BUILDING MAINTENANCE AND STRATA MANAGEMENT ACT

BUILDING MAINTENANCE AND STRATA MANAGEMENT (STRATA TITLES BOARDS) REGULATIONS 2005

STB No. 8 of 2020

In the matter of an application under section 101(8) of the Building Maintenance and Strata Management Act in respect of the development known as **Novena Court** (MCST No. **1594)**

Between

Wee Hock Chye Patrick / Yong Oy Cheng @ Yeow Oy Cheng

… Applicant(s)

And

Lew Shiaw Lin

... Respondent(s)

GROUNDS OF DECISION

BUILDING MAINTENANCE AND STRATA MANAGEMENT ACT

BUILDING MAINTENANCE AND STRATA MANAGEMENT (STRATA TITLES BOARDS) REGULATIONS 2005

STB No. 8 of 2020

In the matter of an application under section 101(8) of the Building Maintenance and Strata Management Act in respect of the development known as **Novena Court** (MCST No. **1594)**

Between

Wee Hock Chye Patrick / Yong Oy Cheng @ Yeow Oy Cheng

… Applicant(s)

And

Lew Shiaw Lin

... Respondent(s)

13 January & 14 January 2021

9 March 2021

Coram:	Mr Alfonso Ang	(President)
	Mr Chng Beng Guan	(Member)
	Dr Edward Ti	(Member)

INTRODUCTION

1 The original Applicants of STB No. 8 of 2020 were **Wee Hock Chye Patrick** ("*the Applicant*") and his mother, **Yong Oy Cheng @ Yeow Oy Cheng** ("Mdm Yong"), then joint tenants of XXX Jalan Novena Barat Singapore 308610. The application was first filed with the Board on 22 January 2020. The Respondent is the subsidiary proprietor of the unit XXX Jalan Novena Barat Singapore 309610 which is above the Applicant's unit ("*the Respondent*") and became its registered proprietor on 21 March 2018.

2 As Mdm Yong passed away on 15 March 2020, the Board recorded during a direction hearing on 12 November 2020 that her application as 2nd applicant was withdrawn. Following Mdm Yong's passing, the Applicant became the only registered proprietor of XXX Jalan Novena Barat and proceeded with the claim as its sole applicant.

3 The preliminary issue before the Board was whether the Applicant has standing to seek compensatory orders *on behalf of his mother's estate* in the period of time when he was joint tenant with his mother, prior to her passing.

BACKGROUND

4 The initial dispute between the Parties pertained to inter-floor seepage from unit XXX to unit XXX. Following a mediation before the Board on 3 April 2020, the parties agreed to jointly appoint a building surveyor to determine the cause of the leak and also agreed to be irrevocably bound by this joint expert's report.[1]

5 Mr Chin Cheong of Building Appraisal Pte Ltd (BAPL) was duly appointed by the Parties and following inspection of both units on 23, 24, 29 and 30 June 2020, BAPL rendered the joint expert's report in July 2020.

6 The BAPL report found the Respondent liable for the leak and made recommendations for rectification works in both units XXX and XXX. The Board accepts these works were remedied by the Respondent in her own unit (XXX) by 20 October 2020.[2] However, none of the recommended works in XXX was carried out by the Respondent.

7 While the BAPL report resolved liability in respect of the leak itself, the Parties could not come to a resolution regarding related ancillary matters such as the Applicant's claims for property damage and loss of rental income. The arbitration hearing on 13 and 14 January 2021 thus dealt with these matters.

ORDER SOUGHT

8 The Applicant sought an Order from the Board for:

> "*1. WORK ORDER: Have professional building surveyor determine where the exact leak(s) are and have a waterproofing specialist do a ponding test before and after to fix / waterproof concrete / leaking AC or water pipes, do a official report to confirm no more leaks*
>
> *2. Compensate me for the time and cost for this application*
>
> *3. Loss of rental for the continued leakage rendering our unit lot lettable despite marketing costs and efforts. To be assessed by STB;*
>
> *4. SS$2675 paid to Building Appraisal Pte Ltd to investigate source of leak into XXX & 16A. And refusing to let them in despite costs already pid (sic) by claimant;*
>
> *5. Repair costs by UEAltraco and others including but not limited to S$16.500 (sic) or such amount to be assessed by STB*."

[1] Letter from Strata Titles Boards dated 3 August 2020 (File Ref: STB 8 of 2020)
[2] Respondent's AEIC paragraph 21 (RW1).

