Choo Kok Lin and Another v The Management Corp Strata Title Plan No 2405 [2005] SGHC 144

Case Number : DA 20/2004

Decision Date : 11 August 2005

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Davinder Singh SC and Adrian Tan (Drew and Napier LLC) for the appellants; Jimmy Yap (Jimmy Yap and Co) for the respondent

Parties : Choo Kok Lin; Wee Irene — The Management Corp Strata Title Plan No 2405

Land – Strata titles – By-laws – Mandatory injunction for removal of various structures installed in breach of condominium by-laws granted – Whether mandatory injunction should be preserved where only one of original numerous structures forming subject-matter of injunction found to be valid complaint – Structure remaining as subject of injunction minor infringement of by-laws

Land – Strata titles – By-laws – Various structures installed before constitution of management corporation and by-laws – Whether by-laws having retrospective application making installation of structures breach of by-laws

Land – Strata titles – Common property – Whether unconsumed gross floor area of condominium amounting to common property – Section 3 Land Titles (Strata) Act (Cap 158, 1999 Rev Ed)

11 August 2005 *Judgment reserved.*

Judith Prakash J:

Introduction

1 This is an appeal against the order of District Judge Low Lye Fong Kathryn that the appellants (defendants in the action below) remove the unauthorised works at No 3, Oxford Road #01-04 and #01-05, Kentish Lodge, Singapore ("the units") and reinstate the units to their original condition within four months from the date of the order. The appellants, Mr Choo Kok Lin and Mdm Irene Wee, are husband and wife and are the registered proprietors of the units.

2 The units are adjoining units in the condominium development known as Kentish Lodge. The respondent is Management Corporation Strata Title Plan No 2405 ("the MCST") formed to manage Kentish Lodge.

3 The units are located on the ground floor of Kentish Lodge. When the condominium was constructed, each of the units contained two uncovered areas, *vis* the "terrace" and the "air well". These areas were commonly described as "private enclosed space" or "PES areas". The PES areas are comprised within the strata title lots of the units and consequently are the private property of the appellants. The appellants erected roof coverings over the terrace and air well areas, installed windows in the terrace area and erected air-conditioning units over the air well area and a planter area.

4 The MCST took out an action against the appellants to obtain a mandatory injunction requiring them to remove these additional works. The district judge held that:

(a) the windows in the terrace area breached the MCST's by-laws 11 and 12;

(b) the air-conditioning units breached the MCST's by-law 11;

(c) the roof coverings over the terrace and air well areas amounted to exclusive use of common property; and

(d) she was justified in ordering a mandatory injunction against the appellants in the terms requested by the MCST.

The appellants had made a counterclaim in the court below. This was dismissed by the trial judge but, at the hearing of the appeal, the appellants indicated that they were no longer pursuing their counterclaim due to a change in the law.

5 The legal framework in which this action was adjudged and must be considered by me is the framework established by the provisions of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("the Act") as those provisions were worded at the material times, *ie*, in 1999 and 2000. Some of the sections which the district judge considered and which I also have to deal with have since been amended. Where these sections are quoted below, the versions quoted are those current at the material times.

The background

6 The appellants bought the units in 1998 from the developer of the condominium, Kentish Green Pte Ltd ("the developer"). The condominium contained 75 units in a structure that was partly seven storeys in height and partly four storeys in height. In August 1998, the authorities issued the temporary occupation permit for the condominium and, two months later, the appellants moved into the units.

7 According to the appellants, their initial intention was to use the PES areas as a garden. As more and more residents began moving into Kentish Lodge, however, litter starting falling into the PES areas. Among the items that fell were a rusty knife, cigarette butts, construction debris and women's underclothing. The appellants spoke to the developer's representative, one Mark Lim, about the problem but it did not abate. The appellants then decided that for safety reasons they should cover the PES areas.

8 On 9 March 1999, Mr Choo wrote to the developer and asked for permission to have the terrace area covered with a reinforced concrete roof "for safety and security reasons". The developer replied two weeks later stating that it was currently managing the estate as a "custodian" pending the formation of the MCST. As such, the developer considered that it did not have the authority to grant proper approval for the appellants' proposed works. It further advised the appellants that the MCST when formed would be able to require residents who had already erected such roofs to remove them if the MCST found the roofs to be marring the aesthetics of the estate. The letter went on to say that if the appellants decided to proceed with the roofing works and take the risk of being required to remove them later, they should consult the Urban Redevelopment Authority ("URA") and the Public Works Department's Building Control Division for the necessary approvals before putting up any additional structures as the same would deviate from the approved building plans.

9 Thereafter, there were discussions between Mr Choo and Mr Lim on whether there was a type of roofing that might not require a permit from the building authority. Around 10 April 1999, Mr Choo decided to use lightweight material for his roofs instead of reinforced concrete and informed the developer accordingly. Thereafter, Mr Lim issued passes to the appellants' contractors to enter the premises of the condominium and to put up the roofs over the terrace. In late May 1999, the

developer wrote again to the appellants reiterating its inability to either approve or disapprove of the works done but stating that the appellants should ensure that the works were approved by the relevant authorities. The appellants took no steps at that stage to get such approval.

10 Subsequently, the appellants installed a roof over the air well area. In the process of this work, they had to move their air-conditioning compressors from the ground floor and they then placed the two compressors above the roof by affixing them onto the external wall of the condominium. It should also be noted that apart from erecting the roofs, the appellants affixed windows within the openings in the parapet walls that bordered the terraces of the units. All this was done in 1999. Subsequently, in September 2000, the appellants affixed two additional compressors onto the exterior wall of the condominium.

11 The MCST was constituted as a body corporate under the Act on 7 April 2000 pursuant to s 33(1) of the Act whereunder the subsidiary proprietors of the lots in the subdivided building comprised in a strata title plan become a body corporate upon the registration of the strata title plan by the Registrar of Deeds under s 9 of the Act. The first annual general meeting of the MCST was held on 14 January 2001 and the first management council ("the council") was elected at that meeting.

