

## **TOWARDS ENFORCEABLE STANDARDS, RULES AND RIGHTS IN STRATA MANAGEMENT: AN ANALYSIS**

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### **ABSTRACT**

The Strata Management Act 2013 (Act 757) and the Strata Titles Act 1985 (Act 318) confer broad powers on strata communities to self-manage and self-regulate through body corporates (termed Strata Management Bodies). The policy behind these legislations promotes maximum autonomy and self-regulatory powers for Strata Management Bodies to, through their internal rule-making and decision-making processes, govern themselves in ways that best suit their needs and interests. Consequently, judicial and administrative recognition of Strata Management Bodies' autonomy has left a lacuna of matters which are not justiciable by the Courts and/or the Strata Management Tribunal. This adversely affects homeowners' ability to access substantive justice. This article, through doctrinal analyses of key Malaysian and Western Australian cases, sheds light on a selection of strata disputes illustrating the inadequacies of the law on strata title and strata management, and the lack of enforceable standards of good management practices. The article also explores how the apathetic application of general principles of company law to strata management bodies has left a lacuna of non-justiciability. Consequently, this article argues the case for strata law reform. It advocates for law reform that promulgate standards, rules and rights of good strata management as enforceable law, rather than mere general, high-level, unenforceable and unjusticiable principles.

**Keywords:** Strata Management, Management Corporation, Common Property, Rights, Corporations, Malaysia, Western Australia.

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## **KE ARAH PIAWAIAN, PERATURAN DAN HAK-HAK YANG BOLEH DILAKSANAKAN DALAM PENGURUSAN STRATA: SATU ANALISA**

### **ABSTRAK**

Akta Pengurusan Strata 2013 (Akta 757) dan Akta Hakmilik Strata 1985 (Akta 318) memberi kuasa luas kepada masyarakat strata untuk menguruskan sendiri dan mengawal selia melalui badan korporat (yang dinamakan sebagai Badan Pengurusan Strata). Dasar di sebalik undang-undang ini menggalakkan autonomi maksimum dan kuasa pengawalseliaan untuk Badan Pengurusan Strata mentadbir dengan cara yang paling sesuai dengan keperluan dan kepentingan mereka melalui proses pembuatan peraturan dan keputusan dalaman mereka sendiri. Namun, pengiktirafan kehakiman dan pentadbiran terhadap autonomi Badan Pengurusan Strata telah menyebabkan kelompongan dalam perkara-perkara yang tidak ada justifikasi oleh Mahkamah dan/atau Tribunal Pengurusan Strata. Ini memberi kesan buruk kepada keupayaan pemilik rumah untuk mencapai keadilan yang substansif. Melalui analisis doktrin mengenai kes-kes utama Australia dan Barat Australia, artikel ini memberi gambaran tentang pemilihan pertikaian strata yang menggambarkan kekurangan undang-undang mengenai hakmilik dan pengurusan strata, dan kekurangan piawaian yang boleh dikuatkuasakan dalam amalan pengurusan yang baik. Artikel ini juga menerangkan bagaimana ketidakacuhan aplikasi prinsip umum undang-undang syarikat kepada badan-badan pengurusan strata telah meninggalkan kelompongan undang-undang yang tidak wajar. Oleh itu, artikel ini membincangkan kes pembaharuan undang-undang strata. Ia menganjurkan pembaharuan undang-undang yang menonjolkan piawaian, peraturan dan hak-hak pengurusan strata yang baik sebagai undang-undang yang boleh dikuatkuasakan, bukannya hanya sekadar prinsip umum di peringkat tinggi yang tidak boleh dikuatkuasakan dan tidak wajar.

**Kata kunci:** Pengurusan Strata, perbadanan pengurusan, harta bersama, hak-hak, perbadanan-perbadanan, Malaysia, Australia Barat.

## INTRODUCTION

Strata Management Bodies are private ‘mini-governments’<sup>1</sup> that administer and manage the affairs of subdivided buildings, land parcels and common property in a strata scheme.<sup>2</sup> As creatures of statute,<sup>3</sup> these Strata Management Bodies operate within a framework prescribed by the Strata Titles Act 1985 and the Strata Management Act 2013. Within this framework, Strata Management Bodies are given powers as delegated rule-making and decision-making bodies. The law recognises the autonomy of Strata Management Bodies to self-regulate and decide for themselves the best form of governance to manage their affairs.<sup>4</sup> This stance is largely a product of the prevailing policy approaches to administrative law – a concept that Harlow and Rawlings term the ‘green light’ theory.<sup>5</sup>

This theory holds that control and direction should come internally from rule-makers and the decision-makers themselves in upholding high standards of public administration and policy.<sup>6</sup> It directs that good governance should be developed through co-operation between the internal political actors, rather than redress bad governance through the

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<sup>1</sup> Quasi-public and non-government entities. See generally, Che Norlia Mustafa, “The Trend of Judicial Thinking in Reviewing Corporate Decisions in Malaysia,” *International Journal of Business and Society* 13(2) (2012): 107.

<sup>2</sup> Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (CRC Press, 2016), 228-36.

<sup>3</sup> Strata Titles Act 1985 (Act 318) ss 17, 17A (“**STA**”); Strata Management Act 2013 (Act 757) s 17 (“**SMA**”); See also *3 Two Square Sdn Bhd v Perbadanan Pengurusan 3 Two Square & Ors; Yong Shang Ming (Third Party) (“Yong”)*[2018] MLRHU 84, [30].

<sup>4</sup> Cornelius van der Merwe, “The Various Policy Options for the Settlement of Disputes in Residential Community Schemes,” *Stellenbosch Law Review* 25 (2014): 385, 386.

<sup>5</sup> See specifically, Chan Sek Keong, “Judicial Review – From Angst to Empathy,” *Singapore Academy of Law Journal* (2010): 469, [29]-[30] 480, referring to *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12. See generally, Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 3<sup>rd</sup> ed, 2009).

<sup>6</sup> Chan, “Judicial Review – From Angst to Empathy,” [29] 480, [30] 480, [34] 481-2.

Courts.<sup>7</sup> Courts play a supporting role by delimiting the bounds of discretion to which strata rule-makers and decision-makers may operate within.<sup>8</sup>

Consequently, Strata Management Bodies are given broad general powers. Courts are slow to interfere where illegalities are not present.<sup>9</sup> Courts and Tribunals generally defer matters to Strata Management Bodies to allow disputes to be settled through the internal mechanisms of strata communities.<sup>10</sup> While this allows the development of good practices specific to that particular strata community, it leaves a lacuna of matters that are not justiciable. This bears tremendous impact on the lives of the people.

This article argues that the reality of strata law is that the broad powers given to Strata Management Bodies has failed to instil in strata communities, good governance. The legislation does not prescribe enforceable standards of good governance. Where good management practices do not materialize internally, strata homeowners are unable to seek redress for wrongs and to right these poor management practices because there is nothing that can be enforced against Strata Management Bodies. In this regard, this article considers that reforming the law to give enforceable rights to homeowners and enhancing the body enforceable management standards, as means of inculcating good management practices, is apposite.

## METHODOLOGY

The discussion will firstly trace a broad overview of strata management laws in Malaysia to give the discussions context. Then, it will look at some of the issues that have arisen in the Courts and Tribunals – a selection of immediate and surface issues – as a means of bringing attention to the underlying systemic issues, and then analyses how these systemic issues severely cause injustice to homeowners. Finally, this

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> E.g., *Ong Hock Eam v Perbadanan Pengurusan Komtar Fasu Satu & Another Appeals (“Komtar Fasu Satu”)* [2018] MLJU 119 [25].

<sup>10</sup> Van der Merwe, “The Various Policy Options for the Settlement of Disputes in Residential Community Schemes,” 386.

article discusses ways law reform could better resolve these issues. This article adopts a legal doctrinal methodology. It will analyse some of the key Malaysian cases, legislation, principles and commentary on strata title and strata management. This article will also refer to key cases in Western Australia to complement the discussion.

## AN OVERVIEW OF STRATA MANAGEMENT

### Legislative Framework

The law pertaining to strata titles in Malaysia has historically been legislated along the lines of the New South Wales Conveyancing (Strata Titles) Act 1961.<sup>11</sup> This broadly sets down the law on subsidiary titles in the National Land Code 1965 (NLC).<sup>12</sup> Throughout the 1970s, Malaysia faced rapid housing growth, where innovations in construction and architecture made provisions in the NLC inadequate. The NLC was further amended in 1977,<sup>13</sup> 1979,<sup>14</sup> and in 1981,<sup>15</sup> before being repealed and replaced by the Strata Titles Act 1985 (STA).<sup>16</sup>

As strata communities grew and larger developments were built, problems arose in matters relating to disagreements and disputes among neighbours, the management and administration of common property, and facilities management, amongst others. Amendments to the STA introduced provisional titles for phased developments,<sup>17</sup> greater buyer-protections for purchasers,<sup>18</sup> the Strata Titles Board for dispute resolution,<sup>19</sup> pre-completion qualified strata title,<sup>20</sup> streamlined and

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<sup>11</sup> As observed by Abdul Malik Ishak J in *John Denis de Silva v Crescent Court Management Corporation* [2006] 1 MLRH 233, [10]; See also *Zarina Tan Sri Jaafar & Ors v Perbadanan Pengurusan Ixora* [2010] 1 MLRH 390.

<sup>12</sup> Act 56 (Malaysia) ss 355-374.

<sup>13</sup> Act A386.

<sup>14</sup> Act A444.

<sup>15</sup> Act A518.

<sup>16</sup> Act 318 (Malaysia).

<sup>17</sup> Strata Titles (Amendment) Act 1990, Act A753 (Malaysia).

<sup>18</sup> *Ibid.*

<sup>19</sup> Strata Titles (Amendment) Act 2001, Act A1107 (Malaysia); This allowed the Director of Land and Mines in a State and the Land Administrator to take over

simplified rules governing Management Corporations,<sup>21</sup> the concept of exclusive use,<sup>22</sup> and private land parcels registered on strata title.<sup>23</sup>

In 2007, Parliament enacted the Building and Common Property (Maintenance & Management) Act 2007 (BCPMMA) to complement the STA.<sup>24</sup> This divided the law on strata in Malaysia into two distinct, but complementary provinces:<sup>25</sup> strata titles (as a registrable land title), and strata management and administration.<sup>26</sup> The changes brought by this Act were however short-lived. Words within the Act were open to multiple interpretations.<sup>27</sup> The BCPMMA was ineffective in ensuring good governance.<sup>28</sup> Strata communities were often plagued with unprofessional building managers and management practices.<sup>29</sup>

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the functions of a dysfunctional Management Corporation, and the prosecution of offences under the STA, with written consent of a public prosecutor.

<sup>20</sup> Strata Titles (Amendment) Act 1996, Act A951 (Malaysia).

<sup>21</sup> *Ibid.* This amendment has also made the procedures for voting and the tabling of special resolutions less stringent than those of companies, to allow for a more flexible decision-making process among council members of the Management Corporation.

<sup>22</sup> Limited common property and sub-management corporations; Strata Titles (Amendment) Act 2013, Act A1450 (Malaysia).

<sup>23</sup> Strata Titles (Amendment) Act 2007, Act A1290 (Malaysia).

<sup>24</sup> Act 663 (Malaysia); See also Strata Titles (Amendment) Act 2007, Act A1290 (Malaysia).

<sup>25</sup> For a summary of the current law on stratified properties in Malaysia, see e.g. Nor Asiah Mohamad, Azlinor Sufian and Sharifah Kader. 2017. "The Potential of Waqf for Maintenance and Management of Stratified Properties in Malaysia," *IUM Law Journal*, 25(2), 229-256. <https://doi.org/10.31436/iiumlj.v25i2.308>

<sup>26</sup> *Ibid.*

<sup>27</sup> E.g., words such as 'maintenance account' and 'proxy'; see generally, *Saujana Triangle Sdn Bhd v JMB Perdana Exclusive and Tropics* [2017] MLRHU 685, [37], referring to Hansard on the Strata Management Bill 2012, second reading, 29 September 2012.

<sup>28</sup> Malaysia, Dewan Rakyat. 2012. *Parliamentary Debates*. 27 September, 41. Fong Kui Lun.

<sup>29</sup> Malaysia, Dewan Rakyat. 2012. *Parliamentary Debates*. 26 November, 82, 89.

This led the Parliament to enact the Strata Management Act 2013 (SMA),<sup>30</sup> repealing the BCPMMA. Significantly, it abolished the STB and replaced it with a more robust Strata Management Tribunal.<sup>31</sup> The SMA also introduced new standard by-laws,<sup>32</sup> and gave more general and wider ranging powers to Strata Management Bodies. It gave these bodies the power to distrain,<sup>33</sup> enforce and recover outstanding charges, contributions and debts from unit owners,<sup>34</sup> including purchasers,<sup>35</sup> and successors-in-title<sup>36</sup>. This power was so broad that it allowed the Strata Management Body, regardless of whether it's claim would be time-barred in the Courts, to bring the claim at the Strata Management Tribunal. The Limitations Act 1953 did not apply to Strata related matters.<sup>37</sup> The Act also created offences which can be tried at the Tribunal.<sup>38</sup>

Broadly speaking, the SMA gave Strata Management Bodies a very broad and general scope of powers and discretion to manage the affairs of their strata communities. As will be discussed, this broad power and discretion is the source of conflict and injustice in strata communities.<sup>39</sup> Further, the SMA continues to be ineffective in compelling good management practices.

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<sup>30</sup>Strata Management Act 2013, Act 757 (Malaysia). (SMA)

<sup>31</sup> See pt ix, x, ss 105, 142 – 145, sch 4 SMA

<sup>32</sup> These by-laws can render any existing by-laws void to the extent of the inconsistency; See r 5 & 28, sch 3 Strata Management (Maintenance and Management) Regulations 2015, P. U. (A) 107 (Malaysia) (SMMMRR).

