BUILDING MAINTENANCE AND STRATA MANAGEMENT ACT

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

STB No. 99 of 2022

In the matter of an application under section(s) 101(8) of the Building Maintenance and Strata Management Act in respect of the development known as **Bukit Timah Plaza / Sherwood Towers** (MCST Plan No. 568)

Between

Tan Chin Pei

... Applicant

And

Robert Francis De Rozario

... Respondent

GROUNDS OF DECISION

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... Respondent

2 May 2023 and 3 May 2023

23 May 2023

Coram:	Ms Lee Lay See	(Deputy President)
	Dr Edward Ti	(Member)
	Mr Lee Coo	(Member)

BACKGROUND

1. Tan Chin Pei (the "**Applicant**"**)** is the subsidiary proprietor ("**SP**") of 3 Jalan Anak Bukit, #XXX, (S) 588998, in the development known as Bukit Timah Plaza/Sherwood Towers. Robert Francis De Rozario (the "**Respondent")** is the SP of the unit situated immediately above the Applicant in the same stack, i.e., 3 Jalan Anak Bukit, #XXX, (S) 588998. Both units are studio apartments.

2. In this case of alleged inter floor leakage, the orders sought by the Applicant are as follows:

   i. The Respondent to engage, at his own cost, a Building and Construction Authority (BCA) registered building contractor to carry out repairs to resolve the water leakage into and water damage caused to the Applicant's unit, to the satisfaction of a building surveyor /

water seepage specialist engaged by the Applicant. Such corrective works shall be completed within ten (10) weeks of the date of the Board's order.

ii. *The Respondent to pay the Applicant damages for inconvenience, anxiety and/or loss of enjoyment.*

iii. *The Respondent to bear the Applicant's costs and disbursements of and incidental to this Application including legal fees, STB fees and surveyor's fees.*

ISSUES BEFORE THE BOARD

3. There were four main issues to be decided – one preliminary issue and three substantive issues that arose from the hearing.

The Preliminary Issue

4. The significance of the Agreement dated 21 December 2022 ("the Agreement") which was signed by the Parties (the "Preliminary Issue") arose because of a submission made by the Respondent at the 11th hour – on the first day of the hearing on the morning of 2 May 2023. In short, the Respondent took the view that the hearing need not be conducted as the parties had in the Agreement, already agreed to appoint one Eddie Chong Keng Wee ("Mr. Chong"), a Professional Engineer (PE), and be bound by his findings and recommended rectifications to be carried out. The Applicant did not object to the application and the Board considered the submission and rendered its decision orally, ruling against the Respondent. As there may have been no necessity of a hearing had the Board accepted the Respondent's submissions on the Preliminary Issue, these Grounds of Decision ("GD") reiterate the oral reasons given by the Board regarding the Preliminary Issue.

5. The material words in paragraph 1 of the Agreement state that the '*Parties are to jointly appoint Eddie Chong… failing which parties will jointly source and appoint a professional Building Surveyor*.' While the Respondent took the view that this meant that the parties had already agreed to appoint Eddie Chong, the Board took the view that the words 'failing which' contemplated scenarios where Mr. Chong failed to be jointly appointed – either because he was unable to unwilling to take up the job, or because either party did not agree to have him so appointed.

6. The various emails exhibited by the Respondent dated 29 and 30 December 2022 show that the Applicant never acquiesced to the appointment of Mr. Chong. Tellingly, in an email dated 3 January 2023 written by the Respondent's counsel which purports to confirm Mr. Chong's appointment, the email materially states '*We are instructed by* ***our client*** *that* ***he accepts*** *the*

revised quotation and accordingly, we return and enclose herewith a softcopy of the same duly executed by us ***on behalf of our client***'[emphasis added]. It is patent that the Respondent's counsel took the position that only their client – the Respondent – had agreed to appoint Mr. Chong, and they never, rightly in our view, took the position that the appointment of Mr. Chong was endorsed by the Applicant.

