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STRATA TITLE AND COMMONHOLD—A LOOK AT SELECTED ASPECTS OF THE SINGAPORE AND ENGLISH LEGISLATION

Building Maintenance and Strata Management Act[1]
Commonhold and Leasehold Reform Act[2]

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I. INTRODUCTION

In 2004, a new strata title legislation, the *Building Maintenance and Strata Management Act* (*BMSMA*), was enacted in Singapore which came into force the following year.[3] It separated, for the first time, the maintenance and management aspects of strata schemes from that pertaining to development related matters such as the subdivision of land into strata, the disposition of titles thereto and the collective sale of property.[4] In the same year 2004, a new development took place in England and Wales. A new form of land tenure, the commonhold, was introduced on 27 September 2004 by the *Commonhold and Leasehold Reform Act 2002* (*CLRA*) which is fine-tuned by the *Commonhold Regulations 2004*.[5] Commonhold is not a new estate but a new system of ownership of freehold properties.[6] Strata title in Singapore

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1 Act 47 of 2004, Sing. The Act was subsequently revised and is now Cap. 30C, 2008 Rev. Ed. Sing.

2 2002, c. 15.

3 *I.e.*, 1 April 2005. See *Building Maintenance and Strata Management Act (Commencement) Notification 2005* (S. 191/2005 Sing.), para. 2.

4 Prior to this, the only piece of legislation in Singapore on strata title, which dealt with both the development and management aspects of a strata scheme, was the *Land Titles (Strata) Act* (Cap. 158, 1999 Rev. Ed. Sing.) [*Land Titles Strata Act*] which dealt with both the development and management aspects of a strata scheme. With the enactment of the *BMSMA*, the *Land Titles Strata Act* now deals primarily with development related matters of such a scheme. This new arrangement might have been encouraged by developments in the Australian state of New South Wales to which Singapore still very much looks to in the area of strata title. In New South Wales, since 1997, a similar arrangement exists in relation to a strata scheme whereby development related matters are dealt with by the *Strata Schemes (Freehold Development) Act 1973* (N.S.W.) [*New South Wales Strata Schemes (Freehold Development) Act*] and the *Strata Schemes (Leasehold Development) Act 1986* (N.S.W.) [*New South Wales Strata Schemes (Leasehold Development) Act*] respectively, while management matters for all strata schemes come under the purview of the *Strata Schemes Management Act 1996* (N.S.W.) [*New South Wales Strata Schemes Management Act*].

5 S.I. 2004/1829.

6 Commonhold can only be created out of registered freehold land (*CLRA*, s. 1(1)(a)).

applies to both freehold and leasehold properties. The commonhold is the equivalent of the Singapore strata title system.[7]

The *BMSMA* seeks[8] to, *inter alia*, facilitate the management of mixed-use strata developments by allowing the formation of layered management schemes within strata developments through the device of subsidiary management corporations. To encourage more self-regulation within strata developments, management corporations are conferred greater flexibility in the management of their strata developments. The *BMSMA* also seeks to streamline and better define the roles and responsibilities of developers of strata developments, unit owners, management corporations and their managing agents. It de-criminalises various offences connected with the management of strata developments where these do not pose a serious threat to the general public.

The *CLRA* devised the commonhold as an alternative to the long-term residential leasehold system which is the most common form of ownership for properties such as blocks of flats. The advantages of commonhold, such as standardisation of documentation, security of freehold ownership in which the value of the land is retained and the ability to manage the commonhold community's own affairs without reference to a landlord, provide a refreshing change from the long leasehold ownership system.[9] In addition, commonhold overcomes the problem of enforcement of positive covenants in respect of the maintenance and management of the common parts and facilities of the freehold development which has only been available with leasehold ownership.[10]

II. Basics of Strata Title and Commonhold Systems

Under the Singapore strata title system, the management corporation comprising the unit owners comes into existence by operation of law.[11] It is merely a statutory creation, being a body corporate having perpetual succession and a common seal.[12] It is not subject to the *Companies Act*.[13] It is the medium through which the unit

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[7] Strata title ownership was first introduced in Singapore by the *Land Titles (Strata) Act 1967* on 15 May 1968. For an account of the legislative background, see Teo Keang Sood, *Strata Title in Singapore and Malaysia*, 2nd ed. (Singapore: Butterworths, 2001), Chap. 1.

[8] See *Sing*., *Parliamentary Debates*, vol. 78, col. 923 at 924 (19 October 2004) (Mr. Mah Bow Tan).

[9] See U.K., Lord Chancellor's Department & Department for Transport, Local Government and the Regions, *Explanatory Notes to the CLRA 2002* (London: Her Majesty's Stationery Office, 2002), at paras. 4-7. For the inadequacies of leasehold ownership, see D.N. Clarke, *Commonhold: The New Law* (Bristol: Jordans, 2002), Chap. 1. See also generally, D.N. Clarke, "The Enactment of Commonhold—Problems, Principles and Perspectives" [2002] The Conveyancer and Property Lawyer 349; Wong, "Potential Pitfalls in the Commonhold Community Statement and the Corporate Mechanisms of the Commonhold Association" [2006] The Conveyancer and Property Lawyer 14; Smith, "The Purity of Commonholds" [2004] The Conveyancer and Property Lawyer 194, and Cornie van der Merwe and Peter Smith, "Commonhold—A Critical Appraisal" in Elizabeth Cooke, ed., *Modern Studies in Property Law* (North America: Hart Publishing, 2005) at 225.