12 In May 2001, Mr Choo wrote to the council asking for its approval of the roof over the terrace. He explained that the roof had been erected before the formation of the MCST for safety reasons as the developer had not been able to stop the litter problem by asking the residents not to litter. In July 2001, the MCST informed Mr Choo that the roofing at the terrace and the installation of additional compressors had not been approved because these matters had affected the uniformity of the estate's façade. Moreover, the compressors were causing inconvenience to the other residents. The council requested the appellants to remove the unauthorised works within 21 days.

13 The appellants did not remove their works. Subsequently, Mr Choo met the council personally to explain his problem with what he described as "killer litter". According to Mr Choo, after he had given his explanation, the chairman of the MCST, one Mr Wan told him that the council unanimously approved the roofs. On 19 November 2001, the MCST wrote to Mr Choo stating that it had written to the relevant authorities "for their confirmation on their authorisation of the erected installation". The letter went on to say "as stated to you at our meeting, our only concern is that the renovation in question is not in any way illegal or in violation of existing laws". The appellants read this letter to mean that the MCST approved of their works as long as the authorities had authorised or would authorise the same.

14 On 11 December 2001, the MCST informed the appellants that the URA had asked it to advise the appellants to apply formally for the retention of their roofs. The letter also asked the appellants to keep the MCST updated on the progress of their application. In a further letter to the appellants dated 20 December 2001, the MCST stated that the council had no objections to the appellants' installations at the PES areas as long as there was no breach of rules and regulations of the URA. The appellants did not apply for the URA's authorisation of the works. Mr Choo's position was that he had not received the MCST's letter in December 2001 and did not get it until he asked about it in July 2002. In August 2002, the MCST wrote again to Mr Choo explaining the procedure for undelivered mail and ended by saying that that the council had expressed no objection to Mr Choo's works provided he regularised them with the authorities. Mr Choo then proceeded to engage an architect to prepare plans for submission to the URA.

15 On 21 November 2002, the URA informed the appellants that their inspection of the unit showed that the appellants had covered the open terrace area and converted it into part of their

living area. The covering of the open terrace constituted development under s 3 of the Planning Act (Cap 232, 1998 Rev Ed) and planning permission was required for this. The appellants were asked to submit a planning application to retain the unauthorised structure so that the URA could consider it. The appellants then instructed their architect to prepare and submit the necessary form within the deadline of one month specified by the URA. The form required the endorsement of the MCST but, to the appellants' surprise, the MCST refused to endorse it. On 12 December 2002, the MCST tersely informed the appellants that, after consultation with its legal adviser, the MCST rejected the appellants' application. No reasons were given.

16 On 9 January 2003, the MCST's lawyers issued the appellants with a letter of demand calling for the removal of all unauthorised works. The MCST's lawyers also issued demand letters against the subsidiary proprietors of two other ground floor units who had also put up roofs over their terraces. The appellants refused to remove the works and the action in the district court was started on 17 January 2003.

The issues

17 This appeal involves the following works and areas:

(a) the roofs at the terrace areas;

(b) the windows in the openings along the common parapet wall at the terrace areas;

(c) the roofs at the air well areas;

(d) the air-conditioning compressors on the external wall at the air well area; and

(e) the air-conditioning compressors on the external wall at the external landscape/planter area.

The appellants used the compendious term "structures" to cover all of the above items but the respondent submitted that the trial judge's decision has to be examined with regard to each of the items as some of the criticisms made by the appellants of the judgment may not be applicable to all of the structures. I agree that it does not aid clarity of analysis to always refer to the works in question by one term although, for convenience, the compendious term may be used from time to time. As I deal with the arguments, I will indicate whether and to what extent the argument concerned is not relevant to any of the structures.

18 The issues in the appeal are as follows:

(a) Whether, in law, the MCST's by-laws derived from the First Schedule to the Act apply to those of the structures that were erected before the constitution of the MCST.

(b) If issue (a) is answered in the negative, whether by-laws 11 and 12 could have been breached by actions taken before they came into effect.

(c) If issue (b) is answered in the affirmative, whether the installation of the windows in the terrace and the compressors over the planter area breached by-laws 11 and 12.

(d) Whether in law the erection of roofs over the terraces and the air well areas amounted to exclusive use of the common property by the appellants.

(e) Whether the appellants breached any by-laws when they installed air-conditioning compressors in September 2000.

(f) If any of the facts warrant the continuation of the mandatory injunction order.

Do the by-laws apply retrospectively?

19 Apart from the compressors installed in September 2000 ("the new compressors"), all of the structures complained of had been erected or installed before the MCST was constituted. The appellants' main contention was that the by-laws only came into force when the MCST was constituted. Accordingly, since there were no such rules in force at the material time, the appellants' actions in erecting the structures could not, in law, have constituted breaches of the by-laws. When the appellants made this argument before the district judge, they relied on *Strata Title in Singapore and Malaysia* (Butterworths Asia, 2nd Ed, 2001) by Teo Keang Sood in which the learned author had stated (at p 269) that the by-laws of a management corporation would only bind parties from the date of incorporation of the management corporation. Prof Teo had cited *MCST Plan No 1378 v Chen Ee Yueh* [1994] 1 SLR 463 ("*Chen Ee Yueh*") as authority for that proposition.

