's 2014 Additional By-Laws and s 37 of the BMSMA ("s 37").

(d) Fourth, the Aluminium Glass Windows Installation affects the appearance of the building as the front of the appellant's balcony reflects more sunlight than the other units.

(e) Finally, the Air-Conditioner Condenser Replacement is in breach of the 1990 Additional By-Laws. It also poses a hazard as it might fall and injure innocent passers-by below.

35 Therefore, since the appellant had breached the Additional By-Laws, the respondent was empowered to cease the renovation at the Unit and to require the appellant to rectify the works to their original condition. The respondent had not acted unreasonably in breach of the provisions of the BMSMA. Given that the renovation was stopped with cause, the respondent should not be responsible for the appellant's alleged loss of rental proceeds (which, in any event, is no longer an issue before me).

36 Ultimately, the respondent maintains that it is not targeting the appellant. While the respondent acknowledges that the Development had previous unauthorised structures before the 2014 Additional By-Laws were passed to regulate and control the façade, once the owners had agreed to regulate and control all future renovations, all owners are bound by the same. Otherwise, the respondent says that its authority to manage the Development would be undermined and the situation would worsen. Indeed, the respondent has investigated other cases of breach in the other units. It has acted against at least two cases after taking issue with the appellant's renovation of the Unit.

The appropriate analytical framework and resulting issues

The interaction between ss 37(3), 37(4), 88(1) and 111 of the BMSMA

37 In the course of the hearing, it became apparent to me that the conceptual interaction between ss 37(3) and 37(4) of the BMSMA (which govern a management corporation's power to authorise a subsidiary proprietor's request to effect any improvement to his or her lot), and as between ss 88(1) and 111(*b*) of the BMSMA (which are the remedial provisions), required some clarification. This is not merely a theoretical exercise. Indeed, if I am not able to understand the appropriate analytical framework that underlies all these provisions, it would be difficult to make a properly reasoned decision pursuant to them.

38 I start by setting out ss 37(3) and 37(4) of the BMSMA:

> **37.**—(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.

39 At a general level, as Vinodh Coomaraswamy J held in the High Court decision of *Management Corporation Strata Title Plan No 940 v Lim Florence Marjorie* [2019] 4 SLR 773 ("*Lim Florence Marjorie*") (at [72]), s 37 of the BMSMA requires a subsidiary proprietor to secure a management corporation's approval before carrying out improvements within the ambit of s 37. In this regard, s 37 imposes restrictions and conditions which bind a subsidiary proprietor before he or she can effect any improvement to his or her lot. However, it is important to recognise that ss 37(3) and 37(4) of the BMSMA each play different roles. It is also important to understand their relationship with the remedial provisions.

The different roles for ss 37(3), 37(4) and the remedial provisions in the BMSMA

Whether the subsidiary proprietor is required to seek the management corporation's approval

40 First, s 37(3) of the BMSMA is concerned with whether the subsidiary proprietor is required to seek the management corporation's approval to "effect any other improvement in or upon the lot for the subsidiary proprietor's benefit". Section 37(3) is not concerned with whether the management corporation can or should give such approval. It is merely concerned with whether the subsidiary proprietor needs approval to begin with. The test envisaged by s 37(3) is whether the proposed improvement "affects the appearance of any building comprised in the strata title plan".

41 Determining whether renovations affect the appearance of a building is a factual exercise, undertaken by comparing the façade presented by the flat in question with the façade presented by other similar flats and by all of the flats as a whole (see *Lim Florence Marjorie* at [74]). However, the focus of the test

is not merely to ascertain whether the façade of the subsidiary proprietor's unit post-renovation was similar in look to the façade of the adjoining units, but it must also be compared with the unit's own original façade (see the High Court decision of *Management Corporation Strata Title Plan No 4123 v Pa Guo An* [2021] 3 SLR 1016 at [26]). Thus, for instance, a feature permanently affixed to a balcony, and which resulted in the balcony looking different from its original state, does affect the overall appearance of the building (see the High Court decision of *Management Corporation Strata Title Plan No 1378 v Chen Ee Yueh Rachel* [1993] 3 SLR(R) 630 ("*Rachel Chen*") at [17]). The test applied in *Rachel Chen* (at [17]) in determining whether the sliding windows affect the external appearance of the building depended on "the degree of permanence with which the addition or alteration is annexed to the original structure of the balcony". Ultimately, whether an improvement effected to a particular unit affects the façade of its building is not to be ascertained as a theoretical exercise but from the viewpoint of a *reasonable observer* who looks at the building from a position which is practically possible or likely (see *Lim Florence Marjorie* at [75]).

42 The burden of proof is thus on the subsidiary proprietor to show that his or her proposed improvement does *not* so affect the appearance of any building, thereby absolving the need for the management corporation's approval. If the subsidiary proprietor cannot discharge this burden, then he or she would need, pursuant to s 37(3), to seek the management corporation's approval to effect the proposed improvement.

Whether the management corporation is empowered to give the approval sought

43 Second, if the subsidiary proprietor requires the management corporation's approval to effect the proposed improvement, s 37(4) of the BMSMA ("s 37(4)") becomes engaged as it provides for when and how a management corporation can give such approval. A management corporation is not empowered to authorise improvements to a unit if the improvements do not meet the statutory criteria, even if oral approval was given for the works as that would be of no legal effect (see *Lim Florence Marjorie* at [84]). In terms of the "when", s 37(4) provides that the management corporation may only give such approval if the two requirements found at ss 37(4)(*a*) and 37(4)(*b*) are satisfied. In particular, the management corporation must be "satisfied" that the proposed improvement: (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. The requirements in ss 37(4)(*a*) and 37(4)(*b*) are conjunctive.

(1) The two limbs under s 37(4)(*a*) of the BMSMA

44 At this juncture, it is apposite to note that there are two limbs under s 37(4)(*a*) of the BMSMA, each of which uses different expressions: "detract from the appearance of any of the buildings comprised in the strata title plan" *or* "in keeping with the rest of the buildings". It is not obvious from the various legislative materials why two different expressions were used when this provision was first introduced (see *Report of the Select Committee on the Building Maintenance and Management Bill* (Bill No 6/2004) (Parl 5 of 2004, 7 October 2004) ("*Report of the Select Committee*") at p E 24; see also,

Singapore Parliamentary Debates, Official Report (19 October 2004) vol 78 at cols 923–933 (Mah Bow Tan, Minister for National Development)).

45 It appears that in preparing the BMSMA, Parliament had decided to look at "more established strata management models in other countries, such as Canada and Australia, which have a longer history". Therefore, it had "studied similar legislation in Australia and Canada" in preparation of the Act (see *Singapore Parliamentary Debates, Official Report* (19 April 2004) vol 77 at cols 2744–2745 (Mah Bow Tan, Minister for National Development)). Hence, it would be fruitful to look towards those jurisdictions to see if there is any similar analogue.

46 Section 37(4) of the BMSMA is said to be adapted from ss 98(1) and 98(2) of the Condominium Act of Ontario, SO 1998, c 19 (Can) (the "Ontario Condominium Act") (see *Lim Florence Marjorie* at [86]; see also, *Report of the Select Committee* at p E 25). Yet despite this derivation, only the first limb of "detract from the appearance …" under s 37(4)(*a*) of the BMSMA is found in s 98(2) of the Ontario Condominium Act, but not the second limb "in keeping with …". The Canadian legislation therefore does not explain the rationale for enacting the two limbs in the Singapore legislation.

47 Looking to the position in Australia, some assistance with determining the meaning of the second limb of s 37(4)(*a*) of the BMSMA, "in keeping with the rest of the buildings", may be derived by looking at the model by-laws found within the Australian subsidiary legislation. Under Schedule 2 of the Australian Strata Schemes Management Regulation 2016 (SR No 501 of 2016) (NSW) (which provides for a model by-law for pre-1996 strata schemes, and this was previously found under by-law 29 in Schedule 1 to the Strata Schemes (Freehold Development) Act 1973 (NSW) and by-law 30 in Schedule 3 to the

Strata Schemes (Leasehold Development) Act 1986 (NSW)), it is provided as such in the relevant part:

> **17 Appearance of lot**
>
> (1) The owner or occupier of a lot must not, without the written consent of the owners corporation, maintain within the lot anything visible from outside the lot that, viewed from outside the lot, *is not in keeping with the rest of the building*.
>
> …
>
> [emphasis added]

Notably, one might observe that, in contrast to the Canadian analogue, only the second limb of "in keeping with …" under s 37(4)(*a*) of the BMSMA is present, but not the first limb of "detract from the appearance …". This may suggest that the two phrases are in fact interchangeable such that only the presence of one is required to express the same result/meaning (and that the absence of the other is inconsequential). To examine this, we can look to the Australian cases interpreting this phrase "in keeping with" under model by-law 17.

48 The key decisions in Australia are the Civil & Administrative Tribunal decision in *The Owners Strata Plan 30198 v Barnes* [2018] NSWCATCD 8 ("*Barnes*"), and the New South Wales Supreme Court's decision in *The Owners Strata Plan No 68976 v Nicholls* [2018] NSWSC 270 ("*Nicholls*").

49 In *Barnes*, the defendant lot owner in a strata scheme had erected a deck and retaining wall used for entertaining in their courtyard without the consent of the Owners Corporation. The Owners Corporation argued it was not "in keeping with" the rest of the building. The Tribunal was thus required to determine the meaning of the words "in keeping with the rest of the building" in by-law 17 and its objective application to the circumstances of the case. The Tribunal said this when determining the meaning of that phrase (at [59]–[66]):

> 59 The applicant's submission, in attempting to ascribe the ordinary meaning to the words *"in keeping with" suggested "consistent with", "in harmony with", "in accordance with" and "in conformity with" as being relevant synonyms for the phrase*.
>
> …
>
> 63 It is necessary therefore to also consider what the ordinary meaning is of the words "in keeping with" and in doing so it is a legitimate exercise to apply to the extent necessary in order to understand those words relevant dictionary definitions. The applicant's submission did not make reference to the source of the synonyms suggested. Nevertheless they are all in accordance with common understanding of the term.
>
> 64 "In keeping with" is not expressly mentioned in the Macquarie Dictionary but that tome does usefully refer to "keep" and "keeping". The many meanings ascribed are consistent with the synonyms relied on by the applicant.
>
> 65 The Shorter Oxford English Dictionary also usefully uses words such as "agreement", "congruity" and "harmony".
>
> 66 *Clearly the words "in keeping with" impart a meaning of something being harmonious with whatever it is being compared to without imparting any intention of the two things being exactly the same and in this case the harmony or similarity is of a visual nature.*
>
> [emphasis added]

Having referred to the dictionary definition and ordinary meaning of the phrase "in keeping with", the Tribunal came to the view that the phrase imparted a meaning of "something being harmonious with whatever it is being compared to without imparting any intention of the two things being exactly the same and in this case the harmony or similarity is of a visual nature". The Tribunal also held that similar phrases such as "in conformity with" would be relevant synonyms. The Tribunal eventually dismissed the application as it was satisfied by photographs that the works had a "uniformity of appearance" that was based on the timber and paving materials used in their construction and on the plants which were largely tropical in appearance (at [69]). It held that the works had a "visual and aesthetic harmony" when compared to photos of other lots and

common property (at [70]). Relating this definition back to the Singapore context, this would suggest that an improvement which is "in keeping with" the rest of the buildings is merely the *flipside* of an improvement which does not "detract from the appearance" of the buildings – *ie*, they mean the same thing in essence as both are concerned with aesthetic uniformity. Indeed, it has been suggested within Singapore cases that the overarching concern is really that of "uniformity" (see *Lim Florence Marjorie* at [91]; *Low Yung Chyuan v The MCST Plan No. 2178* [2019] SGSTB 3 ("*Low Yung Chyuan*") at [20]).

50 Turning then to the decision of *Nicholls*, the defendants were lot owners in a strata scheme building and had performed works such as constructing a spa and surrounding decking which were objected to by the Owners Corporation under by-law 17. The New South Wales Supreme Court held that the phrase "in keeping with the rest of the building" is ordinary English, which bears neither a technical nor legal meaning and requires the adjudicator to undertake an evaluative exercise (at [59]). The court eventually dismissed the application and endorsed the first instance decision as there was "no error in approach to the evaluation that was required" (at [60]). But what is interesting is the reasoning of the first instance decision. The adjudicator had found that as the additional work done "does not detract from the building at all", it was thus in keeping with the appearance of the rest of the building (at [36]):

> The Court should note the Adjudicator's Decision (Exhibit AJ-005). It is appropriate to recite paragraphs [22] – [28] of that determination.
>
> > 23 The only other issue is whether as now installed it is '*in keeping with the appearance of the rest of the building*'. From the photos supplied by the respondent, spa and deck are small, the spa being only 2m square. The colour seems to be a close match to that of the building and it has an unobtrusive cover when not in use.

> 24 Although a Mr Marchese, architect, has opined that the spa is 'totally out of character with the minimalist design of the building' I am unable to agree with him. The photos available to me suggest a small item which ***does not detract from the building at all***.
>
> [emphasis in original; emphasis added in bold italics]

The above extract would seem to suggest that the two phrases are essentially interchangeable and refer to the same thing in substance.

51 With that said, I have some reservations on whether the Australian position is of any assistance in the Singapore context given that, unlike s 37(4)(*a*) of the BMSMA where both limbs are present, the Australian by-law 17 only contains the phrase "in keeping with". It may thus be inappropriate to draw from the Australian experience given that it might lead us to render either of the limbs otiose and lead to a tautologous outcome (see below at [54]).

52 Turning then to the position in Singapore, it is not obvious from the case law that a clear distinction has ever been made between the two limbs. On a general level, it is often the case that where the improvement to the property leads one to conclude that it detracted from the appearance of the building, then one would *concomitantly* conclude that it also did not keep with the rest of the buildings (see, *eg*, *The Management Corporation Strata Title Plan No. 3631 v Richard Koh Chye Heng & Anor* [2016] SGDC 79 at [10]). The converse is also true, in that one could also conclude that *both* limbs were not invoked (see *Low Yung Chyuan* at [22]). Indeed, some cases seem to overlook the fact that there are two limbs within s 37(4)(*a*) of the BMSMA, and focus on only the first limb "detract from the appearance" (see, *eg*, *Sujit Singh Gill v MSCT Plan No. 3466* [2015] SGSTB 2 at [15]).

