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BY-LAWS IN A STRATA SCHEME

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This article looks at four aspects of by-laws in a strata scheme in Singapore. In particular, it examines: (a) the applicability of by-laws to units in a strata shopping mall; (b) the appropriateness of using by-laws, which do not apply to all unit owners, primarily to finance the running of a strata scheme; (c) the validity of by-laws not lodged as required; and (d) the enforcement of statutorily prescribed by-laws before a management corporation is constituted. The legal position is discussed and solutions proposed, where applicable.

I. INTRODUCTION

By-laws play a crucial role in ensuring the smooth and efficient running of a strata scheme. They not only set out the rights and obligations of the stakeholders in the scheme but also regulate aspects of day-to-day communal living therein. This may be in respect of the behaviour and conduct of, *inter alia*, unit owners and occupiers or in controlling and managing the use and enjoyment of the common property for the benefit of all unit owners. In appropriate cases and to the extent allowed by the strata legislation, by-laws may be made to enlarge the powers of the management corporation for the benefit of unit owners or to prohibit the carrying on of activities in a unit considered detrimental to the strata scheme.

Provisions on by-laws are provided for in the *Building Maintenance and Strata Management Act*[1] and the *Building Maintenance* (*Strata Management*) *Regulations 2005*.[2] There are two types of by-laws applicable in a strata scheme: the statutorily prescribed by-laws set out in the Second Schedule to the *2005 Regulations* and the by-laws which a management corporation is empowered to make under the *BMSMA*. These by-laws will now be considered in greater detail below.

II. APPLICABILITY OF BY-LAWS TO STRATA UNITS IN SHOPPING MALLS

Are the provisions in the *BMSMA* pertaining to by-laws applicable only to the control and management of common property? Is the management corporation of a strata

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1 Cap 30C, 2008 Rev Ed Sing [*BMSMA*].

2 S 192/2005 Sing [*2005 Regulations*].

shopping mall empowered to make by-laws under these provisions to provide for the control and management of the units therein as well? Recently, the management of Sim Lim Square, a strata shopping mall, had taken the position that it was not empowered to do so.[3] This was in response to a suggestion, among others, by the Consumers Association of Singapore ("CASE") that the management of Sim Lim Square enforce tighter rules by amending its by-laws to ensure that shop units in the mall run honest businesses,[4] including making it mandatory for all landlords who owned units therein to state in the rental agreements that tenants or retailers must not engage in unethical practices and must conduct their businesses fairly.[5] Failure to do so will result in termination of the rental agreements. In addition, where a landlord allows a tenant to run a dishonest business, the management corporation should have the power under the by-laws to force the landlord to sell the unit.[6]

There is currently a statutorily prescribed by-law which prohibits a unit owner or an occupier of a unit from using the unit "for any purpose (illegal or otherwise) which may be injurious to the reputation of the subdivided building."[7] This is a mandatory by-law which applies to all strata schemes, whether residential, commercial or mixed-use developments. The issue here is whether a management corporation is, nevertheless, empowered to make or amend its own by-laws under the *BMSMA* to provide for clearer and more specific terms to supplement the statutorily prescribed mandatory by-law above so as to better regulate, control and manage the units in a strata shopping mall which will more effectively achieve the objective set out in the latter by-law. That a management corporation may make or amend its own by-laws by special resolution, not inconsistent with the statutorily prescribed by-laws, is not doubted.[8] The question, as noted above, is whether it can do so under the *BMSMA* in respect of the units (and not just the common property)?[9]

A strong case may, indeed, be made out to support the argument that under the *BMSMA*, by-laws can be made or amended to better control and manage the units. The *BMSMA* applies to all residential, commercial or mixed-use strata developments. First, the provisions of s 32 of the *BMSMA*,[10] which deals generally with by-laws, expressly make reference, in several places, to by-laws for regulating a "parcel" which is defined to mean "the whole of any land, building and common property comprised or to be comprised in a strata title plan"[11]—in essence, the by-laws are meant to regulate the whole of the strata scheme. The by-laws are not limited to regulating just the common property. This is notwithstanding that the heading of s 32 is entitled "By-laws for common property", the scope of which is narrower.

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3 Emilia Tan, "Sim Lim management team says it has no power to pass by-laws" *Today* (6 December 2014).

4 Cheryl Faith Wee, "Ensure fair deals, Case tells two malls" *The Straits Times* (2 December 2014).

5 See, for example, *Consumer Protection* (*Fair Trading*) *Act* (Cap 52A, 2009 Rev Ed Sing), Second Schedule where unfair practices include "[u]sing small print to conceal a material fact from the consumer" (para 20) and "[t]aking advantage of a consumer by exerting undue pressure" (para 12).

6 See note 4, above.

7 *2005 Regulations*, *supra* note 2, Second Schedule by-law 16. See also Lim Biow Chuan, "Case needs landlords' support to deal with errant retailers" *The Straits Times* (9 December 2014).

8 *BMSMA*, *supra* note 1, ss 32(2), 32(3).

9 The position under the then s 41(1) of the previous edition of the *Land Titles* (*Strata*) *Act* (Cap 158, 1999 Rev Ed Sing) [*LTSA 1999*] is clearer as the said provision expressly referred to "lots" as well.

10 See, for example, *BMSMA*, *supra* note 1, ss 32(1)-32(3).

11 *Ibid*, s 2(1).

Second, it is clear that the word "parcel" also includes the units in a strata scheme. This can be seen in s 32(3) itself which provides for by-laws to be made by a management corporation in respect of specific matters, for example, for purposes pertaining to the keeping of pets and floor coverings,[12] and the *2005 Regulations* which sets out the prescribed "by-laws for every parcel comprised in a strata title plan".[13] In the latter, a substantial number of the statutorily prescribed by-laws deal with units in a strata scheme.[14] In the circumstance, the power of a management corporation to make or amend by-laws may extend to the units in a strata scheme provided they are not inconsistent with the statutorily prescribed by-laws laid down in the *2005 Regulations*. In this regard, the present position under the *BMSMA* and the *2005 Regulations* is in substance no different from that under the previous edition of the *Land Titles* (*Strata*) *Act* where the then relevant provision pertaining to by-laws expressly referred to the units in a strata scheme.[15]