20 The district judge distinguished *Chen Ee Yueh* on the basis that it dealt with a building that had been built in the 1970s and that had only been brought under the provisions of the Act in 1988. Thus, when the building was completed it was not envisaged by the lessees of the units that it would be brought under the provisions of the Act and that the by-laws in the First Schedule to the Act would apply to them. The present case was quite different in that the appellants knew that the condominium was to be brought under the provisions of the Act upon the registration of the strata title plan and that the by-laws would apply upon the constitution of the MCST. Whilst the judge did not go so far as to hold that the by-laws were in force before April 2000, she decided that it was not open to the appellants to make the argument that they were not applicable because the appellants had stated that they would apply to the MCST for approval once it was constituted. Accordingly, it was not right for the appellants to subsequently claim that they did not need the MCST's approval for the structures. In my judgment, there was no basis for the appellants' argument to be disregarded. The appellants' statement that they intended to apply to the MCST for permission once it was constituted was in itself of no legal effect. The statements made by the appellants did not and could not change the legal position in any way, much less influence the MCST's later conduct. None of the ingredients needed to constitute an estoppel existed in this case.

21 The legal position with regard to the date when the by-laws became binding on the appellants and the other owners of units in Kentish Lodge must be determined by reference to the legal scheme established by the Act. The binding effect of the by-laws is established by s 41 of the Act. The relevant provisions of this section read:

(1) Every subdivided building shown in a strata title plan shall be regulated by by-laws which shall provide for the control, management, administration, use and enjoyment of the lots and the common property.

(2) The by-laws shall include the by-laws set out in the First Schedule which shall not be amended or revoked by the management corporation.

(3) …

(4) Without limiting the operation of any other provision of this Act, the by-laws for the time being in force bind the management corporation and the subsidiary proprietors and any mortgagee

in possession (whether by himself or any other person), or lessee or occupier, of a lot or part thereof to the same extent as if the by-laws had been contained in properly executed agreements on the part of —

(*a*) the management corporation with each subsidiary proprietor, mortgagee, lessee and occupier of a lot or part thereof, respectively; and

(*b*) each subsidiary proprietor, mortgagee, lessee and occupier of a lot or part thereof with the subsidiary proprietor, mortgagee, lessee or occupier of the other lots in the same parcel,

to observe and comply with all the by-laws.

22 The Act is specific as to what the by-laws are supposed to regulate and whom they are supposed to bind: the by-laws regulate the administration of a "subdivided building shown in a strata title plan" and they bind three types of persons. The first two are the management corporation and each subsidiary proprietor, and the third is the mortgagee in possession or lessee or occupier of a lot *ie* a party who occupies or possesses a lot by reason of an arrangement with the relevant subsidiary proprietor. For present purposes, since the third category of persons derive their rights from the subsidiary proprietors, they stand in the same position as subsidiary proprietors for the purposes of this discussion and need not be dealt with separately.

23 Since the by-laws are statutorily constituted contracts between the management corporation and the subsidiary proprietors and between the subsidiary proprietors *inter se*, it would appear logical to hold that the by-laws cannot take effect until these persons come into existence. The appellants' argument to this effect cannot, in my view, be gainsaid. This argument is fortified by the fact that the provisions of the Act make it very clear when the management corporation comes into existence and when persons who have purchased units in a development can be considered to be subsidiary proprietors of a subdivided building. The very term "subdivided building" can only be applied from a specified time.

24 The Act applies from the time an owner of land decides to construct a development on his property containing separate units which he wishes to sell independently of each other and to disparate persons. In order for this developer to pass a good title to the individual units, the land and building will have to be subdivided in accordance with the provisions of the Act. Under s 7(1), the developer may not sell any unit in any development intended for strata subdivision until a schedule of strata units has been filed with and accepted by the Commissioner of Buildings. When this is done, sales may begin even though the development has not been completed, but persons buying units from the developer will not at that stage be regarded as subsidiary proprietors of their units.

25 On completion of the development, a strata title plan has to be lodged for registration. Under s 9(1), the strata title plan is deemed to be registered when it has been signed and sealed by the Registrar of Titles ("the Registrar") and has been marked with the serial number of the strata title plan register. This registration has a number of important effects. First, it is only when the strata title plan has been approved that the development can be called a "subdivided building" as that term is used in the Act. Secondly, by s 9(3), it is only upon the registration of a strata title plan that the subsidiary proprietor is deemed to be the proprietor of his lot and of his share of the common property. Thirdly, it is upon registration that the management corporation of the development comes into existence. Under s 33(1), the subsidiary proprietors from time to time of the lots in the subdivided building comprised in a strata title plan constitute a body corporate only upon registration of that strata title plan.

26 Once the strata title plan is registered, the Registrar will issue a subsidiary strata certificate of title for each lot shown on the strata title plan. Each such title is registered in the subsidiary strata land register which is prepared and maintained by the Registrar. Further, on registration of the strata title plan, the Registrar shall enter a memorial in the land register on the volume and folio of the parcel to the effect that a subsidiary strata land register has been created. This leads to the fourth effect of registration of the strata title plan which is that thereupon the common property will be held by the subsidiary proprietors as tenants-in-common proportional to their respective share values and for the same term and tenure as their respective lots are held by them (s 13(1)). The common property thus is vested in the subsidiary proprietors and not in the management corporation. Once the subsidiary strata title certificate of title for each lot has been issued, a purchaser of a lot can be registered as the subsidiary proprietor of that lot and his share of the common property.

27 Once the strata title plan is registered therefore, all the ingredients necessary for the operation of the by-laws will exist: there will be a subdivided building which will be managed by an extant management corporation and occupied by subsidiary proprietors or persons deriving rights from them. These persons would all be bound by the "by-laws for the time being in force" as provided in s 41(4). This would mean that the by-laws could not bind anyone before the management corporation came into existence and before the purchasers of the units were entitled to be termed "subsidiary proprietors". The terms of the statutory contract might, depending on the language used, indicate that it was intended to have retrospective effect. As the appellants contended, however, the use of the words "for the time being in force" make it clear that the statutory contract created by s 41(4) operates prospectively only. Additionally, the by-laws impose penal sanctions for infringement and penal provisions are not applied retrospectively unless there is very clear language to that effect.