53 As such, there has not been any proper clarification on whether these two limbs convey different things. For example, in *Ganges Portfolio Pte Ltd v MCST No 599* [2009] SGSTB 4, the Strata Titles Board found that to allow a subsidiary proprietor to create a new side access opening for the unit would not be "in keeping with the appearance of the rest of the building", and the management corporation would not be able to "stop other subsidiary proprietors from having similar new openings" (at [50]). To hold otherwise would allow the subsidiary proprietors to do whatever they wanted with the glass panels of their unit, and the "uniformity or character of the building can be marred or altered or destroyed" (at [50]). Given the language used ("in keeping with"), the decision was therefore based on the fact that the second limb of s 37(4)(*a*) was not satisfied. However, if one were to rephrase the reasoning of the Strata Titles Board to conclude instead that the intended improvement would "detract from the appearance" of the rest of the building (*ie*, using the language of the first limb), the purport and thrust of the sentence would remain substantially similar – that the installation of the new side access opening would mar the uniformity the building. On this view, the two limbs within s 37(4)(*a*) would mean the same thing.

54 However, it is a basic principle of statutory interpretation that "Parliament shuns tautology and does not legislate in vain" (see the Court of Appeal decision of *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [38]). Therefore, unless absolutely necessary, I would be slow to conclude that the two limbs within s 37(4)(*a*) mean exactly the same thing. If so, Parliament would not have (so it seems) deliberately departed from Ontario legislation and inserted the expression "in keeping with the rest of the buildings" in our legislation (which appears to have been taken from Australian subsidiary legislation). I find some support for the view that the two limbs are not meant

to be the same in *Lim Florence Marjorie*. In that case at [91], the High Court appeared to consider that while both limbs were concerned with the aesthetic uniformity of the building's façade, there is some difference between them:

> 91 In any event, for what it is worth, I consider that the Works *do detract from the appearance of the building* or, *at the very least, are not in keeping with the buildings* in The Arcadia. The subsidiary proprietors in The Arcadia place *paramount interest on maintaining aesthetic uniformity in their development.* The plaintiff … has also enacted specific by-laws to maintain day-to-day aesthetic *uniformity of the balcony and therefore the façade, even to the extent of regulating the type, height and quantity of plants that can be grown in planter boxes on balconies and the colour and inclination of awnings*. The plaintiff has quite reasonably taken the position that any renovations which affect the *aesthetic uniformity of The Arcadia's façade* "may also impact on [the] good image [and] prestige of an upscale and prestigious estate in [The Arcadia]". …
>
> [emphasis added]

Indeed, Coomaraswamy J appeared to recognise that there were *two* operable limbs to s 37(4)(*a*) of the BMSMA (see also, *Lim Florence Marjorie* at [89]), by his usage of the preceding phrase "at the very least" before mentioning the second limb of s 37(4)(*a*) that the works were also not in keeping with the buildings. Thus, the distinction made between the two limbs was whether the works detracted from the appearance of the building *itself*, and further, were in keeping with the *rest of* the buildings within the condominium development. While it was not necessary to do so in *Lim Florence Marjorie*, there is, in my respectful view, more to be said about the distinction between the two limbs of s 37(4)(*a*).

55 In my view, the second limb of s 37(4)(*a*) of the BMSMA ("in keeping with") is meant to avoid a situation (which may not be common) where the management corporation is not empowered to grant approval even though the façade of the building was not uniform to being with. In this situation, it would

not make sense to ask if the proposed improvement to the unit would "detract from" the façade of the building since it is already irregular and there would be nothing to "detract from". Thus, in the case when the façade was initially not uniform, then the proposed improvement can be found to be "keeping with" this non-uniform state of affairs, which empowers the management corporation to approve it. This is perhaps one way to rationalise the two limbs of s 37(4)(*a*) of the BMSMA, rather than assuming that both limbs are interchangeable. In this regard, I also note that s 37A(2)(*b*) of the BMSMA, which was enacted much later than the original s 37(4)(*a*), only uses the expression "in keeping with the appearance of the building" but not the "detract from" expression that is found in the first limb of s 37(4)(*a*). This seems to have been a deliberate omission although I am not sure why this was done. Nevertheless, while I make these observations in passing, it may be appropriate for the court to clarify how the two limbs of s 37(4)(*a*) are distinct with the benefit of further and fuller arguments in future cases.

(2) The deference accorded to a management corporation's decision made under s 37(4)

56 Returning then to the "how" of approvals being given under s 37(4), if the management corporation is satisfied that the statutory criteria are met, then it "may" authorise the subsidiary proprietor to effect the proposed improvement "upon such terms as it considers appropriate". Put more specifically, upon the management corporation being satisfied that the criteria in ss 37(4)(*a*) and 37(4)(*b*) are satisfied, then s 37(4) confers on the management corporation a broad discretion to decide: (a) whether to grant approval or not, and (b) if approval is granted, on what terms to grant such approval on.

57 Significantly, Coomaraswamy J held in *Lim Florence Marjorie* (at [87]) that whether the statutory criteria in ss 37(4)(*a*) and 37(4)(*b*) are met is for the management corporation, and not the courts, to decide. The learned judge was of the view that this would be consistent with the legislative intent in enacting the BMSMA, which was to empower management corporations to make decisions to encourage self-regulation as government intervention in the face of a significant increase in the number of strata flats was no longer feasible. The Canadian decision in *York Region Standard Condominium Corp No 1076 v Anjali Holdings Ltd* [2010] OJ No 488 ("*York Region Standard*") at [9] was cited by Coomaraswamy J (see *Lim Florence Marjorie* at [87]) and stated as such:

> It is not [the] function [of the] judge, however, to assess the aesthetics of the changes made … As Cusinato J said at paragraph 12: 'It matters not … that the landscaping appears to be beautifully done, or that all other unit holders find it pleasing. Where the elected Board concludes that it is unacceptable … their word [i]s final …'

This therefore seems to suggest, subject to the various avenues to challenge the management corporation's decision provided in the BMSMA, that excessive deference is given to the decision of a management corporation under s 37(4).

58 It appears that that remains the position in Canada as well, and excessive deference is given to the decision of the board of a condominium corporation. Thus, in *Durham Condominium Corporation No 90 v Moore* [2010] OJ No 4138, the Ontario court (at [9]) first made the finding that the respondents (the subsidiary proprietors) had failed to adhere to s 98 of the Ontario Condominium Act as they added an installation to the condominium unit in a manner that did not comply with the approval granted by the board of a condominium corporation. The Ontario court then dealt with the respondent's application under s 135 of the Ontario Condominium Act for an oppression

remedy, where the respondents argued that the condominium board had treated them unfairly and also took an unreasonable position (at [10]). The oppression remedy was not granted in the end (at [15]). But before arriving at the decision, the Ontario court placed heavy emphasis on the fact that great deference ought to be granted to the views of the condominium board, suggesting a wholly subjective approach (at [11] and [12]):

> 11 In *East Gate Estates Essex Condominium Corporation No. 2 v. Kimmerly*, *supra* Cusinato J. said at paragraph 12:
>
> > It matters not as shown by the photos ... that the landscaping appears to be beautifully done, or that all other unit holders find it pleasing. *Where the elected Board concludes it is unacceptable for an area of the common elements, which they are elected to govern their word is final.* In a democracy, the manner in which to overturn such a determination is through the election process and there is no evidence the condo Board ever rescinded their initial approval [which limited the landscaped area]
>
> 12 As Flynn J. said in *Halton Condominium Corporation No. 315 v. Sid Gucciardi* (Unreported, 15 April 2004): "The Board of Directors of this condominium was elected by the unit owners to administer this condominium in the best interests and for the welfare for the whole corporation. *It is not for the court to step into this fray*". …
>
> [emphasis added]

Significant emphasis was placed on the fact that the condominium board was democratically elected, and that hence, the word of the democratically elected condominium board "is final", and that it "is not for the court to step into this fray". Thus, short shrift was given to the respondent's oppression argument (at [15]). This is consistent with the position taken in the Canadian case cited by Coomaraswamy J in *Lim Florence Marjorie* (see above at [57]), which suggests that there should be minimal curial intervention by the court.

59 Nevertheless, I would respectfully suggest that s 37(4) is not wholly subjective as the Canadian courts appeared to suggest. Indeed, I do not think that Coomaraswamy J was suggesting such an approach in *Lim Florence Marjorie*. Indeed, the learned judge clearly pointed out that there were safeguards provided by the BMSMA, under which the management corporation's decision *can be challenged*. Thus, it cannot be correct to think that a management corporation's decision is beyond any judicial control. If so, there would be no need for the present application at all.

60 Rather, in my view, s 37(4) should be construed as comprising subjective and objective elements. First, it would accord better with the legislative intent if the criteria in ss 37(4)(*a*) and 37(4)(*b*) were to be assessed *objectively*. Indeed, to take the criterion in s 37(4)(*b*) as an example, it would not further the legislative intent to promote safety if the management corporation is empowered to ignore *objective* evidence in deciding whether the structural integrity criterion under s 37(4)(*b*) is met or not. Further, a wholly subjective reading of s 37(4) would also be inconsistent with the cases where courts and tribunals have overridden a management corporation's view that a uniform appearance could still be maintained. In my respectful view, a better reading of s 37(4) is that, whereas whether the statutory criteria in ss 37(4)(*a*) and 37(4)(*b*) are met is to be *objectively* determined, whether the management corporation then authorises the proposed improvement is a *subjective* decision. This must follow from the use of the word "may" to describe the management corporation's exercise of its discretion to authorise such improvements. This view is also fortified by the position in law that the court retains the ultimate supervisory jurisdiction to override the decision made based on two types of errors of law which espouse an *objective* basis for intervention (see the High

Court decision of *Wu Chiu Lin v Management Corporation Strata Title Plan No 2874* [2018] 4 SLR 966 at [31]).

61 In my view, this reading of s 37(4) would still further the legislative intent of not burdening the courts and tribunals with an avalanche of disputes due to the large increase in the number of management corporations and strata title flats. This is because a management corporation's decision under s 37(4) stands until it is challenged. Even by this reading of s 37(4), the primary decision-making process is still vested in the management corporation and is not transposed onto the courts and tribunals.

62 Accordingly, by this reading of s 37(4), the burden falls on the management corporation to justify its decision whether to authorise the proposed improvement or not. In this regard, the management corporation could come to three possible conclusions:

(a) First, the management corporation could decide it is empowered under s 37(4) to grant the approval and does indeed grant such approval. This would be unlikely to cause any issues unless *another* dissatisfied subsidiary proprietor challenges the decision on the basis that the criteria in ss 37(4)(*a*) and 37(4)(*b*) have not been met. This would likely be a challenge under s 88(1)(*a*) of the the BMSMA ("s 88(1)(*a*)").

(b) Second, the management corporation could decide it is not empowered under s 37(4) to grant the approval sought and turns the subsidiary proprietor away on this basis. If the management corporation is later challenged, it will bear the burden of showing why it thought it was not so empowered under s 37(4), specifically why it thought that the criteria in ss 37(4)(*a*) and 37(4)(*b*) have not been met (*ie*, whether it had

mistakenly decided not to grant the approval sought despite the criteria being met). While not always the case, this would likely be a challenge under s 88(1)(*a*).

(c) Third, the management corporation could decide that it is empowered under s 37(4) to grant the approval sought but decides not to grant the approval anyway. If the management corporation is later challenged, it will bear the burden of explaining why, despite it being satisfied that the criteria in ss 37(4)(*a*) and 37(4)(*b*) have been met, it still decided not to grant the approval sought. While not always the case, this would likely be a challenge under s 111(*b*) of the BMSMA ("s 111(*b*)").

63 This reading of s 37(4) also better explains *why* a management corporation's decision under the section can be challenged. Indeed, if s 37(4) is to be construed wholly subjectively, then the grounds on which the courts and tribunals can intervene would be very limited and likely not extend to considering the substantive merits of the case, as has been routinely done under s 37(4). There is a difference between where a decision-making power is placed, and whether the decision arising from that decision-making power can be challenged.

How the management corporation's decision under s 37(4) can be challenged

64 This leads me to my third point. In my view, the management corporation's decision under s 37(4) is open to challenge on at least two primary fronts. I only cover these two grounds because they were directly or indirectly raised in the present appeal. To be clear, I do not intend otherwise to be exhaustive in relation to the grounds on which a management corporation's decision under s 37(4) may be challenged.

(1) Section 88(1)(*a*) of the BMSMA: Breach of s 37(4)

65 First, if it can be shown that the management corporation had "breached" s 37(4) of the BMSMA, the court can, pursuant to s 88(1)(*a*), make an order to restrain such breach (which is effectively a prohibitory injunction). In this regard, s 88 provides as follows:

> **88.**—(1) If a management corporation or subsidiary management corporation commits a breach of any provision of this Part, or makes default in complying with any requirement of, or duty imposed on it by, any provision of this Part, a subsidiary proprietor or mortgagee in possession or occupier of a lot is entitled to apply to the court –
>
> (*a*) for an order to restrain the breach of any such provision by; or
>
> (*b*) to recover damages for any loss or injury to the subsidiary proprietor, mortgagee in possession, or occupier or property arising out of the breach of any such provision from,
>
> the management corporation or subsidiary management corporation, as the case may be.

66 A management corporation can commit such a contravention of s 37(4) in several non-exhaustive ways. First, given that s 37(4) prescribes a duty on the management corporation to give due consideration to the subsidiary proprietor's request, a management corporation which wilfully refuses to do so would have acted in breach of s 37(4). Second, s 37(4) enjoins the management corporation to properly consider whether the criteria in ss 37(4)(*a*) and 37(4)(*b*) are met. Thus, if the management corporation based its decision on an objectively indefensible conclusion in so far as the criteria in ss 37(4)(*a*) and 37(4)(*b*) are concerned, it would also have acted in breach of s 37(4).

