Singapore Journal of Legal Studies
[2016] 149–168

MANAGEMENT CORPORATION: COMMON PROPERTY AND STRUCTURAL DEFECTS

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This article looks at three aspects involving a management corporation in a strata development. It is argued that the principle laid down in the New South Wales cases that a management corporation holds the common property as trustee for the unit owners has no application in the Singapore context. In light of the various difficulties faced by a management corporation in pursuing actions in contract and tort for unit owners in respect of the common property, legislative intervention to confer on the management corporation a cause of action in its own right is justified. Finally, greater clarity on what amounts to structural defects in a strata development would be welcomed as it would greatly assist a management corporation in discharging its duty in this respect.

I. Introduction

It is trite that a management corporation comes into existence by operation of law "on the date of registration of the strata title application in respect of the strata title plan".[1] It is merely a statutory creation, being a body corporate having perpetual succession and a common seal, and which may sue and be sued.[2] It comprises the unit owners of the strata development concerned[3] and is the medium through which the unit owners control and manage the development. In this regard, certain powers and duties are conferred and imposed upon a management corporation to assist it in managing and administering the strata development for the benefit of unit owners therein.[4] Nevertheless, a management corporation has a legal existence separate from that of its members *ie* the unit owners. It is entitled, just like any party, to be represented in legal proceedings.[5] However, being an artificially created legal

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1 *Land Titles (Strata) Act* (Cap 158, 2009 Rev Ed Sing), s 10A(1) [*LTSA*].

2 *Building Maintenance and Strata Management Act* (Cap 30C, 2008 Rev Ed Sing), s 24(1)(b) [*BMSMA*]. See also *LTSA*, *ibid*, s 10A(3). A management corporation is not subject to the *Companies Act* (Cap 50, 2006 Rev Ed Sing), being simply a body corporate which comes into existence by operation of the *LTSA* as noted above (see also *Management Corporation Strata Title Plan No 586 v Menezes Ignatius Augustine* [1992] 1 SLR (R) 201 at para 15).

3 *BMSMA*, *ibid*, s 24(1)(a).

4 See generally, *ibid*, ss 29, 38(7)-(10).

5 *Fu Loong Lithographer Pte Ltd v Mok Wai Hoe* [2014] 3 SLR 456 at para 64.

entity, a management corporation may only act through, *inter alia*, its members who may vote in a general meeting not to have legal representation for the management corporation in a suit to which it is a party.[6]

II. Relationship Between the Management Corporation and the Unit Owners in Respect of the Common Property

Under the *Building Maintenance and Strata Management Act*,[7] a management corporation has the statutory duty to, *inter alia*, "control, manage and administer the common property"[8] for the benefit of all unit owners constituting it.[9] In respect of the common property, the unit owners hold it under the *Land Titles (Strata) Act*[10] as "tenants-in-common proportional to their respective share value and for the same term and tenure as their respective [units] are held by them."[11] A pertinent question which arises for consideration is whether in the Singapore context it can be said that, as a general principle, a management corporation holds the common property on trust for the unit owners collectively?

In *Lee Lay Ting Jane v MSCT Plan No 3414* [*sic*],[12] this question appeared to have been answered in the affirmative. In coming to this conclusion, the Strata Titles Boards ("the Board") ruled as follows:

> … Since a Management Corporation cannot hold property for itself absolutely, it must follow that the Management Corporation holds property on trust for the subsidiary proprietors collectively. This is consistent with the general principle articulated in the decision of the New South Wales Court of Appeal in *Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270. In *Thoo,* the court said that a Management Corporation held the common property on a statutory trust for the owners as a whole and owed general duties and statutory duties to the owners. …[13]

In *Lee Lay Ting Jane*, the management corporation had refused the applicant's request to upgrade the electricity supply to the latter's units notwithstanding that there was no objection from the electrical consultants of the strata development concerned. The electrical consultants had earlier issued reports to the management corporation that the applicant's request could be catered for as the total approved load to the entire development would not be exceeded. However, the management corporation informed the applicant that her application had been rejected in view of the limited spare electrical capacity for the development as the management corporation had to reserve the spare power supply for future common areas upgrading or improvement works. The applicant then commenced proceedings before the Board seeking an order that the management corporation allow the applicant's request. The

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6 *Ibid,* at paras 64, 67.

7 *Supra* note 2.

8 *Ie* the part of the strata development not comprised in a unit that is "used or capable of being used or enjoyed by occupiers of 2 or more" units (*ibid*, s 2(1)).

9 *Ibid*, s 29(1)(a).

10 *Supra* note 1.

11 *Ibid*, s 13(1).

12 [2015] SGSTB 5 [*Lee Lay Ting Jane*].

13 *Ibid* at para 46.

management corporation argued, *inter alia*, that there was insufficient electricity supply in the development to meet the applicant's requested upgrade and that the unutilised electricity supply formed part of the common property. This would mean that any approval given by the management corporation would amount to granting the applicant exclusive use and enjoyment or special privileges in respect of the common property for which a requisite resolution had to be first obtained at a general meeting of the management corporation under section 33 of the *BMSMA*.

There is no quarrel with the decision of the Board that the unused electricity supply to the strata development is a property right as a matter of law, having regard to three key features, namely: (i) the right to electricity supply is "immune from summary cancellation or extinguishment" given that SP Services Ltd, the provider of the electricity supply, did not have the right to summarily cancel the power supply so long as the management corporation met its contractual obligations; (ii) the management corporation has a "presumptive entitlement to exclude third parties of the development from this electricity supply"; and (iii) the management corporation is "entitled to prioritise the resource value of this electricity supply".[14] However, the unused electricity supply, notwithstanding its proprietary nature, was not common property. Given the definition of "common property" in section 2 of the *BMSMA*, the unused electricity supply could not be regarded as "part of the land and building".[15]

However, the difficulty is with the position subsequently taken by the Board that the New South Wales Court of Appeal in *Owners Strata Plan 50276 v Thoo*[16] had laid down the *general principle* that "… a Management Corporation held the common property on a statutory trust for the owners as a whole and owed general duties and statutory duties to the owners."[17] Having decided that the unused electricity supply was not common property, reference should not have been made to *Thoo* for any general proposition which touches on common property. It is submitted that *Thoo* was not articulating a *general principle* as such which is applicable across the board to any strata title jurisdiction but was instead enunciating the particular position in New South Wales in this regard. It is clear that the reference to *Thoo* was inappropriate as it was a case concerned with *common property* (which was not the case in *Lee Lay Ting Jane*) and it dealt specifically with the duties of a management corporation in respect of the improvement and enhancement of the common property under the provisions of the New South Wales *Strata Schemes Management Act 1996*.[18] As will be seen below, the position in New South Wales is not representative of the position in Singapore and it was, thus, not apt to derive a general principle in this regard from *Thoo*, a case decided under the strata title legislation of New South Wales.