Third, a management corporation is empowered to make or amend by-laws under the general provision of s 32(3)(i) of the *BMSMA*, *ie* for "such other matters as are appropriate to the type of strata scheme concerned". Following from the discussion above, where the strata scheme concerned is a shopping mall where its reputation is of paramount importance, it is critical that appropriate additional by-laws be made or existing ones amended to better control and manage the units so as to prevent unscrupulous tenants or retailers from ruining the good reputation of the shopping mall. Section 32(3)(i) should be given a purposive interpretation[16] which promotes the objective of having by-laws for shopping malls which is to ensure, *inter alia*, the effective management and control of the units therein so as to safeguard the interests of all stakeholders in the strata scheme concerned.[17]

The significance of having by-laws which are properly made[18] and brought into effect[19] can be seen below. They amount to statutorily constituted contracts[20] which bind not only the management corporation and the unit owners but also any mortgagee in possession, lessee or occupier of a unit to the same extent as if they had signed and sealed the by-laws and covenanted to observe and perform them.[21] The same applies to the prescribed by-laws.[22] Further, a lease[23] of a unit "shall be deemed to contain an agreement by the lessee that the lessee will comply with the prescribed by-laws and any by-laws made".[24] The management corporation or unit owner, lessee or occupier of a unit is also entitled to apply to court for an order to enforce

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12 *Ibid*, ss 32(3)(a), 32(3)(c), 32(3)(e), 32(3)(h).

13 *2005 Regulations*, *supra* note 2, reg 20.

14 *Ibid*, Second Schedule by-laws 1, 5(3), 6, 12, 14-18.

15 *LTSA 1999*, supra note 9, s 41(1) where the word "lots" was used.

16 *Interpretation Act* (Cap 1, 2002 Rev Ed Sing), s 9A.

17 In *White v Betalli* [2006] NSWSC 537 at para 39, aff'd (2007) 71 NSWLR 381 (CA), the New South Wales Supreme Court held that s 43(1) of the *Strata Schemes Management Act 1996* (NSW) [*SSMA*], which provides for the same specific matters as in s 32(3) of the *BMSMA*, *supra* note 1, for which by-laws may be made, is not to be construed narrowly.

18 *BMSMA*, *ibid*, ss 32(2), 32(3).

19 *Ibid*, ss 32(4), 32(5).

20 See *Choo Kok Lin v MCST Plan No 2405* [2005] 4 SLR(R) 175 at para 23 (HC) [*Choo Kok Lin*].

21 *BMSMA*, *supra* note 1, ss 32(6)(a), 32(6)(b).

22 *Ibid.*

23 "[L]ease" for this purpose includes a tenancy agreement: *ibid*, s 32(12).

24 *Ibid*, s 32(7).

the performance of or restrain the breach of any by-law by, or to recover damages for any loss or injury to person or property arising out of the breach of any by-law from, any person bound to comply with it, the management corporation or the managing agent.[25] In this regard, the court may make such order as it thinks fit.[26]

Given the above, there is no real necessity then to incorporate the relevant by-laws into a separate contract between the contracting parties concerned.[27] While this might be resorted to out of extra caution, it provides no added protection to the parties concerned as it adds nothing in substance in law as they already stand in the position of parties with contractual rights and obligations between them.[28]

III. Financing Strata Schemes Primarily Through By-Laws

As seen above, a management corporation may, under the *BMSMA*, make or amend by-laws for the purpose of controlling and managing the use or enjoyment of the parcel comprised in the strata title plan,[29] including the common property and in respect of other specific matters, for example, parking.[30] A pertinent issue for consideration is whether by-laws, which do not apply to all unit owners, may be used primarily to deal with the finances of a strata scheme, including to overcome a budget deficit. Are by-laws appropriate for such purposes? *Roland Yeo Peng Sin v MCST Plan No 2054*[31] is a case in point.

In November 2012, unit owners in the strata development were informed by the management council that a review of the revenue and expenses of the estate revealed that there would be a deficit of $117,827.65 for financial year 2012, *ie* 1 July 2012 to 30 June 2013. A residents' forum was held that same month and cost-cutting measures were discussed. Among the proposals suggested were the imposition of charges for the use of facilities in the estate and payment for the parking of second, third and subsequent vehicles. On 12 January 2013, there was a motion to consider and approve by way of a special resolution the imposition of fees on residents for the parking of second, third and subsequent vehicles. Unit owners were informed that this was for the purpose of generating additional income which was one of many steps being taken to address the financial deficit situation in the estate. The resolution was not passed as the requisite percentage of 75% of the aggregate share value of the units was not met.

On 22 May 2013, unit owners were informed by way of a letter from the chairman of the management council that an extraordinary general meeting was to be called to address a forecasted deficit of $353,000 for the financial year commencing 1 July

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25 *Ibid*, ss 32(10)(a), 32(10)(b).

26 *Ibid*, s 32(11).

27 See, however, Amir Hussain, "Sim Lim Square council now 'open' to Case suggestion" *The Straits Times* (16 December 2014).

28 See *Chia Sok Kheng Kathleen v MCST Plan No 669* [2004] 4 SLR(R) 27 at para 41 (HC). The claims of the unit owner against the management corporation for breaches of by-laws, regarded as breaches of contract by the court, were also held to be time-barred under s 6(1) of the *Limitation Act* (Cap 163, 1996 Rev Ed Sing) as they were not instituted within six years from the date of accrual of the cause of action.

29 *BMSMA*, *supra* note 1, s 32(3).

30 *Ibid*, s 32(3)(d).

31 [2014] SGSTB 1 [*Roland Yeo*].

2013. The motion for the charging of parking fees was an item on the agenda of the 15 June 2013 meeting. Another item on the agenda was a motion for contributions to the management fund to be levied. It was to be $59 per share value per month if the motion for the charging of parking fees was approved and if that was not approved then the amount was to be $64 per share value per month. The motion for the charging of parking fees was approved and the resolution was passed with a vote of 84.37%. In this regard, the by-laws in connection with the parking of second, third and subsequent vehicles were, accordingly, amended to provide for a fee of $100 per month for the parking of a second vehicle and a fee of $150 per month for third and subsequent vehicles with effect from 1 July 2013. Prior to this, the applicable by-laws provided that unit owners who owned more than one vehicle could park their vehicles in the estate without having to pay any parking charges but each had to apply for a parking label and pay an administration fee and a refundable deposit for the label. Labels would be issued only if there were parking lots available. There were 950 units in the estate and an equal number of parking lots.

The applicants commenced proceedings before the Strata Titles Boards ("the Board") for the by-law passed on 15 June 2013 ("the amended by-law") to be repealed and for the previous by-law to be reinstated. They argued that under, *inter alia*, ss 105 and 106 of the *BMSMA*, the Board could make the orders sought as the amended by-law was *ultra vires*, oppressive and discriminatory.