<sup>33</sup> Ss 34, 79 SMA; This is noted not to be effective, as those items may not necessarily belong to the owner. See Malaysia. Dewan Rakyat. 2012. *Parliamentary Debates*, 27 September, 50. R Sivarasa.

<sup>34</sup> Developer: SMA s 9(3)(d), 12(5); JMB: SMA s 21(2)(d), 21(4), 25(6), 33(3), 34; MC: SMA s 52(4), 59(2)(d), 60(4)-(6), 61(4)-(5), 68(4), 78; Sub-MC: SMA ss 77, 78; See also *Badan Pengurusan Bersama Kompleks Pandan Safari Lagoon v Tam Cheng Meng* [2018] MLRHU 394, [25]-[47].

<sup>35</sup> See *Perbadanan Pengurusan Megan Ave 1 v Harcharan S Sidhu & Anor* [2017] 11 MLJ 736; SMA ss 52, 52(8), 60(6), 79(13).

<sup>36</sup> See *Brightville Sdn Bhd v Pantai Towers Management Corporation & Another Appeal* [2018] 4 MLRA 457; SMA ss 60(5) – (6), 61(5) – (6).

<sup>37</sup> *Ibid*, [47].

<sup>38</sup> Malaysia. Dewan Rakyat. 2012. *Parliamentary Debates*, 27 September, 19. Siti Mariah Binte Mahmud.

<sup>39</sup> David Kennedy, *A World of Struggle* (Princeton University Press, 2018) 239-41.

## Strata Management Framework

This broad power can be further classified according to the types of functions and activities the STA and SMA enables Strata Management Bodies to carry out:

### *Corporate and Administrative Character*

Strata Management Bodies are incorporated under the Strata Titles Act 1985<sup>40</sup> and Strata Management Act 2013.<sup>41</sup> Consequently, they operate within the larger framework of governance governing the federal legislature,<sup>42</sup> and inherit some aspects of an administrative body's legal personality.<sup>43</sup> They are charged with statutory powers and duties. Courts, in the spirit of the 'green light' theory, are usually slow to interfere with the affairs of strata governance unless the Strata Management Bodies have '... committed an error of law going to its jurisdiction'.<sup>44</sup> This system of governance recognizes the autonomy of strata rule-making and

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<sup>40</sup> ss 17, 17A Act 318 (Malaysia) ("**STA**")

<sup>41</sup> s 17 Act 757 (Malaysia) ("**SMA**"); See 3 *Two Square Sdn Bhd v Perbadanan Pengurusan 3 Two Square & Ors; Yong Shang Ming (Third Party)* ("**Yong**") [2018] MLRHU 84, [30]; *Fu Loong Lithographer Pte Ltd and Others v Mok Wing Chong* ("**Fu Loong Lithographer**") [2017] SGHC 97, [81].

<sup>42</sup> See Kementerian Kesejahteraan Bandar Perumahan dan Kerajaan Tempatan, "OPS Akta 757 di Astaria Apartment & Ayers Tower" (Media Release, KPKT/BPK/19/7/4 Klt.46 (5), 13 February 2017), 2 [5], [6]. <[http://www.kpkt.gov.my/resources/index/user\\_1/media\\_akhbar/2017/SM OPS\\_Akta\\_757\\_Astaria\\_Apartment\\_&\\_Ayers\\_Tower.pdf](http://www.kpkt.gov.my/resources/index/user_1/media_akhbar/2017/SM OPS_Akta_757_Astaria_Apartment_&_Ayers_Tower.pdf)>.

<sup>43</sup> *Roslan Osman & Anor v Joint Management Body – Amcorp Trade Centre & Anor & Another Appeal* ("**Amcorp Trade Centre**") [2012] MLRHU 262; *Sandanatavan Marimuthu & Anor v Badan Pengurusan Bersama – PV3; TSS Security Services Sdn Bhd (Third Party)* [2014] MLRHU 1493; [2015] 2 CLJ 844.

<sup>44</sup> *Perbadanan Pengurusan Menara Gurney & Ors v Pesuruhjaya Bangunan, Majlis Perbadanan Pulau Pinang & Anor* ("**Menara Gurney**") [2010] 3 MLRH 256, [17]; See also, *Amcorp Trade Centre*, [8], referring to *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374.

decision-making bodies to self-regulate and self-manage their affairs, subject to law.<sup>45</sup>

The law on strata exists to facilitate communal living. A feature of strata schemes is the distinction between individual and shared property.<sup>46</sup> The former is owned solely by its owner. The latter is owned communally by parcel owners, who collectively manage the common property. Individual owners would band together and elect a committee who will make decisions for the whole community. But where the ownership of parcels changes hands from time to time, there was a legislative need for a body whose existence survived the individuals who might at any one time constitute its membership.<sup>47</sup> This led to the reception of the concept of *corporations aggregate* into strata title and strata management law,<sup>48</sup> where the common property would vest with the Strata Management Body Corporate consisting of all the parcel owners, who would have a share in the body corporate.<sup>49</sup> The body corporate manages the common property on behalf of parcel owners for their collective benefit.<sup>50</sup> It is a body that has a perpetual succession and a

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<sup>45</sup> Cornelius van der Merwe, “The Various Policy Options for the Settlement of Disputes in Residential Community Schemes,” 386.

<sup>46</sup> *Management Corporation Strata Title Plan No 940 v Lim Florence Marjorie (“Lim Florence Marjorie”)* [2018] SGHC 254, [1].

<sup>47</sup> Thomas Bathurst, “The Historical Development of Corporations Law” (Lecture, Francis Forbes Society for Australia Legal History Introduction to Australian Legal History Tutorials, Sydney, 3 September 2013). 2 [6] <<http://www.austlii.edu.au/au/journals/NSWJSchol/2013/34.pdf>>.

<sup>48</sup> *Ibid.*

<sup>49</sup> Management by Joint Management Body, consists of the developer and purchasers, s 17(4) SMA; management by MC: s 17(3) STA ; sub-MC: s 63(2) SMA; See also *Sri Wangsaria Management Corporation v Yeap Swee Oo @ Yeap Guan Cheng & Anor & Another Appeal (“Sri Wangsaria”)*[2009] 14 MLRH 635, [17]; s 17B STA.

<sup>50</sup> ss 59, 64, sch 3 para 3 SMA; sch 3, para 4 *Strata Management (Maintenance & Management) Regulations 2015*, P.U. (A) 107 (Malaysia); *Dato’ Manokaran Veraya v Perbadanan Pengurusan Apartmen Kayangan & Other Appeals* [2018] MLRAU 443, [30] – [32].

common seal, and which may sue and be sued, and may sue on behalf of one or many parcel owners.<sup>51</sup>

Where decision-making are concerned, the STA and SMA have incorporated the company law concept of majority rule into strata law,<sup>52</sup> affording Strata Management Bodies aspects of a company's legal personality.<sup>53</sup> Corollary, the Courts will not interfere with the internal management of companies acting within their powers.<sup>54</sup> Where a majority of unit owners can ratify the *bona fide* act, the Court will not interfere.<sup>55</sup> Consequently, Strata Management Bodies have the power to control and manage the affairs of the strata scheme with minimal judicial interference.

### *Institutional Structure*

The management of common property is done through a Strata Management Body<sup>56</sup> consisting of all the unit owners.<sup>57</sup> The Strata

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<sup>51</sup> s 17(3) SMA; *Per: Alfred Lam Choong Choy; Ex Parte: Downtown Condominium Joint Management Body & Another Appeal* [2017] 2 MLRH 422, [24]. *Perbadanan Pengurusan Endah Parade v Magnificent Diagraph Sdn Bhd* [2014] 5 CLJ 881, [26]-[29].

<sup>52</sup> Bathurst, "The Historical Development of Corporations Law," 5 [14].

<sup>53</sup> See E.g., *Ong Hock Eam v Perbadanan Pengurusan Komtar Fasu Satu & Another Appeals* ["**Komtar Fasu Satu**"] [2018] MLJU 119; [2018] MLRHU 89, [25]; *Yong*, [56]; *Palm Springs Joint Management Body & Anor v Muafakat Kekal Sdn Bhd* [2016] 2 MLRA 523, [4]; *Ekuiti Setegap v Plaza 393 Management Corporation* ("**Ekuiti Setegap**") [2018] 3 MLRA 342, [36], referring and following *Perbadanan Pengurusan Endah Parade v Magnificent Diagraph Sdn Bhd* [2013] 4 MLRA 570, 586-7; See also Strata Titles Act 1985 (WA) s 32(3)(d).

<sup>54</sup> See generally, *Foss v Harbottle* (1843) 67 ER 189; See also, Aishah Bidin, "Legal Issues Arising From Minority Shareholders' Remedies in Malaysia and United Kingdom," *Jurnal Undang-undang dan Masyarakat* 7 (2003): 51, 52-3.

<sup>55</sup> *Abdul Rahim Suleiman & Anor v Faridah Mohammed Lazim & Ors* [2016] MLRAU 322, [59] referring to *Howard Smith Ltd v Ampol Petroleum Ltd & Others* [1974] 1 All ER 1126; *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189.

<sup>56</sup> Incorporated under the Strata Management Act 2013, Act 757 (Malaysia).

<sup>57</sup> Management by JMB, consists of the developer and purchasers, s 17(4) SMA; management by MC: s 17(3) STA; sub-MC: s 63(2) SMA; See also *Sri*

Management Body holds title to the common property,<sup>58</sup> and manages the common property on behalf of unit owners collectively.<sup>59</sup> The duties of the management body are,<sup>60</sup> amongst other things, primarily to ‘control, manage, and administer the common property (including common services like janitorial services, lift maintenance, water tank maintenance, electrical equipment maintenance, landscaping, security, painting works, repainting,<sup>61</sup> etc), pay rents, rates, utility bills, and insurance premiums, and discharge other obligations imposed by the Act’.<sup>62</sup> Other duties include enforcing the by-laws, ensuring the accounts are in order, audited and provided to unit owners, holding general meetings, and recovering due debts, etc.<sup>63</sup> In the fulfilment of those duties, the powers of the management body include ‘to determine, impose [and collect] charges (for the maintenance account/fund),<sup>64</sup> contribution to sinking fund from the parcel owners’,<sup>65</sup> authorize expenditures, and make by-laws,<sup>66</sup> etc.<sup>67</sup>

The Strata Management Body manifests itself in three successive stages – *one*, as the Developer,<sup>68</sup> *two* as the Joint Management Body (JMB),<sup>69</sup> and *three*, as the Management Corporation (MC).<sup>70</sup> The Strata Management Body can only manifest itself in one form at any given time

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*Wangsaria Management Corporation v Yeap Swee Oo @ Yeap Guan Cheng & Anor & Another Appeal* [2009] 14 MLRH 635, [17].

<sup>58</sup> s 17B STA.

<sup>59</sup> sch 3 para 3 SMA; *Dato’ Manokaran Veraya v Perbadanan Pengurusan Apartmen Kayangan & Other Appeals* [2018] MLRAU 443, [30] – [32].

<sup>60</sup> ss 9, 21, 22, 59, 64 SMA.

<sup>61</sup> This is paid out the sinking fund: s 24 SMA.

<sup>62</sup> *Sri Wangsaria Management Corporation v Yeap Swee Oo @ Yeap Guan Cheng & Anor & Another Appeal* [2009] 14 MLRH 635, [17].

<sup>63</sup> Pt iv ch 2, 3, pt v ch 2, 3 SMA.

<sup>64</sup> Sss 10, 23, 50, 60, 66 SMA

<sup>65</sup> Ss 11, 24, 51, 61, 67 SMA; *Saujana Triangle Sdn Bhd v JMB Perdana Exclusive and Tropics* [2017] MLRHU 685, [41].

<sup>66</sup> Ss 32, 70, 71; SMMMR sch 3 SMA.

<sup>67</sup> Ss 9, 10, 11, 21, 22, 23, 24, 59, 64, sch 2 SMA; *Strata Management (Maintenance & Management) Regulations 2015*, P. U. (A) 107(SMMMR)(Malaysia)

<sup>68</sup> Pt iv ch2, pt v ch 2 SMA

<sup>69</sup> Pt iv ch 3 SMA

<sup>70</sup> Pt iv ch 3, 4 SMA

– ie: a JMB cannot co-exist with the MC.<sup>71</sup> The developer, upon delivering the first vacant possession, has one year to establish the JMB. The JMB is an interim body established for the purpose of carrying out functions of the MC pending the establishment of the MC.<sup>72</sup> The Joint Management Body is headed by a Joint Management Committee, which automatically consists of the developer.<sup>73</sup> Once the strata title deeds are issued to individual lot owners, and the MC has been established, the JMB automatically dissolves.<sup>74</sup> The duties of the JMB and MC are congruent.<sup>75</sup> The latter, however, is able to establish sub-MCs while the former is unable to.<sup>76</sup>

### *Political Structure*

The functions of the strata management body are undertaken by a Management Committee (or Joint Management Committee), who are elected every year at an Annual General Meeting.<sup>77</sup> Unit owners, especially those who own a sizeable share of the aggregate share value, or those who otherwise are interested in personally managing the strata development for a multitude of reasons that will become apparent later in the article, have a vested interest in being elected to that committee.

The types of strata owners can be categorized into three main groups based on the nature of their interests in the strata scheme. *One*, proprietors who consider their units to be of business interests. This group is usually comprised of developers, commercial unit owners,

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<sup>71</sup> *Park Access Sdn Bhd & Ors v Badan Pengurusan Prima Avenue Dan DPCC Fasa 1 (Blok G, H, I) & Other Appeals (“Prima Avenue”)* [2018] MLRAU 204, [45]-[50]; See also *Palm Springs Joint Management Body & Anor v Muafakat Kekal Sdn Bhd* [2016] 2 MLRA 523, [29]-[31], referring to and affirming *Cayman Development (SP) Sdn Bhd v. Badan Pengurusan Bersama Kompleks Cayman & Anor* [2013] 6 MLRH 286; [2014] 8 MLJ 894.