7. The Board's view is further buttressed by the fact that while the parties entered into the Agreement on 21 December 2022, Mr. Chong only presented a quotation, and subsequently a revised quotation, for his professional services on 28 and 30 December 2022 respectively. It would be unreasonable and unduly onerous to say that the parties were irrevocably bound to appoint Mr. Chong without even seeing his quotation, assuming only that he was willing and able to take on the project.

8. As the Agreement entered between the parties was legally valid but the parties had failed to jointly appoint either Mr. Chong or a professional building surveyor, the Board took the view that both parties were *prima facie* in breach of the Agreement. In the many months since entering into the Agreement, both parties could have done more, such as seeking guidance from the Board via a 3rd mediation session, to ensure that *someone* was appointed.

9. After the Board rendered its oral decision on the Preliminary Issue, the Respondent invited the Applicant to jointly appoint any professional building surveyor of her choice, pursuant to the Agreement. The Applicant did not wish to do so, citing the long delay regarding the leak which she claimed was attributed to the Respondent. While the Respondent's offer was made pursuant to a validly entered Agreement, the Board was mindful that under section 92(9) of the *Building Maintenance and Strata Management Act 2004* ("BMSA"), it is duty bound to make a final order or determination within six months from the date it is constituted, i.e., by 28 May 2023. Accordingly, having disposed of the Preliminary Issue, the Board proceeded to hear the substantive merits of the case.

Substantive Issues

10. An arbitration hearing involving five witnesses – the Applicant, Respondent and three expert witnesses, was conducted before the Board on 2 and 3 May 2023. As with cases of this nature, the case turned on the views of the experts, rather than the opinions of the parties. Neither party sought to discredit the credentials of each other's experts, and the Board took the view that all three experts – Goh Choong Siong ("Mr. Goh") and Dinesh Kumar ("Mr. Kumar") who gave evidence as the Applicant's witnesses, and Paul Crispin Casimir-Mrowczynski ("Mr. Casimir") who gave

evidence as the Respondent's witness, had professional demeanours and appeared candid with their evidence. Upon hearing the parties and considering their respective submissions, the Board considered that there were three substantive issues arising from the hearing:

i. Whether the statutory presumption under section 101(8) of the BMSA applied in favour of the Applicant.

ii. If the answer to (i) is 'Yes,' whether the Respondent has rebutted the presumption on the balance of probabilities.

iii. If the answer to (i) is 'No,' whether the Applicant has nonetheless proven that the cause of the leak in her unit is attributable to the Respondent's unit.

APPLICANTS' CASE

11. Being the SP of the unit affected by the leak, the affidavit of evidence-in-chief (AEIC) of the Applicant (A2) states that she had been suffering from water seepage since September 2022, as well as dampness and moisture from the ceiling, and along the walls of her kitchen and bedroom.

12. The Applicant engaged IGM Integrated Pte Ltd ("IGM"), a water intrusion specialist company and a Leak Condition Survey Report ("Survey Report") dated 22 February 2023[1] was tendered as evidence. Both reports were prepared by Mr. Kumar, an IGM water intrusion engineer, and validated by Mr. Goh, a chartered building engineer and consultant at IGM.

13. IGM's Survey Report utilised a combination of radio-waves, ultra-waves and visual observations performed by Mr. Kumar. Materially, the Survey Report noted that in the Applicant's unit, there were '*water stains observed at kitchen concrete ceiling adjoining affected kitchen wall*' (Survey Report Fig 2.2). Mr. Kumar also explained that the radio wave imaging confirmed this visual observation (Fig 2.3). The report also observed that there was '*dampness and discoloration* (sic) *of cement observed at bathroom RC ceiling*' (Figs 2.10 and 2.11) in the Applicant's unit.

14. IGM performed a water spray test at the Respondent's (upper floor) unit by continuously spraying water for 20 minutes at the left corner of the wall of the long bath (Fig 2.28). After approximately an hour and a half later, water was seen '*oozing out*' from the flooring below the affected kitchen wall in the Applicant's unit (Fig 2.29 and conclusion of Survey Report).