Section 105 empowers a Board to revoke an amended by-law and revive the repealed by-law if, having regard to the interests of all unit owners, it considers that the amendment or repeal should not have been made or effected. Section 106 deals with a situation where a management corporation has no power to make the by-law in question and a Board may make an order invalidating the purported by-law.

On the issue of whether the amended by-law in question was *ultra vires* the powers of the management corporation, the Board rejected the argument of the applicants that a management corporation can raise funds only in accordance with s 39 of the *BMSMA*. This provision makes it mandatory for a management corporation to, from time to time at a general meeting, determine the amounts which are reasonable and necessary to be raised by contributions for the purpose of meeting its actual or expected liabilities in respect of the matters listed therein. The Board was of the view that s 39 is only concerned with the levying of contributions on unit owners and "is not concerned with other means of raising funds to meet the expenses of the management corporation".[32] Further, "there is nothing in the [*BMSMA*] to suggest that Parliament intended that management corporations should be allowed to raise funds only by way of contributions from [unit owners] and not by any other means."[33]

The Board also rejected the argument that other than the fees prescribed in s 47 of the *BMSMA* for, *inter alia*, the supply of information specified therein, a management corporation was prohibited from charging fees in respect of any other matter. The Board observed that there was nothing in the *BMSMA* that prohibited a management corporation from charging fees in connection with services provided by it or for other matters, including fees for the use of various facilities in the estate.[34]

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[32] *Ibid* at para 17.
[33] *Ibid.*
[34] *Ibid* at para 19.

As to whether the amended by-law was discriminatory in its application so as to empower the Board to revoke it, the applicants argued that it targeted a specific class of unit owners. In other words, the amended by-law required unit owners who owned two or more vehicles to pay additional contributions for the maintenance of the estate. The Board took the view that a by-law that was discriminatory in its application would qualify for repeal under s 105. However, the Board found that the amended by-law did not have this effect as unit owners with two or more vehicles were not obliged to park their additional vehicles in the parking lots of the estate given that there were parking lots available in the vicinity of the estate, and hence, would not be required to pay the parking fees. Nevertheless, should they choose to park in the parking lots of the estate fees were chargeable and the proceeds would then be used for the maintenance and upkeep of the estate.[35]

The Board held further that the amended by-law was also not oppressive. Given the equal number between parking lots and the units in the estate, it was not the intention that more than one parking lot would be available for each and every unit.[36] Charging parking fees for additional vehicles when lots were available could not be viewed as being unfair, especially when the fees collected were to be used for the benefit of all unit owners. In any event, the amended by-law was voted in favour by an overwhelming majority of unit owners.[37] Although, in the absence of exclusive use by-laws,[38] unit owners are tenants-in-common of common property,[39] such as car parks, the Board held that it did not detract from the duty of a management corporation to control, manage and administer the common property for the benefit of all unit owners. In other words, to ensure that there was orderly use and enjoyment of common property, it would not be out of order to pass by-laws which spelt out the conditions for the use of common property, such as the imposition of fees.[40]

Given the common practice in other strata developments to charge for the parking of additional vehicles even when there were ample lots available, the Board did not consider the charging of parking fees in the instant case to be contrary to public policy.[41] In this regard, the Board noted that under s 38(5)(c) of the *BMSMA*, moneys can be received from other sources and this would include fees for the use of common property.[42]

Finally, the Board held that the management corporation did not breach its duty under s 29(1)(a) of the *BMSMA* when passing the amended by-law. Under this provision, a management corporation is subject to the statutory duty to control, manage and administer the common property for the benefit of all unit owners. The applicants had argued that the amended by-law did not benefit all the unit owners but only the majority who owned less than two vehicles. The Board was of the view that the amended by-law was passed so that funds could be generated to meet

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35 *Ibid* at para 21.

36 *Ibid* at para 22.

37 *Ibid.*

38 See *BMSMA*, *supra* note 1, s 33.

39 *Land Titles* (*Strata*) *Act* (Cap 158, 2009 Rev Ed Sing), s 13(1) [*LTSA 2009*]. See also, generally, *Poh Kiong Kok v MCST Plan No 581* [1990] 3 MLJ 206 (Sing HC).

40 *Roland Yeo*, *supra* note 31 at para 25.

41 *Ibid* at paras 26, 27 where *ERA Realty Network Pte Ltd v Puspha Rajaram Lakhiani* [1998] 2 SLR(R) 721 at para 21 (HC) was referred to.

42 *Roland Yeo*, *supra* note 31 at para 28.

liabilities and expenses arising from the management corporation's duty under s 29(1)(a). Given that a "deficit of $353[,]000 for the financial year commencing [1 July 2013] had been forecasted and the fees collected could partially offset this deficit", this would "definitely be for the *benefit of all* [*unit owners*]".[43]

A number of comments may be made in respect of the decision above. Where it can be shown that the amended by-law was *ultra vires*, *ie* beyond the powers of the management corporation to make, then it can be invalidated by the Board under s 106 of the *BMSMA*.

In light of the facts and circumstances in *Roland Yeo*, a case may be made out to show that the amended by-law was indeed *ultra vires* the powers of the management corporation. Given the manner in which the provisions on by-laws in the *BMSMA* are worded and the various matters that may be covered,[44] they are clearly intended for the purpose of controlling and managing the use or enjoyment of the strata scheme, including the common property. An indication of the matters for which by-laws may be made by the management corporation under the *BMSMA*[45] does not appear to include generating additional income to help in the finances of a strata scheme. Instead for such a purpose, s 39 of the *BMSMA* should be resorted to. In fact, it is mandatory for a management corporation to act under s 39 to determine the amount of contributions to be raised from unit owners to meet its actual or expected liabilities incurred or to be incurred in respect of the running of the strata scheme. The *BMSMA* clearly provides that "[i]f the management corporation becomes liable to pay any moneys that it is unable to pay immediately, the management corporation shall determine that amount to be raised by contributions."[46] To act otherwise as in *Roland Yeo* would render s 39 obsolete in such situations, especially where there is a financial deficit.

While s 32(3)(d) of the *BMSMA* does refer to "parking", it must be seen in the context for which it is provided. It is meant for the purpose of controlling and managing matters pertaining to parking of vehicles so as to ensure the orderly use and enjoyment of parking areas in a strata scheme. It does not for a moment suggest that the management corporation can under the guise of a parking by-law raise funds to address a financial deficit in a strata scheme. This is primarily the function of s 39.

