Wu Chiu Lin
v
Management Corporation Strata Title Plan No 2874

[2018] SGHC 43

High Court — Tribunal Appeal No 13 of 2017
Chan Seng Onn J
14 August 2017

Land — Strata titles — By-laws

Land — Strata titles — Common property — Exclusive use and enjoyment

Land — Strata titles — Strata Titles Board

28 February 2018 Judgment reserved.

Chan Seng Onn J:

Introduction

1 This is an appeal brought by the appellant, Ms Wu Chiu Lin ("Ms Wu"), pursuant to s 98(1) of the Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed) ("the Act"), against the decision of the Strata Titles Board ("the Board") on points of law. The Board had dismissed the application in Strata Title Board No 86 of 2016 ("the STB Application") brought by various subsidiary proprietors of Strata Title Plan No 2874, which is a condominium development known as "SunGlade" ("the Development"), to install coverings over the trellises of their respective units in the Development.

2 The key controversy before me, amongst the various purported questions of law raised by Ms Wu on appeal, is the thorny issue of whether the proposed installation of the coverings over the trellises amounts to an exclusive use and enjoyment of common property within the ambit prescribed by the Act. This invited considerations, in particular, of the proper interpretation of both "common property" as defined under s 2(1) of the Act, as well as "exclusive use and enjoyment" within the meaning of s 33(1). Before me, only Ms Wu made submissions on appeal. The respondent, which is the management corporation of the Development ("the Management Corporation"), did not take a position in the appeal although it had opposed the STB Application during the proceedings before the Board below.

3 Following the hearing, I reserved judgment. I now furnish my decision for this appeal and the accompanying reasons.

Background

The dispute

4 Ms Wu is the sole subsidiary proprietor of a penthouse unit located on the 13th floor (which is the topmost floor) of Block 7 of the Development.[1]

5 The strata lots in the Development are designed such that there are trellises installed above the private enclosed spaces ("PES") or balconies of some of the ground floor units ("PES trellises"), as well as above the balconies of some of the penthouse units ("roof trellises").[2]

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1 4 ROP 5, row 2; 4 ROP 29, row 50.

2 4 ROP 6, para 3.

6 At the 11th Annual General Meeting ("the 11th AGM") of the Management Corporation held on 28 May 2016, there was a special resolution to adopt a by-law drafted by the managing agent of the Management Corporation, Savills Property Management Pte Ltd, that subjected the installation of coverings over all PES trellises and roof trellises to certain conditions ("the trellis by-law"). These conditions were:[3]

> (i) The width of the PES/Roof Trellis covering shall be no more than 2 metres from the external wall of the unit, unless exempted by URA.
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> (ii) The design of the PES/Roof Trellis covering must be of approved design in Appendix A.
>
> (iii) The design of the PES/Roof Trellis covering must be certified by a Qualified Person at resident's own cost.
>
> (iv) The design of the PES/Roof Trellis covering must be submitted for approval by Urban Redevelopment Authority (URA), Building & Construction Authority (BCA) and any other regulatory bodies as may be required, at resident's own cost.
>
> (v) The PES/Roof Trellis covering will be removed at the Subsidiary Proprietor's own cost should there be a change of property ownership, unless the new owner undertakes the ownership and maintenance of the PES/Roof Trellis covering.
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> (vi) The Subsidiary Proprietor will be responsible for proper maintenance, including cleaning the top of the PES/Roof Trellis on a regular basis, failing which the Management will engage a cleaning contractor and recover the cleaning costs from the Subsidiary Proprietor concerned after due notice is given.

The "approved design" referred to in condition (ii) above has been reproduced in the Annex to this judgment.[4] The resolution was passed by a majority of

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3 4 ROP 20.

4 Annex, Figures 1–3.

83.06% of the votes cast by share value, which was greater than the minimum of 75% required to pass the special resolution.[5]

7 On 19 August 2016, Ms Wu, along with the subsidiary proprietors of ten other units in the Development, sent an email requesting approval from the Management Corporation for the installation of coverings over the trellises of their respective units. In that email, the relevant subsidiary proprietors committed to using the same contractor and professional engineer, as well as adhering to the approved design referred to in the trellis by-law adopted at the 11th AGM, so as to achieve standardisation and uniformity.[6] Of the 11 units for which the subsidiary proprietors were seeking to install coverings over their respective trellises, three were penthouse units, while the remaining eight were ground floor units with PES or balconies.

8 On 9 September 2016, the Management Corporation rejected the applications on the ground that trellises are common property, such that the making of the trellis by-law fell within the ambit of s 33(1) of the Act, which regulates exclusive use by-laws. Section 33(1)(*c*) requires a by-law to be passed pursuant to a 90% resolution if the by-law conferred on subsidiary proprietors exclusive use and enjoyment of common property for a period exceeding three years. Hence, the special resolution passed at the 11th AGM was determined to be insufficient to enact the trellis by-law.[7]

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5 4 ROP 34.

6 4 ROP 61.

7 4 ROP 154.

9 On 14 September 2016, the counsel for the subsidiary proprietors of the 11 units wrote to the Management Corporation, taking the position that the Management Corporation had no legal basis to reject the applications because:[8]

(a) the strata title plan drawings of the units in question clearly showed that the proposed coverings would be within the units;

(b) the special resolution passed at the 11th AGM was sufficient to authorise the installation of the coverings even if the trellises are common property;

(c) it was incorrect that the installation of the coverings would constitute exclusive use of common property because the trellises are not common property, and even if they are, such installation would not amount to exclusive use because the subsidiary proprietors could not set up garden or deck chairs on top of the coverings; and

(d) the Management Corporation could not prevent the subsidiary proprietors of the ground floor units from installing coverings over the PES trellises, given that those coverings were intended as safety devices to keep them safe from killer litter.

The proceedings before the Board

10 On 12 October 2016, the subsidiary proprietors of the 11 units, along with the subsidiary proprietor of another ground floor unit (collectively, "the Applicants"), brought the STB Application pursuant to ss 101(1)(*c*) and 111(*a*)

[8] 2A ROP 218–219, paras 3–7.

of the Act,[9] seeking an order that they be permitted to install coverings over their respective PES trellises and roof trellises in accordance with the conditions laid out under the trellis by-law adopted at the 11th AGM, and an order for the Management Corporation to pay them the costs of the STB Application.[10]

11 The Management Corporation tendered its written submissions in response to the STB Application on 28 November 2016.[11] In its submissions, the Management Corporation stated that:[12]

> The crux of the dispute is the issue of *whether the* ***trellises*** *in the Development constitute common property* and whether the installation of coverings over the [t]rellises by the subsidiary proprietors would constitute exclusive use pursuant to [s] 33(1) of the [Act]. [emphasis added in italics and bold italics]

The Management Corporation's position, as before, was that the trellises constitute common property and the installation of coverings over the trellises would amount to exclusive use of the common property. Hence, the resolution passed at the 11th AGM was invalid and irregular since exclusive use would require the necessary resolutions to be passed pursuant to s 33(1).[13] The Management Corporation also emphasised that its intention was to "ensure that the purported approval granted to the Applicants by way of the Resolution [was] valid and regular", and "not to unreasonably prohibit the Applicants from installing coverings on the [t]rellises".[14]

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9 2A ROP 4–246.

10 2A ROP 15.

11 2B ROP 4–209.

12 2B ROP 5, para 2; 2B ROP 8, para 15.

13 2B ROP 8, para 16.

14 2B ROP 8, para 17.

12 Thereafter at a direction hearing before the Board on 21 February 2017, the counsel for both parties informed the Board that settlement between the subsidiary proprietors of the nine ground floor units and the Management Corporation was imminent. The counsel also indicated that:[15]

(a) it was not in dispute that the trellises are common property; and

(b) the issue identified was whether the installation of the coverings over the trellises would amount to exclusive use of common property.

Those indications from the counsel were confirmed by way of a letter from the Board to the counsel dated 22 February 2017.

13 At a mediation before the Board on 22 February 2017,[16] the Management Corporation agreed to authorise the subsidiary proprietors of the ground floor units with PES trellises (including, but not limited to, the Applicants who occupied the nine ground floor units) to install coverings over the PES trellises, on the grounds that, *inter alia*:[17]

(a) the parties agreed that the installation of coverings over the PES trellises constituted the installation of safety devices for the improvement of safety within those strata lots under para 5(3) of the Second Schedule to the Building Maintenance (Strata Management) Regulations 2005 (S 192/2005) ("the Regulations");

(b) the coverings would be installed in accordance with the design and conditions identical to those set out in the trellis by-law; and

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15 Applicant's Submissions dated 7 August 2017, Annex A, paras 2(a)–(c).

16 1 ROP 18, para 8.