[10] For the difficulties associated with enforcement of positive covenants to freehold land, see *Austerberry v. Oldham Corporation* (1885) L.R. 29 Ch. 750 and *Rhone v. Stephens* [1994] 2 W.L.R. 429.

[11] *Land Titles Strata Act*, s. 10A (upon registration of the strata title application). The same applies under the *New South Wales Strata Schemes Management Act*, s. 8(1) and the *Strata Titles Act 1985* (Malaysia) [*Malaysian Strata Titles Act*], s. 39(1).

[12] *BMSMA*, s. 24(1)(b).

[13] Cap. 50, 2006 Rev. Ed. Sing.

owners control and manage the strata scheme. It is responsible for the maintenance and management of the common property, such as open spaces, lifts, corridors, gardens and community facilities, other than the units in respect of which individual titles have been issued and registered.[14] It does so out of moneys contributed by all the unit owners to the management fund.[15] The common property is held by the unit owners as tenants-in-common proportional to the respective share value assigned to their units.[16] Statutory by-laws, as well as those made by the management corporation, provide the mechanism which regulates the relationship between the owners or occupiers of the units themselves on the one hand, and between them and the management corporation on the other.[17] The strata scheme may be brought to an end in the various ways specified in the strata title legislation, for example, by the management corporation itself pursuant to the appropriate resolutions,[18] on an application to court[19] and through a collective sale of the strata development.[20]

Unlike the strata title system, the equivalent of the management corporation under the commonhold system is the commonhold association duly incorporated as a private company limited by guarantee.[21] The commonhold association must be incorporated so as to facilitate the application for registration of a commonhold development. The unit owners in the development will be members of the commonhold association. Unlike the strata title system, the common parts of the development are owned by the commonhold association.[22] However, just as in the case of the strata title system, each unit owner will have a direct interest in the unit he or she owns and membership of the commonhold association. The commonhold community statement, which is a single document, is the equivalent of the by-laws in the strata title system which contains the fundamental rules of the commonhold community.[23] These, in effect, are the rules and regulations for the operation and management of the commonhold

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[14] *BMSMA*, s. 29(1)(a), (b).

[15] *Ibid*., s. 38(1).

[16] *Land Titles Strata Act*, s. 13(1).

[17] *BMSMA*, s. 32.

[18] *Ibid*., s. 84. See also *Land Titles Strata Act*, s. 81.

[19] *Land Titles Strata Act.*, s. 78.

[20] *Ibid*., s 84A.

[21] *CLRA*, s. 34, Sch. 3. The commonhold association will be subject to the *Companies Act 2006* (U.K.), 2006, c. 46, except as otherwise provided. Note, however, that the articles of association of a company limited by guarantee prescribed by the *Companies Act 1985* (U.K.) do not apply (*CLRA*, Sch. 3, para 4(1)). Although the commonhold association may adopt the relevant provisions in the *Commonhold Regulations 2004*, *supra* note 5, regs. 13, 14, Schs. 1, 2 for its memorandum and articles of association, the standard form provisions of the memorandum and articles as set out in the said Regulations are compulsory and will have effect, irrespective of whether or not they are adopted (*CLRA*, Sch. 3, paras. 2(2), (3)). Given that the commonhold association is a private company limited by guarantee without a share capital, its members (although their liability is limited) will ultimately be liable for the debts of the association if it were to become insolvent.

[22] *CLRA*, ss. 7(3), 9(3). The same applies under the *Malaysian Strata Titles Act*, s. 42(1). Under the *New South Wales Strata Schemes (Freehold Development) Act*, s. 20(b), the legal ownership of the common property is vested in the body corporate as agent for the unit owners as tenants-in-common in shares proportional to the unit entitlements of their respective units. This has the advantage of making dealings with the common property easier without removing the unit owners' control over it as the body corporate holds the common property as agent for them. See further, the *New South Wales Strata Schemes (Freehold Development) Act*, ss. 18(2), 21.

[23] *CLRA*, ss. 31-33.

development. This statement, the standard set of memorandum and articles of association[24] of the commonhold association and all necessary consents, among others, must be presented in order to register the commonhold development.[25] Thus, the commonhold development is created and comes into existence once the Registrar is satisfied that the requirements for registration have been fulfilled and the freehold estate is further registered as a freehold estate in commonhold land.[26] The commonhold development may be terminated through various means as set out in the *CLRA*, for example, by voluntary winding up,[27] compulsory winding up by the court,[28] termination by the court[29] and compulsory purchase.[30]

III. Two-Tier Management Corporation Scheme

The Singapore strata title system provides for such an arrangement which is not available under the commonhold system.

Under the *BMSMA*, such a scheme may be resorted to in the following four types of developments:[31]

(a) a mix of residential and non-residential units, *e.g.*, apartments and retail shops;
(b) non-residential units used for significantly different purposes, *e.g.*, office and retail shops;
(c) non-residential units in distinct office blocks and satisfies prescribed qualifying Criteria, *e.g.*, two office blocks with each block of strata area of at least 5,000 square metres[32] so as to prevent the proliferation of subsidiary management corporations; and
(d) different types of residential units, *e.g.*, an apartment block with lifts and one without lifts.