<sup>72</sup> *Palm Springs Joint Management Body & Anor v Muafakat Kekal Sdn Bhd* [2016] 2 MLRA 523, [29].

<sup>73</sup> S 22(2)(e) SMA.

<sup>74</sup> *Ibid.*

<sup>75</sup> Ngian Siew Siong (ed), *Strata Management Handbook* (REHDA Institute, 2018) 8-16.

<sup>76</sup> s 63 SMA.

<sup>77</sup> sch 2 para 2 SMA.

retail/hotel operators and owners of mixed developments. These are unit owners who operate businesses on the development, or those who plan to make shorter term profits on the development.<sup>78</sup> *Two*, investors. In contrast to the above-mentioned group, this category of owners views their units as longer-term investment assets, rather than merely short-term business interests. While they may, like the above-mentioned group, lease out their units for some short-term gain, they are more concerned with building upkeep and long-term resale profit. *Three*, owner-occupiers. Most of these owners view strata units (mainly apartments), like investors, to be expensive financial investments. While that remains true for almost all owner-occupiers, owner-occupiers may have bought into the strata development for the lifestyle that it purports to offer.<sup>79</sup> Other than for long term monetary gain, owner-occupiers may have invested in strata property for the lifestyle facilities, and/or theme of the development. As Goh notes, the salient features of condominium and apartment living is security, and endless opportunities for developers to promote under the rubric of a ‘modern lifestyle’, different themes of living, e.g. romantic, exotic, exclusive, green, grand, majestic, etc, housing projects.<sup>80</sup>

The potential asymmetry between the interests of these different strata owners present in a strata development, difference in bargaining power, susceptibility to power-broking, more often than not, form the catalyst for conflicts in the strata development.<sup>81</sup> In particular, it will be noted that developers, by virtue of automatically being vested with management powers in the developers’ and joint management body stage of strata management, have the propensity to engage in practices which are unfair and inequitable for gain.

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<sup>78</sup> Jan Warnken, Roslyn Russell and Bill Faulkner, “Condominium Developers in Maturing Destinations: Potentials and Problems of Long-term Sustainability,” *Tourism Management* 24 (2003): 155.

<sup>79</sup> *Ibid.*

<sup>80</sup> Beng-Lan Goh, “Property Developers and the Kampung Serani Conflict,” in *Modern Dreams: An Inquiry into Power, Cultural Production, and the Cityscape in Contemporary Urban Penang, Malaysia* (Cornell South East Asia Program, 2002), 173, 184-7.

<sup>81</sup> E.g., *Frost v Miller* [2018] QSC 206, [17].

### Overview

The law pertaining to strata management can be characterised as a mix of administrative and company law. Often, disputes arising from strata living are resolved through the application of administrative law and company law principles.<sup>82</sup> There are however, problems with attributing the legal personality of public authorities and companies (incorporated under the Companies Act) to strata management bodies.

### SOME ISSUES IN STRATA MANAGEMENT

Behind the corporeal facade of condominiums and apartment complexes often caricatured as ‘modern’, ‘luxurious’, ‘exclusive’, ‘prestigious’, amongst others, lies an incorporeal abyss of power-tripping,<sup>83</sup> manipulative, autocratic, feudal,<sup>84</sup> proxy war-like,<sup>85</sup> and toxic,<sup>86</sup> politicking, power-plays,<sup>87</sup> and power-broking by internal political actors

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<sup>82</sup> E.g., *Amcorp Trade Centre*, where the High Court applied principles of Administrative Law to Strata Management Bodies. See also E.g. *Ong Hock Eam v Perbadanan Pengurusan Komtar Fasu Satu & Another Appeals* [2018] MLJU 119; [2018] MLRHU 89, [25], where the High Court applied principles of company law to strata/management bodies.

<sup>83</sup> Jamie McKinnell, “Real Estate Nightmares and Sydney Strata disputes – what happens when your neighbour is a bully,” *ABC News* (online), 18 December 2018 <<https://www.abc.net.au/news/2018-12-18/real-estate-disputes-what-happens-when-your-neighbour-is-a-bully/10606564>>.

<sup>84</sup> Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (Routledge, 2017).

<sup>85</sup> Keith Jackson, “Strata board bullies can turn community living into a proxy war,” *Sydney Morning Herald* (online), 5 January 2012 <<https://www.smh.com.au/politics/federal/strata-board-bullies-can-turn-community-living-into-a-proxy-war-20120104-1pl5l.html>>.

<sup>86</sup> Hazel Easthope, Bill Randolph and Sarah Judd, *Governing the Compact City: The Role and Effectiveness of Strata Management Final Report* (City Futures Research Centre, University of New South Wales, 2012) 98.

<sup>87</sup> Jackson, “Strata board bullies can turn community living into a proxy war”.

who have huge vested interests in the ownership and management of a strata development.<sup>88</sup>

It is in the inherent nature of owners who individually own most of the share value (ie: developers, hotel, retail and commercial unit owners), and unit owners who see their units as business interest or ancillary in a business venture, to make profits and minimize expense. Apart from merely selling the unit parcels, or operating businesses in those units, there is money to be made in the management of the development –ie: in maintaining the common property, ensuring that there are appropriate and adequate building services and facilities, security services, concierge services, clubhouse facilities, cafes, restaurants, reselling utilities,<sup>89</sup> etc. There is also money to be made in managing the common property and building in a manner that is conducive to their business interests. Furthermore, money can also be made by alienating part of the common property in establishing lots for sale, or in re-purposing underused parts of the common property for commercial purposes,<sup>90</sup> often to the detriment of other unit owners. These conflicting motivations have almost always led to disagreements and disputes.

## **Common Property, Building and Financial Management**

### *Mismanagement and Fraudulent Dealings of the Common Property*

Developers, while in control as the management body,<sup>91</sup> or part of the joint management body,<sup>92</sup> have been noted to engage in these activities,

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<sup>88</sup> Easthope, Randolph and Judd, *Governing the Compact City*.

<sup>89</sup> E.g. *Premier Model (M) Sdn Bhd v Phileo Promenade Sdn Bhd* [2001] 1 LNS 173.

<sup>90</sup> Recourse to remedies in property law or land law as co-owners is limited. Lot owners, while they own a share in the Strata Management Body, do not hold title to the common property as tenant-in-common. The position in Western Australia, however, is radically different. Under the Strata Titles Act 1985 (WA) s 17(1), the common property is owned by all the unit owners in the strata scheme as tenants-in-common. See e.g., *Re Burton; Ex parte Rowell* [2006] WASC 277, [32]-[35], [39]-[44].

<sup>91</sup> Pt iv ch 2 SMA.

<sup>92</sup> *Ibid*, ch 3.

often creating strife in strata communities and sentiment of unjust enrichment, and poor management practices.

In *Palm Springs*,<sup>93</sup> the developer sold 439 car-park bays together with 45 apartment units, to a car-park operator. The 439 car-park bays were sold as accessory lots to those apartment units. The residents of other apartment units, plaintiffs, who were affected due to an alleged lack of parking spaces, contended that each owner was entitled to one car-park each as promised by the developer at sale. They also contended that excessive numbers of car-park lots were ‘skimmed off’ by the developer to allow them to make money by way of rentals to third parties (or the other apartment unit owners).<sup>94</sup> While there are no restrictions on how many car-park lots can be sold by a developer to a single owner, the High Court of Malaya held that illegality arises when the intention of sale and usage of the car-park becomes commercial.<sup>95</sup> The Court held that because the developer had sought to deal the car-park away in a manner independent of the main-parcels where the excessive lots were originally attached to,<sup>96</sup> the sale of the excessive car-park bays as accessory parcels was null and void, and defeasible under the National Land Code 1965.<sup>97</sup>

In *Apartmen Kayangan*,<sup>98</sup> the Strata Management Body converted part of the common property lobby of the building into a restaurant and shop, and sold it to a third party.<sup>99</sup> The Court of Appeal held that the common property is for the enjoyment of all proprietors collectively, and the Strata Management Body could not alienate and deal away the common property,<sup>100</sup> except if all owners unanimously agree to it. Finding no evidence that such a resolution ever took place, and in the absence of legislation that permits the third party to convert the common area into a business premise with the intention of generating income from

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<sup>93</sup> *Perbadanan Pengurusan Palm Springs @ Damansara v Ideal Advantage Sdn Bhd & Anor (No 2)* [2017] MLRHU 1686.

<sup>94</sup> *Ibid*, [127]-[128].

<sup>95</sup> *Ibid*.

<sup>96</sup> In breach of STA ss 34(2), 69; *Ibid*, [130].

<sup>97</sup> S 340, National Land Code 1965.

<sup>98</sup> *Dato’ Manokaran Veraya v Perbadanan Pengurusan Apartmen Kayangan & Other Appeals* [2018] MLRAU 443.

<sup>99</sup> *Ibid*, [9].

<sup>100</sup> See *Prima Avenue*, [99].

them,<sup>101</sup> the third party had acted *ultra vires* the STA and was ordered to restore the lobby to its original condition at their own cost.<sup>102</sup>

The premise of making money resulting in mismanagement sometimes, however, does not stand. Sometimes, owner-occupiers or unit owners who bought into the strata scheme for the lifestyle, security and exclusivity, have been noted to have caused strife amongst others in relation to their use of the common property. Where there are differences in lifestyle interests and differing views on how the common property should be used, conflict occurs.

The case in *Komtar Fasa Satu*<sup>103</sup> was concerned, in part, with the allocation and charging of maintenance fees in respect of certain common property that was used ‘exclusively’ by another unit owner. The plaintiff, contended that because he and other owners did not have access to the 28<sup>th</sup> floor where the Penang Chief Minister’s offices were located on, that those offices were ‘exclusively’ using the common property on that floor, he did not or could not have enjoyed the common property on that floor, and thus should not be liable to contribute to the maintenance fee for that floor. He contended that it would be unfair for him to be subsidizing the lifestyle of other owners. The High Court rejected this contention and held that all proprietors were jointly and severally liable for the maintenance fee.<sup>104</sup> The High Court held that the perceived unfairness was not a triable issue. The proper recourse would be to ‘[for parties] to table their problem for discussion and resolution at the annual general meeting of the management corporation’.<sup>105</sup> Here, the plaintiff took issue with the management of common property, where it appeared that his rights as an owner to use the common property had been restricted because of the presence of government agencies that have stricter security needs.

In relation to the issue of ‘exclusive’ use and allocation of maintenance fees like the one alluded to in *Komtar Fasu Satu*,<sup>106</sup> the

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<sup>101</sup> Ibid, [10].

<sup>102</sup> Ibid, [9].

<sup>103</sup> *Ong Hock Eam v Perbadanan Pengurusan Komtar Fasu Satu & Another Appeals (“Komtar Fasu Satu”)* [2018] MLJU 119.

<sup>104</sup> Ibid, [25].

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

Strata Management Act 2013 provides some framework for the proper management of common property. The Act enables sub-MCs to be incorporated for the separate management of certain common property (ie: limited common property) which are being exclusively used by one or a group of unit owners.<sup>107</sup> The Act also allows limited common property to be administered and managed separately, such that the costs of maintaining and managing these common property can be allocated to the more appropriate parcel owners, and the costs of management and maintenance can then be more equitably charged, without having other proprietors subsidize their exclusive use of common property.

However, the Act does not automatically designate the common property as ‘limited common property’ based on the exclusive use by one or a group of proprietors. It is not a substance test. The designation of common property as ‘limited common property’ requires the MC to ratify, which may not always be possible, especially where majority owners who have been using those common property exclusively, are in control of the MC. Where the management corporation chooses not to establish a sub-MC for the administration of ‘limited common property’, it does not give rise to a triable issue even where unfairness and inequitable outcomes arise.<sup>108</sup> The apparent situation, akin to unjust enrichment,<sup>109</sup> where certain owners stand to benefit at the expense of others is not reviewable in the Courts.<sup>110</sup> Here, where good management practices are not mandated by law, it takes tremendous (and often impossible) internal political will and commitment within Strata Management Bodies to achieve fair and equitable management practices.

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<sup>107</sup> S 17A STA; pt v ch 4 SMA.

<sup>108</sup> *Ong Hock Eam v Perbadanan Pengurusan Komtar Fasu Satu & Another Appeals (“Komtar Fasu Satu”)* [2018] MLJU 119, [25].

<sup>109</sup> Latin maxim ‘*nemo locupletaripotestalienaiaactura or nemo locupletaridebet cum alienaiaactura*’.

<sup>110</sup> This flies in the face of fundamental principles of public and administrative law. See Robin Cooke, “Administrative Law Trends in the Commonwealth” in *The Sultan Azlan Shah Lectures: Judges on the Common Law* (Sweet & Maxwell Asia, Kuala Lumpur, 2004), referring to *Sugumar Balakrishnan v Chief Minister of State of Sabah* [1989] 1 MLJ 233, 236 (Mohamed Noor J): ‘The right of His Majesty’s subjects to have recourse to the courts of law cannot altogether be excluded ...’.

### *Poor Building Maintenance*

Generally unprofessional approaches to property management have often resulted in poorly maintained buildings,<sup>111</sup> unresponsive Strata Management Bodies looking to evade responsibility, an unresponsive Commissioner of Buildings, and un-rectified building defects, amongst others. Terming it a ‘nightmare’ would do no justice to the experiences of many apartment owners who face these problems.<sup>112</sup> Further, appalling anecdotes of non-compliance with building regulations, unsafe structures,<sup>113</sup> bullying,<sup>114</sup> and in some instances management bodies and developers engaging in ‘fraud and corruption’<sup>115</sup> are not unheard of.