17 1 ROP 5–11.

(c) the costs incurred would be reserved to the Board.

These terms were recorded by the Board in a consent order dated 20 March 2017. The subsidiary proprietors of the remaining three penthouse units were unable to similarly reach an agreement with the Management Corporation.

14 On 6 March 2017, the Applicants and the Management Corporation proceeded to file their written submissions.[18] In the Applicants' written submissions, it was stated that the issue to be determined by the Board was:[19]

> … whether the installation of the coverings over the trellises amounts to *'exclusive use'* of common property. If the Board answers this question in the affirmative, then a further issue arises: *Is this the sort of exclusive use that requires a by-law to be made pursuant to an appropriate resolution, under [s] 33 of the [Act].* [emphasis in original]

As for the Management Corporation, it submitted that it was not disputed that the trellises are common property of the Development, and there therefore remained one narrow issue in respect of the trellises at the penthouse strata lots for the Board's determination: "*Whether the installation of coverings on the roof trellises at the penthouse strata lots amounts to an exclusive use of common property under [s] 33 of the [Act]*" [emphasis in original].[20]

15 The parties also submitted a document titled "Agreed Facts and Documents" dated 6 March 2017, in which it was agreed between the parties, amongst other things, that:[21]

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18 3A ROP 25–196.

19 3A ROP 26, para 3.

20 3A ROP 163, paras 8–9.

21 4 ROP 6–7, paras 3–5.

(a) for all the Applicants, their proposed coverings would only extend to the boundary of their respective strata lots;

(b) at the 11th AGM, a special resolution was passed to allow the installation of coverings on the trellises over at the PES of the ground floor strata lots and roof trellises at the penthouse strata lots by subsidiary proprietors in accordance with the conditions and design shown in the appendix thereto; and

(c) the PES trellises and roof trellises were designated as 'common property' in the strata title plans of the Development lodged with the Building & Construction Authority, although the part of the trellises upon which the Applicants intended to install coverings were physically located within the Applicants' strata lots.

16 The parties next filed additional submissions on costs on 10 March 2017.[22]

17 Subsequently, the parties produced another document titled "Further Agreed Facts and Documents" dated 5 April 2017, which specified the following facts as common ground:[23]

> 1. The trellises are common property;
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> 2. The coverings will be about 130 mm above the trellis at the wall, and at the far end, will touch the trellis (with a silicon seal between), as stated in the letter dated 23 March 2017 from FK Deco Awnings Singapore to Lee & Lee; … and
>
> 3. All subsidiary proprietors are not able to access the trellises through the roof before and after the installation of the coverings. Only the owners /

22 3A ROP 197–252.

23 4 ROP 164, paras 1–3.

> occupiers of the penthouse strata lots would be able to access the roof trellises and coverings (if installed) over their respective strata lots, through their respective strata lots. Furthermore, typically, only authorised service providers would be permitted by the managing agent to access the roof (and therefore the trellises).

18 The parties each tendered further submissions on 7 April 2017.[24] Finally, the Board heard oral submissions from the parties on 5 May 2017.[25]

The decision below

19 On 23 May 2017, the Board issued its grounds of decision, dismissing the STB Application, and fixing the costs at S$6,000 to be paid by the Applicants to the Management Corporation.[26] No order as to costs was made specifically in respect of the subsidiary proprietors of the nine ground floor units who had previously reached a settlement with the Management Corporation.

20 In its survey of the background to the dispute, the Board observed that "the [trellis] by-law, other than setting out the specifications and conditions that had to be complied with by subsidiary proprietors before coverings could be installed, *did not permit or authorise the installation of coverings*" [emphasis added].[27] The Board also noted that the parties had agreed when appearing before the Board for directions before the hearing that "[t]he one and only issue for determination was whether the installation of the coverings over the trellises would amount to an exclusive use of common property", but "the Applicants' position with regard to the issues was changed" when their submissions were

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24 3B ROP 4–123.

25 3A ROP 4–24; 3B ROP 124–207.

26 1 ROP 29, paras 34–35.

27 1 ROP 18, para 7.

filed,[28] such that the issues for determination became: (a) whether the trellises were used for the installation of the coverings, and (b) if so, whether this was the sort of exclusive use that required a by-law to be made pursuant to s 33 of the Act.

21 In dismissing the STB Application, the Board found that the installation of the coverings over the trellises would amount to the exclusive use of common property.[29] To this end, the Board held that:

> (a) First, *common property* would be used in the installation of the coverings in this case.[30] In this regard, while a finding could be made that the trellises would not be used in the installation of the coverings, there was no dispute that the coverings would be anchored to the wall of the building.[31] The exterior walls of the building were, in turn, not solely constructed within the subsidiary proprietor's unit for his or her enjoyment only, but were part of the external façade of the building and maintained by the Management Corporation.[32]
>
> (b) Secondly, it was necessary under s 33 of the Act for a by-law permitting the installation of coverings over the trellises to be passed pursuant to a 90% resolution. There was no dispute that the coverings were intended to be permanently installed; also, whilst the coverings were in place, they would be *using* common property *exclusively*.[33]

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28 1 ROP 18–19, para 9.

29 1 ROP 23, para 22.

30 1 ROP 22, para 21.

31 1 ROP 21, paras 15–16.

32 1 ROP 22, para 20.

33 1 ROP 28, para 33.

> Further, contrary to the Applicants' submissions, s 63(*c*) of the Act could not be read to prevent a management corporation from exercising its powers under s 33 to make by-laws conferring on a subsidiary proprietor the exclusive use and enjoyment of common property; just because a subsidiary proprietor did not use common property in a way that unreasonably interfered with another's use and enjoyment of the common property, it did not mean that the management corporation could not exercise its powers under s 33.[34]

22 Implicit in the Board's decision was its finding that the trellis by-law was not a validly passed by-law since it was only adopted pursuant to an 83.06% resolution. Section 33 of the Act required the by-law to be passed pursuant to a 90% resolution.

The appeal

23 On 16 June 2017, Ms Wu filed the present appeal pursuant to s 98(1) of the Act against the Board's decision, seeking orders for: (a) the Board's decision and orders made to be set aside; (b) Ms Wu to be permitted to install coverings over the roof trellises of her penthouse unit in accordance with the conditions specified in the trellis by-law at the 11th AGM; and (c) the costs of and occasioned by this appeal and the proceedings below to be paid by the Management Corporation to her.[35]

24 The grounds of Ms Wu's appeal are set out as follows:[36]

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34 1 ROP 26–28, paras 30–32.

35 2B ROP 211, paras 2–4.

36 2B ROP 210–211, para 1.

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

b. Whether the [Board] erred in law when it premised its decision on the understanding that the [Management Corporation] 'did not permit or authorize the installation of the coverings' when it is undisputed and in fact agreed by both the Applicants and the [Management Corporation] that at the 11th [AGM], the [Management Corporation] had by a[n] 83.06% vote permitted and authorized the installation of the coverings in accordance with certain conditions and designs [("Ground (b)").]

c. Whether the [Board] erred in law in holding that the wall within the Applicants' lots to which the coverings would be attached was part of common property, notwithstanding that it was clearly comprised within the Applicants' strata lots, not marked as common property, and when no evidence was adduced by the [Management Corporation] that the wall was part of the common property [("Ground (c)")].

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

e. Whether the [Board], having agreed that it is not necessary for a subsidiary proprietor to procure a by-law for the exclusive use and enjoyment of common property when his use will not unreasonably interfere with the use and enjoyment by others, and in the absence of any evidence that the coverings would unreasonably interfere with the use and enjoyment of common property by others, erred in law in holding that a by-law for the exclusive use and enjoyment of common property was required for the installation of the coverings [("Ground (e)")].

> f. Whether the [Board] erred in law in failing to consider and address the other alternative arguments and submissions by the Applicants including but not limited to the fact that the [Management Corporation] had unreasonably refused to allow [Ms Wu]'s improvement when [("Ground (f)")]:
>
> i) [the Management Corporation] had allowed the subsidiary proprietors of all ground floor units to build the same structure over [their PES trellises]; and
>
> ii) [the Management Corporation] had taken no action against at least 6 or 7 other subsidiary proprietors who had, without approval, built structures over their [roof] trellises.