Under such a scheme, there are two levels of management: a main management corporation at the first tier and one or more subsidiary management corporations at the second tier. As they are legal entities, each can sue and be sued in its own right.[33] Each subsidiary management corporation represents the interest of a particular group of owners having a common interest. The first-tier management corporation will take care of the common property used by all the subsidiary proprietors, *i.e.*, unit owners, in the development, for example, driveways and car parks, and a lower-tier of subsidiary management corporations will take care of other parts of the common property. For example, in a mixed-use development, the residential subsidiary management corporation may take care of the swimming pool meant for their use only

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[24] See *supra* note 21.
[25] *CLRA*, ss. 1, 3. Schedule 1 thereto sets out the documents to be submitted to the Chief Land Registrar in support of the application for registration of commonhold land.
[26] *Ibid*., s. 1(1)(a)-(c).
[27] *Ibid*., ss. 43-49.
[28] *Ibid*., s. 54.
[29] *Ibid*., ss. 6(3), 40(3)(d).
[30] *Ibid.*, s. 60(1).
[31] *BMSMA*, s. 77(1).
[32] *Building Maintenance (Strata Management) Regulations 2005* (S. 192/2005 Sing.), reg. 18(b).
[33] *BMSMA*, ss. 24(1)(b), (2), 79(1)(b).

and the commercial subsidiary management corporation may take care of the central air-conditioning of the shops.

The aim is to facilitate the management of such developments with disparate interests by allowing the formation of layered management schemes, with each scheme being administered by a subsidiary management corporation representing the interests of specific user groups within the development. In other words, the two-tier management corporation scheme seeks to balance the different interests of user groups in mixed-use strata developments.[34] In the absence of such a scheme in the commonhold system, it will be unattractive to develop mixed commonholds for different user groups within the same development. While parity of interest and voting between each unit owner have the advantage of simplicity, the difficulty of balancing the interests of the disparate users will discourage mixed-use commonholds. For example, it may prove difficult to obtain consensus to implement changes or improvements to the common parts which benefit one user group more than another, such as improvements to the concourse of a shopping area in a mixed-use development which will benefit retail shop owners more than the residential unit owners.

A two-tier management corporation scheme is not without its own problems. There may arise disputes between the main management corporation and subsidiary management corporation and between two subsidiary management corporations in relation to the boundaries of the common property belonging to the respective entities, especially if these are not properly delineated or described in the relevant document that demarcates these boundaries.[35] There may also arise operational problems, such as finding sufficient volunteers to serve in the councils of the main management corporation and subsidiary management corporations since more volunteers will be required in such a scheme; different and disparate standards of maintenance adopted by each entity; and increase in total operation costs.[36] However, considered in totality, the benefits of such a scheme outweigh the disadvantages associated with it.

Such two-tier management corporation scheme exists in some other jurisdictions, such as Australia and Canada.[37]

IV. Common Property/Common Parts

Both systems provide for the common property or parts to mean all those parts of the development that are not comprised in a unit,[38] without enumerating inclusively the parts that are considered to be common property. Such common property or parts would, in effect, include lifts, lobbies, escalators, stairways, central air-conditioning systems, gardens, etc. The need for the concept of 'common property' or 'common parts' is obvious. Depending on whether the relevant part of the development

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[34] See *Sing., Parliamentary Debates*, vol. 78, col. 923 at 925 (19 October 2004) (Mr. Mah Bow Tan).

[35] *BMSMA*, ss. 78(6), (7) allow the corporations concerned to correct errors in demarcation subject to the unit owners passing the requisite resolutions. See also *BMSMA*, s. 115.

[36] See also Cornelius Van Der Merwe, "Two-Tier Governance for Mixed-Use and Large Condominium or Strata Title Schemes" (Paper presented at the 5th Asian Law Institute Conference, Singapore, 22 and 23 May 2008), at 12.

[37] See, for example, the *Community Land Development Act 1989* (N.S.W.) and the *Community Land Management Act 1989* (N.S.W.) and the *Strata Property Act*, S.B.C. 1998, c. 43, ss. 190-198 of British Columbia.

[38] *CLRA*, s. 25(1); *BMSMA*, s. 2(1).

concerned is part of the unit or part of the common property, the unit owner or the commonhold association/management corporation is under a duty to effect the necessary repair or maintenance.

While the *CLRA* provides for the commonhold community statement to set out those parts of a development which are not comprised in a unit,[39] the *Commonhold Regulations 2004* further prescribe that the commonhold community statement must exclude from the definition of a unit, the structure and exterior of a building in a block of flats, including services provided by means of pipes, cables or other fixed installations which are not within a unit and which do not serve exclusively one unit.[40] In other words, they are to be regarded as common parts. Similarly, the *BMSMA* goes further to provide that such common property must also be used or capable of being used or enjoyed by the owners or occupiers of two or more units.[41] Thus, under both systems, it is clear that to amount to common property or common parts, essentially two requirements must be satisfied: the first is that such part of the development concerned must not be comprised in any unit, and second that the part concerned must be used or capable of being used or enjoyed by occupiers of two or more units. Accordingly, where the part of the development concerned, such as a water storage tank, is not comprised in a unit, but yet serves exclusively the unit in question, it will not be regarded as common property or common parts. It is, thus, clear that the emphasis is on the element of common (and not exclusive) use and enjoyment of the part concerned.

