IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 260

Tribunal Appeal No 11 of 2021

Between

Management Corporation
Strata Plan No 3602

… *Applicant*

And

MacFadden, Declan Pearse

… *Respondent*

GROUNDS OF DECISION

[Land] — [Strata titles] — [Common property]
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v
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Andre Maniam J:

Introduction

1 If a pipe that is common property leaks, is the management corporation ("MCST") liable for loss caused by the leakage?

2 An MCST has a duty to properly maintain common property and keep it in a state of good and serviceable repair (s 29(1)(*b*), Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed) ("BMSMA"). But does that make an MCST *strictly liable* for any loss caused by the condition of common property, even if it is not at fault? Or is that duty not breached if the MCST has acted reasonably?

3 In the present case, water from a concealed rainwater downpipe in the Waterfall Gardens condominium leaked into the unit of the respondent subsidiary proprietor ("SP"). The pipe was common property, and it was

encased in a wall. The SP brought a claim before a Strata Titles Board ("STB") seeking damages from the MCST for water damage and consequential losses.

4 The pipe was concealed: it was not visible to a person on the ground looking at the building.[1] It was also not shown in the as-built drawings.[2] In the circumstances, the STB held that there was no inordinate delay on the part of the MCST in establishing the cause of the leak and in repairing the pipe.[3]

5 The STB, however, held that it mattered not that the MCST could not have known of the existence of the pipe[4] – if it did not maintain a pipe that it did not know existed, it breached its duty under s 29(1)(*b*) of the BMSMA.

6 The STB followed an Australian authority (*Seiwa Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157 ("*Seiwa*")) in arriving at the conclusion that the position under s 29(1)(*b*) of the BMSMA is one of *strict liability*: the MCST was not absolved of liability even if it were unaware of the state of the pipe or maintenance thereof, and even if it had acted reasonably. Thus, the STB found the MCST to be in *breach of its statutory duty* to maintain the pipe and keep it in good repair, and as such, held it *liable to pay damages* for the leak from the pipe.[5]

7 I found that the STB erred in deciding that it could award damages for breach of statutory duty; it also erred in deciding that the position under

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1 Record of Appeal ("ROA") at pp 60–65.

2 STB's decision at [38].

3 STB's decision at [36]–[38].

4 STB's decision at [26].

5 STB's decision at [24]–[35], [54].

s 29(1)(*b*) of the BMSMA is one of strict liability. Accordingly, I set aside the STB's orders. These are my grounds of decision.

Issues

8 I considered the following:

(a) Can an STB award damages for breach of statutory duty?

(b) What is the nature of an MCST's duty to maintain common property under s 29(1)(*b*) of the BMSMA?

Can a Strata Titles Board award damages for breach of statutory duty?

9 Sections 101(1)–(3) of the BMSMA provide as follows:

> **101.**—(1) Subject to subsections (4), (6) and (7), a Board may, pursuant to an application by a management corporation or subsidiary management corporation, a subsidiary proprietor, mortgagee in possession, lessee or occupier of a lot in a subdivided building, make an order for the settlement of a dispute, or the rectification of a complaint, with respect to —
>
> (a) any defect in a lot, a subdivided building or its common property or limited common property;
>
> (b) the liability of a subsidiary proprietor to bear the costs of or any part thereof for any work carried out by a management corporation or subsidiary management corporation, as the case may be, in the exercise of its powers or performance of its duties or functions conferred or imposed by this Act or the by-laws relating to the subdivided building or limited common property, as the case may be; or
>
> (c) the exercise or performance of, or the failure to exercise or perform, a power, duty or function conferred or imposed by this Act or the by-laws relating to the subdivided building or limited common property, as the case may be.
>
> (2) An order under subsection (1) may be made on —

> (a) any person entitled to make an application under this section; or
>
> (b) the chairperson, secretary or treasurer of a management corporation or subsidiary management corporation, or its council or executive committee.
>
> (3) Any order made under subsection (1), except an order made with respect to the exercise or performance of, or the failure to exercise or perform, a power, duty or function conferred or imposed by this Act or the by-laws, may provide for the payment of damages not exceeding an amount that may be ordered by a District Court if the dispute had been the subject of civil proceedings in that Court.