BOARD'S DECISION ON PRELIMINARY ISSUE

9 As stated in paragraph 3, a preliminary issue is whether the Applicant has standing to seek compensatory orders for loss of rental income claims *on behalf of his mother's estate* in the period of time when he was joint tenant with his mother, prior to her passing.

10 The Board agrees with the Respondent that the Applicant has no standing to seek compensation in this respect. Even if ownership of XXX vested in the Applicant on 15 March 2020 upon Mdm Yong's demise (due to survivorship), this allows the Applicant to make claims pertaining to the unit *subsequent* to that date. The Applicant has no standing to presently seek claims on behalf of his mother's estate for the period during her lifetime.

11 In *Teo Gim Tiong* v *Krishnasamy Pushpavathi (legal representative of the estate of Maran s/o Kannakasabai, deceased) ("Teo Gim Tiong")*,[3] the Court of Appeal held that an estate's claim for damages required the properly appointed executor or administrator of the estate to act for the estate. Chao JA observed that the underlying purpose of this rule is to preserve the assets of the estate as 'the estate's worth may be frittered away as much through the process of litigation as by the commencement of an action.' Thus, while the alleged losses (rental income and property damage) accrued during Mdm Yong's lifetime and fall within causes of action that survive death pursuant to s 10(1) of the *Civil Law Act* (Cap 43), only Mdm Yong's properly appointed executor or administrator has standing to make these claims on the estate's behalf.

12 The *Teo Gim Tiong* court noted that its approach is on all fours with the English Court of Appeal in *Millburn-Snell* v *Evans*[4] where Rimer LJ held that 'an action commenced by a claimant purportedly as an administrator, when the claimant does not have that capacity, is a nullity'.[5] Chao JA observed that 'the obtaining of proper letters of administration is not a mere formality or technicality but a rule conveying substantive rights and as such should not be easily overridden.'[6] This same principle should also apply where the deceased's will appoints an executor – thus the grant of probate gives the executor substantive rights to act on behalf of the estate.

13 The Board was presented with the will of Mdm Yong dated 14 December 2014 which appointed one **Kuan Fong Lin Roxanne** ("Roxanne") as the sole executor and trustee of Mdm Yong's estate. The fact that Roxanne is the Applicant's wife and Mdm Yong's daughter-in-law is irrelevant; the executor alone has standing to seek compensation on behalf of Mdm Yong's estate. Neither does a letter dated 26 January 2021 (some two weeks after the arbitration hearing before the Board) purportedly in the hand of Roxanne giving authorisation to the Applicant cure this defect. The fact remained that throughout the entire application before the Board in respect of STB No. 8 of 2020, the executor never acted on behalf of Mdm Yong's estate following her passing.

[3] [2014] 4 SLR 15.
[4] [2011] EWCA Civ 577.
[5] *Id*, at [16].
[6] [2014] 4 SLR 15 at [32].

14 A second related issue arises because some of the Applicant's claims for damaged property and loss of rent is purportedly in respect of periods *before* the Respondent became the owner of unit XXX. During the proceedings, evidence emerged that the prior subsidiary proprietor of unit XXX knew about the leak in unit XXX but appeared to take less interest in the same following entering into a contract on 12 December 2017 to sell XXX to the Respondent. As the Applicant failed to seek compensation from the prior owner of XXX, he sought to saddle the Respondent with all claims in relation to his alleged losses, even those accruing prior to the Respondent becoming owner of XXX.

15 In relation to this related preliminary issue, the Board holds that the Respondent cannot be held liable (if and when liability is found) for losses accruing before she became legal owner. While equitable ownership indeed passed to the Respondent on the date of the contract – 12 December 2017, the nature of this constructive trust is unique. While benefits under a trust ordinarily accrue to the beneficiary, rental income beneficially belongs to the legal owner in the post-contract pre-completion phase. The legal owner's liability includes paying property tax and bearing the responsibility for keeping the premises safe.

16 The Board thus finds it incongruous if potential losses stemming from ownership (in this case damages resulting from an existing leak) should be attributed to the equitable owner. Without possession, the Respondent could not have responded to any of the Applicant's claims meaningfully. Once legal title of XXX passed to the Respondent on 21 March 2018 however, it is clear that the entirety of ownership risk passed to her as part of the 'bundle of rights' purchased by the Respondent.

17 Thus, there are three relevant timelines that the Board takes cognisance of:

(a) Claims made in relation to periods prior to 21 March 2018.[7]
(b) Claims made in relation from 21 March 2018 to 15 March 2020.[8]
(c) Claims made in relation from 16 March 2020 to date of Board's judgement.[9]

18 The Board holds that the Respondent cannot be liable for any losses under timeline 17(a). As the Applicant has no standing to make claims on behalf of Mdm Yong's estate, the Board holds that the Applicant is limited to 50% of the value of any claims, qua joint tenant of unit XXX, made under timeline 17(b). Finally, in relation to any claims made under timeline 17(c), the Applicant is entitled to 100% of the value of any losses attributable to the Respondent.