[1] While the Survey Report was dated 22 February 2023, Mr. Kumar explained that this was the date that IGM was first engaged by the Applicant. Mr. Kumar visited the units to perform the leak assessment on 1 and 4 March 2023. There was also an IGM Supplementary Report based on a site visit done on 24 March 2023.

RESPONDENT'S CASE

15. The Respondent's position is that there is no evidence of an inter-floor leak.

16. The Respondent's expert is Crispin Casimir, a Chartered Building Surveyor, of CC Building Surveyors Pte Ltd ("CC"), Mr. Casimir's eponymous company. CC conducted its inspection on 2 February 2023 and the Respondent subsequently submitted CC's Inspection Report ("CC's Report) regarding the alleged inter-floor leakage between the parties' units.

17. CC's observation of a pool of water in the Applicant's kitchen corroborated the existence of a leak. However, CC took the view that '*there was no evidence that the water was emanating from the upper wall level, soffit or the unit above*' (para 3.1 of CC's Report). Instead, CC suggested that the source of water emanated from the air-conditioning pipework condensate within the Applicant's unit and/or the refuse chute, which is part of the common property (paras 3.1 and 4.0).

18. On 24 March 2023, CC conducted a further inspection on both units and issued a Further Inspection Report (FIR). Notably, this was done *after* the bathtub sealant in the Respondent's unit had been recently replaced (para 3.1, FIR). According to the FIR, there was no moisture staining at the kitchen ceiling, and the bathroom ceiling void '*appeared dry*' albeit with '*localised staining*.' CC's FIR also stated that there was no evidence of any leakage or calcium carbonate build-up (para 3.1, FIR). CC also repeated the water spray test done by IGM earlier in that month (where the Respondent's shower head was turned on and directed towards the tiled wall and bathtub interface for 20 minutes). According to the FIR, there was no leakage at the bathroom ceiling or soffit an hour after the water spray test. CC's FIR reiterated that the water damage suffered by the Applicant's unit is attributed to condensate relating to that unit's air-conditioning system and/or water from the refuse chute (para 4.0, FIR).

ANALYSIS OF THE ISSUES

I. The statutory presumption

19. The first substantive issue that emerged from the hearing is whether the statutory presumption under section 101(8) of the BMSMA applies in favour of the Applicant. The sub-section materially reads:

> *(8) In any proceedings under this section with respect to any alleged defect in a lot… situated immediately (whether wholly or partly) above another lot…, it is presumed, in the absence of proof to the contrary, that the defect is within that lot… above if there is any evidence of dampness, moisture or water penetration –*

(a) On the ceiling that forms part of the interior of the lot… immediately below; or

(b) On any finishing material (including plaster, panel or gypsum board) attached, glued, laid or applied to the ceiling that forms part of the interior of the lot… immediately below.

Purpose of the Presumption

20. Parliament made statutory changes in 2004 to enact the presumption of inter-floor leakages. The Select Committee noted that 'in disputes over inter-floor leakages, the fault is usually with the upper floor unit', and that upper floor unit owners tend to be uncooperative. As noted by the then Minister for National Development (MND), the presumption of liability will make upper floor unit owners more responsive to lower unit owners who have to bear with the inconvenience and distress so long as the leakages remain unresolved.[2] The presumption is thus meant to facilitate and expedite the resolution of such disputes.[3]

Applicability of the Presumption

21. As the learned District Judge in *Lim Chuen Khen v Ho Li Ming* [2011] SGDC 160 rightly noted however, this presumption only applies in relation to proceedings before the Strata Titles Board, and not the courts. The court in that case came to this conclusion because of the words 'in any proceedings under this section' stated in section 101(8), as well as the words in section 101(1): '…a *Board* may…' Applicants who seek recourse before the court for inter-floor leakages must therefore positively prove their case, as they do not have recourse to the statutory presumption. As stated by the Minister at the third reading of the 2004 bill, at paragraph 31: '*…the Bill attributes a rebuttable presumption of liability to the upper floor unit owner for such cases* ***that are handled by the STB***.' Indeed, this comports with the policy intent to have strata matters quickly and efficiently handled by the Board.