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14 *Ibid* at paras 28, 29, citing Kevin Gray & Susan Francis Gray, *Elements of Land Law*, 5th ed (Oxford: Oxford University Press, 2009) at para 1.5.32.

15 *Lee Lay Ting Jane*, *ibid* at para 33. The Board also relied on the reasoning of the High Court in *Choo Kok Lin v Management Corporation Strata Title Plan No 2405* [2005] 4 SLR (R) 175 at paras 45-47 where it was held that the unconsumed gross floor area allocated to a particular development could not be properly considered as "common property". This is because gross floor area is not something that has "grown out naturally from the ownership and use of land" but is instead simply an "administrative tool" (*ibid*).

16 *Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270 [*Thoo*].

17 *Lee Lay Ting Jane*, *supra* note 12 at para 46.

18 (NSW), ss 62(2), 65A [*SSMA*].

A. *The New South Wales Position*

In New South Wales, the common property is vested in the owners corporation[19] as agent for the unit owners.[20] Thus, in a case where the rights of all unit owners are not affected, such as where changes of ownership of some units in the strata development mean that only some of the owners have a claim, the owners corporation can sue in a representative capacity on behalf of all unit owners in its capacity as trustee of the common property.[21] Effectively, the owners corporation is a trustee of the common property for the unit owners who are vested with the beneficial ownership therein. This was reiterated in *Thoo*[22] as illustrated below.

In the instant case, the first respondent owned a unit in a development. He intended to use the unit for the commercial cooking and selling of hot Asian food. However, the relevant authority required that before the unit (shop) could be used for that purpose, it must be provided with an adequate exhaust ventilation system to extract cooking fumes and vapours from the shop. Accordingly, the first respondent submitted plans for the shop to the owners corporation and applied to connect the shop to the existing mechanical exhaust ventilation system which constituted part of the common property of the development. However, the owners corporation declined to give the first respondent the guaranteed exhaust capacity that he had requested as installing an additional system would involve significant cost, would interfere with the existing retail operations in the development and would only be achievable after meeting a number of third party requirements outside the control of the owners corporation. In proceedings brought by the first respondent, the latter contended that he had the right to apply to the Court for an injunction in respect of the owners corporation's infringement of his right as an equitable tenant in common with other unit owners entitled to possession of the common property. The Court, in dismissing the claim, was of the view that, while the first respondent as a unit owner had a right as an equitable tenant in common with other unit owners, the owners corporation was not such an owner. It was, therefore:

> erroneous to fasten upon the interest of a [unit] owner as one of several equitable tenants in common of the common property and to seek to construct on that basis some positive general law duty on the part of the owners corporation.[23]

Tobias AJA in *Thoo* had this to say of the proprietary rights argument under the relevant New South Wales strata legislation:

> The interest of a lot owner as an equitable tenant in common is a product of the statutory provisions concerning the relationship of the owners corporation to

[19] *Strata Schemes (Freehold Development) Act 1973* (NSW), s 18(1) [*SSFDA*].

[20] *Ibid,* s 20; *Strata Schemes (Leasehold Development) Act 1986* (NSW), s 23 [*SSLDA*]. Although the common property is vested in the owners corporation, all dealings with the common property can only be undertaken in accordance with the provisions of the *SSFDA*, *SSLDA* and the *SSMA* (see *SSFDA*, *ibid*, s 21; *SSLDA*, *ibid*, s 24). The New South Wales *Strata Schemes Development Act 2015* (NSW), which will come into force in mid-2016 and which repeals the *SSFDA* and *SSLDA*, provides for the same in ss 24(2)(a) and 28(1).

[21] *Owners-Strata Plan No 43551 v Walter Construction Group Limited* (2004) 62 NSWLR 169 at 178-180 (CA). See also Peter Butt, *Land Law*, 6th ed (Sydney: Thomson Lawbook Co, 2010) c 21 at 876.

[22] *Supra* note 16.

[23] *Ibid* at para 134 (Tobias AJA).

> the common property. Because it holds the common property as "agent" in the manner specified in s 20(b) of the [*Strata Schemes (Freehold Development) Act 1973*], the owners corporation holds it upon trust for the several lot owners from time to time in proportion to their unit entitlements…[24]

Barrett JA concurred with the above observations and explained that:

> A statute may cause property to be held upon trust, including "trusts unlike any previously known" and which "cannot be held invalid on the ground of perpetuity or on any other ground": *Re Christchurch Inclosure Act* (1888) 38 Ch D 520 at 530. In the present context, it is the statutory designation of the owners corporation as an "agent" holding the common property "on behalf of" the lot owners that leads to the conclusion that an owners corporation is a trustee.[25]

B. *The Malaysian Position*

The position under the Malaysian *Strata Titles Act 1985*[26] is also different in this respect from that obtained under the strata title legislation of Singapore. Under the *STA*, a unit owner, in relation to the common property, has "the right of user which he would have if he and the other [unit owners] were co-proprietors thereof."[27] However, the common property is vested in the management corporation on the opening of a book of the strata register.[28] The management corporation under the *STA* is also entrusted with the custody of the issue document of title to the land on which the strata development stands[29] which is a separate title from the strata title issued in respect of a unit.

C. *The Singapore Position*

As seen above, the statutory language used is ordinarily determinative of the nature of the relationship of the management corporation in respect of the common property. No similar language as that employed in the New South Wales and Malaysian legislation as noted above is to be found in the strata title legislation of Singapore, that is, the *LTSA*. Under the *LTSA*, the common property is held by the unit owners as tenants-in-common.[30] While a subsidiary strata certificate of title is issued for a unit, no such certificate of title is to be issued for the common property.[31] The certificate of title in respect of the land on which the strata development stands is to be retained by the Registrar of Titles after the issuance of the relevant subsidiary strata certificates of title.[32] Following from the above, it is clear that the common property

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[24] *Ibid* at para 135.
[25] *Ibid* at para 20.
[26] Act 318 [*STA*].
[27] *Ibid,* s 34(1)(b).
[28] *Ibid,* s 17(1).
[29] *Ibid*.
[30] *LTSA*, *supra* note 1, s 13(1). *Cf Management Corporation Strata Title Plan No 958 v Tay Soo Seng* [1992] 3 SLR (R) 818 at para 13 (HC) where G P Selvam JC erred on this point when he stated to the contrary.
[31] *LTSA*, *ibid*, s 13(2).
[32] *Ibid,* s 13(4).

is vested in the unit owners as aforesaid and not in the management corporation.[33] Accordingly, it is to be noted that a unit owner's subsidiary strata certificate of title issued in respect of his unit shall also certify therein his share in the common property[34] and there is no separate certificate of title issued for the common property.[35] Thus, it is not surprising that no mention is made in the *LTSA* of the management corporation being vested with any interest in the common property either by way of an agent or proprietor.