(2) Section 111(*b*) of the BMSMA: Unreasonable decision

67 Second, if it can be shown that the management corporation's decision under s 37(4) was "unreasonable", then the decision can also be challenged. This is the ground of challenge under s 111(*b*), of which s 111 of the BMSMA ("s 111") provides as follows:

> **Order with respect to consents affecting common property**
>
> **111.** Where, pursuant to an application by a subsidiary proprietor, a Board considers that the management corporation or subsidiary management corporation to which the application relates —
>
> (*a*) has unreasonably refused to consent to a proposal by that subsidiary proprietor to effect alterations to the common property or limited common property; or
>
> (*b*) has unreasonably refused to authorise under section 37(4) any improvement in or upon a lot which affects the appearance of any building comprised in the strata title plan,
>
> the Board may make an order that the management corporation or subsidiary management corporation (as the case may be) consents to the proposal.

68 As Coomaraswamy J held in *Lim Florence Marjorie*, the possibility of a challenge under s 111(*b*) is a safeguard against minority oppression by the management corporations (at [88]). As such, the reasons for a challenge under s 111(*b*) will be quite different from those in relation to a challenge under s 88(1)(*a*). Under s 111(*b*), a subsidiary proprietor's challenge would not be that the management corporation breached its duty by coming to the wrong conclusion on whether the statutory criteria have been objectively satisfied. Rather, the challenge under s 111(*b*) would be, for instance, that the management corporation acted capriciously or irrationally in coming to its decision (for example, that the decision was tainted with prejudice, malice or indifference, see the High Court decision of *Chia Sok Kheng Kathleen v The*

Management Corporation Strata Title Plan No 669 [2004] 4 SLR(R) 27 ("*Chia Sok Kheng Kathleen*") at [37]). For example, a management corporation could have decided that while the criteria under ss 37(4)(*a*) and 37(4)(*b*) have been met, it would nonetheless not grant the approval sought. If the management corporation cannot point to some other good reason(s) for this decision but was acting irrationally or capriciously then that would be open to challenge under s 111(*b*).

(3) The relevance of reasonableness

69 Given the distinction I have suggested in relation to ss 88(1)(*a*) or 111(*b*) of the BMSMA, it is important to clarify the relevance of reasonableness in relation to these sections.

70 In the first place, because s 37(4) is only concerned with whether the management corporation is *empowered* to authorise the subsidiary proprietor to make the improvements sought, that section is not directly concerned with the reasonableness of the management corporation's decision unless an appropriate challenge is brought under s 111(*b*). Put another way, a management corporation's decision under s 37(4) is binding without the further need to be endorsed as being reasonable, *unless* it has been challenged. In principle, therefore, an objectively unreasonable decision of the management corporation can remain in place until and unless the subsidiary proprietor brings an action to compel the management corporation to act otherwise. Thus, in so far as the parties and the DJ addressed the reasonableness assessment together with s 37(4), when the appellant's application is brought under s 88(1)(*a*), I would respectfully suggest that this should be avoided.

71 Second, the reasonableness of the management corporation's decision under s 37(4) is not directly relevant if s 88(1)(*a*) is engaged. The terms of s 88(1)(*a*) do not speak of a general duty of reasonableness. Indeed, if there is such a general duty, then it would render s 111(*b*) otiose as such breaches can always be framed as coming under s 88(1)(*a*). If a subsidiary proprietor wishes to rely on s 88(1)(*a*), then he or she must raise the correct grounds for challenge under that section. While the reasonableness of a management corporation's decision under s 37(4) can be *indirectly* relevant in so far as a subsidiary proprietor argues that the management corporation had breached its duty under s 88(1)(*a*) to properly consider the objective facts and is therefore unreasonable, it would be better for subsidiary proprietors to frame the reasons for their challenge under s 88(1)(*a*) to be more in line with the express requirements under that section.

72 Third, the reasonableness of the management corporation's decision under s 37(4) only comes into relevance if s 111(*b*) is engaged. This is because s 111(*b*) refers explicitly to whether the management corporation has "unreasonably refused to authorise under section 37(4) any improvement". In *Low Yung Chyuan*, a case concerning s 111(*b*), it is said (at [19]) that s 37(4) purports to prevent a subsidiary proprietor from making alterations or improvements to their respective lots in order to maintain a uniform appearance and façade with the rest of the building and to ensure that subsidiary proprietors adhere to the structural integrity of the building. Thus, where the subsidiary proprietor's installation of sliding windows does not detract from the appearance or is in keeping with the rest of the building, the "*onus* falls on the [management corporation] to have a *reasonable basis* for rejecting the application" [emphasis added]. Thus, the touchstone of s 111(*b*) (in relation to s 37(4)) is that of reasonableness, or more accurately put, the assessment of the

unreasonableness of the management corporation's conduct (see *Low Yung Chyuan* at [21], where a lack in objectivity and disregard of professional advice could indicate unreasonableness).

Summary and relevant questions raised

73 To summarise the above discussion, there are, in my view, different roles for ss 37(3), 37(4) and the various remedial provisions in the BMSMA. Consequently, three questions are engaged when a subsidiary proprietor challenges a management corporation's decision not to approve a proposed improvement under s 37(4) of the BMSMA:

(a) First, under s 37(3), is the subsidiary proprietor even required to seek the management corporation's approval to effect the proposed improvement? The subsidiary proprietor would need to do so if the improvement "affects the appearance of any building comprised in the strata title plan". The burden is on the subsidiary proprietor to show that his or her improvement does not so affect if he or she wishes to avoid seeking the management corporation's approval.

(b) Second, if the management corporation's approval is needed, is the management corporation even empowered to grant the approval sought under s 37(4)? The management corporation is only empowered to do so if the two criteria under ss 37(4)(*a*) and 37(4)(*b*) are met. The management corporation could decide that it is empowered and grant the approval sought. This will likely not cause any issues in most cases. However, the management corporation could decide that it is not empowered to grant approval and hence turn the subsidiary proprietor away. It can also decide that while it is empowered to do, it exercises its discretion not to grant the approval sought. In any case, the burden falls

on the management corporation to justify its decision whether to authorise the proposed improvement or not.

(c) Third, the management corporation's decision under s 37(4) is open to challenge through various prescribed avenues within the BMSMA, such as s 88(1)(*a*) and s 111(*b*). Each of these grounds of challenge are different and come with their own distinct requirements. A subsidiary proprietor should frame his or her challenge appropriately under the relevant ground of challenge.

74 I hope that the above would clarify, for most cases at least, the conceptual interaction between ss 37(3) and 37(4) of the BMSMA (which govern a management corporation's power to authorise a subsidiary proprietor's request to effect any improvement to his or her lot), and ss 88(1) and 111 of the BMSMA (which are the remedial provisions).

The relevant issues

75 With the above conceptual discussion and the parties' respective general cases on appeal in mind, I come now to set out the relevant issues in the present appeal:

(a) First, I will consider whether the appellant breached the 1990 and 2014 Additional By-Laws by the Unapproved Works. In this regard, while the respondent has alleged that the appellant breached these By-Laws, it does not advance any point about the relevance of these breaches. However, as I will explain, whether the appellant did breach these By-Laws may still be relevant to the other issues I will consider.

(b) Second, I will consider whether the appellant is required to seek the respondent's approval for the Unapproved Works pursuant s 37(3) of the BMSMA. This will require me to consider, first, whether the Unapproved Works "affects the appearance of any building comprised in the [Development]" (see s 37(3)).

(c) Third, if the appellant is required to seek the respondent's approval for the Unapproved Works, I will consider if the respondent was empowered to provide such approval. This would require me to consider if such works "(a) will not detract from the appearance of any of the buildings comprised in the [Development] 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 [Development]" (see s 37(4)).

(d) Fourth, if the respondent is, on an objective consideration of the facts, empowered to grant approval for the Unapproved Works, I need to consider if the respondent's refusal to provide such approval had amounted to a breach of s 37(4), which would entitle me to order a prohibitory injunction under s 88(1)(*a*).

76 In discussing each issue, I will consider each party's arguments, as well as the DJ's decision, in greater detail.

Whether the appellant breached the 1990 and 2014 Additional By-Laws

The parties' arguments

77 Whether the appellant breached the 1990 and 2014 Additional By-Laws does not appear to have been substantively considered below (see, for example, the GD at [93]). While the respondent did allege in its submissions below that

the appellant had breached these By-Laws, the DJ did not deal with this issue squarely. In my view, while it is entirely understandable why the DJ did not decide on this issue directly, nevertheless, it is helpful for me to do so because of its potential relevance to the issues I will consider below.

My decision: the appellant breached the 2014 Additional By-Laws

The Aluminium Glass Windows Installation and Sliding Doors Removal

78 For present purposes, I find that the appellant did breach the 2014 Additional By-Laws by the Aluminium Glass Windows Installation and the Sliding Doors Removal. The starting point is to consider the nature of the By-Laws. In *Lim Florence Marjorie*, Coomaraswamy J held (at [26]) that the by-laws of a management corporation are the analogue of a company's constitution and bind the management corporation and its subsidiary proprietors in the similar way. This is provided for by s 32(6) of the BMSMA. Put another way, the by-laws of a management corporation constitute a binding statutory contract between the management corporation and the subsidiary proprietors (see *Teo Keang Sood 6th Ed* at p 651).

79 I turn first to the 2014 Additional By-Laws. It is clear that the appellant has breached Clauses 9a and 9b of these Additional By-Laws. Clause 9 provides that:

> 9. A Subsidiary Proprietor or occupier shall NOT at all times:-
>
> a. make any alterations to the balcony glass doors, windows installed in the external walls of the subdivided building without having obtained the written approval of the Management Corporation.
>
> b. make any alterations or additions to any balcony of his lot without the approval in writing of the Management Corporation.
>
> …

By commencing the Unapproved Works – specifically the Aluminium Glass Windows Installation and the Sliding Doors Removal – without the respondent's written approval, the appellant has breached Clause 9a and Clause 9b. I do not think that the appellant can make any serious argument otherwise.

The Air-Conditioner Condenser Replacement

(1) 2014 Additional By-Laws

80 I turn next to the Air-Conditioner Condenser Replacement. To begin with, I do not think that the appellant has breached the 2014 Additional By-Laws by this work. Unlike Clause 6.0 of the 1990 Additional By-Laws (see [5] above), there is no specific provision in the 2014 Additional By-Laws that prohibits the installation of an air-conditioning unit to the common areas or any part thereof thereby affecting the general façade of the building. The respondent has not explained why this is so.

81 Be that as it may, the correct analysis is that this is a new act that must be assessed by reference to the prevailing By-Laws (that is, the 2014 Additional By-Laws) at the time of installation and not any breach of previous By-Laws. I therefore find that the appellant, by intending to *replace* the existing air-conditioner condenser has not breached any clause in Part III of the 2014 Additional By-Laws.

(2) 1990 Additional By-Laws

82 Apart from the 2014 Additional By-Laws, the respondent also argued that the appellant breached Clause 6.0 of the 1990 Additional By-Laws by the Air-Conditioner Condenser Replacement, which provided as follows:

> No. 6.0
>
> No air-conditioning unit shall be installed in or otherwise fixed to the common areas or any part thereof thereby affecting the general façade of the building except with the prior approval in writing of the Management Corporation.

83 When I asked Mr Leo why the 1990 Additional By-Laws should even apply when the latest by-laws are the 2014 Additional By-Laws, he argued that s 32(4) of the BMSMA rendered the 1990 Additional By-Laws "evergreen". For completeness, s 32(4) provides as follows:

> **32.**— (4) Any by-laws made, and any amendment of, addition to or repeal of the by-laws made under this section or section 33, have no force or effect until a copy of the by-laws or the amendment, addition or repeal (as the case may be) has been lodged with the Commissioner.

According to Mr Leo, this meant that the 1990 Additional By-Laws remain in force unless they are expressly repealed. And because the respondent never formally repealed the 1990 Additional By-Laws, they remained in force alongside the 2014 Additional By-Laws.

84 I disagree with this submission. First, while s 32(4) of the BMSMA requires the management corporation to lodge a repeal of previous by-laws with the Commissioner for such repeal to be effective, I do not think that the provision requires the same when a later version of by-laws has been validly lodged with the Commissioner. In the present case, I am of the view that the respondent's formal lodgement of the 2014 Additional By-Laws would have impliedly repealed the 1990 Additional By-Laws.

85 Second, I find that my reading of s 32(4) better accords with the purpose of s 32(4), as well as s 32(8) of the BMSMA, which are collectively aimed at giving subsidiary proprietors clear notice of the prevailing by-laws. This purpose would not be advanced if, by default, previous versions of by-laws

remain in effect despite the passage of a later version. This would mean that subsidiary proprietors have to comb through two or more potentially inconsistent by-laws and figure out what the prevailing position on a given issue is. This cannot have been the legislative intent behind s 32(4). It is also not practical.

86 Third, this very difficulty with conflicting by-laws is demonstrated by a simple comparison of the 1990 and 2014 Additional By-Laws in the present case. As Mr Vijayendran suggested before me, the 2014 Additional By-Laws is a self-contained document that does not sit easily with the 1990 Additional By-Laws. For example, whereas the 2014 Additional By-Laws prescribed specific forms for subsidiary proprietors to seek approval from the respondent, the 1990 Additional By-Laws simply state that approval in writing (presumably a simple letter) must be sought from the respondent. It cannot be that a subsidiary proprietor is left to his or her own investigation to figure out what the prevailing position is.

87 I accordingly find that the 1990 Additional By-Laws do not apply in relation to the Air-Conditioner Condenser Replacement, which originated only in 2021, more than three decades after the 1990 Additional By-Laws were passed and seven years after the 2014 Additional By-Laws were passed. More specifically, I find that the 1990 Additional By-Laws have been impliedly repealed by the formal passage of the 2014 Additional By-Laws. Thus, even if the appellant had breached the 1990 Additional By-Laws by his installation of the old air-conditioner condenser unit in the 1990s, that is irrelevant in the present case because we are concerned with the appellant's desire to install a replacement condenser unit *at present*.