22. A survey of the case law indicates that while the presumption is fairly frequently invoked before the Board, it may be instructive to more fully articulate when the presumption arises. In respect of alleged inter-floor leakages, it should first be noted that there is an *evidential* burden on the part of the lot below to show 'evidence of dampness, moisture or water penetration' on the lower lot's ceiling or on any finishing material attached to the ceiling of the lower lot. As the word 'ceiling' under section 2 of the BMSA does not include any false ceiling, the language of subsection 101(8)(b) of the Act provides that if any finishing material attached to the actual ceiling (e.g., a

[2] *Singapore Parliamentary Debates*; Vol. 78, Sitting No. 6; (19 Oct 2004) at cols. 931-2 (Minister Mah Bow Tan).
[3] ibid.

false ceiling) showed evidence of dampness, moisture, or water penetration, that this would be sufficient to invoke the presumption.

23. The words 'defect in a lot' are inseparable from the leak or moisture and need not be separately shown. As noted by Teo Keang Sood's *Strata Title in Singapore and Malaysia* (6th edn)[4], the Board in *Ng Kim Kee v Chee Yeok Fhoon*[5] rightly noted that the ceiling of one apartment is the floor of the apartment immediately above it and is intended not merely to separate one apartment from another but to insulate it against incursions of anything whatsoever from the apartment above into the apartment below. In that case, the Respondent had argued that the Applicant had not referred to broken pipes or cracked pipes or wall cracks but simply to water leakage. The *Ng Kim Kee* Board however noted that if moisture percolates through the floor/ceiling for any reason, then the floor of the upper apartment is defective. Accordingly, a SP in the lower lot who can show evidence of dampness, moisture or water penetration on their ceiling or finishing material attached to their ceiling would *also* be showing that there is a defect in the upper lot.

24. In the Board's view, the words 'in the absence of proof to the contrary' and 'any evidence of dampness, moisture or water penetration' are interrelated and bear analysis. The phrase 'any evidence of dampness, moisture or water penetration' places an evidential burden on the SP on the lower lot to show the needful, and it is a question of fact whether such moisture existed on the lower lot's ceiling or ceiling's finishing material. Thus, a mere allegation on the part of the lower lot SP without proof of some dampness or moisture is insufficient to trigger the presumption. Assuming this evidential burden is discharged, the legal burden is then placed on the SP of the upper lot to prove, on the balance of probabilities, that it is not liable to the lower lot. The phrase 'in the absence of proof to the contrary' emphasises the effect of this presumption – if there is an existence of a ceiling leak but neither party adduces evidence of its source, or the evidence is unclear about the nature of the leak's source, the presumption applies in favour of the Applicant. Clearly, it is the Respondent who has the legal burden to show 'proof to the contrary,' once the evidential burden on the part of the Applicant has been discharged.

Has there been 'any evidence of dampness, moisture or water penetration on the applicant's ceiling or ceiling's finishing material'?

25. Here, the Board was faced with experts from both sides who took opposing views whether there was any evidence of dampness or moisture on the applicant's ceiling or ceiling's finishing material. In answering this question of fact, the Board is of the view that the Applicant had indeed

[4] (LexisNexis, 2019), [17.134].
[5] STB No. 15 of 1989.

discharged her evidentiary burden of showing 'evidence of dampness or moisture' on her ceiling and that this was sufficient to trigger the presumption. IGM's report showed paintwork discolouration and water stain marks in her kitchen (false) ceiling. This was observed using both visual inspections, as well as radio-wave imaging which registered medium to high moisture accumulation at the kitchen concrete ceiling adjoining the kitchen wall (IGM Report, Figs 2.2 and 2.3). Further, IGM also observed that there was dampness and discolouration of cement observed in the bathroom ceiling (above the false ceiling), with radio-wave imaging registering high moisture accumulation within the ceiling when inspecting the bathroom void ceiling space (IGM Report, Figs 2.10 and 2.11). Mr. Kumar's evidence on the use of radio-wave imaging was largely left unscathed in cross-examination. Tellingly, the Respondent's own expert (who did not see the need to use any equipment to measure the moisture content), also did not challenge or critique the use of IGM's radio-wave imaging. Thus, after the close of the Applicant's case, there was certainly a *prima facie* case showing that there was evidence of dampness or moisture on the applicant's ceiling (in the bathroom) and ceiling's finishing material (in the kitchen).