10 The STB considered that it had the power to award damages for breach of statutory duty pursuant to ss 101(1)(*a*) and 101(3) of the BMSMA.[6]

11 However, s 101(3) of the BMSMA (which confers on an STB the power to order damages) specifically excludes "order[s] made with respect to the exercise or performance of, or the failure to exercise or perform, a power, duty or function conferred or imposed by this Act or the by-laws". That corresponds to s 101(1)(*c*) of the BMSMA. An order with respect to a breach of the MCST's duty under s 29(1)(*b*) of the BMSMA to maintain common property, is an order under s 101(1)(*c*) and within the exception to s 101(3). It follows that an STB has no power to order damages for breach of statutory duty.

12 The STB quite rightly regarded s 101(1)(*a*) read with s 101(3) of the BMSMA as empowering in nature, rather than as creating some statutory cause of action. Thus, the STB recognised that the MCST's liability in respect of the leak is inextricably linked to whether the MCST was in breach of its duty to maintain the pipe (under s 29(1)(*b*) of the BMSMA); and that the MCST's

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6 STB's decision at [41].

liability, if any, must flow from that statutory duty imposed on the MCST or any cause of action the SP had against the MCST.[7]

13 In the present case, the SP advanced two causes of action: negligence and breach of statutory duty.[8] The STB noted that the SP focused substantially on breach of statutory duty, with just a fleeting reference to negligence.[9] The STB did not find the MCST liable in negligence – on the contrary, the STB found that there was no inordinate delay on the MCST's part in establishing the cause of the leak and repairing the pipe.[10] That left the breach of statutory duty claim, on which the STB found the MCST liable.

14 Section 101 of the BMSMA does not give an *STB* the power to award damages for breach of statutory duty; s 88 of the BMSMA gives that power to the *court*. Sections 88(1)–(2) of the BMSMA provide as follows:

> **88.**—(1) If a management corporation or subsidiary management corporation commits a breach of any provision of this Part, or makes default in complying with any requirement of, or duty imposed on it by, any provision of this Part, a subsidiary proprietor or mortgagee in possession or occupier of a lot shall be entitled to apply to the court —
>
> (a) for an order to restrain the breach of any such provision by; or
>
> (b) to recover damages for any loss or injury to the subsidiary proprietor, mortgagee in possession, or occupier or property arising out of the breach of any such provision from,
>
> the management corporation or subsidiary management corporation, as the case may be.

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7 STB's decision at [21], read with [18(a)] and [18(b)].

8 STB's decision at [24].

9 STB's decision at [25] and [28].

10 STB's decision at [36]–[38].

> (2) The court may make such order against any such person, the management corporation or the members of its council, or the subsidiary management corporation or its executive committee, or the managing agent, as the court thinks fit.

15 In the present case, the STB relied on *Seiwa* where the Supreme Court of New South Wales held that the breach of s 62(1) of the Strata Schemes Management Act 1996 (NSW) (the "NSW Act") "gives rise to a private cause of action under which damages may be awarded to a lot owner for breach of statutory duty" (at [6]). Section 62(1) of the NSW Act is the equivalent of s 29(1)(*b*) of the BMSMA.

16 *Seiwa* was overruled on the breach of statutory duty point, by the New South Wales Court of Appeal in *The Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270 ("*Thoo*"). The appellate court held that a breach of s 62(1) of the NSW Act by an owners corporation (the equivalent of an MCST) does not give rise to an action for damages for breach of statutory duty (see [198]–[222] per Tobias AJA, with whom Barrett JA (at [1]) and Preston CJ (at [227]) agreed). The NSW Act made provision for the resolution of disputes by an adjudicator, who could make orders regarding "an exercise of, or a failure to exercise, a function conferred or imposed by or under this Act", but such orders could not include the payment of damages (see *Thoo* at [210]–[211]). That parallels the position under ss 101(1)(*c*) and s 101(3) of the BMSMA. But the NSW Act has no equivalent of s 88 of the BMSMA giving the court the power to award damages in such a case.