19 As the Board ultimately found that the Respondent was not liable for loss of rental income, it is noted that the preliminary issues were not determinative.

BOARD'S FINDINGS ON SUBSTANTIVE CLAIMS

20 As stated earlier, the parties have settled the root of the dispute which is inter-floor

[7] Ie before the Respondent became legal owner of unit XXX.
[8] From the date the Respondent became legal owner to Mdm Yong's demise.
[9] From the date the Applicant became the sole owner of XXX to the date of judgement.

seepage from unit XXX to XXX. The main orders sought in this application are loss of rental income in unit XXX due to the leak, as well as property damage. These are addressed in turn.

Loss of Rent

21 The joint expert report makes it clear that XXX is liable for the leak. The Board also affirms the general principle that where the leak causes the affected unit to be untenantable, the proprietors owning the unit causing the leak may be made liable for this loss of rent.[10]

22 However, the fact that the Applicant's unit suffered leakages and that this stemmed from the Respondent's unit does not *ipso facto* mean that the Respondent is liable for the alleged loss of rent. Critically, the Applicant bears the evidentiary burden to prove that the leak caused unit XXX to be untenantable. Where the applicant alleges loss of rental caused by water leakage, it is for the applicant to show that the extent of the leakage for which the respondent is liable was severe enough to render the property untenantable: *Cheng Fu Zay* v *MCST Plan No 1919*.[11] While there is a statutory presumption that the unit above caused the leak to the unit below, the presumption does not go so far as to say that the unit above is also presumed to be liable for all consequential ancillary losses stemming from the leak.

23 The Applicant's case for claiming north of $100,000 in loss of rent is premised on him partitioning his unit into three areas and renting each one out. Detailed evidence emerged during the hearing (that was accepted even by the Applicant) in this respect include the fact that the Applicant exaggerated the size of the three rooms on an online platform by some 20% and was seeking to rent the rooms out for about twice the market rent (on a per square foot basis). Evidence also emerged that the layout of the Applicant's unit is markedly different from other strata units in the development and further, that the Applicant was unable to furnish any relevant local authorities' approval of the unit partitioning.

24 The Applicant submitted separate tenancy agreements (with different tenants) in respect of the three partitioned areas across different periods of time in attempting to show the quantity of the alleged loss. Unfortunately for the Applicant, he was fundamentally unable to provide any credible evidence that the leak actually caused any areas of unit XXX to be untenantable.

25 Apart from the Applicant, only one witness gave evidence on behalf of the Applicant. AW2 **Tham Yin Teng's** ("Tham") AEIC states that Mdm Yong permitted Tham to terminate the tenancy after signing the tenancy agreement but before moving in. The Applicant also gave evidence that the poor conditions in the unit (which he alleges stems from the leak) resulted in tenants who had rented other parts of unit XXX to terminate the lease. According to the Applicant, this means that the Respondent should compensate the Applicant for the loss of rental income.

[10] See for eg STB No 32 of 2018 – *Poh Beng Swee* v *Teo Siew Yam* ("Loyang Valley").
[11] [2008] 3 SLR(R) 328.

26 There is an important distinction between a unit being untenantable in that no reasonable tenant would be expected to start commencing a lease with the situation where a currently tenanted unit starts leaking and the tenant wants to breach the contract. As there are no statutory habitability laws in Singapore, the state of the unit and the price to be paid in exchange for the space is a market transaction between landlord and tenant.

27 The Board finds that the Respondent should not be found liable for the loss of rental income. The Applicant has not proved that the leak caused XXX to be untenantable and in any case, the Applicant has failed to mitigate his losses.

28 As a chattel real, a lease is a hybrid of contract and an estate in land. The applicability of specific performance to the latter means that generally speaking, both landlord and tenant are bound under the lease for the period of the tenancy. Strictly speaking, there is no obligation on the part of the landlord to allow the tenant to terminate the lease due to a leak, unless the tenancy agreement specifies so. Damage arising during the course of a tenancy typically results in shared responsibility between landlord and tenant in terms of apportionment. The mere fact that the tenants may have told the Applicant (or his mother Mdm Yong) that they want to determine the lease does not mean that the unit has become untenantable *because* of the leak.