### *Information Asymmetry – Non-compliance with duties*

While strata management bodies on occasions ‘misuse’ and ‘abuse’ their discretion, or fail to carry out their statutory duties satisfactorily, they are

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<sup>111</sup> Ivan Loh, “Residents want apartment blocks’ management committee to resolve issues,” *The Star* (Online), 4 September 2018 <<https://www.thestar.com.my/metro/metro-news/2018/09/04/displeased-with-slow-reaction-residents-want-apartment-blocks-management-committee-to-resolve-issues/>>.

<sup>112</sup> See Nick Butterly, “Builder’s collapse causes apartment ‘nightmare’,” *Perth Now Sunday Times* (online), 28 March 2017 <<https://www.perthnow.com.au/news/wa/builders-collapse-causes-apartment-nightmare-ng-2c421fc16db42a833ca555a5a00a8115>>; Nick Butterly, “Apartments turn ‘nightmare’,” *The West Australian* (online), 28 March 2017 <<https://thewest.com.au/news/wa/apartments-turn-nightmare-ng-b88423288z>>.

<sup>113</sup> Jamie McKinnell, “Opal Tower reports reveal ‘structural design and construction issues,’” *ABC News* (online), 15 January 2019 <<https://www.abc.net.au/news/2019-01-15/opal-tower-needs-significant-rectification-work-report-finds/10713054>>.

<sup>114</sup> McKinnell, “Opal Tower reports reveal ‘structural design and construction issues’”.

<sup>115</sup> Thean Lee Cheng, “separate role for property managers,” *The Star* (online), 29 October 2018 <<https://www.thestar.com.my/business/business-news/2018/10/29/separate-role-for-property-managers/>>.

sometimes done unwittingly. At times, the management corporation may not be conscious of the duties that they are required to undertake. Sometimes, they may not be professional property managers that can competently do the job.

In the case of *Armanee Terrace*,<sup>116</sup> a dispute arose when the management body failed to appreciate the meaning of the term ‘common property’. The main issue in contention was the determination of whether four shop lots located in the clubhouse was common property. Rejecting the authority in *Silverpark* that anything located within the clubhouse was common property,<sup>117</sup> the High Court held that the determination of what constituted common property was ‘a matter of law, and had to be determined by the construction and interpretation of the relevant provisions of the statute, sales and purchase agreement, STA and BCPMMA/[SMA]’.<sup>118</sup> Ascertaining what constitutes common property is, is an uphill task, where even expert legal counsel may face difficulties.<sup>119</sup> Consequently, it cannot be reasonably expected of property managers, let alone laypersons, to manage common property to a satisfactory standard.

As Teo notes, the definition of common property in the Strata Management Act 2013 is at times problematic.<sup>120</sup> Common Property is defined to mean, ‘in relation to a subdivided building or land, such part thereof as is not comprised in any unit as shown in a certified strata plan and used or capable of being used or enjoyed by occupiers of two or more units.’<sup>121</sup> This definition appears not to classify, for e.g., ‘columns and beams which reside within a unit but which support the entire building are part of common property’ as common property, nor private

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<sup>116</sup> *Armanee Terrace Joint Management Body v Saujana Triangle Sdn Bhd* [2016] 6 CLJ 411; MLRHU 634, [19]-[28].

<sup>117</sup> *Ibid*, referring to *JMB Silverpark Sdn Bhd v Silverpark Sdn Bhd & Anor* [2012] MLRHU 1298; [2013] 9 MLJ 714

<sup>118</sup> *Ibid*, [19].

<sup>119</sup> Teo Keang Sood, “Enhancing Strata Management in Malaysia – Selected Aspects Strata Management Act 2013,” *Singapore Journal of Legal Studies* (2015): 251.

<sup>120</sup> *Ibid*.

<sup>121</sup> s 2 (definition of ‘common property’) SMA.

property.<sup>122</sup> The cases of *Lee Siew Yuen* and *Sit Kwong Lam* demonstrates the high level of complexity involved.

In *Lee Siew Yuen*,<sup>123</sup> the issue was whether the beams above the ceiling of the master bedroom bathroom of the respondent's unit and the above unit was 'common property'. The case was concerned with who was responsible for the maintenance of that beam. If the beams were common property, it is the statutory responsibility of the management corporation to repair and maintain them. On the other hand, if beams are not considered to be common property, then the responsibility would lie with the owners of the unit concerned unless the defects amounted to structural defects, in which case it is for the management corporation to rectify. The High Court of Singapore held that the words 'comprised in' meant 'included in', rather than 'situated in'. On analysis of the facts the Court found that unit surely did not include the beams when the Respondents bought the unit, and the beams did not serve any purpose or function for the unit but were supporting the units above it.<sup>124</sup> The High Court of Singapore, referring to *Hansard*, found that Parliament in enacting a simplified definition of 'common property' under the Singaporean Building Maintenance and Strata Management Act (Cap 30) did not intend to depart from the definition of 'common property' under the Land Titles (Strata) Act 1999, which expressly included beams and supports, together with other structures.

Determining what was common property is a very tricky exercise. In *Sit Kwong Lam*,<sup>125</sup> the Court of Appeal held that while there could be property that were not comprised in any unit but were not capable of being enjoyed by two or more-unit parcels (ie: a third category of property not provided for under the Act), it considered that in reality this was negligible. The second limb of the definition of common property was to be interpreted broadly. It did not require an area to be physically accessible by any of the subsidiary proprietors. Nor did it require the area to be currently used or enjoyed the occupiers of two or more lots.<sup>126</sup>

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<sup>122</sup> Teo, "Enhancing Strata Management in Malaysia – Selected Aspects Strata Management Act 2013," 257.

<sup>123</sup> [2014] 4 SLR 445.

<sup>124</sup> *Ibid*.

<sup>125</sup> *Sit Kwong Lam v MCST Plan No 2645* [2018] SGCA 14.

<sup>126</sup> *Ibid*, [60], [61].

These cases have shown that determining what constitutes ‘common property’ may be exercise too complicated even for expert legal counsels, let alone property managers and the lay community.

## **Financial Mismanagement**

### *Financial Mismanagement Relating to the Common Property*

The industry practice in strata management before the era of strata management, as Christudason notes,<sup>127</sup> was for the developer to bear the burden of managing and maintaining the common property, and then levy a maintenance charge on the units. However, unit owners could not query how the funds paid were being used, and there were no safeguards to ensure that the funds would utilised for the maintenance of the common property.<sup>128</sup> There was no way for unit owners to hold the developer to account. This poses risks of developers short-changing unit owners. In relation to strata management bodies, unit owners face the same issues.

As noted above, autonomy and administrative discretion given to Strata Management Bodies are not infrequently ‘misused’ and ‘abused’ to serve the interests of proprietors who hold a majority of the aggregate share value, often to the detriment of other unit owners.

The case of *Prima Avenue* is a fine example.<sup>129</sup> In that case, the Developer, as part of the JMB, discriminately charged unit owners maintenance charges and sinking fund contributions.<sup>130</sup> The developer, as the purported owner of 1,311 units of car park bays, billed itself a nominal and arbitrary fee of RM5 per bay. It did not bill itself on the same per square foot rate that was imposed on all the other purchasers.<sup>131</sup> Further, the developer did not bill two other owners who owned 60 car-park bays. The Court of Appeal held that this practice was unlawful, as the charges and contributions must be allocated based on the statutorily

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<sup>127</sup> Alice Christudason, “Subdivided Buildings – Developments in Australia, Singapore and England,” *The International and Comparative Law Quarterly* 45(2) (1996): 343, 361.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Prima Avenue.*

<sup>130</sup> *Ibid.*, [153].

<sup>131</sup> *Ibid.*

prescribed share unit value (according to the formula in the SMA,<sup>132</sup> the area of car-park bays is reflected in the share unit value allocated to a unit-owner).<sup>133</sup> The levying of fees can only be done for things set out in the SMA, and any other basis to determine the quantum of contribution would be contrary to the SMA and was thus unlawful.<sup>134</sup>

Such practices are not uncommon. At an event by the Malaysian Institute of Property and Facilities Managers, its president, Sarkunan, highlighted the apparent rife corruption in the property management industry.<sup>135</sup> He recounted:

“Corruption in procurement, kickbacks and side money is so prevalent that it has rusted performance, bringing many buildings to a grinding halt”.<sup>136</sup>

Sarkunan gives an example of two office blocks in Bangsar:

‘Tower A were [sic] fully sold to private individual owners. Tower B belonged to the developer who had put the building under a real estate investment trust. There was a cash surplus in the accounts. It seems that during the period when the developer was managing the property, the developer apportioned all surplus monies collected to the tower they retained. When the management corporation took over, it faced a defiant developer, because it wanted to control the money collected’.<sup>137</sup>

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<sup>132</sup> See sch 1(3) SMA.

<sup>133</sup> *Prima Avenue*, [153]; ss 25(3), 59(2)(a) SMA.

<sup>134</sup> *Management Corporation Strata Title Plan No 901 v Lian Tat Huat Trading Pte Ltd* [2018] SGHC 270, [30]; See also *Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corporation* [2018] 3 MLRA 342, [4], referring to *Perbadanan Pengurusan Endah Parade v. Magnificent Diagraph Sdn Bhd* [2013] 6 MLJ 343; [2014] CLJ 881, [77] – [78].

<sup>135</sup> Akhbar Satar, “Speech,” (Speech Delivered at the Malaysian Institute of Property and Facilities Managers Conference’s Bridging Property Management and Facilities Management seminar, Kuala Lumpur, 25 October 2018); See also, Thean Lee Cheng, “Ministry Studying Plans to Amend Strata Management Act,” *The Star* (online), 25 October 2018 <<https://www.thestar.com.my/business/business-news/2018/10/25/ministry-studying-plans-to-amend-strata-management-act/>>.

<sup>136</sup> Satar, “Speech”; Thean, “Ministry Studying Plans to Amend Strata Management Act”.

<sup>137</sup> *Ibid*.

In relation to developments with one or distinct group of owners controlling a majority of the share value, similar problems can arise. In *Ekuiti Setegap*,<sup>138</sup> a majority owner (who by virtue of holding a majority of the share value, controlled the management corporation) entered into a contract with the management corporation to stop paying levies and contributions for the management of common areas where he had no access to. In this case, the Court of Appeal held this to be unlawful. The Court of Appeal held that if the contract was upheld, it would render *Ekuiti Setegap*, a proprietor under the Act, the *de-facto* management corporation. The contracting out of the duty to pay levies would also run counter to the statutory regime of the STA/SMA. The SMA does not envisage exempting certain proprietors from paying the maintenance charges or sinking fund contributions as resolved by the management corporation.<sup>139</sup>

These issues of developers/majority owners ‘defrauding’ other owners in a strata development in this manner is particularly pressing. Warnken, Russell and Faulkner<sup>140</sup> attribute this to the vast numbers of actors seeking to make profits.<sup>141</sup> Of concern, developers are not the only actors engaged in these practices, but property managers as well.<sup>142</sup> In relation to such wrongs committed against owners of the JMB, the MC, as the successor Strata Management Body, may not have the necessary *locus standi* to bring actions on behalf of its predecessor body against the developers or majority owners.<sup>143</sup> Some developers and majority owners are aware of this, and some have no qualms exploiting this lacunae in the law. Therefore, there is an impetus for the law to create avenues to allow

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<sup>138</sup> *Ekuiti Setegap v Plaza 393 Management Corporation* [2018] 3 MLRA 342.

<sup>139</sup> *Ekuiti Setegap v Plaza 393 Management Corporation* [2018] 3 MLRA 342, [33] – [38]; See also *Perbadanan Pengurusan Endah Parade v. Magnificent Diagraph Sdn Bhd* [2013] 6 MLJ 343; cf *Komtar Fasu Satu*.

<sup>140</sup> Warnken, Russell and Faulkner, “Condominium Developers in Maturing Destinations: Potentials and Problems of Long-term Sustainability”.

<sup>141</sup> Further, see Satar, “Speech”; Thean, “Ministry Studying Plans to Amend Strata Management Act”.

<sup>142</sup> See Anith Adilah, “Firm asks for time to refund condo residents,” *MalayMail* (online), 27 April 2017 <<https://www.malaymail.com/s/1364789/firm-asks-for-time-to-refund-condo-residents>>.

<sup>143</sup> *Pengurusan Perbadanan 3 Two Square v 3 Two Square Sdn Bhd*[2017] MLRHU 1672, [37], [71].

proprietors to realistically impose checks and balances on the management bodies through their internal processes. This is extremely important as not all acts of unfairness and moral iniquity are illegal and reviewable by the Courts.

### *Provision of Utilities and Value-Added Services*

Conflicts concerning unfair management practices involving the provision of utilities, facilities and services often arise when Strata Management Bodies purchase bulk utilities such as water, gas and electricity, and subsequently resell these utilities to individual units as a value-added service. In recent years, this practice of using corporate utilities purchasing agreements has become more common,<sup>144</sup> especially in the context of service apartments,<sup>145</sup> and particularly where bulk utilities could be purchased at a cheaper price, potentially leading to costs savings.

However, the use of these corporate power purchasing agreements in strata developments has led to disputes. These disputes relate to who (which proprietor or class of proprietors) should benefit from these costs savings. The resale or the allocation of costs of these utilities, are often poorly, unfairly or fraudulently managed by the Strata Management Bodies. This may be a result of the absence of a statutory duty to recover these costs in a fair and equitable manner.<sup>146</sup>

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<sup>144</sup> Joel Reid and Kylie Diwell, “Risk Management: Corporate PPAs – A continuing Trend,” *Lexology* (online), 11 September 2018 <<https://www.lexology.com/library/detail.aspx?g=b22ac1c9-b4fc-4edf-a44d-856f1b0f5ac0>>.