17 Prior to the introduction of s 88 of the BMSMA on 1 April 2005, the position in Singapore was like that in New South Wales (per *Thoo*): no breach of statutory duty action was available in relation to the duty to maintain common property. In *Management Corporation Strata Title Plan No 586 v Menezes Ignatius Augustine* [1992] 1 SLR(R) 201 ("*Menezes*"), the High Court rejected

a claim for breach of statutory duty in relation to s 31(1) of the Land Titles (Strata) Act (Cap 158, 1985 Rev Ed) ("LT(S)A"), the equivalent of s 29(1)(*b*) of the BMSMA. Section 45(1) of the LT(S)A provided for criminal liability in the event that provisions including s 31(1) were breached, and s 45(2) allowed applications to court for an order to compel the MCST to perform the duty in question; but there was no reference to any entitlement to apply to recover damages (like there now is under s 88 of the BMSMA). The High Court held that a breach of s 31(1) of the LT(S)A did not give rise to civil liability such that an SP could recover damages.

18 In *Keller Piano Co (Pte) Ltd v Management Corporation Strata Title No 1298* DC/S 3109/1989 (27 August 1993), which concerned a leaking pipe, the District Court followed *Menezes* in holding that no cause of action for breach of statutory duty was available. The court, however, found the MCST liable in negligence (a decision which was overturned by the High Court in *Management Corporation Strata Title No 1298 v Keller Piano Co (Pte) Ltd* [1994] 1 SLR(R) 615, but thereafter restored by the Court of Appeal in *Keller Piano Co (Pte) Ltd* v *Management Corporation Strata Title No 1298* [1994] 3 SLR(R) 965).

19 Section 88 of the BMSMA now entitles an SP to apply to the court to recover damages from the MCST, in the event of any breaches of the provisions in Part V of the BMSMA (which includes s 29(1)(*b*)). The court may make such order as the court thinks fit, which *could* include ordering the MCST to pay damages. Whether damages *would* be ordered, would depend on the circumstances of each case.

20 However, damages for breach of s 29(1)(*b*) of the BMSMA cannot be ordered by an STB.

What is the nature of an MCST's duty to maintain common property?

21 Sections 29(1)(*a*) and 29(1)(*b*) of the BMSMA, provide as follows:

> 29.—(1) Except as otherwise provided in subsection (3), it shall be the duty of a management corporation —
>
> > (a) to control, manage and administer the common property for the benefit of all the subsidiary proprietors constituting the management corporation;
> >
> > (b) to properly maintain and keep in a state of good and serviceable repair (including, where reasonably necessary, renew or replace the whole or part thereof) —
> >
> > > (i) the common property;
> > >
> > > …
> > >
> > > (iv) each door, window and other permanent cover over openings in walls where a side of the door, window or cover is part of the common property; and
> > >
> > > (v) any movable property vested in the management corporation;
>
> …

22 The New South Wales equivalent of s 29(1)(*b*) of the BMSMA, is ss 62(1)–(2) of the NSW Act:

> **62. What are the duties of an owners corporation to maintain and repair property?**
>
> (1) An owners corporation must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
>
> (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.
>
> …

23 That was considered by the Supreme Court of New South Wales in *Seiwa*, where the court granted an injunction for rectification of a waterproof membrane, and awarded damages flowing from water penetration.