It would certainly be in order to impose a fee by way of a by-law to regulate the orderly use and enjoyment of the common property, such as for the use of the various facilities in the strata scheme,[47] but to use by-laws (such as that pertaining to vehicle parking as in the case of *Roland Yeo*) with the main aim of generating additional income to manage a deficit situation would be an overkill. Section 32(3)(d) does

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43 *Ibid* at para 30 [emphasis in original].

44 See *BMSMA*, *supra* note 1, s 32(3). See also the heading to s 32 entitled "By-laws for common property".

45 *Ibid*, ss 32(3)(a)-32(3)(i) empower a management corporation to, *inter alia*, make or amend by-laws in respect of certain specific matters, including for all or any of the following purposes: (i) safety and security measures; (ii) details of any common property of which the use is restricted; (iii) the keeping of pets; (iv) parking; (v) floor coverings; (vi) garbage disposal; (vii) behaviour; and (viii) architectural and landscaping guidelines to be observed by all unit owners, among others. See also the prescribed by-laws set out in *2005 Regulations*, *supra* note 2, Second Schedule.

46 *BMSMA*, *supra* note 1, s 39(3).

47 In this connection, see *2005 Regulations*, *supra* note 2, Second Schedule by-law 19. Granted that this is so, the argument that unit owners being tenants-in-common under s 13(1) of the *LTSA 2009*, *supra* note 39, and hence, need not pay for the use and enjoyment of facilities on common property cannot stand.

not give a management corporation *carte blanche* to do as it likes. Sections 32 and 39 do not overlap as they serve different purposes. It is respectfully submitted that the amended by-law in *Roland Yeo* would extend beyond the purpose of controlling and managing the use or enjoyment of the common property in a strata scheme as stipulated in the *BMSMA*. However, where the revenue generated is incidental to the by-law's primary purpose of regulating the use and enjoyment of the common property, that should be permissible.

The amended by-law in *Roland Yeo* can also be considered to be discriminatory and oppressive as well and thus, may be revoked under s 105(1) of the *BMSMA*. It is clear that the levying of contributions might not be the only means for a management corporation to raise funds to meet the expenses of running a strata scheme. For example, under the *BMSMA*, a management corporation may, subject to the approval of the relevant authority and pursuant to the requisite resolutions, transfer or lease any part of the common property in the strata scheme.[48] But to allow by-laws which are not applicable to all unit owners to be used primarily for fundraising purposes would not only be discriminatory and oppressive in nature but would also go against the spirit and intent of having by-laws under the *BMSMA*. As noted above, by-laws are clearly not designed for such a purpose, *ie* to deal primarily with the finances of a strata scheme.

Section 40(2) of the *BMSMA*, as a general rule, mandates that contributions by unit owners are to be based on the share value of the respective units. This is equitable as the financial burden of the strata scheme (inclusive of the common property) is to be shared by all unit owners in common in shares according to their respective unit entitlements.[49] In this regard, it may be appropriate to refer to the following pertinent observations of Holland J in *Jacklin v Proprietors of Strata Plan No 2795*[50] when dealing with the relevant New South Wales strata legislation[51] which the Singapore strata legislation had regard to:

> The legislation takes the common property as a whole and treats each proprietor as having an undivided beneficial interest in every part of it, whether or not that part is susceptible of any use or enjoyment by that proprietor or of greater use or enjoyment by that proprietor than by any other. Similarly, with respect to the provision of funds for the repair and maintenance of all or any part of the common property, the legislation provides for . . . contributions to be levied proportionately on all proprietors irrespective of any individual proprietor['s] use and enjoyment thereof. Thus the ownership and the financial burden of common property is to be held and shared by all proprietors in common in shares according to their respective unit entitlements. Consistently with this unity of approach, the duty of control, management, administration, repair and maintenance of common

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48 *BMSMA*, *supra* note 1, ss 34(1)(a), 34(1)(b), 34(2). Another possibility is to go by way of exclusive use by-laws: *ibid*, s 33.

49 See also *ibid*, s 44 which further provides that any expenditure lawfully incurred by the management corporation in the course of the exercise of any of its powers or functions or the carrying out of its duties or obligations shall be guaranteed by the unit owners.

50 [1975] 1 NSWLR 15 (SC) [*Jacklin*].

51 See the then *Strata Titles Act 1973* (NSW), ss 59(3), 68(1). See the current *SSMA*, *supra* note 17, ss 75, 78(2) which provide to the same effect. This is also the position under the *BMSMA*, *supra* note 1, ss 39, 40(2).

> property . . . [on] the body corporate . . . is necessarily owed to each and every proprietor. In my opinion, there flows from the scheme of the legislation as an incident of proprietorship of a lot a right in each proprietor to have the body corporate's duty performed in relation to all of the common property at the cost and expense of all proprietors in proportion to unit entitlements.[52]

In the Singapore case of *MCST Plan No 473 v De Beers Jewellery Pte Ltd*,[53] the Court of Appeal had also recently reiterated to the same effect. It ruled that a management corporation, being a body created by statute, only has powers granted expressly or by implication in that statute.[54] As a management corporation's power to raise contributions is clearly and exhaustively delineated in the strata legislation, anything done outside these powers is *void ab initio*.[55]

In *Roland Yeo*, there was evidence to suggest that the amended by-law was being used indirectly to raise contributions to finance the running of the strata scheme and so not based on the mandated share value of the units concerned. There was an item on the agenda at the extraordinary general meeting where there was a motion for contributions to the management fund to be levied. It was to be $59 per share value per month if the motion for the charging of parking fees was approved and if that was not approved, then the amount was to be $64 per share value per month. The motion for the charging of parking fees was later approved. As can be seen, the motion for the charging of parking fees was inextricably linked to that for the levying of contributions to the management fund. Further, the Board said as much when it ruled that given the deficit of $353,000 for the financial year commencing 1 July 2013 which had been forecasted, the fees collected under the amended by-law could partially offset this deficit which would definitely be for the benefit of all unit owners under s 29(1)(a) of the *BMSMA*.

Given the circumstances in *Roland Yeo*, it is difficult to comprehend how the administration and management of the common property by way of the amended by-law which was made pursuant to s 32(3) of the *BMSMA* would be for the benefit of all unit owners under s 29(1)(a). Aren't unit owners who owned more than one car shouldering a greater share of the financial burden of the strata scheme under the amended by-law? Should they be? Wouldn't it be fairer and more equitable for purposes of s 29(1)(a) to go by way of s 40(2) of the *BMSMA* where contributions are required to be levied based on the share value of the respective units as explained in *Jacklin* above? As it is categorically clear for all to see, the applicants are being penalised for owning more than one car for which they are effectively bearing a greater share of the financial burden of the strata scheme than those who owned one car or no car at all. Given this effect of the amended by-law, it surely can't be for the benefit of all unit owners. This renders the amended by-law not only discriminatory and oppressive but also *ultra vires*.