That the position under the *LTSA* is different in this regard from that in New South Wales and Malaysia may also be gleaned from case law. In *RSP Architects Planners & Engineers v Ocean Front Pte Ltd*,[36] the Court of Appeal made certain observations in respect of the relationship between the management corporation and the common property. It noted that a management corporation has certain rights and obligations with respect to the common property. For example, a management corporation has the "powers, duties and functions conferred or imposed by [the strata legislation]" and has the "control, management and administration of the common property".[37] Since a management corporation has powers and duties under the legislation in relation to the common property, it has "something akin to possession of the common property".[38] Thus, a management corporation is competent and empowered to bring and maintain the appropriate action under the relevant provisions of the strata legislation[39] against the developers for defects in the common property.[40] However, the Court of Appeal in *RSP Architects Planners* also made it categorically clear that a "management corporation has *no* proprietary interest in the common property."[41] Given that this is so, a management corporation cannot then be a trustee of the common property for the unit owners as a trustee invariably has to have proprietary interest in the property concerned.[42] This authoritative statement laid down by the Court of Appeal in the Singapore context ties in with the statutory provisions in the *LTSA* noted above.

Another pertinent point is that a management corporation is a creature of statute.[43] Accordingly, it can only have the legal status and powers conferred on it by the *LTSA* and *BMSMA* and nothing more. In this regard, it would be wise to pay heed to the advice given in *Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd*.[44] The general principle to be derived from the Court of Appeal's perceptive observations in *De Beers Jewellery* is that it is trite law that a body created

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33 This also reflects the position in the Australian states of Queensland and Victoria: see *Building Units and Group Titles Act 1980* (Qld), s 20(1); *Body Corporate and Community Management Act 1997* (Qld), s 35(1); *Subdivision Act 1988* (Vic), s 30(1).

34 *LTSA, supra* note 1, s 13(2).

35 *Ibid*.

36 [1995] 3 SLR (R) 653 (CA) [*RSP Architects Planners*].

37 See *BMSMA*, *supra* note 2, ss 24(3), 29.

38 See *RSP Architects Planners*, *supra* note 36 at para 14.

39 See *BMSMA*, *supra* note 2, ss 24(2)(b), (c).

40 *RSP Architects Planners*, *supra* note 36 at para 15.

41 *Ibid* at para 13 [emphasis added].

42 See Simon Gardner, *An Introduction to the Law of Trusts*, 3rd ed (Oxford: Oxford University Press, 2011) at 17 ("The trust must, however, always… involve some property, which the trustee will technically own…") and Robert Pearce & Warren Barr, *Pearce & Stevens' Trusts and Equitable Obligations*, 6th ed (Oxford: Oxford University Press, 2015) at 35 ("[The trustee's] unencumbered capacity to deal with the trust property derives simply from the fact that he owns it.")

43 See further the discussion in Part I above.

44 [2002] 1 SLR (R) 418 (CA) [*De Beers Jewellery*].

by a statute can only act within the legal framework of that statute. If the statute clearly and exhaustively deals with the matter concerned, anything done beyond the framework of the statute is void *ab initio* and is likened to driving "a coach and horses through" the statute.[45]

It may also be noted that in cases brought by a management corporation against developers in respect of defects in the common property in Singapore, none has ever raised the argument that a management corporation is a trustee or agent of the common property for the unit owners. This can be seen in *RSP Architects Planners*,[46] *Management Corporation Strata Title Plan No 1279 v Khong Guan Realty Pte Ltd*,[47] *Management Corporation Strata Title Plan No 1938 v Goodview Properties Pte Ltd*[48] and *Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd*,[49] among others. If indeed the management corporation is a trustee or agent, it is inconceivable that counsel overlooked or failed to raise the trustee or agent argument which would have facilitated the management corporation bringing the action in such a capacity on behalf of the unit owners. The trustee or agent argument, if raised, would have assisted the management corporation in overcoming, for example, the privity of contract limitation and constraint faced by it in the cases mentioned. It is respectfully submitted that, in light of the discussion above, the truth of the matter is that it would have been futile to raise the trustee or agent argument as it would not have been viable or plausible in the first place.

Reference may also be made to Parliamentary materials. The legislative background to section 13(1) of the *LTSA* gives an interesting insight into this issue. To recall, this provision states that the common property is to be held by the unit owners as tenants-in-common proportional to their respective share value and for the same term and tenure as their respective units are held by them.[50] In the *Report of the Select Committee on the Land Titles (Strata) (Amendment) Bill [Bill No 10/861]*,[51] written representations were made by The Law Society of Singapore which articulated, *inter alia*, the difficulties encountered arising "from the Management Corporation's inability to act in respect of the common property owing to the fact that the common property does not belong to the Management Corporation but to the individual subsidiary proprietors as tenants in common."[52] The Law Society of Singapore advocated for the following:

> Serious consideration should be given to amending the law so as to vest ownership of the common property in the Management Corporation… This would overcome many of the technical problems encountered by the Management Corporation in enforcing rights over the common property where difficulties arise from its lack of title. …[53]

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45 *Ibid* at para 10.

46 *Supra* note 36.

47 [1994] 3 SLR (R) 527 (HC) [*Khong Guan*].

48 [2000] 3 SLR (R) 350 (CA) [*Goodview Properties*].

49 [2005] 2 SLR (R) 613 (CA) [*Seasons Park*].

50 This provision appeared as s 12(1) in the 1985 revised edition in substantially the same form but has otherwise remained as s 13(1) in subsequent revised editions of the *LTSA*.

51 Sing, *Report of the Select Committee on the Land Titles (Strata) (Amendment) Bill [Bill No 10/861]*, 25 June 1987, 10th Parliament [*Select Committee Report*].

52 *Ibid* at Appendix II, A44, para 11.1.

53 *Ibid* at Appendix II, A44, para 11.3.

It is clear from the provisions in the *LTSA* that the position in this regard has not changed as no amendments along the lines advocated by The Law Society of Singapore were made. This, once again, confirms that the position in Singapore is that a management corporation does not hold the common property on trust for the unit owners either as agent or proprietor.

Thus, to extract a general principle from *Thoo* in this regard was, thus, unnecessary and inappropriate as it runs the risk of suggesting that the proposition laid down in *Thoo* that a management corporation is a trustee of the common property for the unit owners similarly applies in the Singapore context.[54]

III. Conferring on the Management Corporation Substantive Cause of Actions in its Own Right in Respect of the Common Property

A. *Competence of the Management Corporation to Sue or Defend Actions Generally*

Under the *BMSMA*, a management corporation is conferred the legal capacity to sue and be sued.[55] It may, among the specified subject-matters, sue and be sued in respect of any matter affecting the common property.[56] The legal capacity of a management corporation to bring an action in this respect was considered in *RSP Architects Planners*. In the instant case, the management corporation had commenced legal proceedings against the developer of the condominium concerned for damages for faulty construction of certain areas of the common property. It argued that the developer breached its duty in failing to take reasonable care in the construction of these common areas. Specifically, the management corporation alleged that the faulty construction of the ceiling of certain basement car parks had resulted in the spalling of concrete and that the faulty construction of certain common areas and corridors around the lift lobbies had resulted in water ponding in those areas. The developer brought in the building contractor, architects and engineers who were joined in the action as third parties. The High Court allowed the claim of the management corporation[57] and the developer and architects appealed.