26. The Board was alive to the possibility that the Respondent's expert's evidence could displace the Applicant's evidence of dampness or moisture, even at the evidentiary stage. As mentioned however, CC's report merely stated that Mr. Casimir did not observe (visually and to a certain extent using his sense of smell) any moisture or dampness. CC did not employ any tools or technology – while the Board does not hold that against the Respondent *per se*, CC did not criticise the use of the tools utilised by IGM in any way; CC's opinion based on Mr. Casimir's observations rather was that there was no need to use any tools as there was no moisture or dampness on any of the applicant's ceilings or ceiling's finishing materials. In this vein, the fact that the statutory provision uses the word 'any' is not insignificant. Pitching the thoroughness of the IGM report against CC's bare assertions based on Mr. Casimir's sight and smell meant that the Board would be hard pressed to hold that there was not '*any* evidence' of dampness or moisture on the Applicant's ceiling and ceiling's finishing material.

27. Having concluded that there *was* evidence of dampness and/or moisture on the Applicant's ceiling and ceiling's finishing material, the Board held that the statutory presumption under section 101(8) of the BMSA does indeed apply in favour of the Applicant.

II. Has the Respondent rebutted the presumption on the balance of probabilities?

28. During their respective cross-examinations, both parties questioned the opposing expert why they failed to conduct a water ponding test using fluorescent dye. Indeed, had this test been done, there would have been a good possibility that this would have settled the matter conclusively as the

absence or presence of dye in the lower unit speaks for itself. As the Respondent bore the burden of proof however, it is insufficient for the Respondent's expert to merely state that he saw no need for further testing and equipment, relying only on his own senses. The failure by both experts to conduct a water ponding test is not ideal, but it is the Respondent who has the legal burden to disprove the presumption, and in failing to conduct such a test, the Respondent could not be said to have discharged its legal burden.

29. The Board also considered CC's hypotheses that the moisture found in the applicant's unit may have been attributable to condensate from her air-conditioning piping and rubbish chute – the chute is part of the common property. Taking the case of the Respondent at its highest and even assuming these alternate sources of leakages were true however still does not rebut the presumption. Given the multiple zones of moisture found in the Applicant's unit, and the overall condition of the Respondent's unit (as evidenced from the photographs taken by both the Applicant's and Respondent's experts), it is possible that there may be more than one source of leakage. CC's report suggesting alternate moisture sources is thus insufficient to displace the presumption on the balance of probabilities.

30. Another point made by Mr. Casimir when he gave evidence in the hearing is that the water spray test conducted by IGM in the Respondent's toilet was unrelated to the water seen oozing out from the Applicant's flooring in her kitchen some 1.5 hours later. The Respondent argued that this would mean that the water travelled horizontally for an improbable distance, as the Respondent's toilet is not immediately above the Applicant's kitchen. On the other hand, the expert witnesses from IGM maintained that it was not uncommon for water to travel horizontally before percolating to the lower unit. In analysing these facts, the Board was mindful that while the presumption does not apply to lateral water leakages between units, neither is there any necessity for the water from the unit above to flow perfectly vertically to the unit below. Indeed as Mr. Kumar explained during cross-examination, water finds the path of least resistance and it is impossible to predict the exact path taken by the water as there may be lines of internal weakness in the ceilings, floors, and walls of the units. Indeed, the Board considered that while not impossible, the likelihood of the water seen oozing on the Applicant's floor some 1.5 hours after the water spray test being unrelated to one another is highly improbable. The *fact* of the water spray test being done and the observed oozing subsequently, being unchallenged by the Respondent, the Board cannot come to the conclusion that the Respondent has rebutted the statutory presumption on the balance of probabilities.