A difference which may be noted is that the *BMSMA* expressly makes a distinction between common property on the one hand and fixtures and fittings on the other.[42] In other words, fixtures and fittings are treated as separate and distinct from common property. No such distinction is made in the *CLRA* or the *Commonhold Regulations 2004*. In the result, the definition of common property in the *BMSMA* and the elements therein necessary to be satisfied for such part of the development to amount to common property, do not apply to fixtures and fittings. Instead, what is crucial is the element of common, as opposed to exclusive, usage. In addition, it matters not whether the fixtures or fittings are comprised in the common property or within a unit. Thus, it is the responsibility of the management corporation to properly maintain and keep in a state of good and serviceable repair any fixture or fitting (including any pipe, pole, wire, cable or duct) comprised in, inter alia, the common property that is not used for the servicing or enjoyment of any unit exclusively.[43] The same applies to any fixture or fitting which is comprised within a unit and which is intended to be used for the servicing or enjoyment of the common property.[44] Such an approach

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[39] *CLRA*, s 25(1). See also *Commonhold Regulations 2004*, reg. 9.

[40] *Commonhold Regulations 2004*, *ibid.*, reg. 9(1)(b), (2) (see definitions of 'relevant services' and 'structure and exterior'). The position is substantially similar under the *New South Wales Strata Schemes (Freehold Development) Act*, s. 5(1) where the definition of a unit, *i.e.*, lot, excludes structural cubic space (such as, *inter alia*, any pipe, wire, cable or ducting in the building which is not for the exclusive use of only one unit), unless specifically designated as part of the unit by the surveyor who drew the strata plan. Thus, structural cubic space, located within the boundaries of a unit, is common property and the body corporate is responsible for its maintenance and repair.

[41] *BMSMA*, s. 2(1).

[42] *Ibid.*, s. 29(1)(b)(i)-(iii).

[43] *Ibid.*, s. 29(1)(b)(ii).

[44] *Ibid.*, s. 29(1)(b)(iii).

under the *BMSMA*, emphasising common usage and enjoyment in the context of the responsibility of the management corporation, is neater as it provides for certainty on the matter and dispenses with the need to determine whether the fixture or fitting concerned is or is not common property.

The approach in the *BMSMA* in regard to fixtures and fittings may be illustrated as follows. A service pipe is embedded in the concrete floor inside and outside the unit. It serves exclusively the unit in question. The section of the service pipe leading to the unit is corroded and water from the leakage caused serious damage to the electrical fittings in the electrical riser on the floor below. Applying the approach in the *BMSMA*, notwithstanding that the service pipe is comprised in common property, it will be the responsibility of the unit owner to repair it, not because the service pipe did not qualify as common property as defined in the *BMSMA*, but because it was used for the servicing or enjoyment of the unit exclusively. The approach to take as set out in the *BMSMA*, irrespective of whether any fixture or fitting is comprised in the common property or within a unit, is to consider the element of exclusivity—not the physical element of the facts or the concept of common property. This is understandable as the element of exclusivity must, in the circumstances of the case, necessarily take away any element of common use and enjoyment, with the result that it is the responsibility of the unit owner to repair the fixture or fitting in question.

A final point of difference with the position under the *CLRA*[45] which may be noted is that under the *BMSMA*, all windows of a unit that are located on any exterior wall of the unit, being either louvres, casement windows, sliding windows or windows with any movable part, will be regarded as part of the unit and not common property.[46] The result is that these external windows will be the responsibility of the unit owners to maintain. As they are used by and under the control of the unit owners, it would be difficult for the management corporation to supervise or control the proper usage and maintenance of these windows. However, to ensure the uniformity of the external building façade which has an impact on the value of the property, the management corporation is empowered to continue to regulate the design of these external windows.[47] As for all other windows located on the exterior wall of the unit, such as fixed glass panels or walls, they will be regarded as common property unless otherwise described in the strata title plan.[48] As they are outside the purview and control of the unit owners, the latter cannot be expected to take charge of these external fixed windows.

V. Common Boundary

Under the Singapore strata title system, the common boundary of a unit with another unit or with the common property is taken to be the centre of the floor, wall or ceiling, unless provided otherwise in the strata certified plan.[49] In contrast, under the commonhold system, the boundary between a unit and another unit and the

[45] *Commonhold Regulations 2004*, reg. 9(1)(b).
[46] *BMSMA*, s. 2(9)(a).
[47] *Ibid*., ss. 37(3), (4).
[48] *Ibid*., s. 2(9)(b).
[49] *Boundaries and Survey Maps (Conduct of Cadastral Surveys) Rules* (Cap 25, R 5, 2007 Rev. Ed. Sing.), r. 41. This is also the position under the *Malaysian Strata Titles Act*, s. 13(3).

common parts is the inner surface of the wall, the upper surface of the floor and the under surface of the ceiling.[50] The concept of common boundary determines the obligations of the unit owner and that of the management corporation/commonhold association in respect of the maintenance and repair of the respective parts of the strata development. However, as noted above, the maintenance and repair of services (including fixtures and fittings), irrespective of where they are located, which are for the exclusive use and enjoyment of a unit will be the sole responsibility of the owner concerned. To require otherwise will be inequitable in the circumstances.