As noted earlier, the Court of Appeal was of the view that a management corporation has something akin to possession of the common property as it has certain powers and duties under the strata title legislation in relation to the common property.[58] Thus, it is competent to institute and maintain an action against developers for defective construction of the common property under section 24(2) of the *BMSMA*.[59] However, this does not mean that a management corporation is conferred the various

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[54] The Board in *Lee Lay Ting Jane*, *supra* note 12 at para 57, did concede that it might be wrong in its analysis.

[55] *BMSMA*, *supra* note 2, s 24(1)(b).

[56] *Ibid*, s 24(2)(b).

[57] See *Management Corporation Strata Title Plan No 1272 v Ocean Front Pte Ltd* [1994] 3 SLR (R) 787 (HC).

[58] *BMSMA*, *supra* note 2, ss 24(3), 29.

[59] *RSP Architects Planners*, *supra* note 32 at para 15. This case dealt with, *inter alia*, the then-s 33(2)(b) of the 1988 revised edition of the *LTSA*, which provision is *in pari materia* with s 24(2)(b) of the *BMSMA*, *supra* note 2.

causes of action therein.[60] The Court of Appeal came to this conclusion after looking into the legislative history of the relevant provision[61] by, *inter alia*, perusing the relevant Parliamentary records,[62] such as the *Select Committee Report*.[63] It did not appear that the intention for the amendments made was to confer on a management corporation any cause of action.[64] Accordingly, it is incumbent on a management corporation to "turn to the general law to found its cause of action in any action instituted by it" in respect of any of those subject-matters specified in section 24(2) of the *BMSMA*.[65]

On the question of whether the management corporation in *RSP Architects Planners* had a cause of action in contract against the developer of the condominium based on the sale and purchase agreements made between the latter and the individual purchasers, the Court of Appeal answered in the negative. The Court rightly took the view that it was clearly not the intention of the parties to the sale and purchase agreements that the covenants contained therein would run with the land for the benefit of the management corporation, a third party. It would really be straining the language of the sale and purchase agreements to say that that was the intention of the parties. The agreements were only intended to govern the relations between the developer and the purchasers and not intended to benefit others down the line.[66]

However, the Court of Appeal held that the management corporation had a cause of action against the developer in the tort of negligence in its own right. There was sufficient proximity between the developer and the management corporation which gave rise to the duty of care on the part of the developer to the management corporation to exercise reasonable care in the construction of the common property so as to guard against the latter sustaining the kind of damage complained of. The facts which were of crucial importance in giving rise to the sufficient proximity were as follows:

> … (a) the management corporation was an entity conceived and created by the developers; (b) the developers were the party who built and developed the condominium including the common property and undertook the obligations to construct it in a good and workmanlike manner and were alone responsible for such construction; (c) after completion of the condominium the developers were the party solely responsible for the maintenance and upkeep of the common property; (d) the management corporation as the successor of the developers took over the control, management and administration of the common property and has the obligations of upkeeping and maintaining the common property; (e) the performance of these obligations is very much dependent on the developers having

60 *Ie BMSMA*, *ibid*, ss 24(2)(a)-(d) which is *in pari materia* with the then-ss 33(2)(a)-(d) of the 1988 revised edition of the *LTSA*.

61 Then s 33(2).

62 *RSP Architects Planners*, *supra* note 36 at paras 10, 11.

63 *Supra* note 51. See also Appendix II of the *Select Committee Report* at A51, para 3.

64 *RSP Architects Planners*, *supra* note 36 at para 11.

65 *Ibid* at para 12.

66 *Ibid* at para 25. See also *Rogers v Hosegood* [1900] 2 Ch 388 at 396 (CA). Consistent with the discussion in Part II above, this would also suggest that the agency argument is not tenable. See further, the Singapore Court of Appeal decision in *Seasons Park*, *supra* note 49, discussed below. *Cf* the different language used in the New South Wales *SSFDA*, *supra* note 19, ss 18(1), 20, and *SSLDA*, *supra* note 20, s 23 where it is provided that the common property is vested in the owners corporation as *agent* for the unit owners.

> exercised reasonable care in the construction of the common property; (f) the developers obviously knew or ought to have known that if they were negligent in their construction of the common property the resulting defects would have to be made good by the management corporation. The relationship between the developers and management corporation is as close it could be short of actual privity of contract. …[67]

There was also no policy consideration in negativing such a duty of care. The amount recoverable was the cost of repair and making good the defects in the common property which could not be said to be indeterminate. This was also the same for the class of persons which was finite and definable. The time span was also not indeterminate because the maximum period of time in which the developer could possibly be exposed to liability was limited by statute.[68]

In *RSP Architects Planners & Engineers v Management Corporation Strata Title Plan No 1075*,[69] the Court of Appeal extended the right to sue in tort to cover professional consultants as well. In the instant case, the management corporation successfully sued the architects in tort for the economic loss suffered. Bricks and brick tiles of the external walls (which were common property) of a high-rise block fell onto the roof of a unit in a neighbouring block of the same development, causing damage to the roof and the contents of the latter unit. The Court of Appeal held that there was a sufficient degree of proximity in the relationship between the parties giving rise to a duty on the part of the architects to exercise reasonable care in the design and supervision of the construction of the common property. The Court had no difficulty in holding, *inter alia*, that in respect of such common property, "the architects knew that the management corporation would be in charge and would be managing the common property and would depend on their care and skill in the design and supervision of the construction of the common property."[70] It also noted that there are special factors distinguishing negligence in the construction of buildings from negligence in the manufacture of consumer goods which are "instrumental in dictating the expectations and the degree of reliance placed upon the persons developing, building or designing the structure" which stands upon land which, in Singapore, is "not only scarce but expensive".[71] The architects were found to be in breach of their duty in the design of the walls given that "even if the walls had been built to the utmost quality, they would have still collapsed because of the poor design."[72] The principles set out in the earlier decision in *RSP Architects Planners* were applied and there was no reason, both on principle and on authority, why the approach therein should not be taken in the present case which involved a relationship between the management corporation of the condominium and the architects who were engaged by the developer in the construction of the condominium.[73] Thus, the relationship between the architects and the management corporation is similar or close to that which exists between the developer and the management corporation

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67 *RSP Architects Planners*, *supra* note 36 at para 74.

68 *Ibid* at para 75. See also the *Limitation Act* (Cap 163, 1996 Rev Ed Sing), s 24B.

69 [1999] 2 SLR (R) 134 (CA).

70 *Ibid* at para 38.

71 *Ibid* at para 43.

72 *Ibid* at para 57.

73 *Ibid* at para 31.

so as to give rise to the said duty of care in tort. However, as discussed below, the tort action is not entirely satisfactory as there are difficulties associated with it.