Prescribed by-laws

88 In addition, Mr Leo argued before me that the appellant had, by the Air-Conditioner Condenser Replacement, breached the prescribed by-laws 3 and 5 found in the Second Schedule of the Building Maintenance (Strata Management) Regulations 2005 (S 192/2005) ("Regulations"), which apply by virtue of Regulation 20 of the Regulations read with s 32(2) of the BMSMA to "every parcel comprised in a strata title plan in respect of which a management corporation is constituted on or after 1st April 2005". The prescribed by-laws 3 and 5 relate to the "obstruction of common property" and "alteration or damage to common property", respectively.

89 I disagree with this submission. First, given that the respondent was constituted on 10 June 1985, the very terms of s 32(2) mean that the prescribed by-laws in the Second Schedule of the Regulations do not apply in the present case. While this may have created a lacuna for the respondent as its 2014 Additional By-Laws would have impliedly repealed the 1990 Additional By-Laws, which *were* supplemented by the by-laws in the First Schedule of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("LTSA") (see ss 41(2) and 41(3)), the onus remains on the respondent to sort its affairs out clearly. Second, even if by-laws 3 and 5 apply in the present case, I do not think that the respondent is entitled to rely on them as it has not run its case based on the breach of these by-laws. It would not be fair to the appellant for the respondent to raise this point at this belated stage, which is necessarily heavily dependent on facts, some of which may not be before the court, especially on appeal.

Summary in relation to the appellant's breaches of the Additional By-Laws

90 As such, I find that the appellant has breached Clauses 9a and 9b of the 2014 Additional By-Laws by proceeding with the Aluminium Glass Windows

Installation and the Sliding Doors Removal. However, the appellant has not breached any clause in Part III of the 2014 Additional By-Laws (or the 1990 Additional By-Laws) by doing the Air-Conditioner Condenser Replacement. The *consequence* of the appellant's breaches is that the respondent can apply to court under s 32(10) of the BMSMA for, among others, an order to restrain these breaches. This, the respondent has not done, and I need not consider whether it would have been so entitled.

91 However, one relevance of these breaches is that they may affect whether a management corporation has breached any provision of Part 5 of the BMSMA, which is relevant to the remedy sought in the present case under s 88(1). While not relevant in the present case, a further relevance of these breaches may be to affect the reasonableness of the subsidiary proprietor's conduct in so far as s 111(*b*) read with s 37(4) of the BMSMA are concerned. It seems clear that a management corporation which disapproved works that were in breach of its additional by-laws would more likely be found to have acted reasonably in doing so. Therefore, although the remedial consequences arising from the breaches of the 2014 Additional By-Laws were not pressed by the respondent in the present case, it would still be relevant to make a finding on whether the appellant had breached the Additional By-Laws, and I do so accordingly.

Whether the appellant is required to seek the respondent's approval for the Unapproved Works pursuant to s 37(3) of the BMSMA

Overview

92 I turn then to the next issue, which is whether the appellant is required to seek the respondent's approval for the Unapproved Works in the first place under s 37(3) of the BMSMA. Professor Teo explains in *Teo Keang Sood*

6th Ed (at p 658) that ss 37(3) and 37(4) of the BMSMA subsumed by-law 13 in Part II of the then First Schedule to the LTSA. This by-law prohibited a subsidiary proprietor or occupier of a lot from making any alterations or additions to any balcony of his or her lot without the written approval of the management corporation. For clarity, I reproduce ss 37(3) and 37(4) of the BMSMA once again:

> **37.**—(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.

93 The analysis under s 37(3) therefore turns on whether the Unapproved Works affect the appearance of any building in the Development.

Whether the Unapproved Works affect the appearance of any building in the Development

The parties' arguments

94 The appellant's case is premised on an application of the relevant principles in *Lim Florence Marjorie*. The appellant argues that, from the viewpoint of a reasonable observer, the Aluminium Glass Windows Installation

and the Sliding Doors Removal do not affect the appearance of the building. In respect of the Aluminium Glass Windows Installation in particular, the appellant points to some of the units in the Development that had windows installed behind the approved window grilles. As such, the appellant's case is that the glass windows do not objectively affect the appearance of the building. Rather, it is the approved window grilles that formulate the look rather than the glass windows. Because the appellant only installed the aluminium framed glass windows behind the window grilles, he says that the glass windows that are *behind* the approved window grilles do not affect the overall appearance of the building.

95 In relation to the Sliding Doors Removal, the appellant makes a similar argument. The appellant also says that the sliding doors are located *inside* the Unit at approximately 2.4 metres behind the balcony parapet wall. As such, the removal of the sliding doors would not affect the appearance of the building.

96 Finally, as for the Air-Conditioning Condenser Replacement, the appellant says that many other units in the Development had their condensers installed in a similar fashion. As such, it could not be said that the appellant's air-conditioner had affected the appearance of the buildings in the Development in breach of s 37(3) of the BMSMA.

97 In response, the respondent relies on the case of *Rachel Chen* for the proposition that a feature permanently affixed to a balcony, and which does result in the balcony looking different from its original state, affects the overall appearance of the building. In the present case, the respondent contends that Aluminium Glass Windows Installation affects the appearance of the building as the front of the plaintiff's balcony reflects more sunlight than the other units

due to the material of the glass windows. This would not occur with the respondent's approved designs for the balconies, that is, the window grilles.

98 As for the Air-Conditioner Condenser Replacement, the respondent says that the condenser had been fixed on the exterior of the building or common property in breach of the Additional By-Laws. I have already dealt with this point above (see [80]–[87]) and found that the appellant has not breached any of the 2014 (and 1990) Additional By-Laws by virtue of the Air-Conditioner Condenser Replacement. Further, the respondent also argues that the condenser poses a hazard to residents below.

The DJ's decision

99 The DJ decided that from the photographs tendered, there is a discernible difference in the appearance of those units with glass windows and those units without the glass windows installed. The DJ further found that the difference was not *de minimis*. As such, the DJ accepted the respondent's argument that the Unit with glass windows would reflect more sunlight than those without any glass windows installed, as was the original design of the balconies in the Development. The DJ therefore held that the Aluminium Glass Windows Installation amounted to a breach of s 37(3) of the BMSMA.

100 As for the Sliding Doors Removal, the DJ found that there were no clear photographs tendered that allowed the court to determine if the appearance was affected or not. In doing so, the DJ recognised that the sliding doors are set some 2.4 metres behind the balcony parapet wall. However, the DJ reasoned that if the glass windows were not installed, it would be a logical inference that the façade presented with the sliding doors would look quite different from one without such doors in place when seen from an appropriate vantage point.

The DJ relied on the finding in *Lim Florence Marjorie* where the sliding doors were set well back from the external wall of the balcony.

101 Finally, as for the Air-Conditioner Condenser Replacement, the DJ found that the appellant had carried out the previous installation of the condenser in breach of the 1990 Additional By-Laws. Also, the DJ regarded as important the respondent's concern for the safety of residents and passers-by with the installation of the air-conditioner condensers on the common property. The DJ did not regard as relevant the appellant's submission that six of the 135 units in the Development similarly had air-conditioner condensers installed in a similar way.

102 Accordingly, the DJ found that the Unapproved Works did affect the appearance of the building in which the Unit was located within the Development.

My decision: the Unapproved Works do affect the appearance of the building in the Development

(1) The law

103 I agree with the DJ's conclusion that the Unapproved Works did affect the appearance of the building in which the Unit was located within the Development. The general principles in ascertaining if renovations affect the appearance of a building are not disputed by both parties. To recapitulate (see above at [41]), it was held in *Lim Florence Marjorie* that this exercise is a factual one, to be undertaken by comparing the façade presented by the unit concerned with the façade presented by other similar units and by all the units as a whole. This is not to be done as a theoretical exercise but from the viewpoint of a reasonable observer who looks at the building from a position that is practically

possible or likely (see *Re J Saunders* (1993) NSW Titles Cases 80-019) – *ie*, the court must consider the appearance of the property as it presents itself to a person who might reasonably be able to view it and this must take into account any limitations as to the possible viewing locations and vantage points (see *Lim Florence Marjorie* at [78] as well as the District Court decision of *The Management Corporation Strata Title Plan No. 4066 v Wong Wei Kit Leslie (Huang Wei Jie Lesle) & Jasmin Lau (Liu Ying Xuan)* [2020] SGDC 15 at [37]–[38]). To these well-established principles, I will add four points.

104 First, the comparison exercise in s 37(3) of the BMSMA must not proceed by way of an overly detailed side-by-side comparison between the unit concerned and another unit. This is because a reasonable observer would not scrutinise a building's appearance in such searching detail. Rather, the observer will form an impressionistic view informed by an imperfect recollection. Indeed, a reasonable observer is not likely to be searching for very minor differences in the comparative exercise contemplated by s 37(3).

105 Second, the comparison exercise in s 37(3) is narrower than that in s 37(4) of the BMSMA. The comparison in s 37(3) is predicated on the unit concerned being different from its original state as viewed from a reasonable vantage point. While it is possible to consider how the unit has affected the entirety of the development, that is better left to s 37(4), which uses the word "detract" as opposed to "affect". As Coomaraswamy J held in *Lim Florence Marjorie* (at [80]), s 37(3) uses the objective word "affect" rather than the subjective word "detract" in s 37(4). Thus, as the learned judge put it, the more objective word "affect" ensures that a subsidiary proprietor cannot arrogate to himself or herself a subjective decision on whether his or her improvements come within s 37(3) and thus be obliged to seek and secure prior authorisation.

106 Beyond this, I am also of the view that the use of the word "affect" suggests a *narrower* comparison to be undertaken in s 37(3) than that applied in s 37(4) of the BMSMA. It is important to make this distinction to avoid the analysis in s 37(3) from shading into that in s 37(4). Therefore, once the unit concerned is different from other units in their original states, it would have "affected" the appearance of the building. The subsidiary proprietor is then required to seek the management corporation's approval to proceed with the improvement under s 37(4). Whether the improvement "detracts" from the appearance of any of the buildings comprised in the strata title plan is a separate enquiry.

107 This reading of ss 37(3) and 37(4) is supported by the use of the singular "building" in s 37(3), as contrasted with the use of the plural "buildings" in s 37(4). This shows that the assessment undertaken in s 37(3) is in relation to the *building* in which the unit concerned is in. This necessarily is a narrower comparison than that in s 37(4), which refers to whether the unit concerned "detracts" from the appearance of any of the *buildings* comprised in the strata title. This reading is also supported by the High Court's interpretation of the similar by-law 13 in Part II of the then First schedule to the LTSA (see *Rachel Chen* at [17]), when it referred to the "original state" of the balcony concerned as the point of comparison. Also, it would appear impractical to impose too high a threshold before subsidiary proprietors are required to seek the management corporation's approval for their improvement works.

108 Third, as I have alluded to above (at [42]), under the terms of s 37(3) of the BMSMA, the burden is on the subsidiary proprietor to show that his or her unit does *not* affect the appearance of any building comprised in the strata title plan. This is because it is the subsidiary proprietor who is trying to avoid having to seek the management corporation's approval under s 37(4). Thus, the absence

of any determinative evidence should be determined in favour of the management corporation.

109 Fourth, past cases, unless supported with visual depictions, should be of very limited value to an instant case. This is because, without any visual depiction such as photographs, a reader is left to imagine what the textual descriptions of the alterations concerned mean. In my view, it would not be safe to base a decision on such an imagined outcome. While it is true that the interpretation of descriptive accounts involves some degree of imagination, it would be dangerous to rely on such imagination especially in cases involving s 37(3) (and s 37(4)) of the BMSMA when the outcome of cases can turn on a visual appreciation of sometimes minute differences.

(2) Application to the present facts

110 Applying these principles, I find that Unapproved Works do affect the appearance of the building in the Development.

111 First, in relation to the Aluminium Glass Windows Installation, undertaking the factual and narrower assessment as required by s 37(3) of the BMSMA, it is evident from a comparison between the Unit and its surrounding units (some of which are in their original states) that the Unapproved Works clearly affect the appearance of the building. In this regard, the photograph below speaks for itself:[12]

[12] Affidavit of Chin Cheong dated 3 November 2021 at p 49.

112 The Unit is the one labelled the "Subject Property". The two units above it bear facets of their original states. In particular, the unit that appears at the top of this photograph does not have any grilles or windows installed. A simple comparison between that unit and the Unit shows that the Aluminium Glass Windows Installation is quite clearly "a feature permanently affixed to a balcony and which does result in the balcony looking different from its original state" (see *Rachel Chen* at [17]). This photograph is also taken from a reasonable vantage point, considering that the Unit is on the fourth storey. In this regard, it would, for instance, not be reasonable to take a photograph from a drone looking down at the Unit. That would not be representative of how a reasonable observer would view the development in question. I therefore find that the Aluminium Glass Windows Installation is a breach of s 37(3) of the BMSMA given that the appellant has not obtained the requisite approval from the respondent. Put in

another way, the appellant is required to seek the respondent's approval under s 37(4).

113 I turn then to the Sliding Doors Removal. As I mentioned, the DJ had decided that the appellant was in breach of s 37(3) in relation to this work because there were no sufficiently clear photographs showing that the appearance of the building concerned had not been affected. While I agree with the DJ that the burden falls on the appellant to prove that the Sliding Doors Removal did not affect the appearance referred to in s 37(3), I respectfully disagree with the DJ that he had not discharged this burden. First of all, the appellant adduced several photographs of the external façade of the buildings in the Development. If the DJ's point (as I understand it) is that the sliding doors could not be seen clearly from these numerous photographs, then the correct conclusion ought to be that these doors do *not* affect the appearance of the building. Provided that the photographs are taken from a reasonable vantage point in good lighting, then this conclusion is for the simple reason that the sliding doors cannot be seen from an external vantage point.

114 In this regard, I refer to this photograph:[13]

[13] Affidavit of Chin Cheong dated 3 November 2021 at p 51.