28 Thus, in my judgment, the by-laws in this case would only have taken effect on 7 April 2000 when the strata title plan for Kentish Lodge was registered and the MCST came into existence. This interpretation of the Act is one that is also espoused by Prof Teo in his book. This interpretation also accords with common sense as the two by-laws alleged to have been breached are by-laws that provide that subsidiary proprietors must obtain the approval of the MCST before carrying out the types of works specified in those by-laws. The appellants were not subsidiary proprietors when they did the works and there was no MCST to whom they could have applied for approval.

29 The foregoing does not mean that prior to 7 April 2000 the appellants or other purchasers of units in Kentish Lodge were entirely free to do whatever they liked with their units. In the sale and purchase agreement that the appellants made with the developer, there was a clause (cl 21) that bound the appellants to comply with the restrictions in Schedule A to the sale agreement from the date they took possession of the units until the MCST took over management of the condominium. Schedule A contained restrictions that were similar to the by-laws set out in the First Schedule of the Act. In particular, cl 2(m) of Schedule A provided that the purchaser was not to "mark, paint, drive nails or screws or the like into, or otherwise damage or deface any structure that forms part of the common property without the approval in writing of the [developer]". The developer could, therefore, have forbidden the appellants to carry out any erections or installations that would have damaged or defaced the common property. When the developer received the appellants' request for approval of their intended works, the developer chose to sit on the fence and decline either to approve or specifically disapprove the works. If the developer had rejected the works outright, the appellants would not be in their present position. In any case, even if the appellants were in breach of contract because they did not get specific approval from the developer before proceeding with their works, that breach could only be acted on by the developer and the MCST could not have relied on it in its action before the district judge. Breach of the appellants' contractual obligations under the sale and purchase agreement could not be considered breach of the by-laws as those were not in force at the time the acts constituting the breach took place.

30 The conclusion on this issue is, therefore, that no breach of the by-laws occurred when the appellants did their works in 1999. The works done by the appellants in September 2000 have to be considered separately. By then the by-laws were in force even though the MCST had not yet held its first meeting and if the appellants wanted to do work that had, according to the by-laws, to be pre-approved by the MCST, then the appellants should have got such approval before starting work. I will consider later in this judgment whether the September 2000 works breached any by-law.

Were the appellants in breach of the by-laws after the same came into force?

31 The MCST contended before the district judge that the appellants' breaches of the by-laws were continuing breaches so that even in respect of the structures installed before the MCST came into existence, once there was an MCST, as long as those structures remained in existence and continued to affect the common property, the appellants needed the MCST's approval to retain them. Without such approval, the appellants would be in breach of the by-laws. This argument was renewed before me.

32 The by-laws in question, by-laws 11 and 12, provide as follows:

> **Damage to common property.**
>
> **11**. A subsidiary proprietor or occupier of a lot shall not mark, paint, drive nails or screws or the like into, or otherwise damage or deface, any structure that forms part of the common property without the approval in writing of the management corporation, but this by-law shall not prevent a subsidiary proprietor or person authorised by him from installing —
>
> (*a*) any locking or other safety device for the protection of his lot against intruders; or
>
> (*b*) any screen or other device to prevent entry of animals or insects upon his lot.
>
> **Permission to carry out alterations.**
>
> **12**. A subsidiary proprietor or occupier shall not make any alteration to the windows installed in the external walls of the subdivided building without having obtained the approval in writing of the management corporation.

33 Referring to by-law 11, the MCST pointed out that it prohibited any activity that would damage or deface the common property. It argued that if the structures had damaged the common property, that damage would not cease to exist simply because the structures were erected before the MCST came into existence. Secondly, the dictionary meaning of "deface" is "spoil the appearance of" so similarly if the structures do spoil the appearance of the common property, the defacement would not cease to exist simply because the structures were erected before the MCST was formed. Therefore, as long as the damage to or defacing of the common property continued to exist, the MCST when constituted was entitled to enforce the by-laws by seeking redress under s 41(14)(*a*) which gave the MCST power to apply to court "for an order to enforce the performance of or restrain the breach of any by-law".

34 Looking at the by-laws in question, I do not accept that they can be interpreted in the manner argued for by the MCST. By-law 11 provides that the subsidiary proprietor "shall not mark, paint, drive nails or screws or the like into, or otherwise damage or deface" any part of the common property without the approval of the MCST. To me this language plainly means that at the time the

subsidiary proprietor intends to do any of the actions described, there must be an MCST in existence to whom he can apply for approval. If there is no MCST, then the by-law cannot apply. Further, the by-law contemplates the performance of specific actions which have a defined lifespan. When one marks or paints a structure or drives a nail or screw into it, that action starts at one moment in time and ends at another moment in time. The action is then completed. If the action is started and completed at a time when there is no MCST, then the taking of the action is not a breach of the by-laws. By the time the by-laws come into effect the action is no longer taking place and therefore cannot fall within their purview. In by-law 11, the words "or otherwise damage or deface" are not intended to deal with or imply continuing damage or defacement. What they are intended to do is provide a catch-all description of similar forbidden actions. The by-law is specifying certain types of actions that may damage or deface the common property and then using a general phrase in order to forbid any other type of action that might have the same consequence of damaging or defacing the common property.

35 As regards by-law 12, the language indicates even more clearly that what is contemplated is an action that takes place after the MCST comes into existence because it says that the subsidiary proprietor "shall not make" any alteration in the windows without the MCST's approval. This by-law is not referring to actions taken before the MCST was constituted. The words "shall not make" cannot be construed to mean "shall not continue to have altered windows".

36 As I have found that neither by-law 11 nor by-law 12 contemplates that an action taken and completed before it came into force would constitute a continuing breach of the by-law when it became effective, *ie*, on 7 April 2000, the MCST had no case against the appellants for breach of those by-laws in respect of the structures erected before 7 April 2000 even assuming that the by-laws were breached by the installation of the structures. It is not, therefore, necessary to consider whether the erection of those structures did in fact constitute a breach of those two by-laws. I now go on to consider the alternative basis on which the MCST put its case.