Adoption of the median line as the boundary can give rise to uncertainty and create problems. Where there is leakage arising from water penetration originating beyond the inner half of a wall, doubts can arise as to whether the management corporation or the unit owner is liable for the cost of repair work. This is especially so where, based on the evidence, it is difficult to attribute the defects in the wall to the structure on one side or the other side of the median line.[51] In such an eventuality, it may be more appropriate to hold that both the management corporation and the unit owner have joint responsibility to repair it.[52]

The approach adopted in the commonhold system as seen above would help to avoid disputes between owners of adjoining units, as well as between the commonhold association and a unit owner as to which of them is responsible for damage caused by water penetration. This is because the maintenance and repair of floor, walls and ceilings which are not within a unit would then be the responsibility of the commonhold association. However, such an approach has its fair share of problems. For one, a unit owner will not be permitted to, for example, nail into the walls without getting the permission of the commonhold association or adjoining unit owner. In the case of a commonhold development which is for commercial use, shops and offices will not be able to effectively display goods or products behind glass walls where the commonhold association permits another party to use the outer half of the glass walls for advertising purposes.

Given that the discussion above reflects the default position, much will depend on the needs of the development concerned and it is for the developer to stipulate the common boundary accordingly. Where appropriate, relevant by-laws or rules may also be made by the management corporation or commonhold association to resolve some of the problems mentioned above.

VI. Liability for Inter-Floor Leakage

Inter-floor leaks, which are a common source of disputes between strata home owners, are expected to increase as buildings age. They occur when buildings are about ten years old, when the waterproofing membranes between floors wear out. The

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[50] *Commonhold Regulations 2004*, reg. 9(1)(b). This is similar to the position in the U.S. *Uniform Common Interest Ownership Act 1994*, s. 2-102(1) and the *New South Wales Strata Schemes (Leasehold Development) Act*, ss. 4(2)(a) and the *New South Wales Strata Schemes (Freehold Development) Act*, 5(2)(a).

[51] Such difficulties were encountered in *Simons v. Body Corporate Strata Plan No. 5181* [1980] V.R. 103 and *Allen & Anor. v. Proprietors Strata Plan No. 2110* [1970] 3 N.S.W.R. 339 where the relevant statutes adopted the median line as the boundary.

[52] *Simons v. Body Corporate Strata Plan No 5181*, *ibid.* at 107.

Singapore experience is that, more often than not, such leakages originate from the upper unit. The majority of cases heard by the Strata Titles Boards (Board), set up to deal with, *inter alia*, such disputes,[53] suggest that the fault often lay with the upper floor unit. Despite this, the upper floor unit owners tend to be uncooperative and drag on the dispute resolution process unnecessarily. Furthermore, where the matter is litigated before the Board, the onus of proving liability is on the owner of the lower unit to show on a balance of probabilities that the water damage sustained in respect of the unit was indeed due to some defects within the upper floor unit,[54] be it a defect in a water supply pipe or split waste pipe which serves exclusively the latter unit. In light of this, there is now under the *BMSMA* a statutory presumption of liability to be attributed to the upper floor unit in inter-floor leakage cases, unless rebutted. The presumption arises, in the absence of proof to the contrary, if there is any evidence of dampness, moisture or water penetration on the ceiling of the unit immediately below.[55]

It is hoped that with this statutory presumption of liability, the upper floor unit owners will be more responsive to lower unit owners who have to suffer and bear with the inconvenience and distress as long as the leakage remain unresolved, and so facilitate and expedite the resolution of such disputes. With this statutory presumption in place, in the event that it is established that the water leakage is due to wear and tear of the floor of the upper unit or any defect therein, the Board will require the owner of the unit to bear the entire repair bill.[56] It may be seen as part of the maintenance costs which the owner of the unit above has to rightfully bear so as to maintain his unit in a state of good repair. In fact, he is under a duty to maintain his unit in a good condition so as not to cause annoyance to the owners or occupiers of other units.[57] Previously, the Board had tended to split the bill between both owners to motivate the one on the upper floor to repair the leaks. This was where the unit above had not been subjected to renovation works and damage to the unit below was caused by fair wear and tear.[58] However, this approach is open to abuse as it may encourage the owner of the upper floor unit to bump up the repair costs in the hope that the bill will be split with the owner of the lower unit.[59]

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[53] *BMSMA*, s. 101(1).

[54] See *Norquoy Malcolm John and Another v. Kwan How Chu* [2002] SGSTB 2 at para. 25 where the owners of the lower unit failed to discharge the onus placed on them.

[55] *BMSMA*, s. 101(8)

[56] The Board had alluded to this in *Re The Waterside (Strata Titles Plan No. 1801)* [2005] SGSTB 3 at para. 46 [*Waterside*]. The case was decided before s. 101(8) of the *BMSMA*, providing for the statutory presumption of liability, was enacted.

[57] See *Building Maintenance (Strata Management) Regulations 2005* (S. 192/2005 Sing.), Sch. 2, r. 15.