29 In *Cheng Fu Zay* v *MCST Plan No 1919*,[12] Woo J cited with approval:

> 'In my opinion, the key issue is whether the extent of the leakage was severe enough to render the units untenantable. If the leakage had some impact, then the degree had to be assessed. If the leakage was part of a whole host of factors rendering the unit untenantable, then the contribution it played towards that result had to be assessed.'

30 On the facts, the Applicant has not shown the extent of the leakage was severe enough to render XXX untenantable.

31 A leaking ceiling per se is also very unlikely to amount to a frustrating event. While the House of Lords has recognised that the doctrine of frustration can in principle apply to leases, its application at common law is extremely reticent. In *National Carriers Ltd* v *Panalpina (Northern) Ltd ("National Carriers")*,[13] the issue before the Lords was the twenty-month closure, by the local council, of the only vehicular access to a tenanted warehouse. As the warehouse was unusable for the twenty-month period due to the lack of access, the tenant of the ten-year lease stopped paying rent, declaring the lease frustrated and hence discharged. While a majority of the court held that frustration could apply to leases in principle, the facts at hand were insufficient for the doctrine to apply given the remaining length of the lease, some three years, after the supervening interruption. The twenty-months of rent was thus held to be due and payable to the landlord even though the tenant could not use the property for the period in question.

32 The nature of the intervention in *National Carriers* is more severe than the leak described by the Applicant. The Board thus notes that the Applicant's (or Mdm Yong's) decision

[12] [2008] 3 SLR(R) 328 at [24].
[13] [1981] AC 675.

to allow their tenants to determine their leases may not have been legally required, being akin to a mutual surrender. Thus, absent an explicit term in the contract (which the Board did not observe in any of the leases presented by the Applicant), the Applicant was not obliged to permit the termination of any tenancy agreement on the part of the tenants.

33 The Applicant has not discharged its evidentiary burden to prove that XXX became untenantable due to the leak, and in any case the Board finds that the Applicant has failed to mitigate his own losses as he is required to do: *Tan Soo Leng David* v *Lim Thian Chai Charles*.[14] As a policy meant to reduce wasteful activity, the failure of the Applicant to mitigate his own losses is a further bar against holding the Respondent liable for the loss of rental claim.

34 From one perspective, permitting the tenants in question to terminate the lease when he was not legally required to do so may be seen as a failure to mitigate his losses. That aside, the Board finds that the Applicant has failed to mitigate his losses because he has failed to make repairs / restoration work in XXX to cover up the discolourations he claims emanates from XXX (and which he could have claimed from the Respondent subsequently) and further, that the Applicant has not sufficiently tried to have XXX tenanted. The latter requires some further explanation.

35 While there was evidence given by the Applicant that the unit continues to be untenanted till today, the Board notes that the Applicant has persisted in seeking to have XXX partitioned and rented out as three separate areas at a rate of more than twice the market price (the Board notes the market rate for the development to be approximately $3 per square foot per month). In this respect, the Applicant has failed to mitigate his losses – a reasonable landlord would have sought to rent the property at a reasonable rate, even if this means renting it out as a single unit (and if there is leakage or discolouration as claimed by the Applicant), to further reduce the rent to *below* market rate.

36 For instance, if the market price for the size of the Applicant's unit (850 square feet) was $2550 per month,[15] a tenant would perhaps have been willing to rent XXX at $1500 or $2000 per month. This would have been strong evidence to show the Board that the Applicant had to lower his expectations because of the unsavoury state of the property which the Applicant claims was caused by the Respondent. Instead, the combined rent that the Applicant was seeking as seen from his advertisements was in the range of $6000 per month[16] as he persisted in seeking to rent out the unit as three partitioned areas (and at an assumed 100% occupancy). Even discounting the Respondent's submissions that the Board should not permit alleged illegality on the part of the Applicant in partitioning XXX, the Board finds that the Applicant's conduct in seeking an unrealistic rent in the

[14] [1998] 1 SLR(R) 880.
[15] 850 square feet multiplied by $3.
[16] During the hearing evidence emerged from online property advertisements (99.co) that the Applicant was seeking to rent the portioned areas in XXX as follows: Master bedroom (coloured blue on Annex F) at $1600/month, the 'studio' unit listed a "studio condo in the listing" (coloured green on Annex F) at $2000/month and a '1-bedroom condo' (coloured orange on Annex F) at $2400 per month for a 2-year lease. The advertisements offered a lower rate where the entire rent was paid upfront and a higher rate when the lease was for a 1-year period. While the advertised property belongs to the Applicant, the Board notes that the advertisement does not state that the Applicant was listing his own property.

circumstances shows that he has failed to mitigate his own losses; the Applicant's high expectations may have contributed to the Applicant being unable to find tenants. This reinforces the Board's findings that the Applicant is unable to prove that a *cause* for the loss of rental income stemmed from the Respondent's unit (and not perhaps, because the rent sought by the Applicant was too high).