Issues to be determined

25 In my view, the issues that arise for my determination in this appeal are:

(a) whether the grounds of the appeal raise points of law within the meaning of s 98(1) of the Act ("the Point of Law Issue");

(b) whether the Board erred in assuming that the trellis by-law was not a valid authorisation of the installation of coverings over the roof trellises ("the Validity of the Trellis By-Law Issue");

(c) whether the Board was acting in excess of its jurisdiction by finding that the installation of coverings over the roof trellises would be an exclusive use and enjoyment of the Applicants' *walls* (instead of only the Applicants' *trellises*) ("the Excess of Jurisdiction Issue");

(d) whether the installation of coverings over the roof trellises would be an exclusive use and enjoyment of common property ("the Exclusive Use and Enjoyment of Common Property Issue"); and

(e) whether the Management Corporation's discriminatory rejection of the Applicants' request to install coverings over the roof trellises amounted to an unreasonable refusal to consent to a proposal by the Applicants to effect alterations to common property within the meaning of s 111(*a*) of the Act ("the Unreasonable Refusal to Consent Issue").

26 The Point of Law Issue is a preliminary issue that I must first decide. Section 98(1) of the Act states that "[n]o appeal shall lie to the High Court against an order made by a Board … except on a point of law". Hence, if any of the grounds of appeal relied on by Ms Wu does not raise a point of law, there would be no basis for me to consider that ground in this appeal.

27 As for the other issues, the Validity of the Trellis By-Law Issue addresses Ground (b), the Excess of Jurisdiction Issue addresses Grounds (a) and (d), the Exclusive Use and Enjoyment of Common Property Issue addresses Grounds (c) and (e), and the Unreasonable Refusal to Consent Issue addresses Ground (f).

My decision

28 In my judgment, the appeal should be dismissed. To this end, in respect of the five issues that I have identified above, I find that:

(a) first, the grounds of appeal relied on by Ms Wu in her appeal raise points of law within the meaning of s 98(1) of the Act;

(b) secondly, the trellis by-law was *not* a valid authorisation of the installation of the coverings;

(c) thirdly, the Board was *not* acting in excess of its jurisdiction by finding that the installation of the coverings would be an exclusive use and enjoyment of the Applicants' walls;

(d) fourthly, the installation of coverings over the roof trellises would amount to an exclusive use and enjoyment of common property; and

(e) finally, the Management Corporation did *not* unreasonably refuse to consent to a proposal by the Applicants to effect alterations to common property within the meaning of s 111(*a*) of the Act.

29 I now proceed to set out my detailed reasons for each of these findings in turn.

The Point of Law Issue

30 In my judgment, Ms Wu's grounds of appeal all raise points of law within the meaning of s 98(1) of the Act.

31 In the decision of *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 ("*Ng Eng Ghee*"), the Court of Appeal held that points of law that are subject to appeal under s 98(1) of the Act encompass two types of errors of law (at [91]–[95], citing *Ng Swee Lang and another v Sassoon Samuel Bernard and others* [2008] 1 SLR(R) 522, *Dynamic Investments Pte Ltd v Lee Chee Kian Silas and others* [2008] 1 SLR(R) 729 and *Liu Chee Ming and others v Loo-Lim Shirley* [2008] 2 SLR(R) 764). The first would be *ex facie* errors of law which include (*Ng Eng Ghee* at [90], citing *Halsbury's Laws of England* vol 1(1) (Butterworths, 4th Ed Reissue, 1989) at para 70):

> … misinterpretation of a statute or any other legal document or a rule of common law; asking oneself and answering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts; admitting inadmissible evidence or rejecting admissible and relevant evidence; exercising a discretion on the basis of incorrect legal principles; giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duty to give reasons, and misdirecting oneself as to the burden of proof. [emphasis in original omitted]

The second would be errors of law of the type described by Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 ("*Bairstow*") involving determinations made where (*Ng Eng Ghee* at [93], citing *Bairstow* at 36):

> … without any … misconception [of the relevant law] appearing ex facie [in the decision under appeal], … *the facts found* are *such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal.* [emphasis in original]

The court in this situation would have to intervene because it has "no option but to assume that there has been some misconception of the law and that this has been responsible for the determination" (*Bairstow* at 36).

32 It also bears mentioning that the Court of Appeal in *Ng Eng Ghee* went out of the way to expressly reject (at [96]–[101]) the narrower definition of "question of law" endorsed by the apex court in *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* [2004] 2 SLR(R) 494 ("*Northern Elevator*") in the context of an application for leave to appeal against a domestic arbitral award brought under s 28(2) of the Arbitration Act (Cap 10, 1985 Rev Ed). That provision stated that: "an appeal shall lie to the court on any question of law arising out of an award made on an arbitration agreement". In this regard, the court in *Northern Elevator* held (at [19]) that:

> … a 'question of law' must necessarily be a finding of law which the parties dispute, that requires the guidance of the court to

> resolve. When an arbitrator does not apply a principle of law correctly, that failure is a mere 'error of law' (but more explicitly, an erroneous application of law) which does not entitle an aggrieved party to appeal.

The court in *Ng Eng Ghee* found that this narrower definition of "question of law" could not apply in relation to appeals against decisions of the Board (at [100]). In the court's view, the policy of minimal curial intervention in the domestic arbitration context, where party autonomy is key, does not apply to appeals against decisions of the Board, which necessarily invoke broader public interest considerations. Hence, while it makes sense for the ambit of appeals against arbitral awards to be narrowly circumscribed, the courts should exercise greater supervision over decisions of the Board.

33 I now turn to apply these principles to the individual grounds of appeal brought by Ms Wu.

34 Ground (b), which I will address in my analysis of the Validity of the Trellis By-Law Issue, raises an *ex facie* error of law because it alleges that the Board had taken irrelevant considerations into account when purporting to apply the law to the facts.

35 Grounds (a) and (d), which will be addressed in my analysis of the Excess of Jurisdiction Issue, also raise *ex facie* errors of law insofar as they arguably allege that the Board had asked itself and answered the wrong questions in coming to its decision. Also, as I will also go on to explore in greater detail below, insofar as Grounds (a) and (d) further impute allegations of the failure of the Board to give the parties a fair opportunity to present their respective cases, this should be considered yet another *ex facie* error of law. It is an allegation of a breach of the rules of natural justice which, while not included in the earlier list of *ex facie* errors (at [31] above), has been considered

by Belinda Ang Saw Ean J in *Yap Sing Lee v Management Corporation Strata Title Plan No 1267* [2011] 2 SLR 998 ("*Yap Sing Lee*") (at [55]–[58]) to be an error that could also give rise to an appeal on a point of law.

36 As for Grounds (c) and (e), which I will deal with in my analysis of the Exclusive Use and Enjoyment of Common Property Issue, I also find that they raise *ex facie* errors of law, insofar as they both allege that the Board has misinterpreted the applicable provisions of the Act. In particular, both grounds impugn the Board's interpretation of the definition of "common property" under s 2(1) of the Act, while Ground (e) also invites additional scrutiny of the Board's interpretation of ss 33(1) and 63(*c*) of the Act.

37 Finally, I also find that Ground (f), which will be addressed in my analysis of the Unreasonable Refusal to Consent Issue, raises an *ex facie* error of law, insofar as it alleges that the Board failed to take relevant considerations into account when purporting to apply the law to the facts.

38 Accordingly, I find that all the grounds of appeal relied on by Ms Wu raise points of law within the meaning of s 98(1) of the Act, such that there is a sound basis for me to consider all of these grounds that are dealt with in Ms Wu's submissions before me.

The Validity of the Trellis By-Law Issue

39 Turning now to the second issue, the Board was, in my view, correct in premising its decision on the assumption that the trellis by-law was not a valid authorisation by the Management Corporation of the installation of coverings over the roof trellises. It would be absurd for the Board to ground any analysis in respect of the STB Application on the assumption that the trellis by-law passed was already a valid authorisation for the installation of the coverings,

given that the very question that the Board had been tasked with answering was whether any such by-laws had been validly passed.