Did the erection of the roofs over the terrace and landscape areas amount to exclusive use of common property?

37 Each developer building a development in Singapore has to conform with the overall gross floor area (usually referred to as "GFA") for that development as specified by the URA. As stated by the judge, the GFA of each development is determined by the approved Gross Plot Ratio ("GPR") for the land on which it is constructed. The GPR is approved by the chief planner in accordance with the master plan and it determines the land premium or the development charge payable by the developer. Based on that fee, the URA will permit the developer to develop the site up to a limit and that limit is the maximum permissible GFA. Once the GFA has been ascertained, the area of the constructed development cannot exceed the GFA. If it does, additional premium will be payable to the authorities.

38 In the case of Kentish Lodge, the floor area of the condominium on its completion was only 1.63m² short of the approved GFA. When the appellants covered their PES areas, the covered areas had to be included as part of the GFA of the condominium and this meant that the condominium's gross floor area exceeded its approved GFA. The 1.63m² left over on completion of the construction of Kentish Lodge was completely consumed by reason of the appellants' actions and an additional GFA of 52.53m² was generated. The MCST took issue with this although the evidence was that the GFA of the condominium could be increased to cover the additional floor area created by the erection of the appellants' roofs, if the appellants were willing to pay the additional development charge, and the appellants had indicated such willingness.

39 The position taken by the MCST was that the GFA of the development or rather the 1.63m²

of the GFA that had not been used up on completion of the condominium (referred to as the "unconsumed GFA") was common property. This common property would be affected by the appellants' application to the authorities to regularise their structures and therefore, under s 41(8) of the Act, a unanimous resolution would have to be passed by the subsidiary proprietors before the MCST could endorse the appellants' application to the authorities. Since no such resolution had been passed it was not possible to endorse such application and, following therefrom, it would not be possible to regularise the unsatisfactory position created by the appellants' erection of unauthorised roofs.

40 The above position was not expressly pleaded by the MCST. In relation to the GFA, the allegations of the MCST appeared at para 6 of the Statement of Claim which stated that:

> The [appellants] are in breach of URA regulations on "Erection of shed to cover over [*sic*] Private Enclosed Space (PES) Areas". Uncovered PES areas are not computed as part of the overall Gross Floor Area (GFA) for the Development. The subsequent covering of open PES areas will thus generate additional GFA. The covering of PES without planning permission is also an offence under Section 3 of the Planning Act, Cap. [*sic*]
>
> Particulars
>
> The covered Private Enclosed Space (balcony) have increased the [appellants'] Gross Floor Area (GFA) by 54.16 sq meters (583 sq feet). This covered area is now used by the [appellants] as part of their Living Room, since March 1999.
>
> …

41 In the court below, the appellants submitted that the MCST had not pleaded their cause of action as being founded on the generation of additional GFA. The district judge dismissed this argument as she noted that in para 42 of their Amended Reply and Defence to Counterclaim the MCST had pleaded that it would have to call for an extraordinary general meeting to obtain unanimous consent from the general body present at the meeting. She therefore considered that the issue had been sufficiently pleaded. She then considered the case of *MCST Plan No 1375 v Han Soon Juan* [2004] SGDC 204 where District Judge Wong Peck had held that written permission for a development (that includes the approved GFA/GPR) accrued to the land and not to the owners. The judge agreed with that observation and went on to hold that as the GFA accrued to the land it was a right that was attached to the land that had been fixed and paid for by the developer and, since the land was common property, GFA would also be common property. The judge's holdings on this issue can be summarised as follows:

(a) that GFA formed part of the common property of Kentish Lodge;

(b) that by erecting the roofs over the terrace and landscape areas, the appellants had generated GFA;

(c) thereby the appellants had claimed exclusive use over the common property; and

(d) therefore the appellants required the unanimous consent of the subsidiary proprietors, pursuant to s 41(8) of the Act, for the creation of a by-law to confer on them the exclusive use and enjoyment of the GFA.

At [110] of her judgment, the district judge said that she agreed with the MCST that the utilisation of

GFA affected the land of the condominium and to allow the appellants to utilise the GFA would amount to conferring on them exclusive use and enjoyment or, at the very least, special privileges in respect of the common property. On this basis, the roofs over the landscape/air well areas would fall within s 41(8) of the Act. This finding was one of the ingredients that led the district judge to grant the mandatory order for the removal of the roofs sought by the MCST.

42 I should state here that under s 41(8) of the Act, a management corporation may pursuant to a unanimous resolution of the subsidiary proprietors make a by-law in respect of any lot conferring on a subsidiary proprietor the exclusive use and enjoyment of or special privileges in respect of the common property or any part thereof upon such terms and conditions as may be specified in the by-law. The issue here therefore is whether the unconsumed GFA of a development is common property such that any individual subsidiary proprietor who wishes to undertake works on his unit that would result in the GFA being totally consumed and/or the creation of additional floor area for the development would be required by the Act to obtain a new by-law to that effect approved by the unanimous resolution of all the subsidiary proprietors.

43 The appellants submitted that the judge's reasoning that unconsumed GFA constituted common property was inconsistent with the Act which defines common property as follows (in s 3):

> "common property" —
>
> (*a*) in relation to subdivided buildings in an approved plan bearing the title of "condominium" and issued by the relevant authority, 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 erected) intended to be included as lots in a strata title plan to be lodged with the Registrar after strata subdivision of the building unit has been approved by the relevant authority;
>
> …
>
> (*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.

They argued that the Act does not say that GFA, unconsumed or otherwise, is common property. The items included under the definition of common property were all tangible: water pipes, lifts, staircases, *etc*. None related to intangibles such as GFA and unconsumed GFA.

