

# CASE UPDATE



20 April 2018

## STRATA TITLES BOARD OUTLINES MCSTS' DUTY UNDER S47 BMSMA (INSPECTION OF MCST RECORDS AND DOCUMENTS), AND ITS INTERACTION WITH PDPA 2012

### Introduction

1. Pursuant to Section 47 of the Building Maintenance and Strata Management Act (Cap 30C) ("BMSMA"), subsidiary proprietors are entitled to inspect documents or records in the custody and control of a Management Corporation upon a written request and paying a prescribed fee. Subsidiary proprietors may also make copies of such documents or records, subject to the payment of another prescribed fee.
2. There has been a dearth of case law on Section 47 BMSMA, with only two reported decisions touching on the provision briefly (*Yap Sing Lee v MCST Plan No 1267* [2011] SGHC 24 and *Tan Hee Chye v MCST Plan No 395* [2016] SGSTB 1).
3. In *Timothy Siah Yang Teck v 28<sup>th</sup> Management Council to MCST 1420* STB No. 82 of 2017, the Strata Titles Board embarked on a comprehensive analysis of Section 47 BMSMA, exploring the obligations of Management Corporations, the Board's discretion to grant orders for inspection or production, Personal Data Protection Act 2012 ("PDPA") concerns, and what it means for a record or document to be in the custody and control of a Management Corporation.
4. The successful Applicant was represented by Mr Daniel Chen of Lee & Lee.

### Background

5. The Respondents were The Management Corporation Strata Title Plan No. 1420, of the development known as Balestier Point.
6. The Applicant was a subsidiary proprietor of a unit within Balestier Point.
7. The Applicant was unable to attend an Annual General Meeting of the Respondents held on 22 July 2017 ("the AGM") and appointed his father as proxy to attend on his behalf.
8. Following the AGM, the Applicant submitted a request to the Managing Agent of the Respondents for an audio/video recording of the AGM.
9. The Managing Agent confirmed that an audio recording in CD format was available but said that the Respondents were "*concerned with the legal implication such as pdpa*" and asked the Applicant to "*allay (the Respondents') fears by telling them (his) intentions and which portion of the proceedings (he) need(ed)*".

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10. The Applicant responded to the Managing Agent that he was requesting for the audio recording as a subsidiary proprietor and that no explanations for his request were needed.
11. In further correspondence between the Applicant's solicitors M/s Lee & Lee and the Respondents, the Respondents continued to deny the Applicant's request for the audio recording but invited the Applicant to listen to the audio recording at the management office by prior appointment.
12. The Applicant commenced legal proceedings against the Respondents before the Strata Titles Board, seeking an order under Section 113 of the BMSMA that the Respondents supply to him a copy of the audio recording of the entire proceedings of the AGM, at the prescribed fees.

### **Nature of Sections 47 and 113 of the BMSMA**

13. Section 47(1)(b)(iv) BMSMA states:

*"A management corporation shall, upon application made to it in writing in respect of a lot which is the subject of the subdivided building concerned by a ... subsidiary proprietor ... and on payment of a prescribed fee ... make available for inspection by the applicant or his agent ... any other record or document in the custody or under the control of the management corporation".*

14. Section 47(4) BMSMA provides further that:

*"A person entitled to inspect a document made available under subsection (1)(b) may take extracts from or make a copy of, the document ...".*

15. Section 113 BMSMA provides that:

*"Where, pursuant to an application by any person, a Board considers that the management corporation or subsidiary management corporation to which the application relates, or a managing agent or the chairperson, secretary or treasurer of that management corporation or subsidiary management corporation has wrongfully –*

- (a) withheld from the applicant any information to which the applicant is entitled under (the BMSMA);*  
*or*
- (b) failed to make available for inspection by the applicant or his agent any record or document that, under (the BMSMA), he is entitled to inspect,*

*the Board may order that the management corporation, subsidiary management corporation, managing agent, chairperson, secretary or treasurer to supply or to make available the information or to make so available the record or document, as the case may require, to the applicant."*

16. The Respondents argued that under Section 113 of the BMSMA, the Board has a discretion whether to order that the Respondents supply or make available the record or document to the Applicant, in that it is only where the Board "considers" that the Respondents had "*wrongfully (b) failed to make available for inspection ... any record or document that, under (the BMSMA), (the Applicant) is entitled to inspect*", that the Board may order that the Respondents supply or make available the record or document to the Applicant.