40 The starting position in respect of the requirements for the making of by-laws by a management corporation may be found in s 32(3) of the Act, which reads as follows:

> **By-laws for common property**
>
> **32.**— …
>
> (3) ***Save where otherwise provided in section 33***, a management corporation *may, pursuant to a special resolution, make by-laws, or amend, add to or repeal any by-laws* made under this section, for the purpose of controlling and managing the use or enjoyment of the parcel comprised in the strata title plan, including all or any of the following purposes:
>
> (*a*) safety and security measures;
>
> (*b*) details of any common property of which the use is restricted;
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> (*c*) the keeping of pets;
>
> (*d*) parking;
>
> (*e*) floor coverings;
>
> (*f*) garbage disposal;
>
> (*g*) behaviour;
>
> (*h*) architectural and landscaping guidelines to be observed by all subsidiary proprietors;
>
> (*i*) such other matters as are appropriate to the type of strata scheme concerned.
>
> [emphasis added in italics and bold italics]

Section 33(1) in turn provides that:

> **Exclusive use by-laws**
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> **33.**—(1) Without prejudice to section 32, with the written consent of the subsidiary proprietor of the lot concerned, a management corporation may make a by-law —

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

(i) the exclusive use and enjoyment of; or

(ii) special privileges in respect of,

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

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

(i) the exclusive use and enjoyment of; or

(ii) special privileges in respect of,

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

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

(i) the exclusive use and enjoyment of; or

(ii) special privileges in respect of,

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

> (*d*) amending, adding to or repealing a by-law made in accordance with paragraph (*a*), (*b*) or (*c*), as the case may be.
>
> [emphasis added in italics and bold italics]

41 From the foregoing provisions, it is clear that the general requirement under s 32(3) of the Act – that a management corporation may make by-laws for the purpose of controlling and managing the use or enjoyment of common property pursuant to a special resolution – is *subject to* the specific requirements provided for under s 33(1) when a subsidiary proprietor is seeking to be conferred, by the making of a by-law, the exclusive use and enjoyment of, or special privileges in respect of, common property. Section 33(1) requires such by-laws to be made pursuant to resolutions that may be more, less or just as onerous as, the special resolution required under s 32(3), depending on the length of time for which the exclusive use and enjoyment or special privileges are being sought in respect of the common property. Specifically, where a subsidiary proprietor is seeking to be conferred by a by-law the exclusive use and enjoyment of a part of a common property for a period exceeding three years, the management corporation can only make the by-law to that effect pursuant to a 90% resolution; a mere special resolution would not suffice.

42 Ms Wu claims that the Board had erred in premising its decision on the understanding that the trellis by-law did not permit or authorise the installation of the coverings, and proceeding to find that "an order granted by the Board would equate to the Board ordering the [Management Corporation] to permit the Applicants to have [the] right to exclusive use of the common property for an unlimited period of time".[37] In support of this, Ms Wu made the following two arguments:

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[37] 1 ROP 28, para 33.

(a) The Applicants had abided by the law, obtained approval for the trellis by-law by a supermajority vote of 83.06%, and were simply asking for permission from the Management Corporation to proceed with works that had already been approved by the Management Corporation at the 11th AGM. This should be contrasted with other cases like *Sit Kwong Lam v Management Corporation Strata Title Plan No 2645* [2017] SGHC 57 ("*Sit Kwong Lam*"), where the subsidiary proprietor had proceeded to install works on common property without the approval of the management corporation.[38]

(b) It was an agreed fact that a special resolution had been passed at the 11th AGM to allow the installation of coverings over the PES trellises and roof trellises (see [15] above), and the Management Corporation itself had acknowledged in the course of its submissions before the Board that it was not seeking to unreasonably prohibit the Applicants from installing coverings over their trellises, and recognised that the trellis by-law had been passed by an 83.06% supermajority vote.[39]

43 I disagree with Ms Wu. In my view, the Board was correct to premise its decision on the understanding that the trellis by-law had not in fact permitted the Applicants to install the coverings over the roof trellises.

44 Ms Wu makes much of the fact in her first contention that the trellis by-law had been adopted at the 11th AGM pursuant to an 83.06% supermajority vote, and that the Applicants refrained from installing the coverings over their

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38 Applicant's Submissions, para 23.

39 Applicant's Submissions, paras 25–28.

respective trellises before seeking and receiving the approval of the Management Corporation. To my mind, this argument should be rejected because it begs the crucial question of whether the trellis by-law had been *validly* made. The same logical flaw also afflicts Ms Wu's second contention. It is irrelevant to point out that the Management Corporation acknowledged that a special resolution had been passed at the 11th AGM to adopt the trellis by-law. At the end of the day, if the trellis by-law involved conferring exclusive use and enjoyment of or special privileges in respect of common property for a period exceeding three years, then according to s 33(1)(*c*) of the Act, a mere special resolution would be insufficient to pass the trellis by-laws, and the trellis by-law cannot be regarded as having been *validly* made.

45 This reasoning finds support in the authoritative treatise of Teo Keang Sood, *Strata Title in Singapore and Malaysia* (LexisNexis, 5th Ed, 2015) ("*Strata Title in Singapore and Malaysia*"), where Prof Teo observes (at para 15.84) that: "In view of the explicit requirements set out in [s 33 of the Act] for the conferment of exclusive use or special privileges in respect of common property, it follows that *there is no other method to attain the same end*" [emphasis added].

46 It is also fortified by the outcome reached in the decision of *Poh Kiong Kok v Management Corporation Strata Title Plan No 581* [1990] 1 SLR(R) 617 ("*Poh Kiong Kok*"), in which a condominium development's parking scheme that restricted each subsidiary proprietor to parking his or her car only at the parking lot allocated to him or her, and at no other, was held by Chan Sek Keong J (as he then was) to be invalid. To this end, Chan J determined that the parking scheme was one that excluded subsidiary proprietors from the use and enjoyment of a part of the common property where that part was used by another subsidiary proprietor. Hence, the scheme was of no legal effect unless a by-law

was made by the management corporation pursuant to a unanimous resolution as mandated by s 41(8) of the Land Titles (Strata) Act (Cap 158, 1988 Rev Ed), which corresponds to s 33(1) of the Act, to confer exclusive use and enjoyment of, or special privileges in respect of, the common property on the subsidiary proprietors with their consent (*Poh Kiong Kok* at [20]).

47 In the present case, the trellis by-law, which was made pursuant to a special resolution, would, pursuant to s 33(1)(*c*) of the Act, need to be passed by a 90% resolution if it involves the conferring of exclusive use and enjoyment of or special privileges exceeding three years in respect of common property. Therefore, as long as the question of whether the trellis by-law does involve such conferment remains alive, it cannot be assumed that the trellis by-law had been validly made pursuant to the passing of the resolution based on an 83.06% supermajority vote. It thus follows that the Board did not err in premising its decision on the assumption that the trellis by-law was not a valid authorisation of the installation of coverings over the roof trellises.

The Excess of Jurisdiction Issue

48 I also do not think that the Board was acting in excess of its jurisdiction by finding that the installation of coverings would be an exclusive use and enjoyment of the Applicants' *walls* (instead of the Applicants' *trellises*).

49 Ms Wu submits that the Board exceeded its jurisdiction by finding that the installation of coverings over the trellises constituted exclusive use and enjoyment of the Applicants' *walls* because:[40]

[40] 2B ROP 210–211, paras 1(a), 1(d).

(a) first, the Board had on 22 February 2017 identified the issue of whether the installation of coverings over the trellises would amount to an exclusive use of common property to be the only issue to be determined; and

(b) secondly, the fact that the installation of coverings over the trellises constituted exclusive use of the *walls* was never the Management Corporation's case, and was never argued by the Management Corporation up till its submissions dated 7 April 2017.

50 Ms Wu's arguments thus appear to be that the Board, in finding that the installation of coverings over the trellises constituted exclusive use and enjoyment of the Applicants' *walls*, decided on an issue that was beyond the scope of issues originally contemplated by both the Board and the parties. To my mind, these arguments could be interpreted in two different ways.

51 First, Ms Wu's arguments could be construed to be based on the objection that the Board did not give the parties a fair opportunity to present their cases. Under s 92 of the Act, the Board has the freedom to determine the procedure for arbitration, subject to the conditions that the parties are allowed to present evidence and make submissions to the Board (s 92(2)), and that the Board acts fairly and impartially and gives each party an opportunity to present its case (s 92(3)). Hence, it could be argued that the Board, in making the finding that the installation of coverings over the trellises constituted exclusive use and enjoyment of the Applicants' *walls*, failed to give the parties a fair opportunity to present their cases in respect of that specific issue *per se* (as required under s 92(3)(*b*) of the Act) because it was not an issue that the parties were properly prepared to submit on. However, in my view, this contention self-evidently lacks any merit. The issue that the Board had identified for its determination,

based on the instructions provided by the counsel during the direction hearing on 21 February 2017 and as confirmed by the Board in its letter to the parties dated 22 February 2017, was "whether the installations of the coverings over the trellises [would] amount to exclusive use of common property" (see [12] above).[41] This issue is clearly broad enough to encompass not only a finding regarding whether the trellis *per se* is common property, but also a finding regarding whether the wall to which the covering would be attached is common property. It was thus open to the Board to make a finding that the installation of coverings would be an exclusive use and enjoyment of the Applicants' *walls*, and this finding cannot be said to have been made without the parties having been given a fair opportunity to present their respective cases on the issue.