24 The court in *Seiwa* held (at [3] and [5]) as follows:

> 3 … Section 62(1) imposes on an owners corporation a duty to maintain, and keep in a state of good and serviceable repair, the common property. That duty is not one to use reasonable care to maintain and keep in good repair the common property, nor one to use best endeavours to do so, nor one to take reasonable steps to do so, but a strict duty to maintain and keep in repair.
>
> …
>
> 5 It follows that as soon as something in the common property is no longer operating effectively or at all, or has fallen into disrepair, there has been a breach of the s 62 duty [cf *Ridis* [177]] …

25 The court went on to hold that "[a]s the duty is a strict one, it matters not whether the problem could have been rectified more rapidly" (at [14]); that it matters not when the owners corporation was first given notice of the problem (at [19]); and that "[t]he strict nature of the owners corporation's duty makes whether or not it took all reasonable steps irrelevant, if ultimately it failed at any time to meet the strict requirements of the s 62 duty" (at [21]).

26 Although *Seiwa* cited *Ridis v Strata Plan 10308* [2005] NSWCA 246 ("*Ridis*"), the two decisions stand in some contrast as to what the duty to maintain common property entails.

27 In *Ridis*, a glass pane in the front door of a building shattered and injured the plaintiff. He claimed that the owners corporation had breached its duty of care as an occupier of the common property, and its statutory duties under s 62 of the NSW Act. His claim was dismissed at first instance, and that decision was upheld (by a majority) on appeal.

28 In *Seiwa*, the court held that it was irrelevant whether the owners corporation had acted reasonably; but in *Ridis*, it mattered to all three appellate judges whether the owners corporation had acted reasonably.

29 Hodgson JA held that an owners corporation, acting *reasonably*, should have a system in place for monitoring the maintenance and state of repair of the common property, but inspections of that kind would not have brought home to the owners corporation the risk concerning the glass (at [5]–[7] and [11]). In the circumstances, he concluded that the owners corporation had not breached s 62 of the NSW Act, although the glass in the front door had shattered.

30 McColl JA held that an owners corporation is merely the agent for lot proprietors insofar as its obligations to repair, renew and replace the common property are concerned; as such, it makes no sense for the legislature to have imposed upon the sum of occupiers a statutory obligation more onerous than that imposed at common law (at [186]). Accordingly, an owners corporation would discharge its duty of maintenance and repair if it acted reasonably (at [187]). Her Honour likewise concluded that there had not been a breach of s 62 of the NSW Act.

31 Tobias JA was in the minority – he considered the owners corporation to have fallen short of what was required of it under s 62 of the NSW Act. Even so, he did not consider s 62 of the NSW Act to create a situation of strict liability (such that the mere fact that the glass shattered meant that the owners corporation had breached its duty to maintain and repair common property, and was liable to the injured plaintiff). Instead, he referred to "the standard of care *reasonably* required of it as an owners corporation with respect to its management and control of the use of the common property" [emphasis added] (at [55]).

32 All three judges in *Ridis* did not consider the duty to maintain common property to give rise to strict liability, such that the injured plaintiff only needed to show that the glass had shattered (as it had) for the owners corporation to be liable. But that is what would result from applying the proposition in *Seiwa* at [5].

33 With respect, I consider the law on this point in New South Wales to be represented by the decision of the appellate court in *Ridis*, and not the decision of the first instance court in *Seiwa*.

34 In Canada (as in *Ridis*) it is recognised that the duty to maintain common property does not give rise to strict liability.

35 *John Campbell Law Corp v Strata Plan 1350* [2001] BCSC 1342 ("*John Campbell*") concerned a blocked sewer pipe. Section 34(1)(*d*) of the Condominium Act, RSBC 1996, c 64 (Can) (the "Condominium Act") provided that a strata corporation must "keep in a state of good and serviceable repair and properly maintain common property"; and s 116(*d*) of the Condominium Act specifically provided that a strata corporation must "maintain and repair, including renewal where reasonably necessary, pipes [*etc*] existing in the parcel and capable of being used in connection with the enjoyment of more than one strata lot or common property".

