

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 19

Tribunal Appeal No 15 of 2019

Between

Raman Dhir

... Appellant

And

Management Corporation
Strata Title Plan No 1374

... Respondent

JUDGMENT

[Land] — [Strata titles] — [Common property]

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Raman Dhir
v
Management Corporation Strata Title Plan No 1374

[2020] SGHC 19

High Court — Tribunal Appeal No 15 of 2019
Chan Seng Onn J
22 November 2019

23 January 2020

Judgment reserved.

Chan Seng Onn J:

Introduction

1 This is an appeal against part of the decision of the Strata Titles Board (“STB”) to dismiss the application by an applicant in Strata Title Board No 8 of 2019 (the “STB Application”). The STB Application was brought by the appellant, Mr Raman Dhir (“Mr Dhir”), who is the subsidiary proprietor of a townhouse unit (the “Unit”) in a development known as The Balmoral, against the respondent, the management corporation of The Balmoral (“MCST”).

2 There are two main issues on appeal. The first issue on appeal is whether the STB had erred in finding that the reinforced concrete flat roof above the Unit (“RC flat roof”) and the awning over the entrance of the property (the “Skylight”) failed to satisfy the definition of common property under s 2(1) of

the Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed) (“BMSMA”). The second issue on appeal is whether the STB had erred by failing to apply the statutory presumption required under s 101(8) of the BMSMA in coming to its decision on Mr Dhir’s claim.

The dispute

3 The Balmoral is a 31-year old development that comprises 81 residential units, including two blocks of 4-storey townhouses, which are stand-alone and adjoined to each other along certain parts of the side walls (the STB’s Grounds of Decision (“GD”) at [1]). Mr Dhir owns one of the stand-alone 4-storey townhouse units (*ie*, the Unit).

4 In Mr Dhir’s application to the STB in the proceedings below, he took the position that the water leakages within the Unit at various locations originated from common property. The various water leakages into his unit were from (i) the reinforced concrete flat roof above the Unit (*ie*, the RC flat roof); (ii) various fixed window panels in the property which ran from the 2nd to the 4th storeys of the property (“the Windows”); and (iii) the awning over the entrance of the property (*ie*, the Skylight) (GD at [6]). Termite damage resulted from the various leakages. Mr Dhir’s claimed that the RC flat roof, the Windows and the Skylight were common properties and hence, the MCST was responsible for their repairs and the damage caused by the water leakages originating from these areas (GD at [7]).

5 The MCST took the position that the RC flat roof, the Windows and the Skylight were not common properties (GD at [10]). The MCST also submitted that there was insufficient evidence to make out Mr Dhir’s case as there was no expert report on where the various water leakages originated from and the only

report provided by M3 Multi Services Pte Ltd, a contractor, contained only its observation and recommendation for repairs (GD at [11]).

Decision below

6 The STB found, *inter alia*, that the RC flat roof and the Skylight were not common properties, as they did not satisfy the definition of common property under s 2(1) of the BMSMA and were for the “exclusive use of [Mr Dhir] and serve[d] only his unit” (GD at [34]). The STB found that the Windows were common properties under s 2(9) of the BMSMA.

The RC flat roof

7 In coming to its decision that the RC flat roof was not common property, the STB considered the following:

(a) The whole of the 4th storey of the Unit was in fact an open flat roof deck with balconies and flower boxes, delineated in black lines in the strata title plan (GD at [16]). The 4th storey was the roof of the entire townhouse unit and was part of the total strata area of the Unit (GD at [17]).

(b) The only access to the 4th storey from the 3rd storey was via an internal private staircase, and the area around the staircase landing was enclosed and covered by the RC flat roof with a usable space on it. The usable area was not part of the total strata area of the unit and the RC flat roof was delineated in red in the strata title plan (GD at [18]). Although the RC flat roof was delineated in *red*, and not *black* lines, the other features such as balconies, flower boxes, private internal staircases and wash areas within the Unit were also similarly delineated in red lines

(GD at [27]). According to Ms Low, the MCST's witness who is a practising registered surveyor, black lines indicated strata boundaries and red lines denoted building and other details (GD at [19]). Further, Ms Low testified that the enclosed red area covered by the RC flat roof was within the 4th storey strata boundary (GD at [20]).

(c) The RC flat roof was not a roof, but a feature within the strata boundary of the 4th floor and covered the small enclosed area beneath it (GD at [26]). The roof of the Unit was in fact, the whole of the 4th storey as it formed the top and covered the whole of the Unit (GD at [25]).

(d) The RC flat roof served only Mr Dhir's townhouse unit and no other unit (GD at [26]). The usable space on the RC flat roof was used by Mr Dhir to install his air conditioner condensers, electrical boxes and cables (GD at [21]). It was for his exclusive use and the usable area on the RC flat roof was used by Mr Dhir to install items for his exclusive use and was accessible only from the 3rd storey within the Unit (GD at [26]).

The Skylight

8 In finding that the Skylight was not common property and was comprised in the strata title plan of the Unit, the STB considered the following:

(a) Ms Low testified that the Skylight was drawn outside the strata boundary of the 3rd storey in the strata title plan (GD at [22]).

(b) Ms Low inspected the site and saw that the Skylight did not reach anywhere near the 3rd storey. Ms Low confirmed that the Skylight was physically within the strata boundary of the 1st storey and served also as

a cover for the main entrance concrete structure of the 1st storey (GD at [22]).