52 Secondly, Ms Wu's arguments could also be looked at through the lens of commercial arbitration principles of setting aside arbitral awards on the basis of the tribunal acting in excess of its jurisdiction. But if this is indeed what Ms Wu intended, this is impermissible. Specifically, Ms Wu appears to be arguing that the Board's decision in this case should be set aside on the same basis for which an arbitral award may be set aside in the commercial arbitration context on the ground that "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration": see s 48(1)(*a*)(iv) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the AA"). However, this argument by analogy is completely misguided because it has been statutorily precluded – s 92(6) of the Act expressly provides that the AA shall *not* apply to mediation-arbitration proceedings before the Board, while s 92(8) states that the arbitration proceedings of the Board shall be deemed to be *judicial proceedings* (see *Yap Sing Lee* at [60]). It is thus not open to Ms Wu to import the setting

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41 Applicant's Submissions, Annex A, para 2(c).

aside principles from the commercial arbitration context to the present appeal in order to set aside the orders made by the Board.

53 Further, even if I were to take Ms Wu's arguments at their highest and apply the commercial arbitration principles in respect of the setting aside of arbitral awards on the ground of the Board acting in excess of its jurisdiction, I also do not think that, on the facts, the Board's decision should be set aside. In the context of international commercial arbitration, it is well established that a court, in deciding whether to set aside an arbitral award pursuant to Art 34(2)(*a*)(iii) of the UNCITRAL Model Law on International Commercial Arbitration (21 June 1985) ("Model Law") read with s 3 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"), the court must consider: (a) what matters were within the scope of the submission to the tribunal; (b) whether the award confined itself to such matters or whether it strayed into resolving a new difference outside the scope of the submission to arbitration and, therefore, irrelevant to the issues requiring determination; and (c) whether the parties suffered real or actual prejudice (see *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [30] and [32]; see also *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [37] and [40]). The ground for setting aside an *international* commercial arbitration award under Art 34(2)(*a*)(iii) of the Model Law read with s 3 of the IAA is identical to the ground for setting aside a *domestic* commercial arbitration award under s 48(1)(*a*)(iv) of the AA.

54 Regarding elements (a) and (b) in particular, I had previously observed in the decision of *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 (at [52], citing *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 at [47]), that when determining whether the matters dealt with by the tribunal were within the scope

of the dispute submitted to the tribunal for arbitration, the court may consider not only the pleadings and their contents, but also *any issue that surfaces in the course of the arbitration and that is known to all the parties to the arbitration, even if such issue has not been pleaded*.

55 Applying the foregoing principles to the facts of the present appeal, while it is true that it was not the Management Corporation's case in its original written submissions on 28 November 2016 that the installation of coverings over the trellises constituted exclusive use and enjoyment of the Applicants' *walls* (see [11] above), this was certainly an issue that had surfaced eventually in the course of the arbitration proceedings, and which was known to all the parties in the arbitration. Indeed, as discussed above, the Board had identified on 22 February 2017 the sole issue to be determined in the arbitration to be "whether the installations of the coverings over the trellises [would] amount to exclusive use of common property" (see [12] above).[42] Also, as Ms Wu herself acknowledged, the Management Corporation did ultimately make the submission that the installation of coverings over the trellises constituted exclusive use and enjoyment of the Applicants' external *walls* in its final set of written submissions on 7 April 2017, which was about one month prior to the oral hearing on 5 May 2017 (see [18] above). It should thus have been open to Ms Wu to deal with the issue of whether the installation of coverings over the trellises amounted to exclusive use and enjoyment of the Applicants' external *walls* (and not only the *trellises*).

56 Accordingly, even if I apply the setting aside principles from the commercial arbitration context to the present proceedings under the Act, it cannot be said that the Board acted in excess of its jurisdiction by making the

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42 Applicant's Submissions, Annex A, para 2(c).

finding that the installation of coverings over the trellises amounted to exclusive use and enjoyment of the Applicants' external *walls*.

The Exclusive Use and Enjoyment of Common Property Issue

57 I now direct my mind to the fourth issue, which is arguably the pith and marrow of the present dispute. In this regard, I find that the installation of coverings over the roof trellises would constitute the exclusive use and enjoyment of common property. Based on my interpretation of the definition of "common property" under s 2(1) of the Act and the definition of "exclusive use and enjoyment" under s 33(1), I agree with the Board's finding that the installation of the coverings would constitute the exclusive use and enjoyment of the external walls of the penthouse units to which the coverings would be attached. To be precise, I am of the view that first, the external walls of the penthouse units in the Development constitute *common property*, and secondly, the installation of coverings over the roof trellises would constitute an *exclusive use and enjoyment* of such common property.

Whether the external walls of the penthouse units are common property

58 In my view, the external walls of the penthouse units in the Development constitute *common property*.

59 To illustrate this, I begin by first setting out the law regarding the scope of "common property" as defined under the Act and interpreted in existing case law. The definition of "common property" is set out in s 2(1) of the Act as follows:

> (*a*) in relation to any land and building comprised or to be comprised in a strata title plan, such part of the land and building —

> (i) not comprised in any lot or proposed lot in that strata title plan; and
>
> (ii) used or capable of being used or enjoyed by occupiers of 2 or more lots or proposed lots; or
>
> (*b*) in relation to any other land and building, such part of the land and building —
>
> (i) not comprised in any non-strata lot; and
>
> (ii) used or capable of being used or enjoyed by occupiers of 2 or more non-strata lots within that land or building[.]

For the purposes of the present appeal, only sub-sub-s (*a*) is relevant, given that the external walls of the penthouse units are clearly a part of "land and building comprised … in a strata title plan".

60 It was common ground between the parties during the proceedings before the Board below that the most authoritative decision regarding the correct interpretation of "common property" under s 2(1) of the Act was the recent High Court decision of *Sit Kwong Lam*, where this issue received comprehensive judicial treatment by Kannan Ramesh JC (as he then was). In *Sit Kwong Lam*, Ramesh JC held, following a compendious survey of the legislative history of the relevant statutory provisions and case authorities (at [48]–[77]), that the two limbs of the s 2(1) definition of "common property" – *ie*, that the part of the land and building in question should not be comprised in any lot in the strata title plan, and should be used or capable of being used or enjoyed by occupiers of two or more lots – should be read as *conjunctive* requirements: at [46] and [77], citing *Strata Title in Singapore and Malaysia* at para 6.04 and *Halsbury's Laws of Singapore* vol 14 (LexisNexis, 2014) at para 170.0206 n 4. In other words, it is not sufficient for only either of the limbs of the s 2(1) definition of "common property" to be satisfied in order for a part of a strata title development to be considered common property; the part of the development in question must *both* be not comprised in any lot in the strata title plan *and* be

used or capable of being used or enjoyed by occupiers of two or more strata units.

61 However, Ramesh JC also went on to hold in *Sit Kwong Lam* (at [78]) that the correct way to apply the second limb of the definition of "common property" under s 2(1) of the Act was:

> … to ask whether the area/installation in question was for the exclusive use of the occupier of the unit in question (rather than whether it was for the use of the occupiers of two or more lots). If so, it followed as a matter of logic that it could not concurrently be used or capable of being used by two or more occupiers.

62 This reading of the second limb was justified on the basis of avoiding a situation where an area in the development that is not comprised in any strata lot might not be used or capable of being used or enjoyed by *any* occupier at all, which would thereby give rise to the situation where the area would be neither a subsidiary proprietor's strata unit nor common property. Such a situation, according to Ramesh JC, would be undesirable because it would mean that the Act recognises a third category of property in strata developments that neither the management corporation nor the individual subsidiary proprietors would own and have the responsibility of maintaining, *ie*, a "no man's land" (at [85]–[86]). Ramesh JC also justified this reading of the second limb on the basis of various proposed key amendments to the Act, which involved a proposal to amend the definition of "common property" (at [87]–[88]). What this reading means, in the final analysis, is that any area in a strata title development that is not comprised in any strata lot would be considered common property, *unless* it is for the exclusive use of the occupiers of the strata lot in question.

63 I agree with Ramesh JC that the definition of "common property" under s 2(1) of the Act should promote a pure common property-private property

dichotomous classification of strata title property, and should not permit the finding of a third category of property in a strata title development that amounts to a "no man's land". Put simply, any part of a strata title development that does not satisfy the s 2(1) definition of "common property" should be considered private property. To this end, the second limb of the s 2(1) definition of "common property" – that a part of a land and building should be "used or capable of being used or enjoyed by occupiers of 2 or more lots or proposed lots" – is meant to assist in delineating more clearly where the line is to be drawn between what is or is not common property; it does not delineate an area that is neither common property nor private property (*ie*, a "no man's land").