[58] See *Neoh Choo Lin & Anor v Wang Nin Sun & Anor* STB No 26 of 1991 and *Lau Sin Sun & Bay Puay Hong v. Chng Peng Ser*, STB No 19 of 1995, reported in *Strata Titles Boards Decisions* Singapore: FT Law & Tax 369 and 489 respectively. However, the Board will not entertain an application for apportionment of the costs of rectification works where there is no evidence to show that the owner of the lower floor unit was in any way responsible for the situation arising: see *Woo Wee Shung v Chan Mung Tak* STB No 24 of 1995, reported in *Strata Titles Boards Decisions* Singapore: FT Law & Tax 495.

[59] In *Waterside*, *supra* note 56, the owners of the upper floor unit had, in the course of fixing the leaks, re-waterproofed all five of their bathrooms, as well as re-tiled the floors and walls and replaced items like wash basins and marble vanity tops. The Board rightly disallowed their claim for the bill of $48,121 for the installation of such expensive fittings to be split, with the owner of the lower unit paying half of the amount.

In situations where the owner of the unit above has incurred time and expense to determine the source and cause of the inter-floor leakage and yet is unable to pinpoint with certainty where the fault lies, then, notwithstanding the statutory presumption of liability, it may be appropriate for the Board to determine the question of apportionment of cost depending on the specifics of each case. Such difficulties in determining where the leakage originates may arise given that, as noted earlier, the common boundary of a unit with another unit or with the common property is taken to be the centre of the floor, wall or ceiling, unless provided otherwise in the strata certified plan. It is arguable in such situations that the statutory presumption of liability has been rebutted as the objective in enacting the relevant provision is to ensure a speedy resolution of the problem, which the owner of the unit above has met by his taking timely and appropriate action to ascertain and remedy the alleged defect.

Where the owner of the unit above is able to successfully rebut the statutory presumption of liability against him, it should follow that he is not liable for the repair cost. An example would be where water seeps through an external wall and flows to the unit below. Also in some apartments, a common drainage pipe is concealed in the external wall to discharge rainwater from balconies. Water leaking from this drainage pipe may seep into the ceiling of the unit below. In that case, the upper floor unit is similarly not liable for the leakage.

To deal with uncooperative and unreasonable unit owners who may wish to unnecessarily prolong matters in cases of inter-floor leakages, the commonhold system may wish to consider the adoption of a similar statutory presumption of liability to deal with such situations. Resort to court actions may not necessarily be the best recourse to take, not to mention that it would invariably be expensive and time consuming.

VII. Basis for Determining Maintenance Contributions

Under the *BMSMA*, maintenance contributions are generally levied in proportion to the share value allocated to a particular unit.[60] The share value is a figure that represents the proportionate share entitlement assigned to each unit in a development. The general principle in allocating share value is based on the floor area of the units.[61] The share value determines the amount of shares each unit owner has in relation to the other unit owners in the development. In this regard, detailed provisions are put in place to safeguard the interests of owners when purchasing their units in a development. In particular, a developer is prohibited from selling any unit in a development unless the allocation of share values to the units therein is approved and accepted by the relevant authority.[62] Approval will be granted if and only if the relevant authority is satisfied that the share values are allocated in a just and equitable manner.[63]

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[60] *BMSMA*, s. 40(2).

[61] For example, for single use residential and non-residential developments. For a mixed-use development, the use of weight factors for each type of units are also considered. Factors which may be considered in determining the weight factors include common area, frequency of usage and human traffic. Thus, a unit that uses more of the common facilities is allotted a higher share value and in the result, contributes a higher maintenance levy.

[62] *BMSMA*, s. 11(1).

[63] *Ibid*., s. 11(5).

Under the *CLRA*, equivalent contributions to commonhold assessments, emergency assessments and the reserve fund are also required of unit owners.[64] The proportion of contribution by each unit owner is defined by the stipulated percentage allocations set out in the commonhold community statement.[65] However, unlike the *BMSMA*, the directors of the commonhold association have absolute discretion to determine the proportion of contributions to be made. Although an amendment by special resolution to a significantly disproportionate allocation is available to a unit owner,[66] the majority voting rights may lie elsewhere especially where the developer is still very much in control of the development. In this regard, sufficient safeguards and more objective factors to define the allocations to be made must be put in place to protect the interest of unit owners in the development.

Notwithstanding that the *BMSMA* sets out formal guidelines to prevent abuse in determining maintenance contributions, a strong case can, nevertheless, be made for de-linking the allocation of share value to maintenance contributions. This is especially so where there is an inflexible or rigid use of the floor area method as the basis for determining contributions to the maintenance and repair of the common property in single use residential and non-residential developments. For example, an invalid might have to contribute to the running costs of a tennis court or swimming pool which he is not able to use. Similarly, where the building has a lift, it would be inequitable for an owner of a unit on the ground floor to contribute in proportion to his unit's floor area to the maintenance of the lift. That the internal floor areas of the owners' respective units have got nothing to do with their enjoyment of the common facilities become more obvious where all of them have equal access to such common facilities but some of them pay twice the amount of maintenance charges than others based on the floor area of their respective units.