<sup>145</sup> As noted in *Premier Model (M) Sdn Bhd v Phileo Promenade Sdn Bhd* [2001]1 LNS 173; The facts of the case were that the water supply to the individual unit did not come direct from Jabatan Bekalan Air Selangor (JBAS). Instead JBAS supplied water to bulk meters and the vendor in turn was responsible for the supply from the bulk meters to the individual units.

<sup>146</sup> E.g., see the Western Australian case of *Lim v Owners of Romlea Court Strata Plan 9317* [2019] WADC 35, [15]-[19] (Lemonis DCJ). In this case, the Western Australian District Court held that there was no statutory duty binding on the Strata Company to recover the costs of electricity supplied to individual units. This duty to recover the costs of electricity from an owner came from a

The SMA provides no express power or duty for Strata Management Bodies to provide utilities and services to individual lots *confra* the common property. It does not prescribe any duties in respect of recovering due debts arising from these services. The law implicitly recognises that Strata Management Bodies, as common law *corporations* that can ‘do such other things that may be expedient or necessary for the proper maintenance and management of the subdivided buildings or lands and the common property’,<sup>147</sup> or may engage in these activities.<sup>148</sup>

Conflict arising from this is aptly illustrated by the Western Australian case of *Queens Riverside*.<sup>149</sup> In that case, the Strata Company (Management Corporation) was alleged to have engaged in ‘unfair’ and ‘fraudulent’ practices in relation to reselling of utilities to individual unit owners. The plaintiff had complained, *inter alia*, that the Strata Company when apportioning electricity charges between the strata plan’s four towers, had done so on an unit entitlement (share value) basis, and not according to actual usage of electricity. This meant that owners were not billed according to how much electricity they used within their lots, but in proportion to their unit’s share value entitlement. This meant that the on-site hotel, which had used a large, commercial quantity of electricity than other single lot owners, paid a much lower fee for electricity usage, as compared to the actual cost of their usage. This, in turn, meant that the residential unit owners were subsidizing the on-site hotel’s electricity use, and making a select group of owners their involuntary creditors. The State Administrative Tribunal, in refusing to exercise its discretion under section 81 of the Strata Titles Act 1985 (WA), dismissed the plaintiff’s complaints, ruling that they were beyond the scope of what the Tribunal could deal with under that section of the Act.<sup>150</sup> This is likely

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by-law (statutory contract) of the strata scheme. The Court recognized and upheld the parties’ freedom of contract.

<sup>147</sup> S 59(1)(i) SMA.

<sup>148</sup> *Muhamad Nazri Bin Muhamad v JMB Menara Rajawali and Denflow Sdn Bhd* [2018] 9 CLJ 547.

<sup>149</sup> *Engwirda and The Owners of Queens Riverside Strata Plan 55728* (WASAT CC 2433 of 2017); Similar matters are also currently the subject of a new proceeding: *Engwirda and The Owners of Queens Riverside Strata Plan 55728* (WASAT, CC 2735 of 2018).

<sup>150</sup> *Ibid*; While its further reasons were not given, this could be the product of s 83(6) of the ST Act, where the Tribunal could not exercise its discretion if the

because there is no statutory duty to recover the fair amount for utilities provided to individual subdivided lots *confra* the common property.<sup>151</sup> In another case on a related issue, the Western Australian District Court in *Romlea Court*<sup>152</sup> held there was no statutory duty for the Strata Company to recover debts in relation to utilities or services provided to individual subdivided lots. Such a duty, if any, arose out of contract or covenants (by-laws).<sup>153</sup>

This reasoning is likely applicable in the Malaysian context should cases like *Frasers Queens* and *Romlea Court* arise.

### *Chronic Ailment of Strata Management Legislation*

While the Malayan Court of Appeal has held that contracting out of duties to pay levies (in respect of common property) under the SMA is unlawful (as in *Ekuiti Setegap*<sup>154</sup>), the High Court held in *Menara Rajawali* that the imposition of different rates of levies between different proprietors such that the effect is the same as contracting out of those obligations could be permissible under the SMA,<sup>155</sup> if properly ratified at a duly convened general meeting.<sup>156</sup> The High Court in *3 Two Square* appears to confirm this. In *3 Two Square*, it was held that the imposition of different rates of levies or charges, such that it heavily subsidizes or exempts the majority owners (who can, by holding a majority of the share value, control the general meeting), is legally valid, as long as the resolution or by-law is assented to by a majority of those present and voting at a general meeting.<sup>157</sup> There is nothing stopping the Strata Management bodies from making a select group of owners involuntary creditors of other owners. That said, where actions of owners

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matter was better dealt with under a different section of the Act, perhaps ss 99 or 99A.

<sup>151</sup> *Lim v Owners of Romlea Court Strata Plan 9317* [2019] WADC 35, [15]-[19].

<sup>152</sup> *Ibid.*

<sup>153</sup> See Strata Titles Act 1985 (WA) s 37(1)(g).

<sup>154</sup> *Ekuiti Setegap v Plaza 393 Management Corporation* [2018] 3 MLRA 342.

<sup>155</sup> *Muhamad Nazri Bin Muhamad v JMB Menara Rajawali and Denflow Sdn Bhd* [2018] 9 CLJ 547.

<sup>156</sup> E.g., *Komtar Fasu Satu*.

<sup>157</sup> *Yong*, [30].

participating in the strata community are not illegal, there exists only procedural safeguards. There is little to no substantive safeguards that will protect owners from unfair and inequitable allocation of charges and contributions, nor any enforceable standards to ensure that strata schemes are financially stable. This reveals a chronic ailment of the Strata Management Act 2013.

This is particularly worrying. Without adequate funds in the right accounts, the Strata Management Body would not be able to discharge its obligations fairly and equitably.<sup>158</sup> Without the assurances that the money paid to the Strata Management Body would be properly applied to the maintenance and upkeep of the Strata Scheme, Strata Management Bodies will continue to face difficulties in getting unit owners to pay their share of the maintenance charges and sinking fund contribution and enforcing these debts.<sup>159</sup> Without proper standards in place, some Strata Management Bodies could resort to unlawful and underhand means of enforcing payment,<sup>160</sup> which will undoubtedly create further strife and conflict in the Strata Scheme.

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<sup>158</sup> *Sri Wangsaria Management Corporation v Yeap Swee Oo @ Yeap Guan Cheng & Anor & Another Appeal* [2009] 14 MLRH 635, [17]. It's been noted in Hansard that either more is done to compel payment, or the central bank should step in to offer a bailout to body corporate in need. While Strata Management Bodies may borrow monies, it is unlikely banks would lend. See Malaysia. Dewan Rakyat. 2012. *Parliamentary Debates*. 27 September, 43. Jeyakumar Devaraj; s 59(2)(h) Strata Management Act 2013 (Malaysia).

<sup>159</sup> This was a problem raised in the *Dewan Rakyat*; See, Malaysia. Dewan Rakyat. 2012. *Parliamentary Debates*. 27 September, 22-3. Siti Mariah binti Mahmud:

‘Semenjak dia masuk dalam rumah itu dia tidak pernah bayar satu sen wang penyenggaraan dan COB tidak boleh buat apa-apa pada ketika itu. Akan tetapi orang-orang macam ini Tuan Yang di-Pertua, kita perlu ada satu undang-undang yang lebih deterrent. Saya sendiri bila tengok macam itu saya kata kenapa kita tidak boleh rampas sahaja hartanah mereka kerana mereka tidak menghargai apa yang telah mereka ada ini dan mereka tidak memberi kerjasama kepada pihak yang menjalankan tugas’.

<sup>160</sup> By cutting off water and electricity supply to the units of defaulters. See *John Denis De Silva v Crescent Court Management Corporation* [2006] 1 MLRH 233; See also *Ho Siew Choong v On-Kward Realty Sdn Bhd & Anor* [2008] 8 CLJ 175.

The SMA prescribes high-level principles but makes no provision as to the content of law that compels good management practices, neither content that would safeguard proprietors against unfair management practices. This has far reaching consequences. While the Court in *Hunza Parade*<sup>161</sup> has held that whilst it is the proprietors' rights to hold the management body to account, there are no enforceable statutory or regulatory rules or rights that would assist proprietors to achieve that end.

## **Conduct at General Meetings and the Making of Resolutions and By-Laws**

### *Misleading and Deceptive Conduct*

The Strata Management Bodies have on occasions, been noted to have engaged in misleading and deceptive conducts, particularly when pushing for resolutions concerning financial management to be passed at general meetings.<sup>162</sup> In other instances, commercial lot owners have also been noted to have engaged in misleading and deceptive conducts when seeking re-development or renovation approvals from the management corporation.<sup>163</sup> The passing of resolutions often requires collective consent from owners. This is more so if the resolution pertains to alterations of the common property or strata plan,<sup>164</sup> or in relation to dealings concerning the common property under the National Land Code,<sup>165</sup> which require a unanimous resolution.<sup>166</sup> In such instances, owners who have vested interests in getting their resolution passed sometimes set out to mislead or misinform the owners' corporation. The

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<sup>161</sup> *Hunza Parade Development Sdn Bhd v Fong Chin Tuck* [2010] 10 MLRH 751.

<sup>162</sup> See, e.g. *The Summit Subang USJ Management Corporation v Tribunal Pengurusan Strata & Satu Lagi* [2017] MLRHU 1073, [28] – [29]; *Aikman v The Owners of Strata Plan 48817 – 16 Dolphin Drive Mandurah* [2016] WASC 380, [29] – [30]; *Payne and The Owners of Strata Plan 39733* [2017] WASAT 157, [59].

<sup>163</sup> See, e.g. *Frasers Queens Pty Ltd and Tan* [2018] WASAT 114, [68], [79], [80], [155]; *Frasers Queens Pty Ltd and Tan* [2018] WASAT 73.

<sup>164</sup> Or any function exercisable by a proprietor under the National Land Code 1965; see STA s 17B.

<sup>165</sup> *Ibid*; Eg, see, *Engwirda and Wang* [2019] CC 1005.

<sup>166</sup> Strata Titles Act 1985 (Malaysia) s 17B(2); see also SMA s 74.

motivation behind this is well encapsulated in *Frasers Queens*<sup>167</sup> and *The Summit*,<sup>168</sup> as illustrated below:

*Frasers Queens* is a Western Australian case which concerned a developer who sought a unanimous resolution from the Strata Company for a proposal to undertake renovation works. Amongst other things, the developer sought consent to demolish a party wall between two units,<sup>169</sup> and to fit-out the two units with mechanical and kitchen services with the view of establishing a restaurant.<sup>170</sup> The resolution, known as a ‘section 7 application’, only permitted owners to withhold consent on limited grounds prescribed in section 7(5) of the Western Australian Strata Titles Act 1985 (ST Act) and in regulation 31 of the Strata Titles General Regulations 1996. Under the Strata Titles Act (WA), a ‘section 7 application’ only permits approval for works that deals with structures inside a unit, excluding the walls. The respondent withheld consent, on the basis that amongst other things, some of the works which the developer sought approval for in a section 7 application was *ultra vires* – that the proposal sought to undertake works outside a unit and on common property. The development plan did not fall squarely into the bounds of s 7. The respondent also submitted that since the developer had informed proprietors that they could only dissent to the proposal on limited grounds, which strictly speaking was not the case, the developer had thus engaged in ‘misleading and deceptive’ conduct.<sup>171</sup>

The Tribunal in a preliminary hearing upheld the submission that part of the section 7 application was *ultra vires* the ST Act.<sup>172</sup> The developer then amended their application. In a subsequent hearing, the respondent, in a bid to dismiss the developer’s lawsuit, submitted that the main motivation of the developer in seeking consent in this manner that was allegedly ‘misleading and deceptive’ was so as to misinform

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<sup>167</sup> *Frasers Queens Pty Ltd and Tan* [2018] WASAT 114.

<sup>168</sup> *The Summit Subang USJ Management Corporation v Tribunal Pengurusan Strata & Satu Lagi* [2017] MLRHU 1073.

<sup>169</sup> This is currently the subject of proceedings in the Western Australian State Administrative Tribunal. See *Engwirda and Wang* [2019] CC 1005.

<sup>170</sup> *Frasers Queens Pty Ltd and Tan* [2018] WASAT 114, [4]; See also *Fraser Queens Pty Ltd and Tan* [2018] WASAT 73.

<sup>171</sup> *Fraser Queens Pty Ltd and Tan* [2018] WASAT 73.

<sup>172</sup> *Ibid*, [10] – [14].

proprietors about the law and their rights, ‘so that they can easily get what they want’:<sup>173</sup>

80. The respondent asserts that including in the Proposal matters for which approval cannot be given to pursuant to s 7 of the [Western Australian] ST Act is **misleading and deceptive**.

81. Further, informing the members of the Queens Riverside Strata Company (the proprietors) that the only grounds for refusing the Proposal were set out in s 7(5) of the ST Act when the Proposal could have been objected to because it did not fall within s 7 of the ST Act was ‘... **so as to deceive the proprietors, trick them into not dissenting to their proposal, so that they can easily get what they want**’. (emphasis added)

While the Tribunal held that this point was not well made out,<sup>174</sup> it gives us some insight into some of the motivations of different actors in strata developments. The Tribunal subsequently held that while the developer ‘put the whole of the proposal before the AGM and sought approval for the most significant or contentious parts of the proposal which required approval under s 7 of the act’,<sup>175</sup> notwithstanding the proposal contained some parts that were *ultra vires*, ‘there was nothing inherently unreasonable in proceeding in this manner’.<sup>176</sup> As ‘misleading and deceptive’ was not a ground in section 7(5) of that Act that could make the resolution subject to review, the Tribunal held in favour of the developer.<sup>177</sup>

In *The Summit*,<sup>178</sup> the High Court of Malaya upheld the decision of the Strata Management Tribunal to revoke and not enforce a resolution authorising the management body to levy a fee on a group of owners for the renovation of a podium block in a strata development. The High Court held that the terms such as ‘complex’, ‘mall’ and ‘shopping mall’ used to describe the podium block in the resolution was confusing and

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<sup>173</sup> *Frasers Queens Pty Ltd and Tan* [2018] WASAT 114, [80] – [81].