B. *Action by the Management Corporation in a Representative Capacity*

Although the management corporation may, in the alternative, bring an action in a representative capacity in respect of the common property,[74] it faces difficulties in such proceedings as well. In *RSP Architects Planners*, the Court of Appeal explained that the purpose of section 85 of the *BMSMA*[75] is to provide a procedural mechanism to "enable the management corporation to bring an action on behalf of all or some of the [unit owners], as the case may be, and also to enable a third party to bring an action against the management corporation as representing all or some of the [unit owners]."[76] In such a representative action, the unit owners "are the substantive party, although the proceedings are instituted by or against the management corporation."[77] It is not necessary for all the unit owners to act together at all times and the management corporation may represent only some of the unit owners so long as they have a cause of action.[78] The provision seeks to "simplify the procedural aspect of proceedings so as to avoid naming all the [unit owners] or some of them who are concerned in the proceedings as plaintiffs or defendants, as the case may be."[79]

The difficulties encountered by a management corporation in bringing a representative action are well illustrated in *Seasons Park*.[80] The management corporation had instituted an action in a representative capacity against the developer on account of defects appearing in the common property of the strata development in question. The action brought against the developer was in contract and tort on behalf of all the unit owners. The High Court decided in favour of the developer in respect of certain preliminary questions of law raised by them[81] and the management corporation appealed. The two preliminary questions of law for the consideration of the Court of Appeal were as follows: (i) in relation to the claim in contract, whether the management corporation was entitled to sue on behalf of all the unit owners of the strata development who had entered into sale and purchase agreements with the developer, and if not all the unit owners, which of them; and (ii) in relation to the claim in tort, whether the developer could avail itself of the defence of "independent contractor" against the management corporation's claim.

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74 *BMSMA*, *supra* note 2, s 85.

75 *RSP Architects Planners*, *supra* note 36 at paras 16, 17. The Court dealt with the then-equivalent provision of s 116 of the 1988 revised edition of the *LTSA*, *supra* note 1, a provision corresponding substantially to s 85 of the *BMSMA*, *ibid*.

76 *RSP Architects Planners*, *ibid* at para 17.

77 *Ibid*. See also *Khong Guan*, *supra* note 47.

78 *Goodview Properties*, *supra* note 48 at paras 12, 32. As the sale and purchase agreements were made severally, and not jointly, by the unit owners with the developer, each of them was entitled to take action against the developer to enforce the same. It was also not fatal that the common property was owned by all the unit owners as tenants in common as what was crucial was that the unit owners had a cause of action under their sale and purchase agreements.

79 *RSP Architects Planners*, *supra* note 36 at para 17. For a more detailed analysis of the scope and effect of s 85 of the *BMSMA* and its legislative history, see *Goodview Properties*, *supra* note 48 and the *Select Committee Report*, *supra* note 51 respectively.

80 *Supra* note 49.

81 *Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd (No 2)* [2004] SGHC 160.

On the first issue, the Court of Appeal reiterated that the then-equivalent provision[82] to section 85 of the *BMSMA* did not confer a cause of action upon the management corporation as it was merely a procedural provision which facilitated the management corporation to "institute or defend actions on behalf of [unit owners] and nothing more."[83] Since the unit owners are the substantive party, for the management corporation to be entitled to sue on behalf of the unit owners will depend on whether the unit owners themselves are able to establish a cause of action in contract at general law.[84]

The facts showed that the strata development in question had 390 unit owners. But not all of the owners bought their units directly from the developer. Only 319 unit owners (original purchasers) did so. The remaining 71 unit owners were sub-purchasers as they did not purchase their units directly from the developer. These 71 unit owners would have no privity of contract with the developer which meant that they had no cause of action in contract against the developer at general law. As a result, the management corporation was not entitled to sue on behalf of all the unit owners in contract.

While the management corporation could sue on behalf of unit owners who were the original purchasers, it must specify (which it had not done so) on which of the unit owners' behalf was the action in contract instituted. This would provide certainty as to who were the parties to the proceedings so that the developer would know which unit owners had authorised the management corporation to institute the claim in contract on their behalf as well as to ensure against whom the eventual decision made would bind.[85] The fact that a resolution was passed at an annual general meeting authorising the management corporation to act on behalf of all the unit owners did not help. This was because not all unit owners present at the meeting were original purchasers which meant that the privity of contract obstacle still remained.[86]

However, there was nothing to stop the individual original purchasers who were still the unit owners of the strata development from instituting a new action in contract against the developer. For that matter, there was nothing to prevent the management corporation from doing the same for and on behalf of those unit owners who were the original purchasers. Accordingly, it was more expedient, unless limitation had set in, for the court to grant leave to the management corporation to amend the pleadings to appropriately set out the basis of its claim in contract. Such an approach was to be preferred as then the trial of both the actions in contract and tort could proceed together given that the evidence would be common to both causes.[87] In the result, the management corporation's application for leave was referred to the trial judge for a determination.[88]

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82 Then s 116. See also note 75 and the accompanying text.

83 *Seasons Park*, *supra* note 49 at para 14.

84 *Ibid* at paras 14-17.

85 *Ibid* at para 18.

86 *Ibid* at para 19.

87 *Ibid* at paras 26, 27.

88 *Ibid* at para 28. In this regard, the management corporation was not to be precluded from adding more unit owners to the list setting out the names of those who were the original owners or, in view of the controversy whether the consent given was adequate, obtaining fresh authorisation from the unit owners (*ibid* at para 52).

On the action in tort, the management corporation had a cause of action against the developer for the reasons set out in *RSP Architects Planners*[89] and noted above. However, the Court of Appeal in *Seasons Park* held that the developer was entitled to rely on the defence of independent contractor and that the defence could defeat the management corporation's claim as it was pleaded.[90] As a general rule, an employer is not vicariously liable for the negligence of his independent contractor.[91] It is otherwise if the employer appoints an independent contractor through his own lack of care in which case liability will arise.[92]

The management corporation's argument that, under the *Housing Developers (Control and Licensing) Act*,[93] the developer could not delegate to an independent contractor the duty of building the strata development in a good and workmanlike manner was rejected by the Court. There was nothing in the said Act or the Rules made thereunder which provided to this effect. The Act was enacted "to control and license the business of housing developers" and did not deal with building standards.[94] The *Building Control Act*[95] which does, expressly recognises by way of statutory requirements that the tasks of designing the plans and supervising the construction of the building in a development "should be undertaken by competent professionals and contractors appointed by the developer", and not be undertaken by the developer personally.[96]

The Court of Appeal distinguished the New Zealand Court of Appeal case of *Mount Albert Borough Council v Johnson*[97] given the particular fact situation and the rather lax legal framework found therein. In *Mount Albert*, the developer was held liable for the negligence of the contractor which erected a block of flats. The Court had regard to the relationship between the developer and contractor which was informal, with no written contract between them, such that the developer was identified very much with the contractor. Further, no competent professional consultant was engaged to advise on the various technical requirements of the construction work. These factors will make it more unlikely for a developer to succeed in the defence of independent contractor. The fact situation in *Seasons Park* was different. A building contract was entered into between the parties. In addition, as noted above, the developer "engaged competent professional consultants to design and supervise the development/building contract" as required under the *Building Control Act*.[98]

In the event that the developer succeeds in pleading the defence of independent contractor, the management corporation would have to resort to bringing an action against the contractor in tort in respect of defects to the common property, which

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89 *Supra* note 36 at paras 74, 75.