Regard may be had to the United States *Uniform Common Interest Ownership Act 1994* which clearly envisaged the possibility of a different criterion being used to determine, inter alia, maintenance contributions. The Act provides that the developer must allocate to each unit "… a fraction or percentage of undivided interests in the common elements and in the common expenses of the association, and a portion of the votes in the association; [and] must state the formulas used to establish allocations of interests."[67] There is maximum flexibility given to developers to choose the criterion most suited to the particular development for maintenance contributions. Thus, maintenance contributions may be calculated with reference to the benefit derived from each amenity by a particular unit owner, as well as the use he makes of such amenities. Unit owners are, at the same time, protected against unfair and arbitrary allocations insofar as the developer is required to explain his choice of formulae.

It should be noted that, although the general and accepted principle in the *BMSMA* is that share value with reference to floor area determines the amount of maintenance contribution payable, the Act, nevertheless, allows maintenance contributions to be

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[64] *Commonhold Regulations 2004*, Sch. 3 ("Commonhold Community Statement"), paras. 4.2.4, 4.2.5, 4.2.14, 4.2.15.

[65] *Ibid*., paras. 1-2 of Annex 3.

[66] *Ibid*., Sch. 3, paras. 4.8.11, 4.8.12.

[67] See *Uniform Common Interest Ownership Act 1994* (U.S.), s. 2–107(a)(i),(b).

levied by the management corporation based on any other method if all the unit owners agree.[68]

VIII. Managing Agents

The *CLRA* empowers the board of directors of the commonhold association to appoint and enter into contracts with managing agents of the commonhold on such terms as they think fit including a term providing for cancellation of the contract and return of records and monies paid.[69] The directors remain bound to supervise the managing agent so appointed.[70] Under the *BMSMA*, a managing agent may be appointed by the management corporation by resolution at a general meeting[71] or by its council without a general meeting if duly authorised to do so by the unit owners at the last preceding general meeting of the management corporation.[72]

The obvious difference which may be noted is that the appointment of a managing agent under the *CLRA* does not require the approval of the unit owners in a general meeting. Notwithstanding the safeguards stipulated therein as noted above, the appointment of a managing agent is an important decision which should involve the unit owners of the commonhold as well. As mentioned earlier, a resolution is required to be passed at a general meeting of the management corporation to effect the appointment of a managing agent under the *BMSMA* in the absence of a decision made at a general meeting authorising the council to do so. This ensures that managing agents may be appointed only at general meetings as it is an important decision that would have an impact on all unit owners. An appointment done via a general meeting would mean that every unit owner would be aware of the decision. In addition, giving power to appoint a managing agent to the general body at the general meeting ensures that abuses are kept in check and minimised.

Additional safeguards are also put in place under the *BMSMA* in regard to the appointment of managing agents. It is a statutory requirement that a managing agent who is in any way, whether directly or indirectly, related to an owner of a unit must, prior to his appointment, declare in writing the nature of his relationship.[73] This requirement provides greater emphasis for managing agents to act in the interest of the whole management corporation and not just a few unit owners or the council members. It will also curb or prevent abuse, malpractice and corruption. Otherwise, a managing agent who is, say, related to any unit owner or is a company in which the unit owner or member of his family has an interest, may be appointed to manage the affairs of the strata development with higher expenses and costs being charged to the management corporation. Where there is a possibility of such abuses being committed in the appointment of a managing agent by, say, the council, this may be resolved by making it a restricted matter.[74]

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[68] *BMSMA*, s. 41(8).
[69] *Commonhold Regulations 2004*, Sch. 2 ("Articles of Association"), para. 52.
[70] *Ibid*.
[71] *BMSMA*, s. 66(1)(a).
[72] *Ibid*., s. 66(1)(b).
[73] *Ibid*., s. 66(4).
[74] *I.e*., a matter which can be determined only by the management corporation in a general meeting pursuant to *BMSMA,* ss. 58(4)(b), 59.

Further, while a managing agent can be appointed for a three-year term, which would undoubtedly encourage the agent to plan for a better maintenance programme for the strata development, instead of performing *ad hoc* repairs and maintenance, this has to be balanced against the need for the managing agent's performance to be reviewed at every annual general meeting of the management corporation.[75] Thus, a managing agent's appointment may be terminated at an annual general meeting where his performance is shown to be unsatisfactory.[76]

These provisions in the *BMSMA* seek to ensure that the quality of management undertaken by a managing agent is not compromised and that exorbitant management fees are not borne by the management corporation.

To prevent any further abuse in the appointment of a managing agent, restrictions should also be imposed on the managing agent himself by prohibiting him from engaging in certain activities. This could include prohibiting him from engaging in election activity of the council of a management corporation, including canvassing for proxy votes.[77] A vote by a proxy who is a managing agent can be rendered invalid if it would confer or assist in conferring a benefit on the proxy in any material way.[78] An example of such a material benefit would be obtaining an extension of the term or an additional term of appointment of the proxy as managing agent.[79] This will prevent a managing agent from canvassing for proxies to install his own preferred council members to ensure that his contract is renewed. It will also facilitate the replacement of managing agents who failed to perform.