<sup>174</sup> *Ibid*, [155].

<sup>175</sup> *Ibid*, [191].

<sup>176</sup> *Ibid*.

<sup>177</sup> *Ibid*, [192] – [194].

<sup>178</sup> *The Summit Subang USJ Management Corporation v Tribunal Pengurusan Strata & Satu Lagi* [2017] MLRHU 1073.

misleading, as those terms could refer to buildings other than the podium block.<sup>179</sup> This was likely inadvertent.

The High Court also held that the way the resolution was passed was *ultra vires*. The management corporation only permitted the proprietors of the podium block their voting rights in respect of this resolution. The Court held that because not all eligible proprietors were allowed their voting rights in respect of the resolution, the motion authorising the levy was not properly carried out, and therefore invalid.<sup>180</sup> While this decision seemed to have ruled that ‘misleading and deceptive’ conduct could be a ground on which resolutions and decisions of the management corporation could be overturned, it seems unlikely that the Court would have reached this decision if it were not for the finding of illegality in the voting process. Like in *Fraser Queens* where ‘misleading and deceptive’ aspects of the claim were not explicitly prohibited in Strata Management laws, it is unlikely that the Tribunal and Courts in Malaysia and Western Australia will review, and overturn resolutions or decisions made using misinformation, misrepresentation, or misleading or deceptive conduct.

### *Risks of Defamation*

The efforts of owners and residents in scrutinising the actions of the management body, and to some extent, collective actions of the members of the management body council are often met with harsh sentiment. Attempts to raise awareness amongst fellow residents and owners; to question and hold the management body to account are often defeated with threats by the Strata Management Bodies and in some cases by individual members of the council of those Strata Management Bodies, in respect of defamation and libel.<sup>181</sup> Often, the threats of court proceedings

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<sup>179</sup> Ibid, [28].

<sup>180</sup> Ibid.

<sup>181</sup> *Govindaraji Rajaram & Ors v Wong Chew Fatt & Ors and Another Appeal* [2017] MLRAU 25; See also the WA SAT case of *Tan and The Owners of Queens Riverside Strata Plan 55728* [2018] CC 1258.

and costs have managed to ‘bludgeon’ proprietors into line without a healthy and informed debate.<sup>182</sup>

Not infrequently, such threats are made without basis, and for a collateral purpose of concealing information and stifling debate and discussion. In such instances, owners should stand their ground, for there are limited grounds on which the threat of defamation can be made and succeed. For example, The Court of Appeal in *Rajaram* has held that individual members of a management body council have no *locus standi* to bring defamation proceedings in respect of allegedly defamatory statements made against the Strata Management Body, or in relation to actions and decisions made by council members.<sup>183</sup> It is the right of owners to question and hold the management body to account through the democratic process of a general meeting.<sup>184</sup> Unfortunately, society tends to operate in the ‘shadow of the law’,<sup>185</sup> and often, empty threats are capable of unfairly shaping relations of a community.

In a similar case, the High Court in *Hunza Parade* held that owners and residents have every right to question the manner in which

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<sup>182</sup> This was noted as a possibility by Member De Villers in the WA State Administrative Tribunal case of *Owners of Sorrento Beach Strata Plan 18449 and Slomp* [2010] WASAT 131, [62].

<sup>183</sup> *Govindaraji Rajaram & Ors v Wong Chew Fatt & Ors and Another Appeal* [2017] MLRAU 259. [4], [5], referring to *Amber Court Management Corp & Ors (suing in their capacity as council members of Amber Court Management Corp Management Committee) v Hong Gan Gui & Anor* [2016] 2 MLRA 25; [2016] 2 MLJ 85; [2016] 2 CLJ 751: ‘The Act does not empower the council members of the management corporation with the legal capacity to institute actions in their own individual names or as council members of the management corporation. Since the council only acts on behalf of the management corporation and its powers are restricted to any of the powers of the management corporation, the second to the sixth plaintiffs had no locus to sue in defamation’.

<sup>184</sup> The WA Supreme Court appears to support the proposition that it is the right of individual owners to ‘freely speak about their concerns’ and debate issues concerning the Strata Scheme with other owners. See *Accommodation West v Aikman* [2017] WASC 157, [501].

<sup>185</sup> E.g., Nadja Alexander, “Mediating in the Shadow of Australian Law: Structural Influences on ADR,” *Yearbook of New Zealand Jurisprudence* 9 (2009): 332.

maintenance and sinking funds were utilized, especially when there are 'definite questionable practices in the manner in which the funds have been managed and utilized by the management body'.<sup>186</sup> In an attempt to raise awareness of the various issues plaguing the management body, the residents and owners hung several banners in public view alleging *inter alia* that there were 'no properly [sic] audited accounts for past 15 yrs', '... developer who misuse our funds', 'developer use our funds as they like'.<sup>187</sup> Where there was no malice on the residents and owners' part which the Strata Management Body could prove, the High Court held that the residents and owners' attempts to raise awareness of various issues were fair comments.<sup>188</sup>

### *The Making of By-Laws*

In the context of resolutions, and the making of by-laws, where the ratification of these decisions operate on the basis of the majority rule,<sup>189</sup> homeowners may face a similar fate of injustice. By-laws, by the operation of law, bind relevantly, the Developer, Joint Management Body or Management Corporation, as the case may be, and each parcel owner as if they had been signed and sealed by each, and as if they contained mutual covenants to observe, comply and perform all of the provisions of the by-laws.<sup>190</sup> There are few limitations on the making of by-laws. The SMA allows by-laws concerning any subject to be made by special resolution, provided that they are not inconsistent with the standard by-laws and the SMA.<sup>191</sup> By-laws on their proper constructions,<sup>192</sup> as the

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<sup>186</sup> *Hunza Parade Development SdnBhd v Fong Chin Tuck* [2010] 10 MLRH 751, [17].

<sup>187</sup> *Ibid*, [6].

<sup>188</sup> *Ibid*, [17], [20], [21]; See also *Tiow Weng Theong v Melawangi Sdn Bhd* [2018] 6 MLRA 52.

<sup>189</sup> A feature of company/corporations law.

<sup>190</sup> ss 32(4), 70(3) SMA; similar provisions exist in the Western Australian STA: s 42(6) Strata Titles Act 1985 (WA).

<sup>191</sup> ss 32, 70, 71 SMA.

<sup>192</sup> *Byrne v The Owners of Ceresa River Apartments Strata Plan 55597* [2017] WASCA 104, [72] – [79]; See also *Grewal and The Owners of 16 Milligan Street Perth Strata Plan 43607* [2018] WASAT 56, [16]; *Body Corporate for Hilton Park CTS 27490 v Robertson* [2018] QCATA 168, [31] – [37].

Western Australian Court of Appeal in *Ceresa River Apartments* explains,<sup>193</sup> could not be regarded as ‘absurd, repugnant or capricious’.<sup>194</sup> The High Court of Malaya in *Verve Suites Mont Kiara* appears to adopt a similar view.<sup>195</sup>

While there may have been homeowners who may have dissented to the ratification of certain by-laws that are grossly unfair; or those who may have voted in favour of ratification mistakenly, unknowingly, under duress, misleading impressions, deception, or manipulation;<sup>196</sup> the law has unilaterally bound them to by-laws which they have, *in fact*, not consented to be bound by.<sup>197</sup> Even by-laws that have the effect of being ‘unreasonable’ in application have been ruled not a ground on which it can be revoked.<sup>198</sup> This can also be said for resolutions passed at a general meeting of a body corporate. The process by which by-laws are made could subject owners to harsh by-laws that, if not illegal, will serve to impede harshly and intrude into their freedoms and liberty.<sup>199</sup>

Examples of these are by-laws that deal with behaviour.<sup>200</sup> Some of these by-laws have far reaching powers to intrude into the everyday lives of subsidiary proprietors. Some by-laws are common sense matters which should not really need to be spelt out or matters that are better dealt with through the common law.<sup>201</sup> One on hand, as Christudason notes,<sup>202</sup> the

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<sup>193</sup> *Byrne v The Owners of Ceresa River Apartments Strata Plan 55597* [2017] WASCA 104.

<sup>194</sup> *Ibid*, [160]; The UK Privy Council in *O’Connor (senior) and others v The Proprietors, Strata Plan No. 51* [2017] UKPC 45 appears to have followed and applied this.

<sup>195</sup> *Verve Suits Mont Kiara Management Corporation v Salil Innab & Ors* (Kuala Lumpur High Court Civil Suit No. WA-22NCVC-461-09/2017).

<sup>196</sup> E.g., in the manner alluded to by the respondent in *Frasers Queens*. See *Frasers Queens Pty Ltd and Tan* [2018] WASAT 114, [81].

<sup>197</sup> See generally, David Kennedy, *A World of Struggle* (Princeton University Press, 2018) 232-239.

<sup>198</sup> E.g., *Byrne*.

<sup>199</sup> E.g., *MokSiou Min v Hampshire Residences Management Corporation & Ors* [2018] 3 MLRH 458; sch 3 para 6 SMMMR.

<sup>200</sup> ss 32(3)(g), 70(2)(g) SMA.

<sup>201</sup> Alice Christudason, “Subdivided Buildings – Developments in Australia, Singapore and England,” 343, 360.

<sup>202</sup> *Ibid*, 360.

by-laws can be particularly amusing, for they reflect a very ‘Asian’ attitude and ‘flavour’. For example, the Singapore Land Titles (Strata) Act 1967 sets out some by-laws:<sup>203</sup>

... when upon the common property to be adequately clothed”;

... ensure that the part of the floor is sufficiently covered where chillies are being pounded to prevent transmission of noise likely to disturb the peaceful enjoyment of another subsidiary proprietor or occupier.

On the other hand, behavioural by-laws can be misused and abused by the management corporation in the most absurd of ways, often to silence critics and opponents, to bludgeon owners into line without questioning authority and their decisions.<sup>204</sup>

A proprietor was issued a breach notice for complaining about the state of disrepair and poor management in their apartment complex by the management corporation, and for allegedly ‘embarrassing’ another proprietor during a General Meeting of the Management Corporation.<sup>205</sup> The alleged breach of by-law of that apartment complex was:<sup>206</sup>

10.3.1 A proprietor of a lot shall not use language or behave in a manner to cause offence or embarrassment to the proprietor, occupier, or resident of another lot or to any person lawfully using the common property.

Behavioural by-laws, especially those designed to be a ‘catch-all’ provision that are generally and vaguely worded, have the propensity to censor actions that are deemed politically incorrect and troublesome. They can be used indiscriminately by management corporations to target owners who they deem as ‘trouble makers’.

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<sup>203</sup> Pt II Sch 1, Land Titles (Strata) Act 1967 (Singapore).

<sup>204</sup> E.g., *Owners of Sorrento Beach Strata Plan 18449 and Slomp* [2010] WASAT 131, [62].

<sup>205</sup> *The Owners of Queens Riverside Strata Plan 55728 and Engwirda* (WASAT, CC 304/2019, unreported); Queens Riverside Owners, email correspondence 10 January 2019.

<sup>206</sup> Landgate (WA), Registered Instrument M750712 on Strata Plan 55728.

*Owners' Access to Information and Records*

Holding the strata management bodies to account, has been declared in *Hunza Parade* to be a right of all parcel owners.<sup>207</sup> However, there exist no provision in the Strata Management Act 2013 that would allow owners direct access to strata records and documents in pursuit of that end – i.e.: invoices, correspondences, planning approvals, court orders, government letters, contracts, agreements, bank account statements, tender documents, etc. Unlike provisions in the laws concerning strata management in other jurisdictions,<sup>208</sup> the laws in Malaysia does not provide owners direct access to documents or records, apart from audited statements.<sup>209</sup> The law on whether owners are entitled to these documents or records are also unclear. The Strata Management Act 2013 provides that the Strata Management Tribunal's jurisdiction includes a claim 'compelling the developer, joint management body, management corporation or subsidiary management corporation to supply information or documents'.<sup>210</sup> But whether this claim as included within the jurisdiction of the Strata Management Tribunal is an implied recognition of owners' right to documents, or as a procedure in discovery, or both, is unclear.<sup>211</sup>

When owners have the right to access documents, they may not be able to use them. This would defeat the purpose of seeking access to these documents. In the Western Australian case of *Engwirda*,<sup>212</sup> the plaintiff sought to inspect all documents in the custody of the strata company. Section 43 of the WA Strata Titles Act 1985 prescribes that it is the right of a unit owner to inspect strata documents, but there was no corresponding enforceable duty for a Strata Company to facilitate this right. Justice Curthoys held that it is not a proper use of the Tribunal's

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<sup>207</sup> *Hunza Parade Development Sdn Bhd v Fong Chin Tuck* [2010] 10 MLRH 751.

<sup>208</sup> Cf ss 43, 90 Strata Titles Act 1985 (WA); see also *Tan and The Owners of Queens Riverside* (WASAT CC 1258/2018, unreported).

<sup>209</sup> S 59(1)(g) SMA.

<sup>210</sup> Sch iv, pt 1, para 12 SMA.

<sup>211</sup> *Bandar Utama 1 JMB v Bandar Utama Development SdnBhd & Satu Lagi* [2017] 5 MLRH 622; *Bandar Utama Development SdnBhd and Another v Bandar Utama 1 JMB*[2018] MYCA 196.