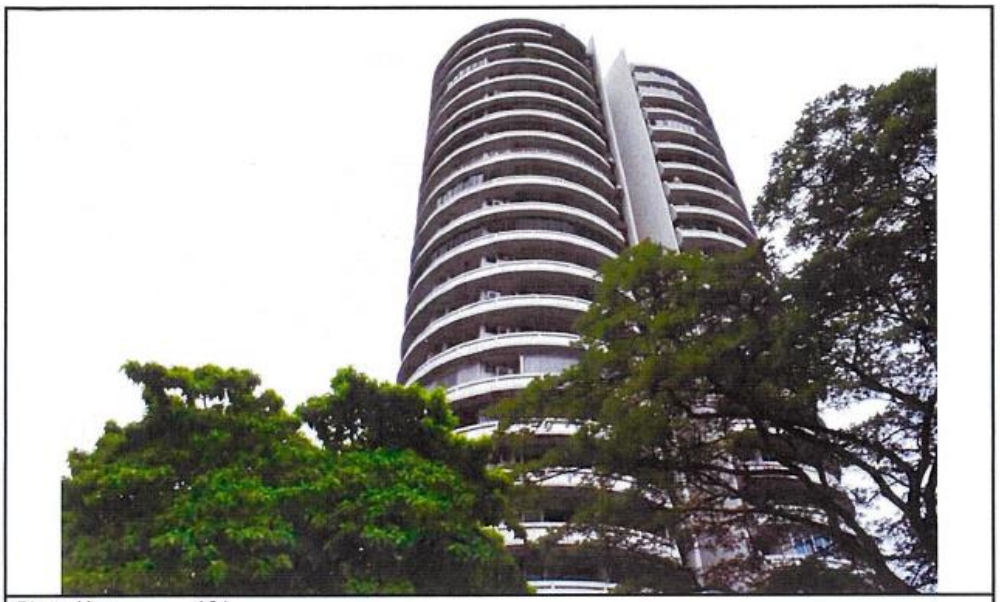
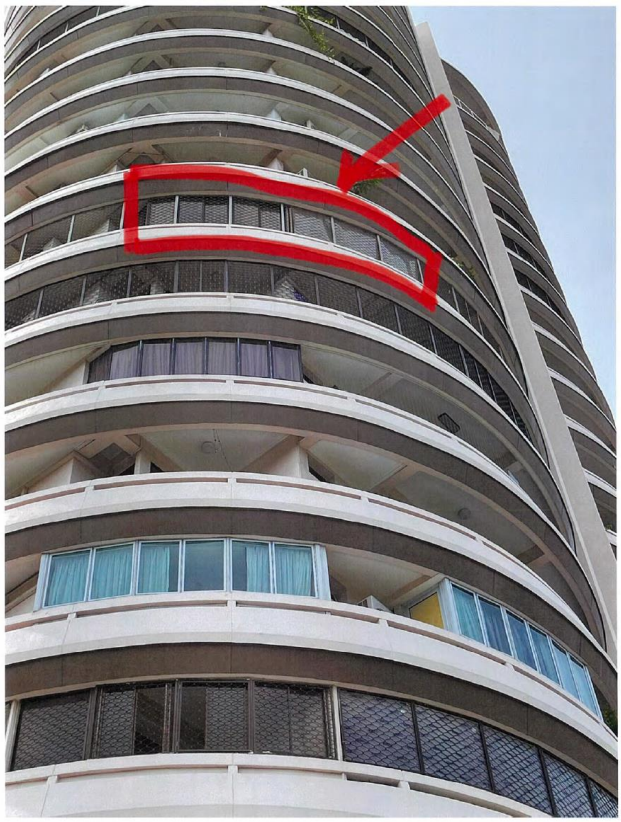


Photo No.:	A31
Location:	Block 75 External Façade – Stack 03.
Description:	There was a total of 4 units with enclosed glass windows installed along the balcony perimeter.

This photograph shows the building in which the Unit is in, though not the exact stack. This is a reasonable vantage point of an observer at ground level looking at the Development from a reasonable distance. I cannot make out the sliding doors at all. In my view, the distance of 2.4m between the sliding doors and the balcony ledge is sufficiently far that a reasonable observer cannot make out the sliding doors as a prominent element of the building's appearance.

115 During the hearing, Mr Vijayendran referred me to several other photographs taken closer to the buildings in the Development. It is only necessary for me to reproduce one of those photographs to show why I do not think that the Sliding Doors Removal affected the appearance of the building in the terms of s 37(3). The photograph is as below:[14]

[14] Agreed Bundle of Documents, Vol I at p 99.

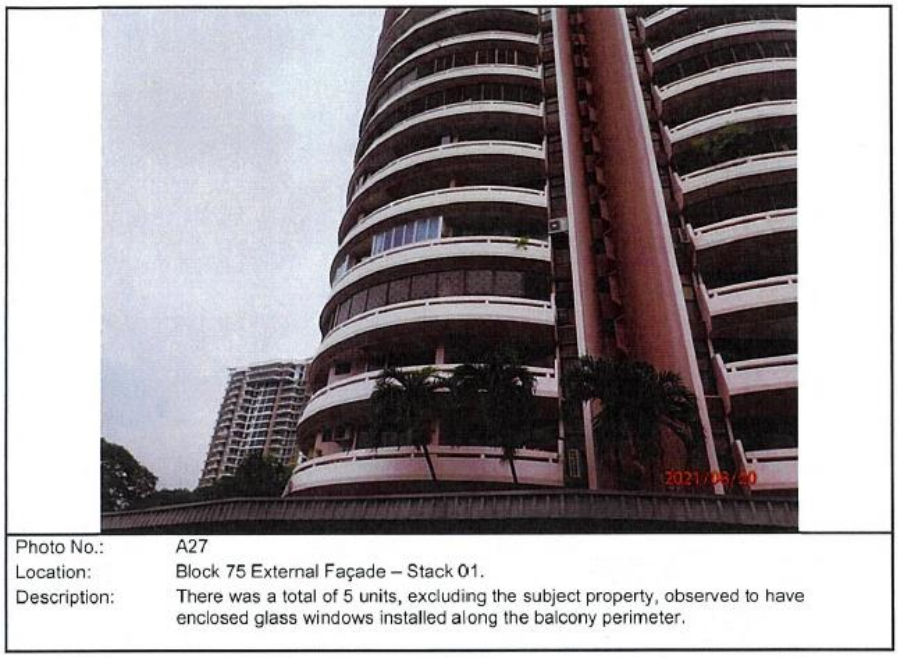


As can be seen, it is not possible for an observer standing at a reasonable vantage point to see much of the sliding doors, if at all. Thus, I find that the removal of the sliding doors does not affect the appearance of the Unit compared to its original state.

116 In coming to this conclusion, and with respect, I do not think the DJ was correct in deriving support from a similar conclusion in *Lim Florence Marjorie*, where the sliding doors were noted to be set well back from the external wall of the balcony as well. As I said above (at [109]), unless there are photographs depicting the state of the alteration, it is simply not safe to rely on what were brief textual descriptions in that case for support in the present case. Indeed, while it may not have been needed for the conclusion in *Lim Florence Marjorie*,

the exact distance between the sliding doors and the balcony in that case was not specified.

117 Finally, as for the Air-Conditioner Condenser Replacement, in addition to the photographs I referred to above,[15] I also refer to this photograph below:[16]



As I mentioned above at [10(c)], the air-conditioner condenser pictured here is not that of the Unit. This is understandable because the appellant is seeking to replace his existing condenser, which Mr Vijayendran confirmed to have been removed. Examining the condenser near the middle of this photograph, and assuming that this is what the appellant has in mind, I find that the Air-Conditioner Condenser Replacement would no doubt affect the appearance of

[15] Agreed Bundle of Documents, Vol I at pp 255 and 256.

[16] Affidavit of Chin Cheong dated 3 November 2021 at p 49.

the building in which the Unit is in. It is therefore in breach of s 37(3) of the BMSMA.

118 In this connection, while I recognise that the hazard posed by such air-conditioner condensers being affixed to the external wall is an important consideration, I do not think that that is relevant to the ss 37(3) and 37(4) analysis. These provisions are concerned with the appearance and structural integrity of the building. While structural integrity is obviously a safety concern, I do not think that extends to cover the hazard posed by the air-conditioner condensers affixed to the external wall. Thus, the respondent cannot rely on the safety concern it has with the Air-Conditioner Condenser Replacement to justify its decision under s 37(4). However, I do not foreclose a management corporation imposing its concerns about safety through other provisions of the BMSMA. Indeed, I do not intend by my analysis to diminish the importance of such safety concerns.

119 In any event, I agree with Mr Vijayendran that the respondent has not raised *specific* evidence that substantiated its concerns about safety in the present case. It is not enough for the respondent to point to such safety concerns in *other* developments but without explaining how those may be relevant to the Development.

Summary in relation to the appellant's need to seek approval for the Unapproved Works

120 In summary, I find that the Aluminium Glass Windows Installation and the Air-Conditioner Condenser Replacement *do* affect the appearance of the building the Unit is in, pursuant to the terms of s 37(3) of the BMSMA. The appellant is therefore required to seek the respondent's approval to proceed with these works.

121 However, I do not find that the Sliding Doors Removal affect the appearance of the building the Unit is in. Accordingly, the appellant is not required to seek the respondent's approval to remove the sliding doors concerned. This would be sufficient for me to allow the appeal in relation to the Sliding Doors Removal.

Whether the respondent is empowered to approve the Unapproved Works under s 37(4) of the BMSMA

Overview

122 To recap, I have found that the Aluminium Glass Windows Installation and the Air-Conditioner Condenser Unit are in breach of s 37(3) of the BMSMA, and that the appellant is required to seek approval from the respondent to effect these works. Accordingly, the next question that arises is whether the respondent is empowered under s 37(4) to authorise the appellant to carry out these two works.

123 The answer to this question is significant in the following manner. If the respondent is not empowered to grant approval, and this outcome is objectively defensible, then it would be correct that no approval was granted for the Unapproved Works. However, if the respondent was in fact empowered to grant approval, but was, on an objective analysis, wrong in coming to a contrary conclusion, then its decision under s 37(4) not to grant approval may be challenged.

Whether the Unapproved Works detract from the appearance of any of the buildings in the Development or is in keeping with the rest of the buildings

The parties' arguments

124 I turn first to the parties' arguments. The appellant relies primarily on the Strata Titles Board decision of *Low Yung Chyuan*. In that case, the Board had found that the subsidiary proprietor's installation of sliding windows at the yard area of her unit had affected the external appearance of the development. Despite this, the Board decided that the subsidiary proprietor's installation of the sliding windows did not detract from the appearance of, and was in keeping with, the rest of the buildings. This is because the same sliding windows had been allowed for ground floor units. Indeed, various types of installations, such as screens, blinds, and grilles, had all been permitted. As such, the Board reasoned that the MCST there had unreasonably refused the subsidiary proprietor's application to install the sliding doors and ordered it to do so.

125 The appellant also refers to *Rachel Chen*. In that case, Chao Hick Tin J had decided that the sliding windows which were permanently affixed to the balcony did affect the overall appearance of the building. However, the learned judge declined to grant a mandatory injunction against the defendant. This is because an order for the defendant to remove the sliding windows would cause hardship to the defendant without any real benefit as the uniformity sought by the management corporation could not be achieved. This was in turn because there were seven other units in the buildings which had installed metal grilles or glass windows covering the balconies. The management corporation could not take out proceedings against these units because these structures had been erected before the management corporation came into being.

126 Relying on these two cases, the appellant's submission is that the uniformity sought by the respondent here is also unachievable. This is because there are 19 other units in the Development with alterations and additions made to them. As such, the appellant says that the respondent's refusal to authorise the Unapproved Works is unreasonable as there are similar works which have been undertaken by other units in the Development. More substantively, the appellant argues that the respondent is not empowered to take action against these 19 other units because any potential claim would likely be time-barred. This is because those breaches had occurred more than six years ago.

127 In response, the respondent says that more than 85% of the units in the Development are compliant with the Additional By-Laws 2014. As for the units that are not in compliance, the respondent has taken out enforcement action against some of them. The respondent only raised two such cases: a final letter of demand sent to the owner of a unit at Block 75 (which unit appears in some of the photographs above) and an originating summons had been filed against the owner of a unit at Block 73. Above all, the respondent contends that if the appellant's actions went without challenge, it would undermine the respondent's authority in future actions to act in the common interest of all the proprietors.

The DJ's decision

128 The DJ ruled against the appellant. In relation to the Aluminium Glass Windows Installation and the Sliding Doors Removal, the DJ found that the cases of *Low Ying Chyuan* and *Rachel Chen* can both be distinguished on their facts. For *Low Ying Chyuan*, the DJ found that unlike that case, none of the 19 units in the Development here had obtained any written approval from the respondent for their respective alterations. This is unlike *Low Ying Chyuan*

because the management corporation there had approved the other similar cases but then refused to approve the subsidiary proprietor's application. As such, the management corporation's refusal in *Low Ying Chyuan* was rightly found to be unreasonable. No similar conclusion could be made here.

129 As for *Rachel Chen*, the DJ found that the case can be distinguished because the management corporation there could not take action against the units which had carried out the alterations. This is different from the present case because the respondent can, in theory at least, act against the 19 subsidiary proprietors and has in fact started enforcement action against two of them. As such, the DJ held that the respondent clearly has a reasonable basis to reject the appellant's application for the Unapproved Works.

130 As for the Air-Conditioner Condenser Replacement, the DJ found that the respondent's case was even stronger given that only six other units in the Development are non-compliant.

My decision: the Aluminium Glass Windows Installation and Air-Conditioner Condenser Replacement are in keeping with the rest of the buildings

(1) The law

131 As Coomaraswamy J held in *Lim Florence Marjorie* (at [85]), s 37(4) of the BMSMA empowers a management corporation to authorise a subsidiary proprietor to effect improvements to his or her lot if the management corporation is satisfied that the statutory criteria in ss 37(4)(*a*) and 37(4)(*b*) are met. The learned judge also found that the management corporation is not empowered to authorise improvements to the lot if the improvements do not meet the statutory criteria. Hence, a management corporation cannot obviously

authorise renovations that would affect the structural integrity of the building. To this clear statement of the law, I would add a few further points.

132 First, as I alluded to above (at [106]), s 37(4) of the BMSMA intentionally refers to "buildings" as opposed to the singular "building" in s 37(3). Thus, the comparative assessment in s 37(4) is wider than that in s 37(3). The assessment must consider not only the subsidiary proprietor's unit compared with that unit's original state but must be measured against the appearance of the building in which the unit exists and other buildings in the strata title plan *as a whole*.