64 However, I do not consider it necessary to construe the second limb of the definition of "common property" under s 2(1) of the Act in the manner that Ramesh JC did in order to reach this outcome for two reasons. First, Ramesh JC found it necessary to apply the second limb of the s 2(1) definition of "common property" by asking whether the area was for the exclusive use of the occupier of the strata title lot in question (rather than whether it was for the use of the occupiers of two or more lots) because in his view, any area of a development that is not comprised in any strata title lot and is *not* used or capable of being used or enjoyed by *any* subsidiary proprietor at all would be considered "no man's land". With respect, due to the broad construction that should be accorded to the second limb of the s 2(1) definition (see [74]–[75] below), I find it practically impossible for an area of a development that is not comprised in any lot to also *not* be used or capable of being used or enjoyed by *any* subsidiary proprietor at all. Put another way, the spectre of a "no man's land" hanging over a strata title development is more perceived than real because the s 2(1) definition of "common property" does not, in practice, allow the concept of a "no man's land" to exist. Secondly, Ramesh JC relied on various extraneous materials to arrive at the construction of the s 2(1) definition that he did. In my

view, it may not be necessary to rely on such extraneous materials because the plain and ordinary meaning of the second limb of the s 2(1) definition of "common property" appears to be clear and unambiguous. While s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) behoves the court to interpret statutory provisions purposively, it is well established that in seeking to ascertain the legislative purpose underlying a provision, "primacy should be accorded to the text of the provision and its statutory context over any extraneous material": see *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [43]. Hence, a purposive reading of the definition of "common property" should be obtained from a plain reading of the definition under s 2(1) of the Act.

65 Having said all that, it is unnecessary for me to take a more definitive position on the proper interpretation of the second limb of the definition of "common property" under s 2(1) of the Act, given that the parties did not make full and comprehensive submissions on this issue before me. In any event, for the reasons that I will go on to provide when addressing Ms Wu's arguments, I am of the view that nothing in this appeal turns on this particular issue of law.

66 Before me, Ms Wu argues that the external walls of the penthouse units to which the coverings over the roof trellises would be attached should *not* be regarded as common property for various reasons. I disagree with Ms Wu, and will now proceed to address two of her main submissions in turn.

67 First, Ms Wu submits that the first limb of the definition of "common property" under s 2(1) of the Act is not satisfied because the proposed coverings cannot be considered to not be *comprised in the Applicants' strata lots*. To this end, Ms Wu argues that: (a) it is common ground between the parties that the proposed coverings will only extend to the boundary of the respective strata lots, and the parts of the trellises upon which the Applicants intend to install

coverings are physically located within the Applicants' strata lots;[43] (b) the strata title plans clearly show that the Applicants' strata lots extend to a height of 3.3m, while the coverings are to be installed at a height of only 2.7m, which would be well within the Applicants' strata lots;[44] and (c) while the trellis structures within the Applicants' strata lots were expressly demarcated on the strata title plan of the Development as common property, the external walls were not similarly demarcated.[45]

68 I reject this submission. While the external walls of the Applicants' penthouse units are in this case indeed *physically located within* the boundaries of the Applicants' penthouse units, this does not *ipso facto* mean that the external walls in question are *comprised in* the Applicants' penthouse units.

69 In the first place, I do not think that the observation that the external walls, to which the coverings are to be attached, are physically located within the boundaries of the Applicants' strata lots – both laterally and vertically – necessarily support Ms Wu's argument that the external walls are *comprised in* the Applicants' strata lots. This is because "common property" used to be defined in s 3 of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed), as amended in 2003 by the Planning (Amendment) Act 2003 (Act 30 of 2003) ("the 2003 LTSA"), in the following manner:

> "common property" —
>
> > (*a*) in relation to any subdivided building, means so much of the land for the time being ***not*** *comprised in any lot shown in a strata title plan or in any parts of any building unit* (partially erected or to be

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43 Applicant's Submissions, paras 32–33.

44 Applicant's Submissions, para 34.

45 Applicant's Submissions, para 35.

> erected) intended to be included as lots in a strata title plan to be lodged with the Registrar; and
>
> (*c*) *unless otherwise described specifically as comprised in any lot in a strata title plan and shown as capable of being comprised in such lot*, includes —
>
> (i) foundations, columns, beams, supports, ***walls***, roofs, lobbies, corridors, stairs, stairways, fire escapes, entrances and exits of the building and windows installed in the external walls of the building;
>
> (ii) car parks, recreational or community facilities, gardens, parking areas, roofs, storage spaces and rooms approved by the relevant authority for the use of a management corporation and its members;
>
> (iii) central and appurtenant installations for services such as power, light, gas, hot and cold water, heating, refrigeration, air-conditioning and incinerators;
>
> (iv) escalators, lifts, tanks, pumps, motors, fans, compressors, ducts, and in general all apparatus and installations existing for common use;
>
> (v) water pipes, drainage pipes, sewerage pipes, gas pipes and electrical cables which serve 2 or more lots;
>
> (vi) *all facilities described as common property in any plan approved by the relevant authority for a condominium development and all facilities which may be shown in a legend of a strata title plan as common property*; and
>
> (vii) all other parts of the land not comprised in any lot necessary or convenient to the existence and maintenance and for the reasonable common use and safety of the common property[.]
>
> [emphasis added in italics and bold italics]

70 It is clear from the foregoing definition that external walls are clearly meant to be construed as being *not* comprised in any lot shown in a strata title plan, *unless otherwise described specifically as comprised in any lot in a strata title plan*. While this definition of "common property" was replaced by the

passing of the Building Maintenance and Management Bill (No 6 of 2004) – with the 2004 version of the Act coming into force on 1 April 2005 – the simplification of the definition of "common property" in 2004 was *not* meant to exclude from the definition of "common property" the specific structures listed in the earlier iteration of the definition of "common property". Rather, the amendment was merely intended to avoid having to rely on an exhaustive list of structures so as to accommodate future developments in technology and architecture, and to avoid confusion in the industry by preserving the previous definition that was generally known and accepted by the industry: see *Management Corporation Strata Title Plan No 367 v Lee Siew Yuen and another* [2014] 4 SLR 445 at [22]–[23] and *Sit Kwong Lam* at [69]–[73]. Hence, the mere fact that the external wall of a strata title lot is physically located within the boundaries of the lot in question surely cannot *ipso facto* lead to the conclusion that the external walls in question to which the coverings are to be permanently attached does not constitute common property. Put another way, in order for the external walls here to *not* be considered common property, it seems to me that Ms Wu would have to point to something more than the mere fact that these external walls are located within the physical confines of the strata title lots.

71 As for the contention that the external walls were not demarcated as common property in the strata title plan of the Development, I once again do not think that this is a fact that points conclusively to a finding that these external walls cannot be common property. I acknowledge that the fact that an area has been demarcated as common property on the strata title plan of a development should ordinarily establish that that area is *prima facie* intended to be considered common property. This flows as a matter of common sense from the fact that a strata title plan should surely be intended to accurately reflect the boundaries of a subsidiary proprietor's unit and those of common property in a strata title

development. This also flows from the previous definition of "common property" in s 3 of the 2003 LTSA (see [69] above), which defined "common property" to also include "all facilities described as common property in any plan approved by the relevant authority for a condominium development and all facilities which may be shown in a legend of a strata title plan as common property". As concluded above, Parliament did not intend, in amending the definition of "common property", to exclude from the definition the structures or features included in the previous definition. It thus only makes sense for an area that has been demarcated as common property on a strata title plan to *prima facie* be considered common property.

72 Having said that, this does not mean that areas in a development that have *not* been demarcated as common property in a strata title plan cannot be considered common property and must necessarily be private property. There could be a variety of reasons why some areas might not have been so demarcated; for the external walls of a strata unit in particular, it might simply not be standard architectural or engineering practice to specify their status as common property on a strata title plan. Ms Wu's assertion that the fact that the Applicants' external walls were not demarcated as common property means that they should be considered to be comprised in the Applicants' strata units thus does not withstand scrutiny.

73 Secondly, Ms Wu submits that the second limb of the definition of "common property" under s 2(1) of the Act is also not satisfied. To this end, Ms Wu contends that the Board was incorrect in finding that the walls in question are common property on the basis that they are exterior walls of the building that are not solely constructed within the subsidiary proprietors' units for the enjoyment of the subsidiary proprietors only, but are part of the external façade

of the building and are maintained by the Management Corporation.[46] This is because the mere fact that a wall is outward-facing and visible from the outside of a strata lot does not automatically mean it can be used or is capable of being used or enjoyed by others such that it is therefore common property.[47]

74 I also reject this argument. In my view, a wall that is outward-facing and visible from the outside of a strata lot *should* indeed be considered a part of the development that is used or capable of being used or enjoyed by occupiers of two or more strata lots, such that it falls within the second limb of the definition of "common property" under s 2(1) of the Act. There are two reasons for this:

(a) First, the second limb of this definition expressly lists "use" and "enjoy" as two distinct forms of interaction that a subsidiary proprietor might engage in with a particular area in the strata title development. It is trite that the court should endeavour to give significance to every single word in a particular provision, given that Parliament shuns tautology and does not legislate in vain: *Tan Cheng Bock* at [38], citing *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR(R) 484 at [43]. Accordingly, "enjoy" must surely be taken to bear a meaning that is distinct from "use". Moreover, while "use" has been defined in the *Oxford Dictionaries* (Oxford University Press, 2018), <https://en.oxforddictionaries.com> (accessed 26 February 2018), to mean "[t]ake, hold, or deploy (something) as a means of accomplishing or achieving something", "enjoy" has been defined to mean "[t]ake delight or pleasure in". What may be surmised from this comparison of the plain meanings of both words is that "enjoy" bears a significantly

46 1 ROP 22, para 20.