90 *Seasons Park*, *supra* note 49 at paras 37-51.

91 For the exceptions to this general rule, see *Salsbury v Woodland* [1970] 1 QB 324 (CA).

92 *Seasons Park*, *supra* note 49 at para 37.

93 Cap 130, 1985 Rev Ed Sing.

94 *Seasons Park*, *supra* note 49 at para 41.

95 Cap 29, 1999 Rev Ed Sing.

96 *Seasons Park*, *supra* note 49 at para 41.

97 [1979] 2 NZLR 234 (CA) [*Mount Albert*]. *Cf Anglia Commercial Properties Ltd v South Bedfordshire District Council* (1984) 2 Con LR 99; *D & F Estates Ltd v Church Commissioners for England* [1989] 1 AC 177 at 209, 210 (HL) [*D & F Estates*] for the position under English law. In *D & F Estates*, the House of Lords held that the builders were not liable for the negligence of their sub-contractor in carrying out the plastering work as they had discharged their duty in employing a competent plasterer.

98 *Seasons Park*, *supra* note 49 at para 48.

action is not as straightforward as an action in contract.[99] As discussed above in relation to the contract action, the management corporation may resort to the same if it is able to secure the authorisation of unit owners who are original purchasers. This may be viewed as an easier option given that the developer will not be able to plead the defence of having hired an independent contractor.[100] However, as will be seen below, this brings with it problems in claiming the full amount of the damages suffered.

C. *The Case for Legislative Intervention*

A limited solution has been provided in regard to the position of sub-purchasers in relation to an action in contract. With effect from 20 July 2015,[101] a sub-purchaser is conferred a right under the standard sale and purchase agreement[102] prescribed in the *Housing Developers Rules*[103] to sue a developer in contract during the defects liability period in respect of faulty construction of the common property. This would be pursuant to the *Contracts (Rights of Third Parties) Act*.[104]

Earlier in *Seasons Park*, the Court of Appeal had suggested alternative arrangements to assist sub-purchasers in overcoming the difficulty involving the privity principle as they do not have a claim in contract against the developer. Among others, these arrangements would depend on whether the developer is agreeable to a novation agreement or if the original purchaser agrees to being a co-plaintiff to the action in contract, subject always to the sub-purchaser indemnifying the original purchaser as to costs and other possible liabilities.[105] Such alternative arrangements would no longer be necessary where the standard sale and purchase agreement applies.

The limited solution provided to sub-purchasers, as noted above, still does not resolve some of the difficulties faced by the management corporation when suing in respect of defects in the common property in a representative action in contract. This can be seen in the example given by the management corporation in *Seasons Park*.[106] In a strata development with 100 units (each unit having the same share value), the developer has retained or has yet to sell 40 units. The remaining 60 units are sold to purchasers, with some units having been sub-sold. The problem with the sub-purchasers highlighted in *Seasons Park* is now resolved with the amendments made to the standard sale and purchase agreement. However, when the management corporation brings an action in a representative capacity in contract against the developer, it still has to go through the procedure to secure the authorisation of the

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[99] *Ibid* at para 32. See further discussion below.

[100] As for original purchasers who are still the unit owners of the strata development, they have a remedy in contract against the developer for defective design or inadequate supervision by the architect or engineer whom the developer has appointed. The appointment of competent professionals to design the project and supervise its construction and an experienced contractor to build it is no defence to the developer given his contractual obligations to the unit owners who are original purchasers (*ibid* at para 42).

[101] See *Housing Developers (Amendment No 2) Rules 2015* (S 291/2015), r 1(2) [*2015 Amendments*].

[102] See cl 21 of Form 5 in the *2015 Amendments*, *ibid* which applies to strata developments.

[103] Cap 130, R 1, 2008 Rev Ed Sing, as amended by the *2015 Amendments*, *ibid*. Any reference hereinafter to the *Housing Developers Rules* includes any amendments pursuant to the *2015 Amendments*.

[104] Cap 53B, 2002 Rev Ed Sing, s 2(1)(a).

[105] *Supra* note 49 at para 43.

[106] *Ibid* at para 31.

purchasers so as to properly sue on their behalf which is cumbersome. It is obvious that the developer, who has retained or has yet to sell the 40 units, would not be joining in the action since the developer obviously has no right of action against himself even though he is the owner of the said units.

Then, there is the attendant requirement to seek proportionately abated damages. From the example given, the management corporation would only be representing, at most, 60 unit owners. Based on the rule of abatement enunciated in *Goodview Properties*,[107] the damages sought would have to be proportionately abated. As explained in *Seasons Park*, the management corporation would have to claim a proportionate part of the damages suffered "… corresponding to the ratio that the collective share value of the units owned by subsidiary proprietors of the units on whose behalf the action was taken bore against the total share value of all the units in the development."[108] This is because each unit owner is only a tenant-in-common of the common property to the extent of his or her share value.[109] Furthermore, the management corporation is not suing on behalf of the 40 units owned by the developer. Accordingly, the amount of damages awarded might not be adequate to carry out all the repairs as it is not possible to differentiate between the various common areas at which repairs are required to be undertaken.[110]

The alternative in bringing an action in tort by the management corporation is not entirely satisfactory either. As the Court of Appeal in *Seasons Park* acknowledged, "… a claim in tort is perhaps not as efficient as a claim in contract…".[111] In an action against the developer, there is the defence of independent contractor to contend with where the former has exercised proper care in engaging the independent contractor. As was also noted by the Court of Appeal in *Chia Kok Leong v Prosperland Pte Ltd*,[112] "… a claim in tort can also be defeated by the defence of independent contractor."[113]

Even though the management corporation can always go against the contractor in tort for the defects to the common property in the event that the defence of independent contractor is successfully raised by the developer, it was observed in *Chia Kok Leong* that a "… claim in tort is not a 'provision of a direct entitlement' and it is subject to establishing proximity and foreseeability and defences such as independent

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107 *Supra* note 48 at para 32.

108 *Supra* note 49 at para 29.

109 *LTSA*, *supra* note 1, s 13(1).