133 Second, it is possible for the management corporation to argue for uniformity in respect of only certain aspects of the development. Indeed, s 37(4) cannot be contemplated to envisage utmost uniformity across all aspects of a development. Take, for example, a development with several buildings. It cannot be that just because one building is not uniform that the management corporation cannot insist on uniformity *within* another building. Or, even within the same building comprising of several stacks, it cannot be that the management corporation cannot insist on uniformity in one stack if uniformity has become impossible in other stacks.

134 Third, the management corporation can through its own actions alter the appearance of the buildings in the strata title plan so that it becomes impossible to achieve uniformity anymore. This may be perceived as a sliding scale of actions. On one end, the management corporation may itself authorise alterations that make it impossible to achieve uniformity in later cases. For example, depending on the situation, a management corporation may well permit subsidiary proprietors to install glass windows at the balconies. In this case, the management corporation may find it harder to argue that uniformity

can still be achieved in respect of other alterations. On the other end, the subsidiary proprietors may have made unauthorised alterations that have gone unnoticed for many years. In such cases, depending on the situation, the management corporation may also find it harder to insist on uniformity especially if enforcement becomes an issue.

(2) Application to the present facts

135 I turn now to apply the law to the present facts. As I have found the Sliding Doors Removal not to be in breach of s 37(3) (see above at [121]), only the Aluminium Glass Windows Installation and the Air-Conditioner Condenser Replacement remain relevant for s 37(4) of the BMSMA.

(A) THE ALUMINIUM GLASS WINDOWS INSTALLATION

136 In my judgment, I find that the Aluminium Glass Windows Installation are in keeping with the rest of the buildings in the Development for the purpose of s 37(4) of the BMSMA. I have deliberately used the expression "in keeping with the rest of the buildings" for reasons that I have explained above at [55] and which will also become apparent when I come to the facts in the present case.

137 To begin with, I accept that it is clear from the photographs below that the Aluminium Glass Windows Installation can *factually* detract from the appearance of the buildings in the Development,[17] *but only if* the other units were all not altered.

[17] Affidavit of Chin Cheong dated 3 November 2021 at pp 49 and 50.

Photo No.:	A27
Location:	Block 75 External Façade – Stack 01.
Description:	There was a total of 5 units, excluding the subject property, observed to have enclosed glass windows installed along the balcony perimeter.

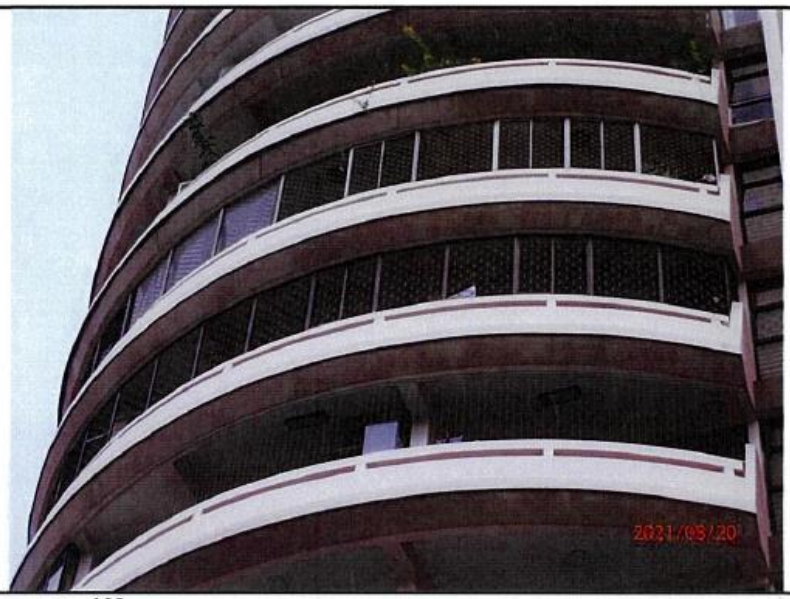


Photo No.:	A29
Location:	Block 75 External Façade – Stack 01.
Description:	There was a total of 5 units, excluding the subject property, observed to have enclosed glass windows installed along the balcony perimeter.

138 These photographs clearly show that the Aluminium Glass Windows Installation reflect more sunlight than the other units. They also create a sense of enclosure which renders its appearance quite different from the surrounding units. However, this is on the assumption that the Unit is the only one with the altered appearance. If there are *existing* units that have already departed from a uniform appearance, and this departure cannot be turned back, then there would not be any "detraction" to speak of, since there is no uniformity to begin with. Thus, it would be more accurate then to speak of the Unit as *keeping with* the rest of the (non-uniform appearance) of the other buildings.

(I) THE RESPONDENT'S CLAIMS AGAINST THE 19 SUBSIDIARY PROPRIETORS ARE LIKELY TIME-BARRED

139 Therefore, the crux of my consideration is whether the respondent can conceivably go after the 19 other subsidiary proprietors who have made similar alterations to their units. If the respondent can do so, then it can legitimately claim under s 37(4) that there is, *objectively*, a factual basis under s 37(4)(*a*) for it to say that it cannot authorise the improvement works which the appellant seeks. In this regard, the DJ had set out a summary table of these 19 units (see the GD at [33]) and it is not necessary for me to reproduce the lengthy table. It is significant that easily more than a majority of those 19 units had made their alterations *before* the passage of the 2014 Additional By-Laws. This is significant because those units would have been governed by the 1990 Additional By-Laws when the renovations were made. Accordingly, the respondent's potential action against these units would have to be premised on the 1990 Additional By-Laws and *not* the 2014 Additional By-Laws.

140 In this regard, there is nothing in the 1990 Additional By-Laws which prohibit the installation of glass windows at the balconies. I reproduce the two most relevant clauses:

> No. 6.0
>
> No air-conditioning unit shall be installed in or otherwise fixed to the common areas or any part thereof thereby affecting the general façade of the building except with the prior approval in writing of the Management Corporation.
>
> No. 7.0
>
> No balcony grilles shall be installed except with the prior approval in writing of the Management Corporation.

141 However, pursuant to s 41(2) of the LSTA, by-law 13 of Part II of the First Schedule provides that:

> 13. A subsidiary proprietor or occupier of a lot shall not make any alterations or any additions to any balcony of his lot without the written approval of the management corporation.

Therefore, these 19 subsidiary proprietors should have sought approval from the respondent. They did not. They therefore took the risk that a future management corporation would enforce the by-laws as they stood at the time against them. This has now happened. However, the question remains whether the respondent can in fact enforce the 1990 Additional By-Laws against them.

142 I accept the appellant's argument that the respondent's claims against the 19 subsidiary proprietors are likely to be time-barred. To begin with, the 1990 Additional By-Laws amount to statutorily constituted contracts between the respondent and the subsidiary proprietors. Pursuant to s 6(1) of the Limitation Act 1959 (2020 Rev Ed), breaches of the By-Laws must be enforced within six years of the breach. Thus, in the High Court decision of *Chia Sok Kheng Kathleen*, the court found that even if the defendant had failed to discharge its duties under the By-Laws (by rejecting the plaintiff's applications), the failures were breaches of contract, and such actions had to be instituted within six years from the date of the accrual of the action (at [63]). Thus, the plaintiff's claims there were time-barred.

143 This is similar to the present case. The breaches of the 19 subsidiary proprietors were in relation to the 1990 Additional By-Laws. It is undisputed that these breaches had taken place more than six years ago. It is therefore likely that the respondent is time-barred from acting against these 19 subsidiary proprietors. Accordingly, the respondent is no longer able to achieve the uniformity it seeks, and it cannot objectively point to the appellant being unable to meet s 37(4)(*a*) so as to be unable to be authorised to carry out the improvement works.

(II) THE RESPONDENT'S OWN ACTIONS HAVE LED TO THE LACK OF UNIFORMITY IN APPEARANCE

144 Furthermore, apart from it not being able to take action against the subsidiary proprietors who may have acted in breach of s 37(3), I also find that it was the respondent's *own* actions which has led to the present lack of uniformity in appearance of the buildings within the Development.

145 First, the appellant points out that the respondent's own inaction in the last 25 years have given rise to acquiescence in respect of the works undertaken by the 19 subsidiary proprietors. I agree. I derive support from the District Court decision of *Management Corporation Strata Title Plan No 1786 v Huang Hsiang Shui* [2006] SGDC 20. In that case, the management corporation had claimed against the subsidiary proprietor for the removal of several unauthorised works in contravention of the by-laws or House Rules of the development concerned. The court refused to order the subsidiary proprietor to remove the unauthorised awning on the basis that the management corporation had, through its inaction for several years, acquiesced to its presence. The court had said this (at [223]):

> What about item (ii), the awning? The crucial difference between this item and the others above stemmed from the fact that this

> item was installed way back thereabouts in 1997, and until 2001, there was no evidence, not even from the Plaintiffs, that anyone had objected to it. Notwithstanding that there was no formal written approval for its installation, I had found that the fact that the awning was allowed to stand for so many years seemed to suggest that implicit approval had been given, or that previous councils had acquiescenced to it. Requiring the Defendant to remove it now appeared too harsh, *given the long period of time that the awning had been present, and that the Plaintiffs only brought it up because of the unauthorised works*.
>
> [emphasis in original]

146 Applied to the present case, this reinforces the point that the respondent's own inactions against the other subsidiary proprietors have created the present lack of uniformity in the appearance of the buildings in the Development. Apart from its claims being likely time-barred against these other subsidiary proprietors, it needs to be said that the respondent's claims would also likely fail because of its own acquiescence.

147 Second, the appellant also specifically points out that the respondent had approved the installation of grilles in the Development. On its own, this would not be sufficient to show that the premise of uniformity is not achievable anymore. This is because s 37A of the BMSMA permits the installation of safety equipment, including those grilles. Thus, s 37A is a carve-out to s 37(3) and potentially insulates the installation of such safety equipment from the assessment under ss 37(3) and 37(4). Accordingly, despite having approved these grilles, the respondent can still insist on uniformity under the terms of s 37(4)(*a*).

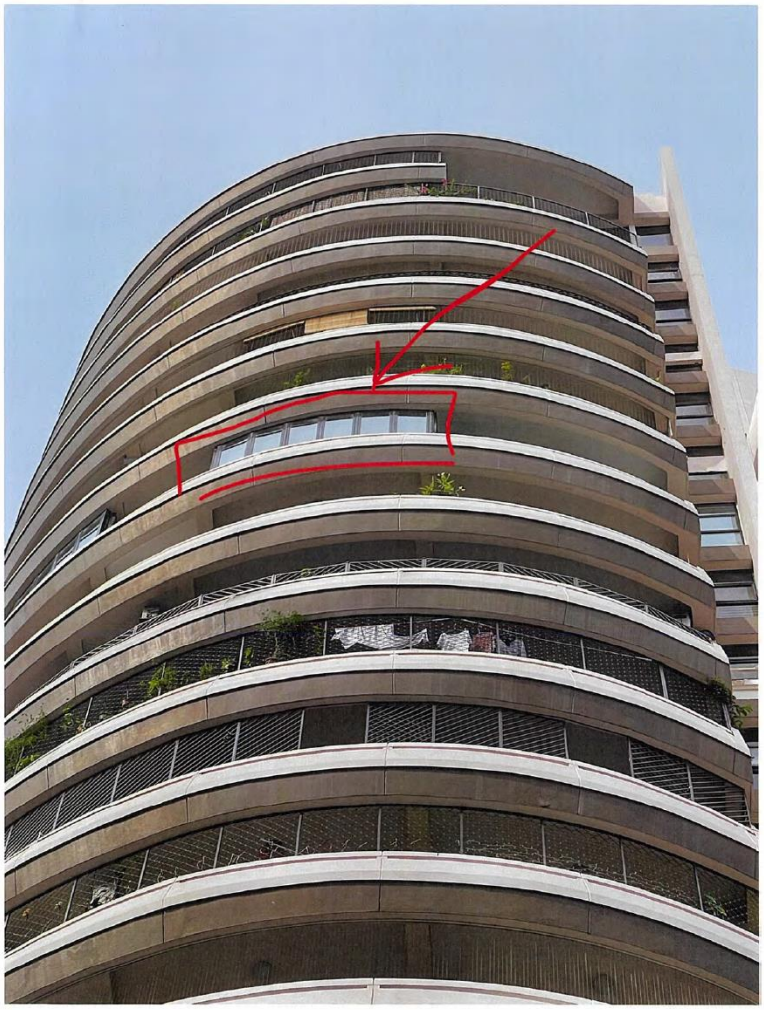
148 However, as Mr Vijayendran pointed out before me, his argument in relation to the grilles is more nuanced. This is because s 37A, while carving out grilles as an exception, also refers to uniformity in s 37A(2)(*b*). Thus, Mr Vijayendran argued that despite the provision in s 37A(2)(*b*) that requires

the subsidiary proprietor to ensure that the grilles (being a safety equipment) is "in keeping with the appearance of the building" (which is the same expression used in s 37(4)(*a*)), the respondent has neglected to ensure that this is done in respect of the subsidiary proprietors who have installed grilles. Accordingly, it is the respondent's own doing that has resulted in uniformity of appearance being impossible to achieve now. For completeness, s 37A provides as follows:

> **Installation of safety equipment permitted**
>
> **37A.**—(1) A subsidiary proprietor of a lot in a building on a parcel comprised in a strata title plan may install safety equipment on the lot, or as part of any window, door or opening on the lot which is facing outdoors, despite any other provision of this Act or the regulations or any by-law of the parcel which otherwise prohibits the installation of the safety equipment.
>
> (2) A subsidiary proprietor of a lot in a building who installs safety equipment under this section must —
>
> (*a*) repair any damage caused to any part of the common property or limited common property (as the case may be) by the installation of the safety equipment; and
>
> (*b*) ensure that the safety equipment is installed in a competent and proper manner and has an appearance, after it has been installed, in keeping with the appearance of the building.

149 I agree with this submission. It suffices to refer to just one photograph to illustrate the untidy state of the grilles that the respondent has implicitly allowed in the Development:[18]

[18] Agreed Bundle of Documents, Vol I at p 218.