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52 *Jacklin*, *supra* note 50 at 24. In the subsequent New South Wales case of *Owners Strata Plan No 60919 v Consumer Trader and Tenancy Tribunal* [2009] NSWSC 1158, Patten AJ in the Supreme Court held at paras 20, 21 that a by-law purporting to impose contributions on unit owners in ways other than in accordance with unit entitlements as stipulated in s 78(2) of the *SSMA*, *supra* note 17 (equivalent to s 40(2) of the *BMSMA*, *supra* note 1), was void.

53 [2002] 1 SLR(R) 418 (CA).

54 *Ibid* at para 10.

55 *Ibid.*

However, it is otherwise if the amended by-law is primarily to regulate the parking of additional cars in the strata scheme to ensure the orderly use and enjoyment of the parking lots and a fee is imposed to achieve this objective. In other words, the passing of the amended by-law is not tied to the raising of contributions or masked as a means for doing so—it has nothing to do with raising contributions which is primarily the purview of s 39 of the *BMSMA* and the revenue generated by it is purely incidental.

For the above reasons and given the rationale for the legislative framework concerning ss 32(3) and 39, the amended by-law in *Roland Yeo* would be considered contrary to public policy. This is notwithstanding the common practice in other strata developments of charging parking fees for the same purpose as the amended by-law in *Roland Yeo* as practice does not make the law. Thus, it is immaterial that an overwhelming majority of unit owners had voted in favour of the amended by-law. Further, to recognise such long-standing practice is to fly in the face of the statutory provisions discussed above.

IV. Validity of By-Laws Not Lodged as Required

Under the *BMSMA*, a copy of every by-law made by the management corporation and every addition to, amendment or repeal of any such by-law, certified as a true copy under the seal of the management corporation, is required to be lodged by the management corporation with the Commissioner of Buildings within 30 days of the passing of the relevant resolution by the management corporation.[56] In the event of non-compliance with the 30-day period, any by-laws made, and any amendment of, or addition to or repeal of the by-laws shall have no force or effect until a copy thereof, as the case may be, has been lodged with the Commissioner.[57] So is the by-law concerned or amendment thereto void as well or merely ineffective in the event of non-compliance?

These issues were considered in the Singapore High Court case of *Automobile Association of Singapore v MCST Plan No 918*.[58] The principal issue in *Automobile Association of Singapore* was whether certain by-laws governing the use of the car park at the AA Centre were valid and thus binding on the defendant management corporation. The plaintiff, a unit owner, applied for, *inter alia*, a declaration that the by-laws were valid and for injunctions restraining the defendant from implementing a new car park scheme.

The AA Centre comprised 30 strata units. The plaintiff owned and occupied two strata units which it used for commercial purposes. The remaining 28 strata units were residential units. The by-laws pertaining to the existing car park scheme were passed by special resolution at an extraordinary general meeting of the defendant on 25 July 2003. Under the by-laws, the 94 car park spaces in the AA Centre would be allocated among the unit owners in proportion to their respective share values. 28 car park spaces were allocated to the unit owners of the 28 residential units, *ie* one car park space per residential unit, and the remaining 66 car park spaces were allocated to the plaintiff. Car park labels were issued for the purpose of putting this

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56 *BMSMA*, *supra* note 1, s 32(5).

57 *Ibid*, s 32(4).

58 [2014] 1 SLR 164 (HC) [*Automobile Association of Singapore*].

scheme of allocation into effect: one label for every car park space allocated to a unit owner, which meant, for instance, that 66 car park labels were issued to the plaintiff.

By a letter dated 21 August 2012, the defendant sought to implement a new car park scheme. Under the new scheme, the plaintiff would be allocated just two car park spaces and correspondingly be issued only two car park labels. The plaintiff complained that this contravened the existing by-laws under which it would enjoy an allocation of 66 car park spaces.

One of the arguments raised by the defendant against the validity of the by-laws was that since the by-laws were not lodged with the Commissioner of Buildings within 30 days of the passing of the special resolution as required, they were invalid or void.

In light of s 108 of the *Evidence Act*[59] and given that it was the defendant's obligation to lodge the by-laws with the Commissioner, the court was of the view that the date on which such lodgment took place was a fact especially within the defendant's knowledge. Accordingly, the burden was on the defendant to prove that the lodgment took place out of time. The High Court rejected the argument of the defendant and held that the by-laws were valid and binding on the defendant. The court found that the evidence was equivocal as to whether the by-laws were lodged out of time, given that the first letter from the defendant's agent to the Commissioner relied on by the defendant, although marked with a "RECEIVED" stamp dated 12 September 2003, was dated 20 August 2003, a date within 30 days of the passing of the special resolution. A further letter was also not helpful since it merely restated the fact that the letter was dated 20 August 2003 but marked as received on 12 September 2003. In the result, the defendant had not discharged the burden of showing unambiguously that the by-laws were lodged more than 30 days after the special resolution was passed.

What then is the legal position even if it could be shown that the by-laws were lodged with the Commissioner after the expiry of the 30-day period? Are the by-laws necessarily void for that reason alone? On the one hand, as the court noted, it could be argued that the consequence of non-compliance is that the by-laws were void and thus, never came into force. On the other hand, non-compliance does not affect the validity of the by-laws and hence does not prevent the by-laws from coming into effect whenever they are lodged, however late that might be. However, as neither party argued this point, the High Court expressed no preference for either view.[60]

It is to be noted that the case dealt with the then ss 41(12) and 41(13) in the *LTSA 1999*[61] which were substantially similar to ss 32(4) and 32(5) in the *BMSMA* on the matter. Both provisions, *ie* ss 41(12) and 32(5), require that a copy of the relevant by-law be lodged by the management corporation with the Commissioner within 30 days of the passing of the resolution concerned. While the then s 41(13) provided that a by-law shall not come into force until a copy was lodged with the Commissioner, the current s 32(4) provides that it shall have no force or effect—with the mere addition of the word "effect" thereto. It is respectfully submitted that the language and wordings in s 32(4), as it currently stands, do not definitively clarify or set out the legal consequence, one way or the other. In essence, the actual legal

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59 Cap 97, 1997 Rev Ed Sing.

60 *Automobile Association of Singapore*, *supra* note 58 at para 17.

61 *Supra* note 9.

consequence arising from s 32(4) remains ambiguous and unresolved, as was the case of the then s 42(13) noted earlier by the court in *Automobile Association of Singapore*.