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17. The Respondents urged the Board not to exercise such a discretion on the basis that the Respondents already allowed the Applicant to listen to the audio recording, the Respondents were not entitled under the BMSMA to make copies of the audio recording, and the Respondent's PDPA concerns.
18. The Applicant argued that the Respondents' obligations under Section 47 BMSMA were mandatory, and that Section 113 BMSMA did not provide the Board any discretion where the conditions under that provision were fulfilled (i.e. the Respondents had wrongfully failed to make available any record or document).
19. The Board held that:
  - a. An applicant under Section 47 BMSMA was not required, in his written application, to inform the management corporation of the reasons for his request.
  - b. Under Section 113 BMSMA The Board has a discretion to order a relevant party to supply or make available the information, record or document to an applicant if the Board considers such information, document or record was wrongfully withheld from the applicant or that a party had wrongfully failed to make such information available for inspection by the applicant or his agent.
20. Although not mentioned by the Board, one possible situation in which the Board may decline to exercise its discretion under Section 113 BMSMA, is where an applicant intended to use the information, document or record requested in other proceedings. This occurred in the unreported decision of STB 39 of 2014, a brief update of which may be found at: <https://www.leenlee.com.sg/wp-content/uploads/2014/11/The-Grange-Case-Update-26112014.pdf>

## ***Personal Data Protection Act***

21. The Respondents argued that their obligations under Section 47 BMSMA should be guided by the requirements and restrictions of the PDPA, and that pursuant to the provisions of the PDPA, they would not be able to release or disclose copies of the audio recording of the AGM due to the lack of consent by persons whose personal data had been captured by the audio recording.
22. The Applicant maintained that there would not be a breach of the PDPA in the release of the audio recording as the Respondents' obligations under Section 47 BMSMA prevailed over any provisions of Parts III to VI of the PDPA. Section 4(6)(b) of the PDPA provides that:

*“Unless otherwise expressly provided in this Act – the provisions of other written law shall prevail to the extent that any provision of Parts III to VI is inconsistent with the provisions of that other written law”.*
23. The Board noted that the Respondents' position on the PDPA was inconsistent, since they were willing to allow the Applicant to inspect (i.e. listen to) the audio recording, which would also risk the disclosure of the personal data that had been captured by the audio recording.

24. The Board ruled that Section 47 does not contradict the provisions of the PDPA as information relating to subsidiary proprietors is considered publicly available, therefore falling under exceptions at Sections 17(3) and Paragraph 1(d) of the 4<sup>th</sup> Schedule to the PDPA.

## **Control and Custody**

25. The Respondents argued that the audio recording was under the custody and control of the Managing Agent, and never under the custody and control of the Respondents.
26. The Applicant argued the Managing Agent was acting for and on behalf of the Respondents in creating and maintaining the audio recording of the AGM, and that as such, the audio recording was in the custody and control of the Respondents.
27. The Applicant further noted that almost every document of a Management Corporation is actually created or maintained by Managing Agents on behalf of Management Corporations. If Management Corporations could avoid their obligations under Section 47 BMSMA simply by saying that the documents are in the custody and control of the Managing Agent, no subsidiary proprietor will ever be able to inspect any document of the Management Corporation.
28. The Applicant also contended that the Respondents and its representatives had by their conduct and various correspondences shown clearly that the AGM audio recording was in the Respondents' custody or under their control. In particular, the Applicant noted that Richard Tang of the Managing Agent had expressly stated that he needed to get clearance from the Council of the Respondents to release the audio recording, and that the Respondents had even offered to allow the Applicant to listed to the audio recording.
29. The Board observed that under cross-examination, Richard Tang stated that the AGM recording was under his custody and control, but when questioned further, indicated that the AGM recording would be given to the Respondents if they requested for it. On this basis, the Board held that while the AGM recording was not under the custody of the Respondents, it was undoubtedly under their control.

## **Record or Document**

30. The Respondents argued that as Section 47(4) BMSMA provides only that a person can "*take extracts from, or make a copy of, the document*", it does not permit the person to make a copy of a 'record' in the custody and control of the Management Corporation.
31. The Respondents also contend that 'document' must refer to something that is written, since the prescribed fee for the taking of a copy of a document is 50 cents per page under Section 11 of the Building Maintenance (Strata Management) Regulations 2005 ("BMSMR").
32. In light of the above, the Respondents took the position that an audio recording, which is not written, is not a document which the Applicant was entitled to take a copy of.
33. The Applicant argued that the Respondents were making an artificial distinction and urged the Board to follow the holding in *Tan Hee Chye v MCST Plan No 395* [2016] SGSTB 1 that an audio recording of an annual general meeting constituted a record or document under Section 47 BMSMA.

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34. The Board agreed with the Applicant, holding that the Respondent's narrow view interpretation of the wording of Section 11 BMSMR should not be employed as a basis for disallowing the Applicant from obtaining a copy of the AGM recording. The Board further observed that despite the absence of a prescribed fee for copies of an audio recording, the Respondents could charge a reasonable fee.

## Orders

35. In light of all the above, the Board allowed the application, ordering that:

- a. The Respondents supply the Applicant a copy of the audio recording of the AGM held on 22 July 2017, pursuant to Section 47(4) of the BMSMA; and
- b. The Respondents may charge a reasonable fee not exceeding S\$300.00.

36. The Board also ordered that the Respondents pay the Applicant:

- a. Costs of S\$5,000.00;
- b. Reimbursement of all fees payable to the STB for the sum of S\$1,100.00, being application fee, hearing fee and fee for delivery of decision; and
- c. Reasonable disbursements.

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