Leaving aside the units which have unauthorised windows, the external façade of this building in the Development is still far from uniform. This can be partly attributed to installation of a wide variety of grilles, permitted as they are under s 37A, but which the respondent has failed to ensure are "in keeping with the appearance of the building" (s 37A(2)(*b*)). Indeed, from this photograph alone, there are half-grilles, grilles with different patterns, invisible grilles and so forth. This cannot, by any stretch of the imagination, be described as anywhere near uniform.

150 Given that the respondent is partly responsible for this state of affairs by either explicitly allowing the installation of these particular grilles, or not policing the installation of these grilles as it is entitled to under s 37A(2)(*b*), the respondent cannot now hope to reverse the situation. It cannot be heard to insist on uniformity. That boat has long sailed. The horse has bolted. Whichever metaphor is used, the fact remains that the respondent cannot insist that the appellant adhere to a dream of uniformity that bears no semblance to reality. There is no longer any benefit to the Development for the respondent to refuse the appellant's Unapproved Works. Accordingly, for this reason as well, I find that the respondent cannot objectively point to the appellant being unable to meet s 37(4)(*a*) so as to be unable to be authorised to carry out the improvement works.

(III) The main architectural feature of the Development

151 Finally, as a closing point, I also agree with the appellant that the main architectural feature of the buildings in the Development is the circular balconies. This is *what* a reasonable observer would be concerned about when he is concerned about the appearance of any of the buildings comprised in the Development. Because of the predominance of this architectural feature for this *particular* Development, I also find that it overwhelms all other inconsistencies in uniformity, such as the Aluminium Glass Windows Installation.

(B) The Air-Conditioner Condenser Replacement

152 I conclude the same with respect to the Air-Conditioner Condenser Replacement. First of all, I accept that if the appellant's air-conditioner condenser unit were the *only* one in the Development, it would certainly detract

from the appearance of the buildings within. However, the evidence is that there are other such units. The photograph below speaks for itself:[19]

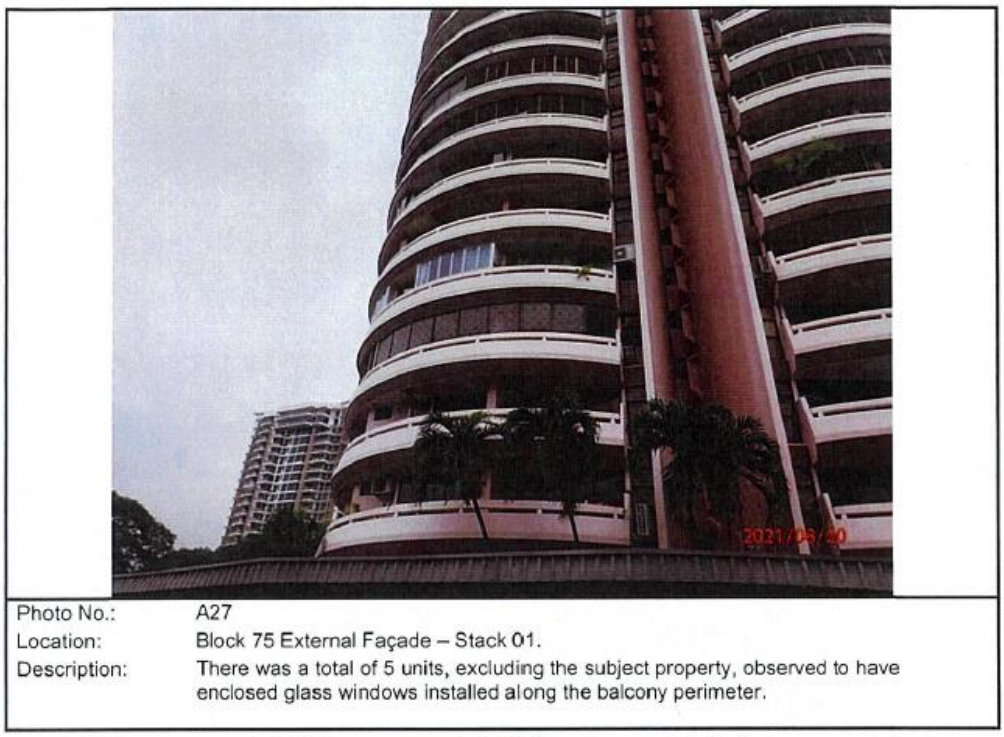


Photo No.:	A27
Location:	Block 75 External Façade – Stack 01.
Description:	There was a total of 5 units, excluding the subject property, observed to have enclosed glass windows installed along the balcony perimeter.

153 Accordingly, I need to consider if the respondent can likewise go after the other six units with similar external air-conditioner condenser units. In my judgment, the respondent cannot do so because, as I have found above, the subsidiary proprietors of these units have simply not breached either the 1990 Additional By-Laws (read with the by-laws in the First Schedule of the LTSA) or the 2014 Additional By-Laws.

154 Further, even if the subsidiary proprietors had breached the 1990 Additional By-Laws, the respondent's claim in respect of such breaches would

[19] Affidavit of Chin Cheong dated 3 November 2021 at p 49.

likely be time-barred or fail due to acquiescence. I repeat my analysis above at [139]–[150].

Summary in relation to whether the respondent is empowered to approve the Unapproved Works

155 For these reasons, I find that the respondent is *empowered* under s 37(4) of the BMSMA to grant approval in respect of the Aluminium Glass Windows Installation and the Air-Conditioner Condenser Replacement. Yet, despite this, the respondent has either wrongly concluded that it was not empowered to do so, or exercised its discretion *not* to authorise the appellant to carry out the Aluminium Glass Windows Installation and the Air-Conditioner Condenser Replacement. The remaining question is whether this amounted to a breach for the purposes of s 88(1) of the BMSMA.

Whether an order for restraint of the respondent's breach should be ordered pursuant to s 88(1) of the BMSMA

156 I find that the respondent has breached its duty under s 37(4) because it had based its decision not to grant approval on an objectively indefensible conclusion in so far as the criteria in ss 37(4)(*a*) and 37(4)(*b*) are concerned.

157 First, in respect of the Aluminium Glass Windows Installation, there was no objectively defensible reason for the respondent's decision, except that it wished to pursue uniformity across the Development. Yet, the boat has truly sailed for that endeavour as, due not necessarily to the actions of the management corporation, it is no longer possible to achieve such uniformity.

158 Second, the same analysis applies in relation to the Air-Conditioner Condenser Replacement, with the additional reason that there was simply no discernible breach of any by-laws in this regard. This made the respondent's

decision with regard to the Air-Conditioner Condenser Replacement all the more unreasonable.

159 As for the Sliding Doors Removal, as I have concluded that it does not come within s 37(3) of the BMSMA, it must follow that the respondent was incorrect to withhold approval, since no such approval was needed.

160 For all these reasons, I order, pursuant to s 88(1)(*a*) of the BMSMA, for the respondent to approve the Unapproved Works requested for by the appellant. For the avoidance of doubt, the "Unapproved Works" comprise the Aluminium Glass Windows Installation, the Sliding Doors Removal, and the Air-Conditioner Condenser Replacement as I have defined them at [10] above.

161 Taking a step back, I do not think there is any broader benefit to the Development by the respondent refusing to approve the Unapproved Works. This is for the simple reason that the very purpose under s 37(4)(*a*), that of a uniformity in the appearance of the buildings in the Development, is no longer achievable. If so, there is no overarching communitarian need for the respondent to deny the appellant his individual right to effect the Unapproved Works for his own benefit. The appellant should be allowed to improve his own home to his individual preferences.

Conclusion

162 In conclusion, I allow the appellant's appeal in its entirety, except in relation to the question of damages since the appellant has not pursued that point before me.

163 Unless they are able to agree, the parties are to write in with their brief submissions on the appropriate costs order within 14 days of this judgment.

164 I would also like to thank Mr Vijayendran and Mr Leo, as well as their respective teams, for their helpful submissions.

Coda

165 Before I end this judgment, I raise two points by way of a coda.

A practical suggestion

166 First, I would add a practical suggestion. I have found many of the undoubtedly thoroughly reasoned cases on ss 37(3) and 37(4) of the BMSMA to be of limited use in the present case. This is because many of these cases describe in words what can be much better conveyed through floorplans or photographs. The reader is then left to the imagination of how exactly the façade of the development concerned has been changed. However, it would not be safe for a court to base its reasoning on its imagination of what the descriptions mean.

167 It is true that each case must ultimately turn on its own facts. The courts have said the same for the precedential value of trade marks for the marks-similarity inquiry, and implied terms (in fact) in a previous case for the implication of terms in contract. However, at least for trade marks, the marks are reproduced in judgments routinely. This makes previous judgments much more helpful in terms of precedential value. Thus, it would be a shame if the cases concerning ss 37(3) and 37(4) of the BMSMA end up being of limited precedential value because the courts and tribunals concerned do not visually reproduce the situation at hand.

168 Accordingly, I would respectfully suggest that, if privacy concerns are not in issue or can be adequately addressed, future cases should set out the

relevant photographs in a way that makes the decision more accessible to an external reader with no knowledge of the proceedings. At the very least, a floorplan of the affected unit, along with clear photographs of the contested features, should be reproduced in judgments (although, to be fair, I note that this has been done occasionally, albeit infrequently).

169 Further, the parties should also make it easier for the court or tribunal to refer to the relevant floorplan or photographs. Instead of cross-referencing these important visual depictions to the affidavits, the parties ought to reproduce them directly in their submissions, with the references to the underlying affidavits. Above all, the decision-maker should never be placed in a position where he or she has to scour the underlying documents for the relevant floorplan or photographs. In sum, parties in future cases should properly exhibit the relevant photographs in a way that makes it convenient for the decision-maker.

*The unsatisfactory relationship between ss 88(1)(**a**) and 111(**b**) of the BMSMA in relation to challenges brought by subsidiary proprietors*

170 Second, I record my view that the relationship between ss 88(1)(*a*) and 111(*b*) of the BMSMA may require legislative refinement in relation to challenges brought by *subsidiary proprietors* against a management corporation's decision under s 37(4), as well as a consideration of the proper spheres of jurisdiction for the court and the Stata Titles Board. I do not think, and in any event, it is not before me, that there is a similar problem (subject to my views at [184]) in relation to claims brought by *management corporations* against subsidiary proprietors, as the cases of *Lim Florence Marjorie* and *Rachel Chan* were about. This is because, in those cases, only s 88(1)(*a*) would apply but not s 111(*b*) in relation to breaches by subsidiary proprietors, However, as I will explain below, in relation to challenges brought by subsidiary

proprietors, the present legislative scheme potentially allows the subsidiary proprietor to bring its challenge under *both* ss 88(1)(*a*) and 111(*b*) for substantively the *same* remedy but with quite different *originating* processes.

171 In this respect, I have attempted to explain above that ss 88(1)(*a*) and 111(*b*) cater for distinct situations where a management corporation's decision under s 37(4) may be challenged. I have explained that the basis for challenge is different for each of these provisions and that is why it is crucial for parties (as I explained above at [69]) not to use arguments of "unreasonableness" for a challenge brought under s 88(1)(*a*). I have tried to do this because whereas the power to order the remedy under s 111(*b*) is vested with the Strata Titles Board, the power to do the same under s 88(1)(*a*) is vested with the court. Indeed, this difference as to the body to order the remedy under ss 88(1)(*a*) and 111(*b*) suggests that each provision is meant to cater for a distinct situation.

172 However, I recognise that despite my best attempts, there remains the possibility that a challenge could be brought under ss 88(1)(*a*) or 111(*b*). For example, depending on how the claim is framed, a challenge under s 111(*b*) can be recast as a challenge under s 88(1)(*a*) by alleging that a management corporation has *breached* its duty to consider the satisfaction of the statutory criteria *by unreasonably refusing authorisatio*n (in other words, the challenge under s 111(*b*) is a particular manner of *breach* of s 37(4)). In this situation, there would be an overlap between a challenge brought under s 88(1)(*a*) and one made under s 111(*b*). This would allow a subsidiary proprietor to choose between s 88(1)(*a*) and s 111(*b*), which involves different starting decision-making bodies (the court for s 88(1)(*a*), and the Strata Titles Board for s 111(*b*), but for *substantively the same* remedy except for damages (a prohibitory injunction to compel the management corporation to approve the proposed improvement works for s 88(1)(*a*), and an order that the management

corporation consents to the proposed improvement works under s 111(*b*)). In saying this, I recognise that s 88(1)(*a*) allows the subsidiary proprietor to claim damages, whereas s 111(*b*) does not. But should this allow a subsidiary proprietor to utilise the s 88(1)(*a*) route by tagging on a claim for minimal damages and yet take advantage of the considerable benefits of such a course of action?

173 This does not seem like a satisfactory situation to me. It means that a subsidiary proprietor whose proposed improvement works have not been approved by the management corporation can, in most cases at least, freely choose to commence its challenge under s 88(1)(*a*) or s 111(*b*) for substantively the same remedy but with vastly different originating processes and the corresponding right of appeal. Indeed, the appellant in this *very* present case could have, on the very same facts, commenced his challenge against the respondent (apart from the claim for damages) before the Strata Titles Board instead of the District Court had he invoked s 111(*b*) instead of s 88(1)(*a*). And had the appellant done so, the appeal before me from the Strata Titles Board in that scenario would have been very different. This is because s 98(1) of the BMSMA would have restricted the appellant's appeal to only *points of law*. He would not have been able to challenge a decision on, for example, whether the Unapproved Works detracted from the appearance of the building. Yet, by commencing his action under s 88(1)(*a*) for essentially the same remedy, the appellant has got two bites at the proverbial cherry, by having the learned DJ hear his case first on both points of fact and law, and to then appeal to the High Court on similar points of fact and law. This, as I have said, does not seem like a satisfactory situation to me although I am duty-bound to consider the appellant's appeal on both points of fact and law. Why then was this dual-track

regime created and can a subsidiary proprietor have a free hand to choose the preferred dispute resolution forum?