47 Applicant's Submissions, para 47.

broader meaning than "use". Specifically, whereas the definition of "use" requires the subsidiary proprietor to engage in a *tangible* form of interaction (*eg*, to take or hold something) with the area of the development in question, the definition of "enjoy" suggests that even *intangible* forms of interaction (*eg*, to appreciate) would suffice.

(b) Secondly, the second limb of the definition of "common property" under s 2(1) of the Act also specifically provides for the situation where a particular area in the development is merely *capable* of being used or enjoyed by occupiers of two or more lots. In other words, a particular area in a development does not even need to be used or enjoyed by occupiers of two or more lots *at present* in order to be considered common property; it can be considered common property as long as it *can* be used or enjoyed by occupiers of two or more lots *sometime in the future*.

75 The upshot of the above observations is that the second limb of the definition of "common property" under s 2(1) of the Act is evidently meant to be construed in a very broad fashion, such that even *prospective intangible* forms of interaction by subsidiary proprietors with a particular area of a development that may result in them deriving some form of benefit will be sufficient for that area to satisfy this second limb. It thus can certainly be said as a fact that the external walls of the Applicants' respective penthouse units are parts of the Development that are at least *capable* of being *enjoyed* by occupiers of two or more strata units. Given that it has earlier been established that the external walls are also not property that are *comprised in* the Applicants' respective penthouse units, it follows that the external walls satisfy both limbs of the s 2(1) definition of "common property".

76 The foregoing analysis thus demonstrates that the external walls of the penthouse units in the Development constitute *common property*.

Whether the installation of coverings over the roof trellises would constitute exclusive use and enjoyment of the external walls

77 In relation to the issue of whether there would be *exclusive use and enjoyment* of the external walls to which the coverings would be attached, I have earlier explained how the second limb of the definition of "common property" under s 2(1) of the Act contains the requirement that the area of the development in question must be capable of being used or enjoyed by occupiers of two or more strata lots. Hence, my earlier analysis (at [74]–[75]) that expounds upon the meanings of "use" and "enjoy" should similarly go towards showing that an installation of coverings over the roof trellises would amount to the use and enjoyment of the external walls to which the coverings are to be attached.

78 As for the *exclusivity* of the use and enjoyment of the external walls, this requirement is self-evidently met in respect of the installation of coverings over the roof trellises. It is not disputed that the coverings are intended to be installed permanently over the roof trellises. Also, while it was not an expressly agreed fact that following the installation of the coverings, no other subsidiary proprietor will be able to enjoy the parts of the external walls where the coverings are to be permanently secured and attached, such a finding can be made. To my mind, in the light of the broad definition of "enjoy" as set out earlier (see [74(a)] above), it is inevitable that following the installation of the coverings, the *enjoyment* by other subsidiary proprietors of parts of the external walls of the penthouse units would be affected. This would thus constitute a use of parts of the external walls by the Applicants who install the coverings *to the exclusion of the other subsidiary proprietors*. Accordingly, they will clearly

constitute the *exclusive* use and enjoyment of the parts of the external walls to which the coverings are attached.

79 However, Ms Wu makes one final argument in this regard, which is that even if the external walls to which the coverings are attached constitute common property, the installation of the coverings does not amount to exclusive use and enjoyment of the type that requires a by-law to be made pursuant to a resolution under s 33(1) of the Act. This is because according to Ms Wu, it is only necessary for subsidiary proprietors to obtain a s 33(1) resolution to authorise their exclusive use and enjoyment *if* the use or enjoyment is in such a manner or for such a purpose as to interfere unreasonably with the use or enjoyment of the common property by any other person entitled to the use and enjoyment of that common property, as defined under s 63(*c*).[48]

80 Section 63(*c*) of the Act reads as follows:

> **Duties of subsidiary proprietors and other occupiers of lots**
>
> **63.** A subsidiary proprietor, mortgagee in possession (whether by himself or any other person), lessee or occupier of a lot shall not —
>
> …
>
> (*c*) *use or enjoy the common property in such a manner or for such a purpose as to interfere unreasonably with the use or enjoyment of the common property* by the occupier of any other lot (whether that person is a subsidiary proprietor or not) or by any other person entitled to the use and enjoyment of the common property[.]
>
> [emphasis added]

81 In my view, this submission ought to be rejected. Section 63(*c*) is a provision that imposes a duty on occupiers of a strata title lot, including the

[48] Applicant's Submissions, paras 48–62.

subsidiary proprietors of the lot, to use or enjoy common property in a manner or for a purpose that does not *unreasonably interfere* with the usage or enjoyment of others entitled to similar use. In contrast, s 33(1) is a provision that effectively imposes an obligation on subsidiary proprietors to request for the management corporation to confer on them use and enjoyment of, or special privileges in respect of, common property *to the exclusion of others*. The two provisions thus clearly concern themselves with distinct types of usage and enjoyment of common property. They are separate and independent obligations to be fulfilled.

82 Accordingly, it is *not* correct for Ms Wu to suggest that a subsidiary proprietor would only need to petition for the management corporation to make a s 33(1) by-law conferring on him or her exclusive use and enjoyment of common property if the use or enjoyment is in a manner or for a purpose that would interfere unreasonably with the use or enjoyment of the common property by others entitled to such use. The management corporation has to make a by-law under s 33(1) in respect of common property as long as the use and enjoyment or special privilege being conferred is *exclusive* in nature (*ie, to the exclusion of others*), *irrespective of* whether the usage or enjoyment interferes unreasonably with that by others similarly entitled to such usage or enjoyment.

83 Insofar as a particular usage or enjoyment of common property interferes unreasonably with another person's usage or enjoyment of the common property but does not amount to a usage or enjoyment to that person's exclusion, it would not assist the subsidiary proprietor if he or she proceeds to request for the management corporation to make a by-law pursuant to s 33(1) to authorise that particular conduct. This would certainly be the case if the particular usage or enjoyment contravenes the prescribed by-laws reflected in the Second Schedule to the Regulations. For example, if a subsidiary proprietor

leaves a huge bucket of rotting fish next to the main entrance of a condominium development, he would be interfering unreasonably with the other subsidiary proprietors' usage of the main entrance. He would also be acting in contravention of para 3 of the Second Schedule to the Regulations, which is a prescribed by-law that prohibits subsidiary proprietors from obstructing the lawful use of common property by any person, except on a temporary and non-recurring basis. This would clearly not be the sort of usage or enjoyment of the main entrance that can be remedied by a by-law passed pursuant to s 33(1).

84 The converse is also true. Even if a particular usage or enjoyment of common property does *not* interfere unreasonably with another person's usage or enjoyment of the common property, it will still be necessary for the subsidiary proprietor to request for the management corporation to make a by-law pursuant to s 33(1) if he desires to use or enjoy the common property *to the exclusion of others*. The present case is an example of this situation. While the Applicants' installation of coverings over the roof trellises might not amount to an unreasonable interference of the use or enjoyment by others of the external walls of the penthouse units, it would still be necessary for the Applicants to request for the Management Corporation to make a by-law pursuant to s 33(1) authorising them to use and enjoy the external walls of the penthouse units, given that the installation of the coverings amounts to the use and enjoyment of the external walls *to the exclusion of the others*.

85 Accordingly, I find that the proposed installation of coverings by the Applicants over the roof trellises would constitute an exclusive use and enjoyment of the external walls of the penthouse units.

The Unreasonable Refusal to Consent Issue

86 Finally, I find that the Management Corporation did *not* unreasonably refuse to consent to a proposal by the Applicants to effect alterations to common property within the meaning of s 111(*a*) of the Act.