44 While it is true that the items mentioned in the definition are tangible items, that does not mean that intangible rights cannot form part of the land and thus be part of the common property. In *Frontfield Investment Holding (Pte) Ltd v MCST No 938* [2001] 3 SLR 627, I held that an easement over the land of a third party would also be part of the common property of a condominium. That holding was based on the definition of "land" in the Act which made it clear that "proprietorship of land includes natural rights to air, light, water and support and the right of access to any highway on which the land abuts". An easement is not tangible and yet it has long been recognised by the common law as being part of a parcel of rights which a purchaser acquires when he purchases a parcel of land which enjoys an easement over an adjacent parcel.

45 Despite my recognition that land, and therefore, common property, can include intangible rights, I do not think that unconsumed GFA is capable of constituting land. First of all, the common law does not recognise the concept of GFA. It is not something that has grown out naturally from the ownership and use of land. GFA is a concept that has been invented by the planning authorities in order to control and administer the usage of land in accordance with the currently prevailing policy applied by such authorities. Secondly, to an extent, the GFA of a development is determined by the amount of development charge that a developer is prepared to pay, although of course, there may be guidelines as to the maximum permissible GFA in any particular case. All I am pointing out is that there is no pre-designated GFA for any particular plot by which I mean a GFA which has to be assigned to that plot regardless of the size of the GFA applied for by the developer and the amount that the developer is willing to pay. As a tool of planning policy, the GFA does not have an inherent connection with any particular plot. It is a creature of a completely different nature from an easement which the Act itself describes as a "natural right". Thirdly, the Act itself has not statutorily included GFA in the definition of "land" for the purposes of the Act.

46 As unconsumed GFA cannot be "land", *a fortiori* it cannot be common property. It is of interest that the URA recognises this. In the court below, the evidence given by Mr Greig who was called as a representative of the URA was that to the URA, GFA and common property were two separate issues. Mr Greig gave this evidence when he was asked whether the URA's requirement that a management council should endorse a subsidiary proprietor's application for regularisation of structures that had been erected without proper authority always applied to condominium units. Mr Greig agreed that this requirement was only imposed when the application involved common property. He then confirmed that, in this connection, whether the application involved GFA and whether it involved common property were two separate issues.

47 I am also impressed by the reasoning of District Judge Wong Peck in *MSCT Plan No 1375 v Han Soon Juan* (*supra* [41]). She said:

> 25. It has been stated in URA's letter dated 10 June 2002 that GFA accrues to the land and not to the owners. I accept this position. It follows that GFA does not belong to the defendants nor the plaintiffs. As such, I do not find the plaintiffs' claim to the GFA of Lot 2062 on which

> Flynn Park stands on to be valid. GFA and Gross Plot Ratio are within the purview of URA for planning purposes. To put it simply, they are planning guidelines that limit the extent to which the land can be built up. Having said that, it is also URA which ensures compliance by enforcing these guidelines. It is the legal owner of the land who has the duty to ensure that he does not run foul of these guidelines. In this instance, it is the collective responsibility of all the subsidiary proprietors of Lot 2062 to ensure that these guidelines are met.
>
> 26. It is therefore erroneous of the plaintiffs' counsel to argue that in the alternative, the GFA belonged to the subsidiary proprietors collectively in undivided shares. GFA does not belong to anyone or can be owned by anyone. To me, it is apparent that both counsels [*sic*] have mistakenly likened GFA to that of [*sic*] share values in the land. Common property is held by all the subsidiary proprietors as tenants in common proportional to their respective share values. Their respective shares are stated in the Subsidiary Strata Certificates of Title (SSCTs) issued by the Registrar of Titles. SSCTs are essentially title ownership documents that also show the encumbrances affecting the strata lots. A SSCT shows the name of the subsidiary proprietor for a certain strata lot and the share value in the common property held by this subsidiary proprietor. GFA and GPR cannot be owned by any subsidiary proprietor and do not form part of the common property. Being planning guidelines which do not reflect or determine title ownership, they are not reflected in the SSCT nor are they included in the definition of common property in s 3 of the Act.

With respect, I agree that GFA does not belong to anyone and is not a right of such a nature that it is capable of being owned by anyone. As the appellants submitted, GFA is simply an administrative tool. As such, it was solely up to the URA to increase or decrease the GFA for any particular parcel of land and to decide what it would do if construction on the land resulted in it being built up beyond the GFA.

48 Since the GFA cannot be common property, s 41(8) of the Act calling for a unanimous resolution to support exclusive use of the common property would not have applied in relation to the erection of the roofs over the appellants' PES areas.

49 In passing, I mention that, due to the passing of the Building Maintenance and Strata Management Act 2004 (No 47 of 2004), the situation has now changed. Section 37 of that Act provides:

> (1) Except pursuant to an authority granted under subsection (2), no subsidiary proprietor of a lot that is comprised in a strata title plan shall effect any improvement in or upon his lot for his benefit which increases or is likely to increase the floor area of the land and building comprised in the strata title plan.
>
> (2) A management corporation may, at the request of a subsidiary proprietor of any lot comprised in its strata title plan and upon such terms as it considers appropriate, by 90% resolution, authorise the subsidiary proprietor to effect any improvement in or upon his lot referred to in subsection (1).

Thus, under the present regime, the subsidiary proprietors who wish to cover their PES areas would require the authorisation of the MCST supported by a resolution of 90% of the subsidiary proprietors in order to do so.

The air-conditioning compressors installed in September 2000

50 In September 2000, the appellants installed the new compressors on the external wall of the building above the landscape/air well area. As at that time, the appellants were bound by the by-laws. The MCST was then in existence but had not had its first meeting yet and the appellants carried out the work without waiting to seek its approval. The judge found (at [73] of her judgment) that these compressors above the air well were installed, at least partially, onto external walls that formed part of the common property. She held that the appellants were clearly in breach of by-law 11 in this regard. Although she did not state this specifically in her judgment in relation to the new compressors, she must have considered that the act of installing the new compressors would have damaged or defaced the common property because nails or screws or the like would have had to be driven into the wall in order to effect the installation.