174 To answer this, we must go back to examine the establishment of the Strata Titles Board. The impetus to set up the Strata Titles Board for the resolution of disputes in the strata title scheme was first elaborated upon by the then Second Minister for Law (Prof S Jayakumar) in such terms (*Singapore Parliamentary Debates, Official Report* (28 July 1987) vol 49 at cols 1412–1413):

> I would like to draw the attention of hon. Members to the new Part VI in the Bill which deals with the *establishment of Strata Titles Boards*. Several representors made requests to the Select Committee urging the establishment of such boards … to adjudicate disputes between subsidiary proprietors and management corporations and between one subsidiary proprietor and another. As at 9th July 1987, based on the records at the Registry of Titles, there are more than 1,200 management corporations in Singapore in charge of more than 54,000 strata units. If *such disputes were not to be adjudicated by the Strata Titles Boards*, they will have to be resolved in the courts. *Proceedings in the courts are complex, protracted and costly*. Furthermore, *we should not overload our courts with such disputes*.
>
> [emphasis added]

Hence, it was envisioned from its inception that the Strata Titles Board would supplement the formal court dispute resolution process in order to prevent the courts from being inundated with disputes in the strata title scheme. Proceedings before the Strata Titles Board were envisioned to be relatively more expeditious and inexpensive when compared to court processes. This alternative forum could deal with cases which may not justify the initiation of court proceedings, hence leaving the courts free to deal with more important matters.

175 On 1 December 1987, the Strata Titles Board was then officially instituted in Singapore with the enactment of a new Part IV in the previous Land

Titles (Strata) Act (Cap 158, 1985 Rev Ed) ("LTSA 1985"). The Strata Titles Board was given jurisdiction over certain disputes such as those under s 101 (the predecessor provision to the current s 111(*a*) of the BMSMA) where the management corporation "has unreasonably refused to consent to a proposal by that subsidiary proprietor to effect alterations to the common property". Subsequently, in 2004, Parliament decided to merge Part IV of the LTSA 1985 (amongst other parts) into the present BMSMA.

176 In this connection, the jurisdiction of the Strata Titles Board was then carefully debated and scoped out by Parliament once more in 2004. During the Second Reading of the Bill, Dr Amy Khor Lean Suan (Chairperson of the Singapore Institute of Surveyors and Valuers) had suggested for the Strata Titles Board's jurisdiction to be widened to deal with, *eg*, "disputes over boundaries between the main MC and sub-MCs or even between sub-MCs" (*Singapore Parliamentary Debates, Official Report* (19 April 2004) vol 77 at col 2767):

> Lastly, jurisdiction of the Strata Titles Board (STB). The types of disputes which the STB has jurisdiction over are limited to those spelt out under clauses 100 to 113 of the Bill. Disputes which are not covered under these clauses would have to be *settled via the courts, which can be time-consuming and very costly*. It is thus proposed that the *STB's jurisdiction be widened to deal with* conflicts relating to management and operation, so that *parties need not resort to court proceedings*. For instance, the Bill does not provide for the Commissioner of Buildings to approve the demarcation of boundaries for the limited common properties. Hence, disputes over boundaries between the main MC and sub-MCs or even between sub-MCs would have to be resolved via the courts. *It would be more efficient if such disputes can be adjudicated by the Strata Titles Board*. The STB could also be given the powers to adjudicate on operational conflicts between the main MC and the sub-MCs.
>
> [emphasis added]

Some of these suggestions were then accepted by the Select Committee eventually: "the Strata Titles Board (STB) will be allowed to adjudicate

boundary disputes on limited common property between MC and sub-MC, or even among sub-MCs. This would be *more efficient and less costly than going to the courts*" [emphasis added] (*Singapore Parliamentary Debates, Official Report* (19 October 2004) vol 78 at cols 925–926). But whatever the changes being suggested, the thrust and purport of the discussion regarding the Strata Titles Board's function and jurisdiction were still focused along the lines of what Prof S Jayakumar had previously mentioned – *ie*, the Strata Title Board was there to ensure an efficient and less costly resolution of disputes rather than invoking the formal court process. Its purpose was to ensure that more disputes could be resolved at that level and it has even been described as a "clearing house" (see *Report of the Select Committee* at p C 68).

177 It was also envisaged that the Strata Titles Board would be able to bring a different set of expertise and experience in performing their adjudicatory function as opposed to judges sitting in court as its members come from myriad professions apart from advocates and solicitors (such as engineers, architects, and surveyors) (see *Report of the Select Committee* at p C 70):

> (Mr Mah Bow Tan) The STB can adjudicate where it is a matter of the process not being followed. … So, it is the legality of the process. When it comes to the actual substance, *where does the STB derive its expertise?* — (Prof Lim Lan Yuan) I suppose in a *conflict which has nothing to do with law but on facts*, someone could also make a decision. Because, right now, the STB, in some situations, has a panel of three. In other situations, it has a panel of five. So, based on the five members – *a lot of them are professionals in different fields – they can give their own judgment on who is right and who is wrong*. If not, then the matter could go up to the court. (Dr Amy Khor) Minister, may I add that usually the *STB would have somebody who is an expert in that area, besides the legal profession.*
>
> [emphasis added]

178 Nevertheless, despite those intended ideals by Parliament, it appears from the Singapore case law that subsequently followed that the subsidiary

proprietors could have a free hand to choose which forum to determine its dispute. As a result, the force of those ideals has arguably been partly diluted.

179 The ability of a subsidiary proprietor to freely choose its forum, despite the fact that the Strata Titles Board is given jurisdiction over disputes under Part VI of the BMSMA, can be observed from the High Court decision of *Fu Loong Lithographer Pte Ltd and others v Mok Wai Hoe and another* [2014] 1 SLR 218 ("*Fu Loong Lithographer*"). There, the dissatisfied subsidiary proprietors of the strata development had brought an application against the management corporation (amongst other defendants) seeking the invalidation of certain rulings made by the chairman at an extraordinary general meeting. Notably, the application to the High Court in that case was *not* made under s 88 of the BMSMA, and the subsidiary proprietors were invoking ss 101(1) and 104(1) of the BMSMA instead. One of the defendants argued that the High Court was not the appropriate forum for the dispute and that the subsidiary proprietors should have brought it before the Strata Titles Board instead (see *Fu Loong Lithographer* at [20]). The court outrightly rejected that view and stated as such (see *Fu Loong Lithographer* at [26]):

> … The mere fact that the BMSMA provides for the establishment of STBs to determine disputes under the BMSMA does not mean that the jurisdiction of the courts is thereby ousted. In the *absence of a provision expressly ousting the court's jurisdiction or granting the STBs exclusive jurisdiction* over strata management disputes, the position will simply be that a *plaintiff has two possible forums to choose from*. However, if he *chooses to proceed before a STB in the first instance*, then *any appeal against the STB's decision to the High Court can only be on a point of law*: s 98(1) of the BMSMA.
>
> [emphasis added]

Consequently, the subsidiary proprietor has a choice to bring the dispute before the courts or the Strata Titles Board at the first instance as the Strata Titles Board does not have the exclusive jurisdiction over disputes under the BMSMA, but

that if he chose to proceed before the Strata Titles Board initially, then any appeal is restricted to a point of law under s 98(1) of the BMSMA. The High Court's decision in *Fu Loong Lithographer* (at [25]) was reasoned based on the decision of *Kwok Wai Hon v Teo Kim Hui* [2008] SGMC 4 (upheld in *Teo Kim Hui and Another v Kwok Wai Hon* [2008] SGHC 232) where it was held that in order to oust the court's jurisdiction in favour of the exclusive jurisdiction of a tribunal other than the courts, then there must be express legislative provision to that effect. As s 101(1) of the BMSMA clearly provided that the Strata Titles Board "may, pursuant to an application by a … subsidiary proprietor" make orders to resolve the dispute between the various parties mentioned in that provision, then that permissive language cannot be regarded as expressly providing for the exclusive jurisdiction of the Strata Titles Board.

180 The holding in *Fu Loong Lithographer* has since been endorsed in the High Court decision of *Diora-Ace Ltd and others v Management Corporation Strata Title Plan No 3661 and another* [2015] 3 SLR 620 at [34]–[35] ("*Diora-Ace Ltd*"). This was another case where the defendants (including the management corporation) had similarly submitted that the subsidiary proprietors should have commenced proceedings before the Strata Titles Board under ss 103 and 104 of the BMSMA instead of relying on s 88 (at [25]), but that the court rejected that argument.

181 Perhaps more pointedly to the present situation at hand, the case of *Loh Sook Cheng v Management Corporation Strata Title Plan No 508* [2020] SGDC 159 concerned the invocation of s 111 of the BMSMA (amongst other provisions such as s 88(1)) by the subsidiary proprietor as the basis for reliefs sought. The learned District Judge had to consider the preliminary issue of whether the District Court had the jurisdiction to make the orders sought, or whether the "request for relief should more appropriately be put before the

[Strata Titles Board]" (at [9]), given that s 111 provided that a subsidiary proprietor could apply to the Strata Titles Board for relief. The District Judge endorsed and followed the ruling in *Fu Loong Lithographer* and concluded that he had jurisdiction (at [10]):

> However, on further reflection, it is clear to me that the Court's jurisdiction has not been ousted. Section 123 of the BMSMA makes that fairly clear. Furthermore, as Chan Seng Onn J explained in *Fu Loong Lithographer Pte Ltd and ors v Mok Wai Hoe and anor* [2014] 1 SLR 218 at [24] to [26], in the absence of a provision expressly ousting the Court's jurisdiction or granting STB exclusive jurisdiction over such disputes, the position will simply be that a plaintiff has two possible forums to choose from. In some situations, it may be preferable to seek relief from STB given the wider powers they possessed, as explained by District Judge Loo Ngan Chor in *Tan Su We, Hazel v Management Corporation Strata Title Plan No 1645* [2014] SGDC 276 at [11]. But the bottom line is that I had the jurisdiction to make the orders sought.

The court essentially held that it could determine the dispute by invocation of s 111 of the BMSMA without needing the Strata Title Board's involvement at all. Thus, it appears to be the settled position that despite the Strata Titles Board being granted jurisdiction over certain matters (as carefully scoped out by Parliament), a fragmented regime persists as the subsidiary proprietor can play gambit and arbitrage the election of the forum to determine its dispute – possibly going against the ideals of Parliament for the efficient resolution of certain disputes by the Strata Titles Board and to prevent the courts from being overloaded by such cases (see above at [174]–[176]).

182 In my respectful view, and in view of the above discussion, Parliament could possibly undertake a review of two issues.

183 First, Parliament could consider the satisfactoriness of the apparent interchangeability between ss 88(1)(*a*) and 111(*b*) in so far as a subsidiary

proprietor's challenge against a management corporation's decision to not approve its proposed improvement works. While I have tried to rationalise the situation by a certain interpretation of ss 88(1)(*a*) and 111(*b*), there are larger policy reasons at play that go beyond the remit of the courts. I would venture to think that the problem lies partly on the fact that s 88(1)(*a*) is a remedial provision for breaches of any provision *in the whole of* Part 5 of the BMSMA, whereas s 111(*b*) is a remedial provision that is *targeted* at s 37(4). Thus, while it is legally permissible for a subsidiary proprietor to bring a challenge to a decision made under s 37(4) under s 88(1)(*a*) since the former provision is part of Part 5, it may be questioned whether this advances the legislative intention of enacting a *targeted* provision in s 111(*b*) specifically for cases involving challenges to a management corporation's decision not to approve a subsidiary proprietor's proposed improvement works. The subsidiary proprietor's free choice to resolve its dispute starting with the Strata Titles Board or the courts (a position which has been upheld by the High Court) arguably goes against the *rationale* for Parliament to establish the Strata Titles Board in the first place, which is to insulate the courts from these disputes and to provide specialist input in the resolution process. I would therefore respectfully suggest for Parliament to look into the relationship between ss 88(1)(*a*) and 111(*b*) in relation to the situation exemplified by the present appeal.

184 Second, and more broadly, Parliament may also wish to consider whether the presently fragmented regime is intended. This fragmentation can happen in the following ways. First, depending on the identity of complainant, the originating tribunal or court may be different. For example, as I have explained above, whereas a management corporation's complaint against a subsidiary proprietor (for instance, for breach of its obligation to seek approval for improvement works under s 37(3)) will inevitably proceed by way of

s 88(1)(*a*), a subsidiary proprietor's challenge against a management corporation's decision under s 37(4) can proceed by way of s 88(1)(*a*) or, more appropriately, as I have tried to explain above, s 111(*b*). If so, the fragmentation occurs by a management corporation's complaint being heard by a court in the first instance, but a subsidiary proprietor's challenge being heard by the Strata Titles Board first, over potentially largely similar issues and for substantively identical remedies (except for damages). Second, the courts, led by the High Court decision of *Fu Loong Lithographer*, have maintained that unless the courts' jurisdiction is expressly ousted by the BMSMA, they retain jurisdiction to hear matters even if the BMSMA provides that the Strata Titles Board should hear the matter in the first instance. In this sense, there is fragmentation as the courts and tribunals maintain concurrent jurisdiction over essentially the same matter, and the choice is left to the subsidiary proprietor to decide where to commence its action. There are examples of such fragmentation apart from ss 88(1)(*a*) and 111(*b*), as exemplified by cases such as *Fu Loong Lithographer* and *Diora-Ace Ltd*. Considering that the Strata Titles Board was set up to provide a more efficient and cost effective manner of adjudication in disputes between the management corporation and subsidiary proprietors, it is questionable if Parliament ever intended for this fragmented regime. Indeed, in my respectful view, with the broader rationale in mind of achieving the swift resolution of disputes, there seems to be no good explanation to justify this fragmented regime.

185 Perhaps, as with many instances where subsequent developments have been justified by reference to a technical interpretation of the law, as the courts are bound to do, the time has come to return to the underlying purpose of the law. But, this is something that Parliament is best placed to do. The respective

spheres of jurisdiction between the courts and the Strata Titles Board should be made clear.

Goh Yihan
Judicial Commissioner

Gregory Vijayendran SC and Tomoyuki Lewis Ban (Rajah & Tann Singapore LLP) (instructed), Mulani Prakash P and Safiuddin Bin Mohamed Naseem (M & A Law Corporation) for the appellant;
Leo Cheng Suan and Lee Shu Xian (Infinitus Law Corporation) for the respondent.