110 Compare the different language used in the New Zealand *Unit Titles Act 2010* (NZ) 2010/22 (Reprint 2014), ss 54(1), (2) where it is provided that the common property is "*owned*" by the body corporate with the unit owners being "*beneficially entitled*" thereto [emphasis added] (which is not the case in the Singapore *LTSA*). Given that this is so, it is easier to put forward the agency argument as the management corporation has ownership of and controls the common property on behalf of individual unit owners. In this regard, see Rod Thomas, "Efficient Outcomes—Recovering the Cost of Damage to Common Property under New Zealand Unit Titles Legislation" (2010) 16 New Zealand Business Law Quarterly 373 where he also argued (at 387) that the reference to the unit owners' beneficial entitlement is akin to the interest of a beneficiary under a trust. Although the article makes reference to *RSP Architects Planners*, *supra* note 36, unfortunately, it did not also have the benefit of the subsequent Court of Appeal decisions in *Goodview Properties*, *supra* note 48 and *Seasons Park*, *supra* note 49, which would have shown that the position is indeed different under the Singapore strata title legislation in this respect.

111 *Seasons Park, ibid* at para 32.

112 [2005] 2 SLR (R) 484 (CA) [*Chia Kok Leong*].

113 *Ibid* at para 36. See also *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] SGHC 38.

contractors."[114] Hence, there are more "obstacles" to overcome in a tort action as compared to one in contract.

The net result of the various Singapore Court of Appeal decisions discussed above is that the management corporation may not proceed with the action in contract in its own right against the developer because it does not have the *locus standi* and is dependent on the unit owners successfully establishing a cause of action at general law. Only the action in tort may continue and even then at the trial, the defence of independent contractor will be available to the developer unless the latter is found to be in breach of his duty of care in appointing the contractor. This is an unsatisfactory outcome which has also prompted the Court of Appeal in *Seasons Park* to advise as follows:

> While we acknowledge that a claim in tort is perhaps not as efficient as a claim in contract, it seems to us that a more comprehensive solution would be to await legislative intervention. The Legislature is far better equipped than the courts to deal with policy matters in the field of consumer protection which may require limitations or safeguards. …[115]

As it currently stands, the management corporation, unlike a sub-purchaser, is not entitled to sue the developer in its own right under the standard sale and purchase agreement in respect of defects in the common property. It is expressly provided thereunder that a person who is not a party to the agreement shall have no right under the *Contracts (Rights of Third Parties) Act* to enforce any of its terms.[116] In the event that the management corporation is similarly conferred a right under the agreement as in the case of a sub-purchaser, so that it can sue pursuant to the *Contracts (Rights of Third Parties) Act*,[117] the amount of damages recoverable by it should not be subject to the abatement rule laid down in *Goodview Properties*.[118] As the management corporation is under a statutory duty to maintain and upkeep the common property in a state of good repair,[119] it should be entitled to recover full damages representing the cost of putting right the defects in the common property.

Where the defects liability period in the standard sale and purchase agreement has expired, both the original purchasers and sub-purchasers would have no recourse in contract against the developer in respect of defects appearing thereafter in the common property. However, since the management corporation has the statutory duty to maintain the common property, its responsibility in this regard continues even after the expiry of the defects liability period. So, on the one hand, the developer is no longer liable in contract for such defects but, on the other hand, the management corporation continues to assume responsibility for the defects with no recourse in contract against any party. This inequity is reinforced where the faulty construction giving rise to serious defects can be clearly shown to be the developer's fault. In addition, the defects liability period is only for a short period of 12 months from

[114] *Ibid* at para 45.
[115] *Supra* note 49 at para 32.
[116] See cl 22 of the sale and purchase agreement in Form 5 of the Schedule to the *Housing Developers Rules*, *supra* note 103.
[117] *Supra* note 104.
[118] *Supra* note 48 at para 32.
[119] *BMSMA*, *supra* note 2, ss 29(1)(a), (b).

(i) the date the developer actually delivers vacant possession of the unit to the purchaser; or (ii) the 15th day after the purchaser receives the documents specified under item 3 of the Payment Schedule, whichever is the earlier.[120] Some defects, even serious ones, may take more than 12 months, or a short period after that, to surface. On the question of the allocation of risks, it would appear that the losses suffered by the management corporation on account of bad workmanship and defects in the common property occurring after the expiry of the defects liability period should rightfully be borne by the developer. It is part of the latter's business risks which should be insured against.

In regard to the defence of independent contractor, it is justified as developers need to rely on competent and suitably qualified professionals and licensed contractors to fulfil their obligations to purchasers. In fact, this reliance is spelt out as statutory requirements in the *Building Control Act*.[121] Hence, this explains the reluctance of the courts to disallow the defence in this area of the law. However, certain limitations may have to be placed on the defence of independent contractor and for developers to be held to higher standards of responsibility. This is to ensure that the defence of independent contractor does not impact negatively on future strata developments, with developers cutting on costs and resulting in more faulty constructions which affect unit owners, both financially and physically.

For the reasons above, and given the close relationship that exists between the developer and the management corporation as observed by the courts, legislative intervention should be resorted to so as to confer on the management corporation a deemed contractual remedy under the relevant strata title legislation to sue in respect of defects in the common property in its own right. This recognises that an action in contract is more efficient than one in tort. The legislature may put in place such limitations or safeguards that it thinks necessary. However, the management corporation should be able to avail itself of this remedy irrespective of whether the defects occurred during or after the defects liability period. A policy justification is that land is both scarce and expensive in Singapore, and a significant and substantial sum of money has to be expended to reside in a strata development which comes with the common property. This brings with it a greater expectation that the developer will not breach its contractual obligations in building the strata development. The recourse in contract against the developer is, accordingly, commensurate with the duty of the management corporation to maintain the common property beyond the defects liability period.

Alternatively, the position in New South Wales, as discussed above, may be adopted. The common property will be vested in the management corporation. It will also be expressly provided that the management corporation holds the common property in the strata development as agent for the unit owners as tenants-in-common proportional to their respective share value and for the same term and tenure as their respective units are held by them. Designating the management corporation as an "agent" holding the common property in the manner specified leads to the conclusion that it holds the common property as trustee for the unit owners.[122] Thus, the

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[120] See cl 17 of the sale and purchase agreement in Form 5 of the Schedule to the *Housing Developers Rules*, *supra* note 103.

[121] *Supra* note 95, ss 5, 7, 8.

[122] *Thoo*, *supra* note 16 at paras 20, 135.

management corporation can bring actions in respect of the common property in its own right as trustee for the unit owners. As the position in New South Wales illustrates,[123] this will avoid some of the difficulties encountered in proceedings brought by the management corporation in respect of the common property as seen in the Singapore cases.

IV. Duty of the Management Corporation in Respect of Structural Defects

Under the *BMSMA*, it is trite that a management corporation has the duty to control, manage and administer the common property for the benefit of all unit owners.[124] There are, however, certain instances not involving the common property where a management corporation is empowered to carry out the necessary work so as to remedy the situation.[125] A non-common property situation which mandates a management corporation to rectify is where there is a structural defect. It is expressly provided in the *BMSMA* that where any part of a building comprised in a unit contains any structural defect which affects or is likely to affect the support or shelter provided by that unit for, *inter alia*, another unit in that building, the management corporation shall carry out such work as is necessary to rectify the defect.[126]

This situation was considered in *Management Corporation Strata Title Plan No 367 v Lee Siew Yuen*.[127] The management corporation of a 41-year-old strata development had applied for an order from the Strata Titles Board that the unit owners rectify the defects found in the beams above the ceiling of the master bedroom toilet and that of the kitchen in their unit. This would depend on a determination of whether or not the beams in question were common property. If they were, then it was the statutory responsibility of the management corporation to repair and maintain them.[128] Otherwise, the responsibility would lie on the owners of the unit concerned.