<sup>212</sup> *Engwirda and The Owners of Queens Riverside Strata Plan 55728* [2018] WASAT 15, referring to *Hearne v Street* (2008) 235 CLR 125.

power to order inspection to allow a ‘fishing expedition’ to discover wrongdoing.<sup>213</sup> Despite that, the Tribunal allowed the plaintiff to inspect all strata records, but placed restrictions on the plaintiff’s ability to use the documents other than for the purpose for which they are provided.<sup>214</sup> His Honour, applying *Hearne v Street*,<sup>215</sup> imposed an undertaking not to use the documents for a ‘collateral’ purpose.<sup>216</sup> This meant that the plaintiff could not share the documents or information contained within with other proprietors, even at an annual general meeting, to freely speak her mind or debate issues with the aim of holding the strata management body to account.<sup>217</sup> This has been noted to defeat the purpose of the plaintiff seeking access to the documents, which was to hold the strata company to account, either through the Courts or through the internal mechanisms and processes of the strata management body.<sup>218</sup> Without the ability to use these information or documents, homeowners are unable to use accurate information to inform, educate and rally fellow parcel owners to cause change in management practices in strata management bodies.

Whether the Australian case of *Hearne v Street* would apply in Malaysia is unclear. *Hearne v Street* applied and extended the rule in *Riddick*<sup>219</sup> barring the collateral use of documents disclosed by way of discovery to all documents obtained through the Court. That, when applied in *Engwirda*, meant that documents disclosed under a court order, even if it was in fulfilment of a statutory right, must only be used

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<sup>213</sup> Ibid, [24].

<sup>214</sup> Ibid, [31].

<sup>215</sup> (2008) 235 CLR 125.

<sup>216</sup> This is an express order embodying the terms of the implied undertaking against collateral use as enumerated by the High Court of Australia in *Hearne v Street* (2008) 235 CLR 125.

<sup>217</sup> *Engwirda and The Owners of Queens Riverside Strata Plan 55728* [2018] WASAT 15, [33].

<sup>218</sup> Ibid; This case is currently on appeal at the Western Australian Court of Appeal, where it is argued that the Tribunal has conflated concepts of discovery and statutory disclosure, and that the imposition of an undertaking frustrates the statutory purpose of the Strata Titles Act. See *Engwirda v The Owners of Queens Riverside Strata Plan 55728* (Court of Appeal, WA, Case No. CACV 96 of 2018).

<sup>219</sup> *Riddick v Thames Board Mill Ltd* [1977] 3 All ER 677, 687-8.

for purposes of the court proceedings, and cannot be used for the purpose of holding the strata management body to account which would be classified as ulterior or alien purposes. The High Court of Singapore appears to have taken the same approach as the High Court of Australia in *Hearne v Street*.<sup>220</sup>

The High Court of Malaya, however, appears to take a different approach. The High Court held that the rule in *Riddick* ‘must be restricted only to the documents obtained by way of discovery in the course of the action’.<sup>221</sup> The High Court of Malaya has refused to extend the rule on collateral use of documents disclosed by way of discovery to all documents or information disclosed as a result of or in the course of court proceedings. It appears then, that it may be possible in Malaysia that documents obtained in exercise of a right to access strata documents and records (when there is such a right) would not be barred by the rule on collateral use. The law on this, however, is not settled as there are no appellate authorities on this.

## SYSTEMIC PROBLEMS WITH STRATA MANAGEMENT LAWS

The above issues are not a product of recent changes in the law, but a product of systemic issues in the body of strata law uncorrected, despite a multitude of amendments and enactments through the years. Issues pertaining to the delays in the issuance of strata title, apparent unprofessionalism and lack of integrity amongst property building managers,<sup>222</sup> and standards of conduct of those on the strata management body committee,<sup>223</sup> have been raised in the *Dewan Rakyat* when

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<sup>220</sup> *Coopers & Lybrand v Singapore Society of Accountants* [1988] 3 MLJ 134, [20]; This is the same position taken by the High Court of Australia in *Hearne v Street* (2008) 235 CLR 125, [96]; See also *Gatley on Libel & Slander* (8th Ed), [1210]; See also *Wright v Times Business Publications Ltd & Anor* [1991] 3 MLJ 12, [60]; *Chua v Manghardt* [1987] 2 MLJ 153, [10], referring to *Riddick v Thames Board Mill Ltd* [1977] 3 All ER 677, 687-88.

<sup>221</sup> *Pee v Tan Sri Datuk Paduka Dr Ting Pek Khiing* [1999] 3 MLJ 402.

<sup>222</sup> Malaysia. Dewan Rakyat. 2012. *Parliamentary Debates*. 27 September, 31. Loke Siew Fook.

<sup>223</sup> See GunaprasathBupalan, “Lacunae in the Strata Management Legislation – Part 2,” *The Malaysian Reserve*, 17 January 2018

Parliament sought to enact the SMA. Some members of the Parliament took issue with majority owners controlling the management corporation be acting in their own interests, at the expense and to the detriment of all other proprietors.<sup>224</sup>

### **A Systemic Problem – Good Management Practices not the Enforceable Standard**

Quite pertinently, the SMA and STA do not address nor set down proper standards and rules governing the affairs of the strata community.<sup>225</sup> These Acts prescribes high level principles (of legality), setting out the outline of strata management – i.e.: general duties, responsibilities, and powers. Taking the analogy of a doughnut,<sup>226</sup> the SMA and STA is like the dough. There is a hole, gap or lacunae in the middle, of discretion exercisable by the Strata Management Body. Discretion, as Dworkin posits, does not exist except as an area left open by a surrounding belt of restriction.<sup>227</sup> This leaves the carrying out of those duties and responsibilities to the ‘open texture’ of law – of boundless and differing principles, standards, rules, approaches; each correct in its own right,<sup>228</sup> and of equal pedigree,<sup>229</sup> and all not reviewable by the Courts.<sup>230</sup> This

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<https://themalaysianreserve.com/2018/01/17/lacuna-strata-management-legislation-part-2/>.

<sup>224</sup> Malaysia. Dewan Rakyat. 2012. *Parliamentary Debates*. 26 November, 83. Siti Mariah binti Mahmud; Malaysia. Dewan Rakyat. 2012. *Parliamentary Debates*. 26 November, 83, 92-3. Chor Chee Heung; See also Malaysia. Dewan Rakyat. 2012. *Parliamentary Debates*. 27 September, 41. Fong KuiLun.

<sup>225</sup> This was implicitly raised, when debating on the issue of whether property managers should be licenced or regulated; Malaysia. Dewan Rakyat. 2012. *Parliamentary Debates*. 26 November, 84. Chor Chee Heung.

<sup>226</sup> In the Dworkinian usage.

<sup>227</sup> Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 31.

<sup>228</sup> Ibid, 43. Dworkin posits that there are ‘no tests of pedigree, relating to principles and standards, can be formulated’.

<sup>229</sup> Ibid, 40-5; or no pedigree at all, see David Kennedy, *A World of Struggle* (Princeton University Press, 2018) 239, referring to Phillippe Sands, *The Greening of International Law* (New Press, 2004) xxxvii-xxxix.

<sup>230</sup> Principles and standards, in the Dworkinian usage, are not reviewable. Only ‘laws’ of statutory bases are reviewable. See eg, *Ong Hock Eam v Perbadanan*

brings us to the question: to what standard or principle should discretion be exercised?

Clearly, of course, the cases which this article has analysed demonstrates that there are clearly *illegal* actions that have caused strife amongst owners that rightly warrant judicial intervention. But where nothing is inherently *illegal*,<sup>231</sup> and where unit owners are unable to collectively agree on the standard or approach to management, this invariably leads to heightened sentiment of dissatisfaction. Dissatisfaction often leads to argument, and ultimately, disputes which are referred to the Tribunals and Courts.<sup>232</sup>

In these cases, there are no real legal issues to be tried.<sup>233</sup> The perceived unfairness or justice of a matter is not a ground on which the Court, applying strict principles of administrative and company law to strata management bodies, can review a matter.<sup>234</sup> Courts generally dismiss these proceedings.<sup>235</sup> As the High Court in *Komtar Fasa Satu* notes,<sup>236</sup> such disputes ‘[are] merely an attempt to raise an issue but not a triable one’.<sup>237</sup> Where there is no illegality on the part of any party, or errors going to the Strata Management Body’s jurisdiction,<sup>238</sup> the Courts do not play the role of finding what is correct or preferable in the

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*Pengurusan Komtar Fasu Satu & Another Appeals (“Komtar Fasu Satu”)* [2018] MLJU 119, [25].

<sup>231</sup> In the positivist sense, where not all immorality or immoral deeds are illegal, unless they have been explicitly designated as such.

<sup>232</sup> See generally, William Felstiner, Richard Abel and Austin Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...,” *Law and Society Review* 15(3-4) (1980/81): 631.

<sup>233</sup> *Menara Gurney*, [17].

<sup>234</sup> *Komtar Fasu Satu*.

<sup>235</sup> *Ong Hock Eam v Perbadanan Pengurusan Komtar Fasu Satu & Another Appeals* [2018] MLJU 119.

<sup>236</sup> *Ibid*.

<sup>237</sup> *Ibid*, [25]; See also *Saujana Triangle Sdn Bhd v JMB Perdana Exclusive and Tropics* [2017] MLRHU 685, [48]; See also *Anwar Yeoh Abdullah v Perbadanan Pengurusan CBD Perdana 1* [2017] MLRHU 1575, [37].

<sup>238</sup> *Menara Gurney*, [17]; See also, *Amcorp Trade Centre*, [8], referring to *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374

circumstances.<sup>239</sup> To do so would amount to the Courts supplanting the valid (legally speaking) decisions of the Strata Management Body.<sup>240</sup>

Often, the Courts and Tribunals directs that ‘[t]he appropriate recourse ... would be [for parties] to table their problem for discussion and resolution at the annual general meeting of the management corporation’.<sup>241</sup> This is often not possible. Where Strata Management Bodies refuses to review the matter, or to make decisions that would alleviate such iniquity,<sup>242</sup> unit owners are often left without recourse to justice.<sup>243</sup> This is where the problem lies. The Courts rarely adjudicate on the fairness or ‘substantive justice’ of a matter, unless the law directs it to do so. As the High Court of Malaya appositely observes in *Pakatan Mawar*,<sup>244</sup> and *3 Two Square*,<sup>245</sup> respectively:

‘So the Courts must, for the sake of law and order, take a firm stand. We can sympathise with the plight in which the appellants find themselves. But we can go no further.’<sup>246</sup>

‘The point that such an arrangement [was] unfair was well made. However, in the administration of justice, **what is fair and what is right**, following a proper consideration and application of legal principles, **may not always perfectly coincide**.’<sup>247</sup>

(emphasis added)

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<sup>239</sup> As noted by Zainun Ali HMR in *Yazid Sufaat & Ors v Suruhanjaya Pilihanraya*[2009] 1 MLRA 333, [79].

<sup>240</sup> *Ibid. Foss v Harbottle* (1843) 2 Hare 461; *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374; *AmcorpTrade Centre*, [8]. See also, *Abdul Rahim Suleiman & Anor v Faridah Mohammed Lazim & Ors*[2016] MLRAU 322, [59].

<sup>241</sup> *KomtarFasu Satu*, [25].

<sup>242</sup> David Kennedy, *A World of Struggle* (Princeton University Press, 2018) 239-41.

<sup>243</sup> Unit owners may be barred from making their claim because of the ‘proper plaintiff’ rule; Eg, *Lance v QAV Pty Ltd* [2013] WASC 13; *Radiant Preference Sdn Bhd v Mohaizi Bin Mohamad & Anor* [2015] 11 MLJ 637.

<sup>244</sup> *Lim Meow Khean & Ors v Pakatan Mawar (M) Sdn Bhd & Ors* [2018] MLRHU 1325, [76], referring to *Sidek Muhamad & Ors v The Government of the State of Perak & Ors* [1982] 1 MLRA 156.

<sup>245</sup> *Yong*, [30].

<sup>246</sup> *Pakatan Mawar*, [76].

<sup>247</sup> *Yong*, [30].

## The Policy Flaw in Strata Management Legislation

The general policy of strata management is to allow the Strata Management Bodies broad and general discretion to manage, control and preserve the essence or theme of the strata scheme—the ‘green light theory’.<sup>248</sup> In the exercise of this discretion, the law allows the delegation of these tasks to those who may assist them develop good practices and attain a satisfactory standard of management – ie: MC committee,<sup>249</sup> professional managers, and managing agents.<sup>250</sup> With that, this general policy makes a few unyielding assumptions.

*One*, that the MC or property managers are competent or ought to be competent in managing the development professionally to the satisfactory standard which complies with law, over above and beyond the law (ie: to a standard that is legal and satisfactory to most unit owners). *Two*, that unit owners, as a management corporation, can afford to hire professional people to manage the place. *Three*, whence any of these assumptions fail, the policy then assumes that the unit owners themselves, as the management corporation, are competent enough and have the capacity to manage the development to a standard that is both satisfactory and complies with the duties and responsibilities prescribed under the Act.

These assumptions rarely remain true. *First*, as members of the *Dewan Rakyat* note, building managers lack professionalism.<sup>251</sup> *Second*, there are many who live in low-medium-cost housing that cannot afford

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<sup>248</sup> Van der Merwe, “The Various Policy Options for the Settlement of Disputes in Residential Community Schemes”; See also, *Nadia Management Corporation v Yap Kuee Hong* [2015] 1 MLRH 476, [50]; *Byrne v The Owners of Ceresia River Apartments Strata Plan 55597* [2017] WASCA 104, [79] – [81]; *Moussa v Strata Plan 65404 & Ors* [2007] NSWLEC 807 [23], [77]; *Grant and The Owners of Rosneath Farm* [2006] WASAT 162, [61] – [66]. See eg, Sch 2A para 4 Strata Titles Act 1985 (WA); s 28J *Strata Schemes (Freehold Development) Act 1973* (NSW).