51 The appellants submitted that it was not pleaded that the new compressors were on common property. Secondly, it was not pleaded that the new compressors were in breach of any by-law. The only pleading was that at para 5 of the Statement of Claim which simply alleged that the appellants had installed additional compressors on 8 September 2000 without the prior approval of the developer who was then managing the condominium. Thirdly, by this pleading, the MCST had admitted that the developer was managing the condominium on its behalf. By a letter dated 8 September 2000 signed by Mark Lim then acting on behalf of the MCST, the appellants were advised that the council when formed would reserve the right to require the appellants to undo the installation works should they be found to be visually obstructive and jarring. To this, the appellants had replied the same day stating that Mr Lim had inspected both units and had verbally informed Mr Choo that he was quite satisfied. As such Mr Choo was surprised to receive the letter stating the contrary. If there was any objection, Mr Choo asked to be informed of the same within a week. There was no response and the appellants submitted that the MCST had not maintained the objection. In any event, the MCST's objection was not that these compressors were placed on common property nor that they breached by-laws 11, 12 or 13. It was simply that the appellants had carried out renovations without prior permission. The appellants also submitted that the Statement of Claim did not contain any prayer for relief in respect of the new compressors.

52 Dealing with the last point first, this point has been taken in error as para (a)(iv) of the reliefs prayed for in the Statement of Claim specifically mentioned all four air-conditioning compressors as being unauthorised additions which the appellants should remove. As regards the argument that it was not expressly pleaded that the installation of the new compressors breached by-law 11, the MCST would have had no ground to complain about the erection of the compressors without the developer's consent had such consent (on the basis that the developer was then the MCST's representative) not been required under by-law 11. Such consent would only be required when the installation work necessitated nails or screws being driven into the common property or other actions being taken that would otherwise damage or deface part of it. In my view, the appellants would not have been embarrassed by the way in which para 5 of the Amended Statement of Claim was pleaded and would have known the substance of the allegation being made.

53 Looking at the correspondence also, it does make clear that the MCST's approval was required for the additions. In the letter of 8 September 2000 signed by Mr Lim on behalf of the MCST, Mr Choo was reminded that management's approval had to be sought before renovation works were carried out and that the council reserved the right to require the appellants to undo the renovation works if the same were visually obstructive and jarring. Mr Choo's reply of 8 September 2000 said it was an oversight on the part of the appellants not to have informed the MCST prior to effecting the installations. Although the MCST did not respond to this letter within a week as requested by Mr Choo, it did respond by a letter of 25 September 2000 signed by one Angie Wu. That letter stated that as the developer was managing the condominium on trust for the MCST, Mr Choo's application for additions/alteration works could not be approved at that stage. He was asked to forward his

application to the MCST upon formation of the council. The letter repeated that the MCST might require the appellants to remove the installation after it took over direct management from the developer. Once again, the only reason that it could have been stated that the MCST had such a right was that by-law 11 prohibited work being done without its authorisation where such work would damage or deface the common property. In this regard, I think that the appellants' arguments that the issue as to whether the installation of the new compressors was a breach of the by-laws was not before the district court are not well founded.

54 The district judge heard a great deal of evidence on the way that the various structures were erected and the areas where they were installed. I find no basis on which to disturb her finding that the new compressors were partially installed in walls that formed part of the common property of the condominium and that by so installing them, the appellants were in breach of the by-laws. The next issue is whether this means that the mandatory injunction granted by the district court should, in so far as the new compressors are concerned, be maintained.

Should the mandatory injunction be continued in respect of the new compressors alone?

55 The law in Singapore as established by the cases of *Chen Ee Yueh* and *Tay Tuan Kiat v Pritnam Singh Brar* [1986] SLR 290 ("*Tay Tuan Kiat*") is that even where there is an encroachment by one land owner on the property of another or a subsidiary proprietor has erected structures without the permission of the management corporation, a mandatory injunction will not necessarily be issued to force the removal of the structures or end the encroachment. In *Tay Tuan Kat*, the High Court found that the defendant's wall had encroached upon the plaintiffs' property. Nevertheless, L P Thean J (as he then was) ruled that the relief the plaintiffs asked for, namely that the defendant pull down and remove the wall, should not be granted as this would not be a fair result. Justice Thean's reasoning was (at [9] and [10]):

> 9 … In my view, if the mandatory injunction asked for by the plaintiffs is granted the obligation imposed on the defendant is extremely onerous and is out of all proportion to the benefit to be gained by the plaintiffs. In my view, it will not produce a fair result. In *Charrington v Simons & Co* [1970] 1 WLR 725 … Buckley J in considering the grant of a mandatory injunction said, at p 730:
>
> > Where a mandatory order is sought the court must consider whether in the circumstances as they exist after the breach a mandatory order, and if so, what kind of mandatory order, will produce a fair result. In this connection the court must, in my judgment, take into consideration amongst other relevant circumstances the benefit which the order will confer on the plaintiff and the detriment which it will cause the defendant. A plaintiff should not, of course, be deprived of relief to which he is justly entitled merely because it will be disadvantageous to the defendant. On the other hand, he should not be permitted to insist on a form of relief which confer no appreciable benefit on himself and will be materially detrimental to the defendant.
>
> 10 The concept of 'fair result' as one of the criteria in determining the grant of a mandatory injunction was accepted by Megarry J in *Shepherd Homes v Sandham* [1971] Ch D 340 where he said, at p 351:
>
> > Second, although it may not be possible to state in any comprehensive way the grounds upon which the court will refuse to grant a mandatory injunction in such cases at the trial, they at least include the triviality of the damage to the plaintiff and the existence of a disproportion between the detriment that the injunction would inflict on the defendant and

the benefit that it would confer on the plaintiff. The basic concept is that of producing a 'fair result', and this involves the exercise of a judicial discretion.