The Board found in favour of the unit owners and the management corporation appealed. In dismissing the appeal, the High Court found that the defective beams were common property which meant that it was the responsibility of the management corporation to repair them.[129] The High Court went on to consider if the defective beams were structural defects as well which had the effect described above. If they were, this meant that the management corporation also had the responsibility to remedy the defects even if the defective beams were determined to be not common property in the first place. This was subject to the unit owners themselves not being in breach of their duty spelt out under the *BMSMA*.[130]

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[123] See Part II.A above.

[124] *BMSMA*, *supra* note 2, s 29(1)(a).

[125] *Ibid*, s 30.

[126] *Ibid*, s 30(5)(a).

[127] [2014] 4 SLR 445 (HC) [*Lee Siew Yuen*].

[128] *BMSMA*, *supra* note 2, s 29(1)(a), 29(1)(b)(i).

[129] *Lee Siew Yuan*, *supra* note 127 at para 34. The High Court held that the word "comprised" in the definition of common property in s 2(1) of the *BMSMA* must be taken to mean "include" and not "situated". Although located on top of the unit, the beams were not "comprised" in the unit as they were "part of a supporting infrastructure that [held] the entire building together" which was "crucial" in ensuring the building's structural integrity (*ibid* at para 29).

[130] *BMSMA*, *supra* note 2, s 63(a)(i).

The High Court found that the reports of both the engineers and expert engaged by the parties took the position that the defects in the beams were structural in nature which had the effect as described under the *BMSMA*[131] and which required immediate attention and urgent repair work to be undertaken. In this regard, the *Building Control Act*[132] was referred to wherein it was provided that "key structural elements" of a building means "the foundations, columns, beams, shear cores, structural walls, struts, ground anchors and such other parts of a building which are essential for its support and overall structural stability".[133] Defects in the "key structural elements" of a building would ordinarily amount to structural defects. As the defects had also significantly affected the load bearing capacities of the beams, they constituted a structural defect under the *BMSMA*.[134]

It may also be noted further that, in line with the requirement in the *BMSMA* that it is for the management corporation to rectify structural defects in the building, the *Building Control Act* provides that the owner of a subdivided building is the management corporation having control of the building.[135] The Commissioner of Building Control may, by notice served on the management corporation, require the building to be inspected[136] which duly took place in the instant case. The engineers engaged by the management corporation to inspect the affected beams made certain recommendations in its report. The Building and Control Authority then directed the management corporation (and not the unit owners) to expeditiously implement the measures as recommended in the report to prevent further deterioration of the building structure and to continue to maintain the building in good condition until the next inspection for the structural safety of the building. Any failure to comply by the management corporation is made an offence which attracts a fine or imprisonment or both.[137]

As the unit owners were not in breach of their duty under the *BMSMA*, which could have contributed to the defects in the beams,[138] the management corporation was, thus, duty bound to rectify the structural defects under the *BMSMA*.

As can be seen from *Lee Siew Yuen*, the *BMSMA* itself does not provide for a satisfactory determination of what amounts to a structural defect. Although it is not possible for the *BMSMA* to be all-encompassing as to the meaning of structural defects, this would, undoubtedly, better assist a management corporation in discharging its duty in this regard under the *BMSMA*.

To provide clearer guidance on what amounts to structural defects, it is suggested that the *BMSMA* be amended so that there is greater clarity in this regard. For example, providing a definition of "structural defects" in obvious situations (such as cases involving defects in beams or columns) or a reference to the definition of

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[131] *Ibid*, s 30(5)(a).
[132] *Supra* note 95.
[133] *Ibid*, s 2(1).
[134] *Supra* note 127 at para 38.
[135] *Supra* note 95, s 26(1), which pertains to the inspection of buildings.
[136] *Ibid*, s 28(1).
[137] *Ibid*, s 28(9).
[138] *Supra* note 127 at paras 44, 45. The High Court found that the unit owners did not cause or permit anything to be done to the beams in question that resulted in the structural defects. In addition, the defects were not due to any wilful omission on their part given that the beams were hidden in the false ceiling with the result that they would have had no knowledge of such defects (*ibid* at para 44).

"key structural elements" of a building in the *Building Control Act* may assist in removing uncertainty and would certainly be a welcome move. This would also align the *BMSMA* more with the *Building Control Act* to ensure consistency in this respect.

It may be noted that in the circumstances obtained in *Lee Siew Yuen*, the management corporation may have recourse to the moneys available in the sinking fund to undertake repairs of the structural defects in the beams concerned as it is for the purpose of carrying out its duties in this regard under the *BMSMA*. This is specifically catered for in the *BMSMA* which provides that: "A management corporation shall not disburse any moneys from its sinking fund *otherwise* than for the *purpose* of —… (b) carrying out its powers, authorities, *duties* or functions under [the] Act."[139]

In the event that there are insufficient funds available in the sinking fund, the management corporation may levy contributions on the unit owners in accordance with the *BMSMA*.[140] Under the *BMSMA*, the "payment of any expenditure lawfully incurred by a management corporation in the course of the exercise of any of its powers or functions or the carrying out of its duties or obligations" is "guaranteed by the [unit owners] who, for the time being and from time to time, comprise the management corporation.'[141]

As structural defects affect the safety and integrity of the entire building, it is sound policy that the *BMSMA* sees it fit to impose the duty on the management corporation which is in a better position to coordinate and carry out the appropriate and necessary repairs which will ultimately benefit all the unit owners concerned notwithstanding that there may be units which may not suffer from structural defects. In turn, it is only fair that as the unit owners as a whole benefit from the repairs of the structural defects, they should fund the rectification work through the sinking fund to which they contribute.

V. Conclusion

Being a creature of statute, a management corporation can only have the legal status as set out in the *LTSA* and *BMSMA* in respect of the common property. To import a concept which is applicable in a particular strata title jurisdiction and which is different from the Singapore context would cause confusion which should be avoided. For the various reasons ventilated above, legislative intervention to confer on a management corporation a substantive cause of action in its own right in respect of the common property is justified. This is in light of the various shortcomings and difficulties faced by it in pursuing actions, either in contract or in tort, for unit owners. There is a need for greater clarity in the *BMSMA* as to what amounts to structural defects in a strata development which will better assist a management corporation when discharging its duty in this respect. A greater alignment of the *BMSMA* and the *Building Control Act* which promotes certainty and ensures consistency in this respect would be a welcome move.

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[139] *BMSMA*, *supra* note 2, s 38(6) [emphasis added].
[140] *Ibid*, s 40.
[141] *Ibid*, s 44(1).