<sup>249</sup> E.g., sch 2 SMA.

<sup>250</sup> E.g., pt vi SMA.

<sup>251</sup> E.g., Malaysia, Dewan Rakyat. 2012. *Parliamentary Debates*. 26 November, 82, 89.

to pay for managers.<sup>252</sup> *Third*, unit owners on their own, are generally not competent in strata management, let alone know, for example, ‘what quality of paint should be used’ for maintenance and upkeep of the strata scheme.<sup>253</sup>

Without enforceable laws or regulations that address the standards and rules of strata governance; without legislative codes and guides that assist the common folk in understanding the standards and rules of proper strata management; it cannot be reasonably expected of management bodies to discharge their duties to the satisfaction of unit owners and in compliance with the law.<sup>254</sup> This information asymmetry could pose difficulties for owners to comply with their obligations. It would render the determination of what is ‘sufficient’ to adhere to or comply with their obligations, difficult.<sup>255</sup>

## **CONCLUSION: WHERE TO FROM HERE?**

This article considers that law reform that promulgates good and enforceable standards, rules, and rights of strata management is an apt approach to providing basic and minimum standards and rules of good governance in strata schemes. This can provide the foundation for which good practices can be built upon, and ensure disputes are quickly and efficiently resolved.

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<sup>252</sup> E.g., Malaysia. Dewan Rakyat. 2012. *Parliamentary Debates*. 27 September, 60. Mohd. Yusmadi Mohd. Yusoff; Malaysia. Dewan Rakyat. 2012. *Parliamentary Debates*. 27 September, 61. Nurul Izzah Anwar.

<sup>253</sup> Malaysia. Dewan Rakyat. 2012. *Parliamentary Debates*. 27 September, 25. Ong Tee Keat.

<sup>254</sup> Malaysia. Dewan Rakyat. 2012. *Parliamentary Debates*. 27 September 2012, 29. Loke Siew Fook.

<sup>255</sup> E.g., see Greenwood, McKerracher and Moshinsky JJ in *Keris Pty Ltd (Trustee) v Deputy Commissioner of Taxation* [2017] FCAFC 164, [114], referring to *Bluebottle UK Limited v Deputy Commissioner of Taxation* (2007) 232 CLR 598, [39] (French CJ and Kiefel J).

### **Enhancing the Body of Enforceable Standards, Rules and Rights**

The current framework behind strata law is not robust enough to support and facilitate good management practices. In a ‘green light’ system of governance, the theoretical approach assumes that the rule-making and decision-making bodies can develop good management practices. In the province of strata management, there are little good industry practices that make up the body of law to which conduct can be assessed and enforced against. And because poor management practices do not necessarily mean illegal practices, the Courts are unable to review them. This leaves strata scheme lot owners without recourse to justice. In this regard, the body of law should be strengthened and reformed. Robust guidelines and comprehensive legislative codes should be introduced to encourage good management practices. On this, the laws should enshrine the following values of good urban governance: increased homeowners’ participation, fidelity to Rule of Law,<sup>256</sup> greater transparency and the ability for homeowners to impose checks and balances, responsiveness, greater consensus orientation, and equity.<sup>257</sup> Proper management standards should be clearly spelt out, defined, and strata scheme lot owners must be allowed *locus standi* to enforce these standards freely.

### **Moving away from Company and Administrative Law Principles**

The wholesale application of administrative and company law principles, especially those such as the rules in *Komtar Fasu Satu*<sup>258</sup> and *Amcorp Trade Centre*<sup>259</sup> that give strata management bodies broad and unfettered self-regulatory power and autonomy should be reconsidered. This is due to conceptual differences between the legal structure of the company and management corporation, and their relative strength of separate legal personality.<sup>260</sup>

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<sup>256</sup> In Fuller’s conception of the 8 excellencies of law; Lon L Fuller, *The Morality of Law* (Yale University Press, 1969) 33-8.

<sup>257</sup> Goh Ban Lee, *Non-Compliance: A Neglected Agenda in Urban Governance* (Institute Sultan Iskandar of Urban Habitat and Highrise, 2002) 210-229.

<sup>258</sup> *Komtar Fasu Satu*, [25].

<sup>259</sup> *Amcorp Trade Centre*, [8].

<sup>260</sup> Rachel Leow, “Minority Protection Doctrines: From Equity and Company Law to Strata Title,” *Conveyancer and Property Lawyer* (2011): 96, 107.

Both Companies (incorporated under the Companies Act 2016 (Act 777)) and the Strata Management Bodies are creatures of statute (body corporate) having formal separate legal personality to the effect that the company and its members are regarded at law as legally distinct.<sup>261</sup> Strata Management Bodies, in contrast to Companies, have in substance, a relatively more limited and weaker separate legal personality. Fundamentally, the Management Corporation is not established for the purposes of pursuing a venture or economic activity. A management corporation exists simply as a repository of property rights that are common to all the proprietors in a development.<sup>262</sup> Even though a proprietor does not (and cannot) own common property, he has a usufruct over it.<sup>263</sup> Fundamentally also, the management corporation is comprised of all the unit owners comprised in the strata title plan.<sup>264</sup>

Further, the Management Corporation has an unlimited liability structure.<sup>265</sup> The unit owners comprising the management corporation guarantee lawfully incurred debts of the management.<sup>266</sup> This ‘trickle-down effect’ of legal liability from the management corporation to the unit owners, as Leow posits, further demonstrates the lack of an actual separation of legal interests between the two.<sup>267</sup> There is *in fact* little to no separation between the interests of its members and the management corporation. Finally, the management corporation has limited powers and

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<sup>261</sup> *Salomon v Salomon & Co* [1987] AC 22; Aishah Bidin, “Legal Issues Arising From Minority Shareholders’ Remedies in Malaysia and United Kingdom,” *Jurnal Undang-undang dan Masyarakat* 7 (2003): 51, 52-3.

<sup>262</sup> *Yong*, [75].

<sup>263</sup> S 34 STA; The position in Western Australia is radically different. Under the Strata Titles Act 1985 (WA) s 17(1), the common property is owned by all the unit owners in the strata scheme with a share in proportion with the share value, as tenants-in-common. See eg, *Re Burton; Ex parte Rowell* [2006] WASC 277, [32]-[35], [39]-[44]; *The Owners of Habitat 74 Strata Plan 222 v Western Australian Planning Commission* [2004] WASC 23, [36]; *Chu Underwriting Agencies Pty Ltd v Wise* [2012] WASCA 123, [24].

<sup>264</sup> S 17 STA.

<sup>265</sup> E.g., *Sri Wangsaria Management Corporation v Yeap Swee Oo @ Yeap Guan Cheng & Anor & Another Appeal* [2009] 14 MLRH 635, [17].

<sup>266</sup> SMA ss 69, 143(3), 143(4).

<sup>267</sup> Leow, “Minority protection doctrines: from equity and company law to strata title”.

functions conferred on it by statute. Any separation of the interests of unit owners and of the management corporation is *purely* illusory. In totality, all these factors form strong indicia that points to the management corporation's legal personality being relatively weak and illusory. Due to the interests of the unit owners being so intimately related to those of the management corporation, there is hardly any real distinction between the two.

The judicial reasoning in the decision of *3 Two Square* further demonstrates this illusory separation of interests.<sup>268</sup> In examining the concept of a fiduciary in the context of the Malaysian Strata Titles Act 1985 and Strata Management Act 2013, His Honour Azizul Azmi Adnan J viewed that:

'council members of a management corporation do owe a fiduciary duty to the corporation and to the proprietors collectively. However, this duty is not co-extensive as the duty that is owed by a director to the company of which he or she is a director'.<sup>269</sup>

Contrasting between management corporations and companies, His Honour noted that 'a management corporation is not a for-profit enterprise that seeks to undertake a venture or activity for commercial gain. Its role is a more conservatory one, concerned primarily with the preservation and upkeep of assets in the common interest of all the proprietors'.<sup>270</sup> Further, His Honour notes that there the separation of legal interest between a council member of the management corporation and the management corporation per se, are stretched thin. There is in reality, much more limited separation of legal personality, in the fact that the 'collective' interests of the management corporation is in fact the management corporation's council members' personal interests:<sup>271</sup>

A council member ... owe a fiduciary duty to management corporation and to the proprietors as a whole. At the same time, he or she would not be a council member but for the fact that he or she owns a parcel within the relevant development area. That is the *sine qua non* for election to office. It would be apparent to the reasonable observer that the office of a council member is not one that is held for

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<sup>268</sup> *Yong*.

<sup>269</sup> *Ibid*, [78].

<sup>270</sup> *Ibid*, [80].

<sup>271</sup> *Ibid*, [81]-[84].

monetary gain, but rather to advance the interests of the management company, and in so doing advancing that council member's personal interest in the collective in his or her capacity as a proprietor. Thus a **council member would always have a personal interest to advance**, as he or she must necessarily also be a proprietor.

In addition, where the council member has a personal interest (which arises other than by reason of the council member's interest as a proprietor of a parcel) in a transaction or undertaking that is being contemplated in a meeting of the council or of the management corporation in general meeting, then that council member must disclose that personal interest at such meetings. Having done so, he or she would be free to vote in that meeting in any way he or she considers fit ...

... in particular, the council member would be free to exercise his or her voting rights at such meetings to advance a personal interest that he or she may have in his or her capacity as a proprietor, and to suborn the interests of the collective to his or her personal interests.

(emphasis added)

Despite recognizing that Strata Management Bodies have illusory separate legal personality and therefore a lack of basis for the corporate veil, the Courts have yet to apply the common law concept of derivative action and minority shareholder rights to Strata Management Bodies.<sup>272</sup> The Courts do not reject the proposition that the derivative action rule applies to Strata Management Bodies in Malaysia and Western Australia. In fact, the Courts have expressed some support for it.<sup>273</sup> The Courts have simply not affirmatively applied or allowed derivative claims yet. This may be because a complaint against the Strata Management Body is in fact a complaint against the lot owners collectively, and it would be absurd in this sense to allow lot owners to sue themselves. However, while owners are technically suing themselves, they are essentially challenging the actions and decisions of those 'trustees' who control and manage the strata scheme on behalf of the owners. Such an action is

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<sup>272</sup> The Companies Act 2016 (Malaysia) and Corporations Act 2001 (Cth) and the minority shareholder remedies that apply to companies/corporations incorporated under those statutes do not apply to Strata Management Bodies.

<sup>273</sup> *Aikman v The Owners of Strata Plan 48817 – 16 Dolphin Drive Mandurah* [2016] WASC 380, [133]-[142]; *3 Two Square Sdn Bhd v Perbadanan Pengurusan 3 Two Square & Ors* [2018] MLJU 111, [23]-[25].

consistent with the approach taken in respect of ‘Sdn Bhd’ and ‘Pty Ltd’ corporations which have stronger separate legal personality and is not inconsistent with the established exceptions to the ‘proper plaintiff’ rule in *Foss v Harbottle*.<sup>274</sup>

Law is a salient tool of distribution and inequality.<sup>275</sup> Principles of administrative law and company law<sup>276</sup> recognizing and deferring to the autonomy of strata communities to self-regulate should not be so readily applied to strata management. The relative strength of a separate corporate personality between strata companies and their members are virtually non-existent. The personality of the strata corporation is, an illusory front for the interests of the majority, particularly for those in control of the Management Corporation’s council. While the current statutory framework exists to ensure that practices are legal, they are merely guarantees of process and not of substance. For positive change to occur, it is imperative that law reform is undertaken to move strata law towards a system of enforceable standards, rules and rights codifying and promulgating good management practices. While the realities of Strata Management Bodies are that there will still be inequalities of power between majority and minority owners,<sup>277</sup> law reform promulgating

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<sup>274</sup> (1843) 67 ER 189; On this, it is apt to note that the Malaysian Strata Titles Act 1985 was modelled along the lines of the New South Wales Conveyancing (Strata Titles) Act 1961. In New South Wales, derivative actions in respect of Strata Management Bodies have been recognized as an important remedy to assisting lot owners achieve greater justice. See, eg, *Houghton v Immer (No 155) Pty Ltd* [1997] NSWSC 608; *Carre v Owners Corporation - Strata Plan 53020* [2003] NSWSC 397; (2003) 58 NSWLR 302, [20]-[25] (Barrett J); *Eastmark Holdings Pty Ltd v Kabraji* [2013] NSWSC 1763, [78] (Darke J); *Barrett v Duckett* (1996) 14 ACLC 3101, 3106 (Peter Gibson LJ); *Biala Pty Ltd v Mallina Holdings Ltd* (1993) 13 WAR 11, 73; The Malaysian decision of *3 Two Square SdnBhd v Perbadanan Pengurusan 3 Two Square & Ors; Yong Shang Ming (Third Party)* [2018] MLRHU 84 appears to express support for development in this area of law.

<sup>275</sup> David Kennedy, “Introducing a World of Struggle,” *London Review of International Law* (2016) 4(3): 443, 449.

<sup>276</sup> As summarized in the analyses of cases above.

<sup>277</sup> Encouraging the development of good practices itself does not resolve issues in instances where majority owners can still be ‘masters of what [minority owners can do and] say’; see generally, Malaysia. Dewan Rakyat. 2012. *Parliamentary Debates*, 26 November, 92. Chor Chee Heung.

enforceable standards, rules and rights of good management practices can be a catalyst for positive change in Strata Management in Malaysia.<sup>278</sup>

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<sup>278</sup> Ahmad Murad Merican, “Knowledge Inequality explains need for new modernisation theory,” in Ahmad Murad Merican, Azeem Fazwan Ahmad Farouk and Mohamed Ghouse Nasuruddin (eds), *Views from Pulau Pinang: Countering Modern Orientalism and Policy Perspectives* (SIRD, 2018), 22, 23-4.