56 This concept of balancing the benefits and burdens in order to produce a fair result was echoed by Chao Hick Tin J (as he then was) in *Chen Ee Yueh*. In that case, the subsidiary proprietor had breached the by-laws by installing windows in her balcony without the consent of the management corporation but Chao J ruled that she should not be ordered to remove the windows because the harm to her outweighed any benefit to the management corporation since other subsidiary proprietors had erected similar windows which could not be ordered to be removed. He also stated, having reviewed certain authorities that the court will grant a mandatory injunction to redress a breach of a negative covenant, the breach of which is already accomplished (as in *Chen Ee Yueh* and the present instance) unless:

(a) the plaintiff's own conduct would make it unjust to do so; or

(b) the breach was trivial or had caused no damage or no appreciable damage to the plaintiff and a mandatory injunction would impose substantial hardship on the defendant with no counter-balancing benefit to the plaintiff.

57 The district judge awarded a mandatory injunction to compel the appellants to remove all of the structures. I have reversed her decision in relation to all structures installed before April 2000 as I have found that the by-laws did not apply before that date. Accordingly, the considerations that the district judge had to weigh in deciding whether to grant the mandatory injunction below are quite different from the considerations that I have to balance now. A significant factor now is that the injunction if continued would affect only two, comparatively minor, structures, whilst the major unauthorised structures would remain in place. The main complaint that the MCST had regarding the appellants' works was the covering over of the PES areas. The complaints about all four air-conditioning compressors were minor in comparison. Now that only two compressors remain in issue, the question of the triviality of the damage that would be caused to the MCST should the appellants be allowed to retain these compressors looms large in my mind. I note here that although the MCST had complained of heat being emitted by the new compressors, the district judge found that there was no direct evidence of annoyance caused to the other subsidiary proprietors by reason of the installation of these compressors. She expressly stated that the MCST had failed to discharge its burden of proof in this regard.

58 The next significant factor is the behaviour of the MCST. In July 2001, the MCST wrote to the appellants and told them that the structures should be removed because they affected the uniformity of the façade and caused inconvenience to the other residents. On 1 November 2001, Mr Choo met the management council to discuss the issue. Mr Choo's evidence was that he was then informed by the chairman of the council that the council approved the covering of the PES areas for safety reasons but that the appellants had to make an application to the URA for the authorities' approval of the same. Mr Choo's evidence was supported by that of one Ms Evelyn Zeng, an employee of the MCST's managing agent who testified that by that time the only concern the MCST had was that the structures did not infringe the URA's regulations and the MCST's by-laws. She also testified that by 19 November 2001 the MCST would have known if the structures had encroached on the common property and whether they had breached any by-laws. On the same day, the MCST wrote to Mr Choo telling him that it had written to the authorities enquiring about the structures and stating that as Mr Choo had been informed at the meeting, the MCST's only concern was that the renovation in question was not in any way illegal or in violation of any existing law. The matter was resolved when the URA replied. On 11 December 2001, the MCST wrote to Mr Choo stating that the URA wanted it to advise the appellants to formally apply for the retention of their roofs "to regularise

the process of the installation". The appellants were asked to proceed with the formal application and then forward copies of the same to the MCST for its file. On 20 December 2001, the MCST wrote a further letter stating "the Council have no objections to your additional installation erected at private enclosed space area as long as there is no breach of rules and regulations of the URA". In August 2002, the MCST's managing agent wrote a letter to Mr Choo stating that it had confirmed with the council that the council expressed no objections regarding the appellants' installations provided that these were regularised with the authorities.

59 Thus, from November 2001 right up to August 2002, the MCST had no difficulty with any of the structures erected by the appellants including the new compressors. When the appellants finally took action, however, to regularise the structures and asked the MCST to endorse the application form, it refused. That refusal prevented the submission of the form to the URA. The appellants' position both before the district judge and in the appeal was that that reversal of the MCST's position was based on personal animosity between the chairman and vice-chairman of the management council and Mr Choo. The district judge did not accept this argument. For present purposes, however, I do not think that I need to go into and discuss the findings on this issue. The important thing is that the evidence did show that up to August 2002, the MCST did not consider that it would suffer any damage by allowing the structures to remain as long as all the legal formalities were complied with. Obviously, therefore, it did not consider that the appearance or administration of the condominium or the convenience of the other subsidiary proprietors had been adversely affected by the existence of the structures including the new compressors. These circumstances lead me to infer that the continuation of the mandatory injunction in respect of the compressors would bring no benefit to either the other subsidiary proprietors or the MCST itself. It was also Evelyn Zeng's evidence that the MCST had nothing to gain from the removal of the structures.

60 On the other hand, I recognise that there is little harm that the appellants would suffer if the new compressors had to be removed. They would have to find some other way of cooling the areas served by these compressors but the cost of doing this would not be very great. They submitted that their renovations had cost them $50,000 and that this money would be thrown away if they had to remove them. That figure related to the roofs and the windows and even if it included the cost of installing the new compressors, I would be surprised if that cost amounted to much more than 10% of the total figure. There was also evidence that a number of other compressors had been erected by various subsidiary proprietors either completely or partially on common property. These, together with the earlier compressors installed by the appellants which the district judge found to have been installed entirely on common property, will remain in place even if the new compressors are removed.

61 Balancing all the circumstances as best I can, I do not think it would be a fair result if I were to order that the mandatory injunction should remain in place in relation to the new compressors.

Conclusion

62 In the result this appeal is allowed and the orders made below are set aside. I will hear the parties on costs.

Appeal allowed.