IX. Proceedings Against Third Parties in Respect of Common Parts/Common Property

As noted earlier, the common parts of a commonhold development are owned by the commonhold association.[80] This is in contrast to the position under the strata title system where the common property is held by the unit owners as tenants-in-common proportional to the respective share value assigned to their units.[81] In cases where proceedings are instituted against developers for defective construction of the common parts or common property, questions will inevitably arise as to whether the commonhold association or management corporation has the legal capacity to sue the developer for damages to rectify the defects. Notwithstanding the difference noted above in respect of the ownership of the common property, the position on the matter would likely be the same under both systems.

It would be necessary for the commonhold association or management corporation to turn to the general law to find its cause of action in an action instituted by it against the developer. The commonhold association or management corporation would have no cause of action in contract against the developer. There is no privity of contract between them. The benefit of the relevant clauses in the sale and purchase agreements

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[75] *Ibid*., s. 66(2)(a)-(c).
[76] *Ibid*., s. 66(2)(c).
[77] See *ibid*., s. 68(1). A contravention of this provision is made an offence (*ibid*., s. 68(3)).
[78] *Ibid*., s. 68(2).
[79] *Ibid*., s. 68(4)(a).
[80] *CLRA*, ss. 7(3), 9(3).
[81] *Land Titles Strata Act*, s. 13(1).

made between the developer and purchasers would not pass at common law as it must be shown that it was the intention of the parties that the benefit should run with the land.[82] Unless provided otherwise, the agreements are intended to govern the relations only between the developer and the original purchasers, as it is unlikely that the intention of the developer is to benefit the subsequent purchasers down the line, namely, the present unit owners who constitute the commonhold association or management corporation.[83]

Even where a representative action may be commenced by the commonhold association or management corporation on behalf of all or some of the unit owners,[84] the obstacle presented by the doctrine of privity would still have to be grappled with. The subsequent purchasers, who are the unit owners, would not be able to make a claim in contract against the developer, there being no privity. The commonhold association or management corporation can only act for and on behalf of those unit owners who are the original purchasers.[85] Further, as only the latter can sue for the defects, a claim can only be made for a proportionate part of the damages suffered in respect of defects to the common property.[86] This is understandable given the principle of privity of contract. Accordingly, having a small proportion of original purchasers involved in the action would also lower the amount of damages eventually awarded which may be insufficient to rectify the defects suffered.

However, the commonhold association or management corporation can recover for the losses suffered where the cause of action is in tort. As the successor of the developer, it takes over the responsibility for the control, management and administration of the common parts or common property and has the obligation of upkeeping and maintaining it. The developer should know or ought to have known that if it were negligent in the construction of the common parts or common property, the resulting defects would have to be made good by the commonhold association or management corporation.[87] There is, thus, a sufficient degree of proximity between the developer and the latter to give rise to a duty on the part of the developer to take care to avoid causing the kind of damage the latter had sustained.

However, a claim in tort may be defeated by the defence of independent contractor relied upon by the developer.[88] Where the defence of independent contractor is successfully pleaded by the developer, the recourse of the commonhold association

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[82] *Rogers v. Hosegood* [1900] 2 Ch. 388 at 396.

[83] *RSP Architects Planners & Engineers v. Ocean Front Pte Ltd and another appeal* [1996] 1 S.L.R. 113 at 123 [*RSP*]. There is, of course, nothing to stop the individual original purchasers who are the unit owners from instituting an action in contract against the developer.

[84] *BMSMA*, s. 85. The position under the *New South Wales Strata Schemes Management Act*, s. 227 is more restrictive as it requires proceedings that affect the rights of *all* unit owners, not merely *some* of them: see *Owners—Strata Plan No. 43551 v. Walter Construction Group Ltd* (2004) 62 NSWLR 169 at 173-174 and *Motor Group Australia Pty Ltd v. Owners Corporation Strata Plan No. 64622* [2004] NSWSC 633 at [90]-[91].

[85] *MCST Plan No 2297 v. Seasons Park Ltd* [2005] 2 S.L.R. 613 [*Seasons Park*].

[86] *MCST Plan No. 1938 v. Goodview Properties Pte Ltd* [2000] 4 S.L.R. 576.

[87] *RSP, supra* note 83.

[88] *Seasons Park*, *supra* note 85. For exceptions to this general rule, see *Salsbury v. Woodland* [1970] 1 Q.B. 324. Accordingly, the position would be different if the developer did not show that it has exercised proper care in engaging the independent contractor. In such a situation, the developer would be liable because of its own lack of care.

or management corporation, where appropriate, is to sue the contractor in tort for the building defects.

Given the limitations and constraints in contract and tort, and the close relationship that exists between the developer and the commonhold association or management corporation, as seen above, it may be appropriate to legislate for a deemed contractual remedy[89] in favour of the latter against the developer as though it was a party to the sale and purchase contracts entered into by the original purchasers.

X. Conclusion

There are several significant differences between the strata title and commonhold systems. Compared to the Singapore strata title system, it is still early days for the commonhold system. Its success in providing for community living and communal sharing of facilities in respect of properties such as blocks of flats as an effective alternative to the long-term residential leasehold system can only be meaningfully assessed some years down the road. The differences notwithstanding, much can be learnt from the various features and approaches employed in the two systems as they strive to further meet the needs and aspirations of the respective communities that they serve.

[89] Similarly, there is no statutory provision establishing such a contractual remedy in the *New South Wales Strata Schemes Management Act*, s. 227 and the *Body Corporate and Community Management Act 1997* (Qld), s. 36.