In the interest of clarity and to ensure the smooth and efficient running of a strata scheme, the *BMSMA* should spell out categorically the legal consequence of non-compliance. By-laws play a crucial role not only in dealing with the problems of community living but also in maintaining harmony in a strata scheme. Accordingly, a provision equivalent to that in the *SSMA* should be enacted.[62] Unit owners and the management corporation are entitled to know for a certainty what the consequence is if they were to embark on a certain course of action. Setting out the legal consequence clearly will also avoid possible contest on the authenticity and validity of the by-laws.

The case for arguing that non-compliance merely renders the by-laws ineffective without affecting their validity is unconvincing for the following reasons. Section 32(5) makes it a mandatory obligation for a management corporation to lodge the by-laws with the Commissioner. Will a management corporation take this obligation seriously if its failure, intentional or otherwise, to lodge the by-laws does not affect their validity but merely postpone their coming into force? Will it encourage a management corporation to adopt a lackadaisical attitude when it comes to lodging by-laws with the Commissioner? This mandatory obligation or duty of a management corporation is likely to be rendered illusory in the absence of any penalty prescribed in the *BMSMA*. Even the civil remedies provided in the *BMSMA*[63] do not apply as the by-laws have yet to come into force or effect.[64]

Further, the imposition of a 30-day period requirement in s 32(5) would suggest that lodgment of the by-laws outside this period would affect their validity. If the legal consequence of non-lodgment is to render the by-laws ineffective only and not invalid as well, why specify a 30-day period for lodgment? If this is truly the legal consequence, there is no necessity then to specify a period for lodgment given that the by-laws have no force or effect anyway until they are lodged with the Commissioner, however late that might be. In other words, the effect of s 32(4) renders it unnecessary or obsolete to specify the 30-day period in s 32(5) if it is, indeed, the case that the by-laws are only rendered ineffective in the event of non-compliance which does not affect their validity.

For the sake of transparency and certainty, and to remove any ambiguity, it is submitted that the legal consequence of a by-law having no force or effect under s 32(4) for non-compliance is that it is rendered void. Further, the by-law cannot be cured by lodging it with the Commissioner after the 30-day period has expired. Otherwise, issues will arise as to what is a reasonable period of delay for the by-law concerned to be still eligible for lodgment with the Commissioner: six months or a year or longer? All this will give rise to uncertainty and ambiguity for a unit owner who wishes to plan his or her affairs accordingly. If the 30-day period is, in practice, insufficient, a longer period of, say 45 days or 60 days may be provided for[65] with

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62 See, for example, s 48(2) of the *SSMA*, *supra* note 17, which clearly provides that a notification of an amendment or repeal of a by-law, or a new by-law cannot be lodged in the Registrar-General's office more than two years after the passing of the relevant resolution.

63 *Supra* note 1, ss 32(10)(a), 32(10)(b).

64 *Ibid*, s 32(4).

65 See also Recommendation 19(c) in Building and Construction Authority, *Public Consultation on the Proposed Amendments to the Building Maintenance and Strata Management Act*, (Singapore: BCA,

the same consequence that failure to lodge within the said period will render the by-law void (and not merely ineffective). A fresh resolution would have to be passed approving the making of the same by-law. To argue for such an outcome of non-compliance is to align it with a management corporation's mandatory obligation or duty to lodge by-laws within the period specified in s 32(5) of the *BMSMA*. This will also ensure that a management corporation takes its obligation or duty to lodge by-laws seriously.

V. Enforcement of Prescribed By-Laws before Management Corporation Constituted

As noted above, the statutorily prescribed by-laws set out in the Second Schedule to the *2005 Regulations*[66] are mandatory in their application to all strata schemes in Singapore in respect of which a management corporation is constituted on or after 1 April 2005.[67] They are statutorily constituted contracts between the management corporation and the unit owners and between the unit owners *inter se*, among others.[68] They provide for the control and management of the strata scheme.

The effectiveness of the prescribed by-laws has been called into question for the period before the management corporation is constituted which is when the strata title application in respect of the strata title plan is registered.[69]

In Singapore, unit owners are allowed to take possession of the premises when the temporary occupation permits are issued[70] by the Building and Construction Authority,[71] and before titles are issued and management corporations formed. During this period, unit owners might undertake activities which may be inconsistent with the prescribed by-laws. For example, some unit owners might have installed locking or safety devices, for the protection or improvement of the safety of their units or the prevention of harm to children, in a manner that is not in keeping with the appearance of the rest of the building and which infringes a prescribed by-law.[72] It appears that there is not much that a management corporation can do about these infringements after it is constituted.

The current practice is to include the relevant prohibitions in the standard sale and purchase agreement[73] and to provide that the purchaser agrees to comply with

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25 September 2013), online: <http://www.bca.gov.sg/bmsm/others/ConsultationPaper_BMSMA_Review.pdf> at 24.

66 *Supra* note 2.

67 *BMSMA*, *supra* note 1, s 32(2). For strata schemes in existence prior to 1 April 2005, the prescribed by-laws under the *2005 Regulations*, *supra* note 2, will only apply if the management corporation, by special resolution, adopts them in substitution for the by-laws set out in the then First Schedule to the *LTSA 1999*, supra note 9 (see *BMSMA*, *supra* note 1, para 14(3) of Fourth Schedule).

68 *Ibid*, s 32(6). See also *Choo Kok Lin*, *supra* note 20 at para 23.

69 *LTSA 2009*, *supra* note 39, s 10A(1).

70 See also *Building Control Act* (Cap 29, 1999 Rev Ed Sing), s 12(2)(b).

71 A body corporate established under s 3 of the *Building and Construction Authority Act* (Cap 30A, 2012 Rev Ed Sing) and which is under the Ministry of National Development.

72 See, for example, *2005 Regulations*, *supra* note 2, Second Schedule by-law 5(4).

73 See, for example, the standard sale and purchase agreement prescribed in Form 5 in the Schedule to the *Housing Developers Rules* (Cap 130, R 1, 2008 Rev Ed Sing) for private residential properties and in Form D in the Schedule to the *Sale of Commercial Properties Rules* (Cap 281, R 1, 1999 Rev Ed Sing) for commercial properties, where the purchaser is under an obligation not to carry out any alterations

them from the date he takes possession of the unit until the management corporation takes over from the developer the functions of managing and maintaining the strata scheme.[74] Even if the unit owner is prohibited from doing so because of a contract between him and the developer, the prohibitions may, generally, only be enforced by the developer and not the management corporation which is not a party to the contract.