36 The Supreme Court of British Columbia in *John Campbell* stated at [10]: "The central question here is whether a standard of reasonableness should be read into the duties imposed on a strata corporation by the legislation … or whether it imposes strict or absolute liability." On that, the court concluded at [18]:

> … if a strata corporation such as the defendant has taken all reasonable steps to inspect and maintain its common facilities,

> consistent with the practice of other such associations generally, they should not be held liable for damages arising as a result of any strict statutory liability nor should they be put in the position of acting as an insurer by default. The defendants have thus discharged the burden they had to inspect and maintain.

37 The Canadian legislation uses the phrase "reasonably necessary" to qualify the duty of "renewal"; s 29(1)(*b*) of the BMSMA uses the phrase "reasonably necessary" to qualify the duty to "renew or replace the whole or part thereof [of the common property]". The concept – "reasonably necessary" – cannot sit with the conclusion in *Seiwa* as to strict liability.

38 I respectfully adopt the reasoning in the Canadian cases such as *John Campbell*, and that at the appellate level in New South Wales (especially that of McColl JA in *Ridis*). The duty to maintain common property does not create strict liability: it *does* matter whether the MCST acted reasonably or not.

39 The law in Singapore has moved from SPs having no right to claim damages for breach of the MCST's duty to maintain common property (per *Menezes* interpreting the LT(S)A), to SPs now having such a right to make such a claim (under s 88 of the BMSMA). But it would go too far to hold that an MCST is now strictly liable for any loss caused by the condition of common property.

40 As noted in *Menezes*, a breach of s 31(1) of the LT(S)A (the predecessor of s 29(1)(*b*) of the BMSMA) would be a criminal offence by the MCST under s 45 of the LT(S)A. A court should refrain from construing an offence as one of strict liability unless it can be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act: *Chng Wei Meng v Public Prosecutor* [2002] 2 SLR(R) 566 at [17]. That is not the case with s 29 of the

BMSMA. In relation to its duty to maintain common property, the MCST is merely the agent for the SPs (*Ridis* at [186]), the MCST is not an insurer (*John Campbell* at [18]). The MCST should act with reasonable care, it should not be strictly liable.

41 In *Loh Ngai Seng v The Management Corporation Strata Title Plan No 0581 (Pandan Valley Condominium) and another suit* [2019] SGMC 34, certain residents sued their MCST because on a rainy night a tree had fallen onto their parked cars. The claim was brought in negligence, a particular of which was that the MCST had breached its duty under s 29 of the BMSMA. On the evidence, the claim was dismissed. It was (rightly) not suggested that the MCST was strictly liable, such that the mere fact of the tree falling would render the MCST liable.

42 In the present case, the MCST did not know, and could not reasonably have known, of the concealed pipe. When the leak occurred, it ascertained the source of the leak, and repaired the pipe. The MCST acted reasonably: there was no breach of s 29(1)(*b*) of the BMSMA.

Conclusion

43 If a pipe that is common property leaks, the MCST is only liable for loss caused by the leakage if:

(a) it has breached its duty to maintain common property under s 29(1)(*b*) of the BMSMA; or

(b) it is liable on some other cause of action, such as negligence.

44 Section 29(1)(*b*) of the BMSMA does not create a situation of strict liability: the mere fact that the leaking pipe is common property does not,

without more, render the MCST liable. If the MCST has acted reasonably in the discharge of its duty to maintain common property, it has not breached its statutory duty.

45 The STB erred, both in awarding damages for breach of statutory duty (which it had no power to do), and in deciding that the duty to maintain common property gives rise to strict liability. I thus set aside the STB's orders, and awarded costs to the applicant.

Andre Maniam
Judge of the High Court

Hong Heng Leong and Noh Bin Abd Hamid
(Just Law LLC) for the applicant;
Phone Ko Canaan and Lim Kian Leng Malcolm
(Tan & Lim) for the respondent.