87 Ms Wu argued that the Board erred in failing to consider the arguments made by the Applicants in the proceedings below that the Management Corporation had unreasonably refused to consent to the Applicants' proposal to "effect alterations" to the trellises because:[49]

(a) first, the Management Corporation had allowed the subsidiary proprietors of the ground floor units to install coverings over the PES trellises, and the subsidiary proprietors of the penthouse units should thus not be treated differently from those of the ground floor units;

(b) secondly, the Management Corporation had failed to take action against at least six or seven other subsidiary proprietors in the Development who had installed unauthorised covers over their roof trellises for many years; and

(c) thirdly, it would be a travesty of justice for Ms Wu to be denied the right to install coverings over her trellises for protection and shelter from the weather, even though she had obediently followed all the rules, had made the proper application to the Management Corporation, had obtained a supermajority vote in favour of the trellis by-law, and had complied (or undertaken to comply) with all regulatory requirements.

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[49] Applicant's Submissions, paras 65–67.

88 In the first place, I do not even consider it necessary for the Board to expressly consider the Applicants' arguments made in respect of the application under s 111(*a*) of the Act because the Board's finding that the installation of coverings over the roof trellises would indeed constitute an exclusive use and enjoyment of common property would *ipso facto* constitute good reason for the Management Corporation's refusal to consent to the Applicants' proposals to install the coverings in the absence of a valid by-law.

89 In any event, it is clear to me that all the submissions made in this regard are manifestly unmeritorious. None of them come anywhere close to showing how the Management Corporation was unreasonable in refusing to consent to the installation of coverings over the roof trellises.

90 First, it is wrong for Ms Wu to assert that the subsidiary proprietors of the penthouse units should be entitled to install coverings over the roof trellises just because the other subsidiary proprietors occupying the ground floor units had been entitled to install coverings over the PES trellises. The Management Corporation clearly stated that it was not objecting to the installation of coverings over the PES trellises only because it agreed that such an installation constituted the installation of safety devices for the improvement of safety within the ground floor units as provided for by the prescribed by-law reflected in para 5(3) of the Second Schedule to the Regulations (see [13] above). The same clearly cannot be said of the installation of coverings over the roof trellises, given that the penthouse units are not being afflicted with the problem of killer litter that the subsidiary proprietors of the ground floor units have been having to endure.

91 Second, it is absurd for Ms Wu to assert that she is entitled to install coverings over her roof trellises just because no action has been taken against

other subsidiary proprietors occupying penthouse units who have built structures over their roof trellises. It is not unreasonable for the Management Corporation to refuse to consent to the installation of the coverings although the Applicants have presented evidence of subsidiary proprietors who have defiantly installed coverings over their roof trellises without having obtained the necessary authorisation. While the Management Corporation should certainly endeavour to enforce the rules regarding the exclusive use and enjoyment of common property uniformly among all the subsidiary proprietors in the Development, the solution cannot possibly be to eschew the enforcement of the rules just because there are some who have defied them. This would make a mockery of the existing legal framework governing the exclusive use and enjoyment of common property enshrined within the Act. Surely, the familiar axiom that two wrongs do not make a right rings true here.

92 Finally, the argument that Ms Wu or the Applicants generally should not be penalised for dutifully following the trellis by-law and seeking authorisation from the Management Corporation before proceeding to install the coverings over their trellises should also be dismissed for being plainly irrelevant. It cannot be gainsaid that obtaining the necessary resolution as specified under s 33(1) of the Act is an *obligation* imposed upon any subsidiary proprietor petitioning for the Management Corporation to make a by-law that confers exclusive use and enjoyment or special privileges in respect of common property for extended periods of time. It is thus irrelevant that the Applicants took steps that were ultimately insufficient to meet the requirements under s 33(1) because a refusal by the Management Corporation on this basis to consent to their proposal for the installation of coverings would surely be eminently justified.

Conclusion

93 For the reasons aforesaid, I find that the Board was correct to find that the Applicants' proposed installation of coverings over the roof trellises of their penthouse units in the Development would constitute an exclusive use and enjoyment of common property. It is thus necessary, pursuant to s 33(1)(*c*) of the Act, for the Applicants to petition the Management Corporation to make the trellis by-law pursuant to a 90% resolution in order to be properly authorised to carry out the proposed installation of coverings over the roof trellises. In the result, I agree with the decision of the Board below and dismiss Ms Wu's appeal.

Chan Seng Onn
Judge

Toh Kok Seng and Chen Chongguang, Daniel (Lee & Lee) for the appellant;
Lee Swee Sian and Peh Bee Tien for the respondent.

Annex

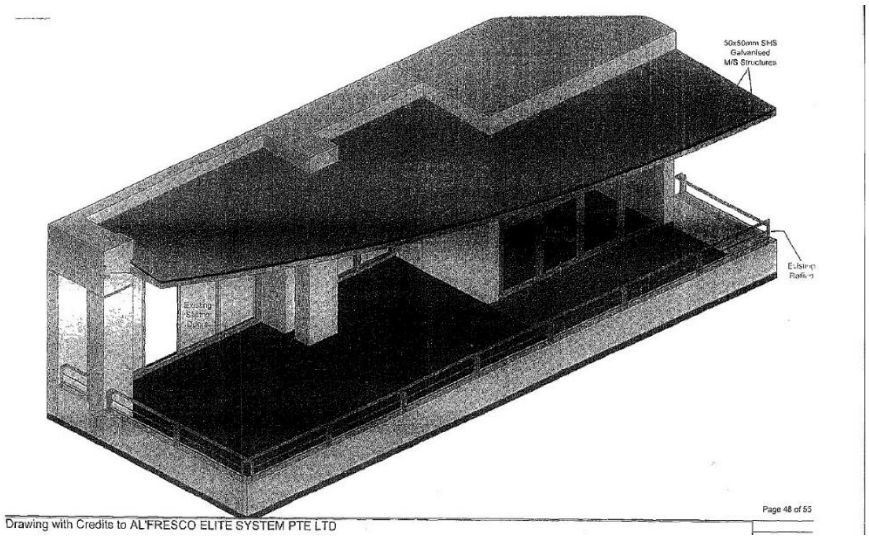

Figure 1[50]

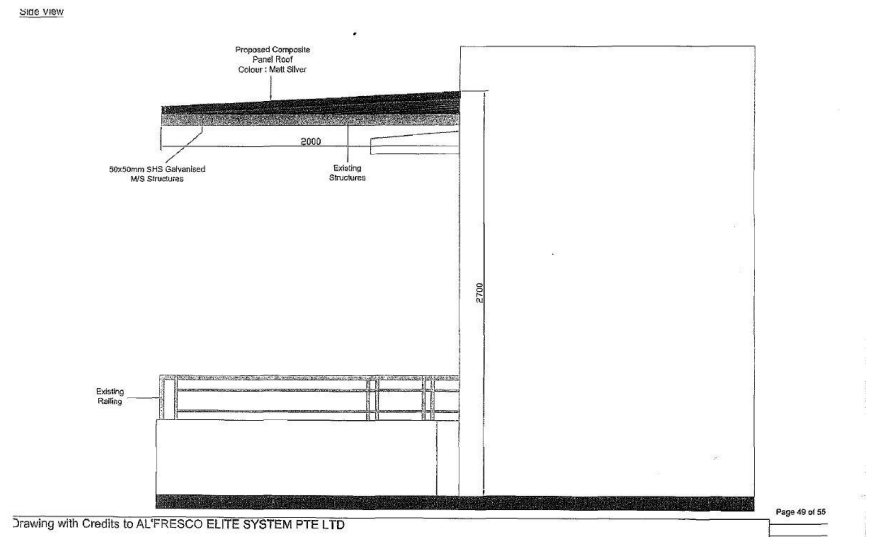

Figure 2[51]

50 4 ROP 24.

51 4 ROP 25.

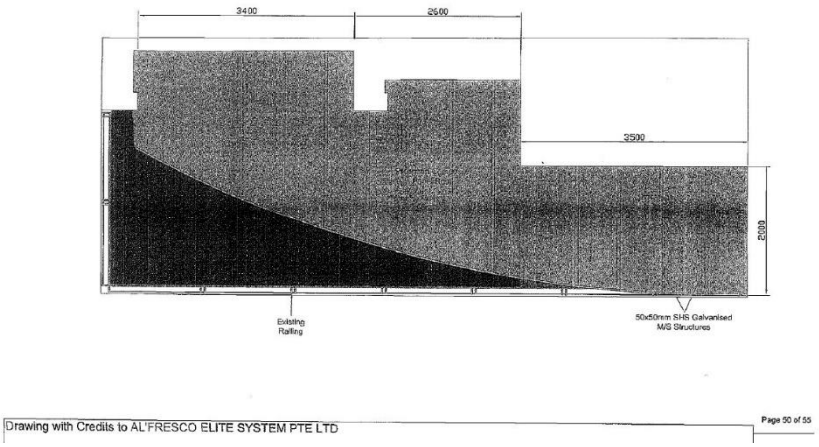

Figure 3[52]

[52] 4 ROP 26.