That the authority of a management corporation is very much undermined in this respect is further compounded by decided case law which has generally ruled that a management corporation cannot interfere after it is constituted to redress a breach of the prohibitions contained in the prescribed by-laws. Thus, in *MCST Plan No 1378 v Chen Ee Yueh Rachel*,[75] the High Court held that it was inappropriate, in the circumstances of the case, to grant a mandatory injunction in favour of the management corporation to redress a breach of the statutory prohibition pertaining to facade control. The prohibition was contained in the then prescribed by-law 13 in Part II of the then First Schedule to the *Land Titles* (*Strata*) *Act*[76] which is now to be found in s 37(3) of the *BMSMA*.[77] A unit owner had undertaken alterations to her balcony by replacing the metal grills with sliding glass windows to keep the rain out. This was done without the prior written approval of the management corporation. As this adversely affected the facade of the building, the management corporation commenced proceedings for a mandatory injunction requiring the unit owner to restore the balcony to its original state and condition.

In refusing to exercise its equitable discretion to grant the mandatory injunction sought, the High Court ruled that the prescribed by-laws only bound the parties with effect from the date the management corporation was constituted.[78] In light of this and given that some unit owners had altered the balconies of their units before the management corporation was constituted over which the latter could not interfere, the objective of seeking uniformity was no longer possible, even with the grant of a mandatory injunction to redress the particular breach which took place after the management corporation was formed.[79] The New South Wales case of *Proprietors—Strata Plan No 464 v Oborn*[80] was distinguished on the ground, *inter alia*, that it was still possible to achieve the objective of ensuring uniformity of the overall appearance of the building there with the grant of a mandatory injunction.

In the subsequent case of *Choo Kok Lin*,[81] the appellants had, in 1999, erected roof coverings over the uncovered terrace and air well areas comprised within the two units owned by them and located on the ground floor of the strata development in

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or additions to the unit without the prior written consent of the developer and where the certificate of statutory completion has not been issued for the unit (see cl 10 and cl 11 respectively).

74 As can be seen in cl 21 and Schedule A to the sale and purchase agreement in *Choo Kok Lin*, *supra* note 20, and noted by the High Court at para 29. The restrictions contained in Schedule A therein were similar to the prescribed by-laws.

75 [1993] 3 SLR(R) 630 (HC) [*Chen Ee Yueh Rachel*].

76 Cap 158, 1988 Rev Ed Sing. Another relevant by-law was the then by-law 12 pertaining to alterations to windows installed in the external walls of a subdivided building which were not permitted without the written approval of the management corporation.

77 *Supra* note 1.

78 *Chen Ee Yueh Rachel*, *supra* note 75 at para 9.

79 *Ibid* at para 23.

80 [1975] 2 CCH Strata Title Law & Practice 50 at para 201 (SC).

81 *Supra* note 20.

question. Other structures put up by the appellants were windows in the terrace area and air-conditioning units over the air well area, among others. All these structures were put up before the management corporation was constituted in April 2000. After this, the appellants put in place two additional compressors onto the exterior wall of their units without the management corporation's prior approval. The management corporation obtained a mandatory injunction from the district court against the appellants requiring the latter to remove the structures.

The appellants appealed, contending that their actions did not amount to breaches of the relevant prescribed by-laws which were not in force at the material time as the management corporation had yet to be constituted. The management corporation argued, *inter alia*, that so long as the structures installed remained and continued to affect the common property after it was constituted, there was a continuing breach of the by-laws. The then applicable by-laws 11 and 12, set out in the First Schedule to the *LTSA 1999*,[82] respectively prohibited damage to common property[83] and required the permission of the management corporation before any alteration could be carried out to windows installed in the external walls of the development.[84]

The High Court in *Choo Kok Lin* first considered the operative date of the prescribed by-laws and came to the conclusion, having regard to the legislative framework of the strata legislation, that they took effect from the date the management corporation was constituted as decided in *Chen Ee Yueh Rachel*. In a detailed and comprehensive analysis, the High Court was of the view that given that 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."[85] Further, the by-laws could apply only prospectively and not retrospectively. The High Court noted:

> These persons would all be bound by the "by-laws for the time being in force" . . . [which] 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".[86]

Such an 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 [management corporation] 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 [management corporation] to whom they could have applied for approval.[87]

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82 *Supra* note 9.

83 See the substantially similar provision in by-law 5(1) in the Second Schedule to the *2005 Regulations*, *supra* note 2.

84 See the corresponding provisions in ss 37(3) and 37(4) of the *BMSMA*, *supra* note 1.

85 *Choo Kok Lin*, *supra* note 20 at para 23.

86 *Ibid* at para 27.

87 *Ibid* at para 28.

Although the appellants were not free to act as they liked with their units because of the restrictions contained in the sale and purchase agreement which compelled them to comply therewith, only the developer could act on the breach of the contractual obligations therein and not the management corporation. In any event, there was no breach of the by-laws as those were not in force at the time the acts constituting the breach took place.[88]

On the issue of whether there was a continuing breach of the relevant by-laws after they became effective when the management corporation was constituted, the High Court ruled in the negative. In respect of the then prescribed by-law 11 which provided that a unit owner "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 management corporation,[89] the court held:

> [Any such prohibited] action starts at one moment in time and ends at another moment in time. . . If the action is started and completed at a time when there is no [management corporation], then the taking of the action is not a breach of the by-laws.[90]

As for by-law 12 which prohibited any alteration to the windows, it did not refer to actions taken before the management corporation was constituted. The words "shall not make" therein could not be construed to mean "shall not continue to have altered windows".[91] There was, therefore, no case against the appellants in respect of the structures that were erected before the management corporation was constituted.

In regard to the new air-conditioning compressors installed after the management corporation was constituted, this was clearly in breach of the then prescribed by-law 11. The issue was whether the mandatory injunction granted by the district court should be continued in respect of the new compressors alone. In deciding on the issue, the High Court took into account the following factors.[92] First, the damage that would be caused to the management corporation was trivial should the appellants be allowed to retain the new compressors which were minor structures compared to the major unauthorised structures which would remain in place as the prescribed by-laws did not apply to the latter. Second, the behaviour of the management corporation all this while showed that it did not consider that the appearance of the condominium had been adversely affected by the existence of the new compressors. Finally, there was evidence that other unit owners had similarly erected compressors on the common property. These would remain even if the appellants' new compressors were removed. In the result, after balancing all the circumstances of the case, the High Court declined to exercise its discretion to continue with the mandatory injunction granted.