37 Perplexingly, the Applicant's advertisements (including photographs) represent that the entirety of unit XXX is in an excellent condition. For instance, the advertisement for the "studio unit" describes the property as "almost brand-new designer studio." These advertisements were placed by the Respondent in his capacity as a registered salesperson to the general public in the 99.co platform. This is diametrically opposed with the Applicant's claims before the Board that the Respondent had caused significant harm to the tenantability of XXX.

38 As there is no credible evidence which shows that the leak in XXX (stemming from XXX) actually *caused* any loss of rental income to the Applicant, and that in any case, the Applicant has failed to mitigate his loss, the Board dismisses the Applicant's claims for loss of rent in its entirety.

Property Damage

39 The Applicant seeks approximately $35,000 from the Respondent for certain remedial works and property damage.

40 In relation to the claim for $16,500 (UE Altraco Quotation dated 10 April 2018), the Board finds that there is no evidentiary nexus between the leak caused by the Respondent and the works on the sink and wardrobe. While that quote also included costs for supplying labour and materials in respect of XXX's ceiling, the Board notes that this was in relation to waterproofing membrane in respect of the Applicant's own ceiling. Accordingly, this claim is dismissed.

41 In respect of the claim for the washing machine ($899) and a dehumidifier ($1200), this is also dismissed. The Applicant did not provide any evidence that the washing machine was spoilt by the Respondent's unit. Indeed, **Lim Hiong Kwang**, a licensed electrician gave evidence before the Board that in his view, it was unlikely that the Respondent's unit caused the Applicant's washing machine to spoil. In respect of the claim for the dehumidifier, this appears to be based on the joint expert's recommendation to use a dehumidifier inside the rooms to remove any excess moisture. The jointly appointed expert did not recommend that a dehumidifier was permanently needed. Indeed, the use of the humidifier is part of the $13,900 claim dealt with in the next paragraph.

42 In respect of the Applicant's claim for $16,900 ($13,900 excluding the claim for the mirrors as per the UE Altraco Quotation dated 30 June 2020), the Board finds that the quote goes beyond what is recommended in the joint expert report. The Respondent has obtained a quotation of $3,600 (Aaron Au's quote dated 1 December 2020) as being sufficient to carry out the necessary rectification works. As the Respondent does not dispute that she is to adhere with the joint expert's report, the issue for the Board in respect of this claim is one of quantification. The Board notes that the joint expert has

estimated that the cost of works in XXX is $10,000 (paragraph 5.10 of BAPL Report). There is no reason to disturb the finding of the neutral joint expert in this respect and the Board thus finds the Respondent liable to pay the Applicant $10,000. While this may appear to slightly overcompensate the Applicant (as the Respondent has done some touch up to the ceiling of XXX), the Board also notes that the touch up to the ceiling would in any case have to be redone when the underlying ceiling works are done to XXX.

Other claims

43 Finally, the Board dismisses the Applicant's prayer for loss of time as there is no legal basis for such a claim. The Board also dismisses the application for a further work order as this was not recommended by the joint expert which the parties had agreed to be bound by.

BOARD'S DECISION

44 The Board hereby finds that the Respondent is liable to pay the Applicant $10,000 being the costs of rectification works to the Applicant's unit as concluded by BAPL in its report in July 2020.

45 In addition to paragraph [44] above, the Board after hearing the parties on costs, makes the following order:

a. The Respondent to pay the Applicant the sum of $2,675 for the costs of the BAPL report in July 2020;

b. The Respondent to reimburse the Applicant the filing fee of $500 and the fee for the 3rd mediation / direction hearing on 13 August 2020 of $150;

c. The Applicant to pay the Strata Titles Boards fees of $1,500 for attendances and arbitration hearings before the Board;

d. The Applicant to pay to the Respondent costs of $5,000 being costs for the 2-day hearing in respect of assessment of damages; and

e. Parties are to make payments within seven (7) days from the date of this Order.

Dated this 9th day of March 2021

_____

Mr Alfonso Ang
President

_____

Mr Chng Beng Guan
Member

_____

Dr Edward Ti
Member

Mr Wee Hock Chye Patrick (in-person) for the Applicant(s).
Ms Grace Lu Huiru (M/s Holborn Law LLC) for the Respondent.