III. In the absence of the presumption, has the Applicant nonetheless proven that the cause of the leak in her unit is attributable to the Respondent's unit?

31. As the Board finds that the Applicant has successfully made out her case on reliance of the statutory presumption, there is no need for the Board to consider the third issue, i.e., whether the Applicant in the absence of the presumption is nonetheless able to prove that the cause of the leak in her unit is attributable to the Respondent's unit.

BOARD'S DECISION

32. The Board finds that the Respondent has not rebutted the statutory presumption under section 101(8) of the BMSA and remains liable to the Applicant.

33. The Board hereby orders that:

(A) The Respondent shall engage, at his own cost, within two (2) weeks from the date of this order a Building and Construction Authority (BCA) registered building contractor to carry out repairs to resolve the water leakage into and water damage caused to the Applicant's unit, to the satisfaction of a building surveyor / water seepage specialist engaged by the Applicant provided that such works are as stated in the last three (3) pages of IGM's supplementary report ("**RECOMMENDATION**").

(B) Such corrective works shall be completed within ten (10) weeks of the date of this order.

34. The Applicant claims damages for 'inconvenience, anxiety and/or loss of enjoyment' in the sum of $2,000, disbursements of $10,600 inclusive of all STB fees and legal costs of $16,500.

35. While the Respondent submitted that the Applicant failed to adduce evidence to prove the damages sought, the Board notes that in relation to trespass to property and nuisance, there have been awards for mental distress and anxiety (*McGregor on Damages*, 21st edn, [5-013]). Many of these cases relate to the unreasonable behaviour of landlords. In *Barr v Biffa Waste Services Ltd* [2012] EWCA 312 however concerned itself with a dispute between two neighbours. In that case, the English Court of Appeal regarded that disposing of certain pre-treated waste *on the defendant's own land*, and despite having a waste management permit to do so, was nevertheless an actionable nuisance because of the strong odours which emanated. In this case, the leak deemed to originate from the Respondent's unit caused nuisance to the Applicant. Indeed, the Board previously awarded a sum of $2,500 as damages for 'inconvenience, anxiety, and loss of enjoyment' in *Zainal Abidin de Silva v Choy Kok Meng* [2021] SGSTB 5 at [37]. There, the Board reduced the sum sought for special damages to $2,500 as the Applicants in that case continued to reside in the

affected unit and were not deprived of the use of any part of the unit at any time. In this case, the Board notes *inter alia*, the relatively short period of time (since September 2022) that the Applicant has suffered from the leak, and similarly that the Applicant could continue to reside in her unit. Pursuant to its jurisdiction under section 101(3) of the BMSA, the Board thus awards $500 to the Applicant to mark the anxiety and inconvenience suffered by her.

36. The Board orders the Respondent to fully reimburse the Applicant the sum of $10,600 for the expert reports and attendance at the hearing, as well as for the STB fees.

37. In relation to the legal costs sought by the Applicant, the Board awards $7,000 to the Applicant. This is slightly less than what the Respondent sought had he prevailed in the case, and the Board notes its appreciation of the articulate submissions made by Mr. Philip Ling, the lead counsel for the Respondent. In this regard, the reduced costs given to the Applicant also considered the fact that the Respondent had given the Applicant an opportunity, albeit, at the 11th hour, to agree to jointly appoint a professional building surveyor of her choice, in fulfillment of the Agreement that the parties had signed on 21 December 2021.

38. Accordingly, apart from ordering the Respondent to comply with the order as stated in paragraph 33, the Respondent is to pay $18,100 to the Applicant within seven (7) days of this order.

Dated this 23rd day of May 2023

MS LEE LAY SEE
Deputy President

DR EDWARD TI
Member

MR LEE COO
Member

Mr Daniel Li (M/s Ramdas & Wong) for the Applicant
Mr Philip Ling & Ms Patricia Kang (M/s Wong Tan & Molly Lim LLC) for the Respondent
Ms Michelle Yap Ching Hua as young amicus curiae