The above decisions illustrate the difficulties faced by management corporations in dealing with breaches of prescribed by-laws committed before they are constituted which also have an impact on the legal outcome for breaches committed after their constitution. Given that the by-laws are statutorily constituted contracts between

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88 *Ibid* at para 29.

89 Substantially similar to by-law 5(1) in the Second Schedule to the *2005 Regulations*, *supra* note 2.

90 *Choo Kok Lin*, *supra* note 20 at para 34.

91 *Ibid* at para 35.

92 *Ibid* at paras 57-60.

the management corporation and the unit owners, among others,[93] and that the prescribed by-laws make references to "management corporation" and "subsidiary proprietor",[94] it would not be possible to argue that the prescribed by-laws have effect from the date they are brought into force[95] for the period when the management corporation has yet to be constituted and before the unit owners become the "subsidiary proprietors" of their units.[96] To ensure that the prescribed by-laws are not rendered illusory during the period before the management corporation is constituted, the following suggestions may be considered.

As the position advocated in the case law is unsatisfactory, legislative amendments may have to be put in place to provide for the prescribed by-laws to have effect from the date the unit owners take possession of their units. This will ensure that the very purpose for which prescribed by-laws are enacted in the first place is not frustrated. It will also elevate the status of the various duties and prohibitions imposed on unit owners to one which is statutory in nature (and not just merely contractual) and having the force of statutory law to reflect their significance. These prescribed by-laws deal with important matters in a strata scheme and hence, their application is made mandatory. Where it is necessary to obtain prior written approval to undertake the activities concerned, the approval would have to be obtained from the developer who is tasked with, and who is also very much involved in, administering and managing the strata scheme during this period. Thus, the statutorily prescribed by-laws shall apply, with the necessary modifications, for the period before the management corporation is constituted: for example, any reference therein to obtaining the approval of the management corporation would have to be construed as a reference to the approval of the developer. Similarly, any reference to a subsidiary proprietor shall be construed as a reference to a purchaser who has obtained possession of the unit. In the circumstances, the management corporation, when constituted, would be in a better position to deal more effectively with any breaches of the prescribed by-laws committed before it came into existence.[97] The courts are likely to be more amenable to exercise their equitable discretions in granting mandatory injunctions to order the removal of the unauthorised structures as the prescribed by-laws were operative at the material time.

In this regard, reference may be made to the Malaysian *Strata Management (Maintenance and Management) Regulations 2015*.[98] The prescribed statutory by-laws in the Third Schedule therein equally apply to the period before the management corporation comes into existence[99] and to a developer and purchaser as well.[100]

Alternatively, the prescribed by-laws should be made a compulsory inclusion in a schedule to the sale and purchase agreement entered into between the unit owners and developer. The duties and restrictions imposed on unit owners should be made to benefit the management corporation as well when it is constituted and

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93 *BMSMA*, *supra* note 1, s 32(6). See also *Choo Kok Lin*, *supra* note 20 at para 23.

94 See the various prescribed by-laws in the Second Schedule to the *2005 Regulations*, *supra* note 2.

95 *Ie* 1 April 2005: see *ibid*, reg 1.

96 *LTSA 2009*, *supra* note 39, ss 10(2), 10A(1).

97 See also *BMSMA*, *supra* note 1, ss 32(10)(a), 32(10)(b) which entitle the management corporation to apply to court for the remedies specified therein against any person bound to comply with the by-laws.

98 PU (A) 107/2015, Malaysia [*SMR*], which came into force on 2 June 2015 (see reg 1(2) therein).

99 *Strata Management Act 2013* (Act 757, Malaysia), s 32(1).

100 *SMR*, *supra* note 98, Third Schedule by-laws 1(1), 1(2).

binding on subsequent unit owners. While not statutory in nature, this suggestion would, nevertheless, provide for a watertight solution as it would cover practically all the important areas and activities which the prescribed by-laws seek to have supervision over. Given the contractual privity between the parties and the comprehensive coverage of the by-laws, it will enable the developer to better enforce the by-law provisions in managing and administering the strata scheme before the management corporation is constituted. In the event that the developer neglected to enforce effectively the by-law provisions and this caused the management corporation to suffer loss as a result, is the latter entitled to recover damages from the developer?

Under the *BMSMA*, a management corporation is given the legal capacity to, *inter alia*, sue in respect of any loss or damage suffered by it arising out of a contract or otherwise, among others.[101] In *RSP Architects Planners & Engineers v Ocean Front Pte Ltd*,[102] the Singapore Court of Appeal held that, notwithstanding the conferment of legal capacity, it is still necessary for a management corporation to turn to the general law to found its cause of action in any action instituted by it.[103] Thus, drawing by analogy from the principle of a cause of action in negligence laid down in *RSP Architects Planners & Engineers*,[104] it would appear that the management corporation could possibly bring an action in tort for this purpose. It is plausible to argue that the degree of proximity between the developer and the management corporation is sufficient to give rise to a duty on the part of the developer to enforce the relevant by-law provisions so as to avoid causing to the management corporation the loss the latter had sustained. Among others, the management corporation is an entity conceived and created by the developer; after completion of the strata scheme, the developer is the party solely responsible for its management and administration, including enforcement of the by-law provisions; the management corporation as the successor of the developer takes over the control, management and administration of the strata scheme and has the obligations of upkeeping and maintaining the scheme; and the developer obviously knows or ought to know that if it is negligent in its enforcement of the by-law provisions, the management corporation would have to incur expenses in having the unauthorised structures removed.[105]

VI. Conclusion

The various issues ventilated above underscore the need for a proper understanding of the scope and application of the by-laws, among others. This will obviate any misunderstanding that may arise as to the purposes for which by-laws may be used. A proper application of the by-laws is not only vital to the efficient running of a strata scheme but will also instil confidence in the unit owners that the by-laws are being applied fairly and justly. By-laws that have been carefully considered and passed at a duly convened general meeting must be properly lodged as prescribed so that there is

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[101] *BMSMA*, *supra* note 1, s 24(2)(c).
[102] [1995] 3 SLR(R) 653 (CA) [*RSP Architects Planners & Engineers*].
[103] *Ibid* at para 12.
[104] *Ibid* at paras 27, 70-73.
[105] *Ibid* at para 74.

no doubt as to their validity to enable unit owners to properly plan their affairs with certainty. Ways must be explored, including by legislation if necessary, to make prescribed by-laws effective for the period before the management corporation is constituted so as not to defeat and frustrate the very purposes for which such by-laws were enacted in the first place. There is no doubt that by-laws are put in place for the benefit of all stakeholders in a strata scheme and there is no better way than for the by-laws to be applied correctly, fairly and effectively.