(c) STB accepted Ms Low's evidence that the Skylight sat within the strata boundary of the 1st storey of the Unit and was situated between the 1st and 2nd level (GD at [29]).

(d) The Skylight was neither a roof nor a window and was simply a fixed feature that extended from within the Unit and covered the main entrance of the 1st storey (GD at [29]).

(e) The Skylight served only the Unit and was for Mr Dhir's exclusive use (GD at [30]).

(f) This feature was also situated in Mr Dhir's lot in the strata title plan (GD at [30]).

The Windows

9 The STB found that the fixed Windows were located on the exterior walls of the lot and fell within the definition of all other windows under s 2(9) of the BMSMA (GD at [31]). Therefore, the fixed Windows satisfied the common property definition.

Termite damage and water leakages

10 The STB also found that there was no evidence adduced to show termite damage to Mr Dhir's property except for a quotation for treatment (GD at [32]). There was also no expert report tracing where the various leakages originated from (GD at [33]). Therefore, the STB was unable to make a finding, based on

the evidence adduced, that various leakages in the Unit originated from the RC flat roof, the Skylight and the fixed Windows.

11 As such, the STB dismissed Mr Dhir’s claim for damages and disbursements, and awarded costs to the MCST.

Scope of Appeal

12 I start by dealing with the preliminary issue of the scope of the appeal, which parties dispute. Mr Dhir is appealing on two issues:

(a) First, STB committed errors on points of law by holding that the RC flat roof and the Skylight were not common properties (“Common Property Appeal”).

(b) Second, STB failed to consider and apply the statutory presumption and reversal of burden of proof in Mr Dhir’s favour under s 101(8) of the BMSMA and reversing the burden of proof in its decision on the causation of the water leakages (the “Statutory Presumption Appeal”). This Statutory Presumption Appeal fits squarely within the definition of an *ex facie* error of law that is appealable pursuant to s 98(1) of the BMSMA.

As such, Mr Dhir submits that the court should correct STB’s errors of law, set aside STB’s decision and remit the matter to STB for rehearing and

determination in accordance with the applicable correct legal principles (*ie*, direct the STB to apply the presumption under s 101(8) of the BMSMA).¹

13 The MCST does not dispute that the Common Property Appeal could be brought but objects to Mr Dhir’s Statutory Presumption Appeal, arguing that Mr Dhir is not entitled to appeal against STB’s decision other than on a point of law pursuant to s 98(1) of the BMSMA. The appeal should be “confined to a finding ... on whether the RC flat roof and [Skylight] are common propert[ies]” as “there is no appeal against the STB’s findings that [Mr Dhir] had failed to prove the damages for the various water leakages from the various locations”.² The MCST submits that Mr Dhir’s claim for damages was rejected on the basis that the evidence adduced by Mr Dhir did not show that the various leakages originated from the various areas, and such a finding was made independently of the finding of whether the RC flat roof or the Skylight were common properties.³ STB’s findings of fact cannot be disturbed and appealed from, regardless of whether Mr Dhir opines that there are manifest errors of fact.

14 Section 98(1) of the BMSMA states the following:

Appeal to High Court on question of law

98.—(1) No appeal shall lie to the High Court against an order made by a Board under this Part or the Land Titles (Strata) Act (Cap. 158) except on *a point of law*.

(2) Where an appeal is made to the High Court, the Court may confirm, vary or set aside the order or remit the order to the

¹ Appellant’s Skeletal Arguments (“ASA”) at para 41-42; Appellant’s Reply (“AR”) at para 8.

² Respondent’s Reply (“RR”) at paras 19, 75.

³ RR at para 12.

Board for reconsideration together with such directions as the Court thinks fit.

...

[emphasis added]

15 The Court of Appeal held in *Ng Eng Ghee & Ors v Mamata Kapildev Dave & Ors (Horizon Partners Pte Ltd, intervener) & another appeal* [2009] 3 SLR(R) 109 (“*Ng Eng Ghee*”) at [90] that *ex facie* errors of law would in turn raise points of law subject to appeal under s 98(1) of the BMSMA, citing *Halsbury’s Laws of England* vol 1(1) (Buttersworths, 4th Ed Reissue, 1989); *Dynamic Investments Pte Ltd v Lee Chee Kian Silas* [2008] 1 SLR(R) 729 at [11(b)]; *Liu Chee Ming v Loo-Lim Shirley* [2008] 2 SLR(R) 765 at [16]). Such *ex facie* errors of law would include:

... misinterpretation of a statute or any other legal document or a rule of common law; asking oneself and answering the wrong question, *taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts*; admitting inadmissible evidence or rejecting admissible and relevant evidence; exercising a discretion on the basis of incorrect legal principles; *giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duty to give reasons*, and *misdirecting oneself as to the burden of proof*. [emphasis in original omitted; emphasis added]

16 In *Ng Eng Ghee* (at [102]), the Court of Appeal noted that a STB must correctly apply the appropriate burden of proof in deciding whether a collective sale was in good faith and a misapprehension as to the burden of proof was an *ex facie* error of law against which an appeal may lie. Similarly, the crux of Mr Dhir’s Statutory Presumption Appeal pertains to the failure of the STB to apply the presumption required under s 101(8) of the BMSMA and reversing the burden of proof in its decision on the causation of the water leakages. The

Statutory Presumption Appeal fits squarely within the definition of an *ex facie* error of law that is appealable pursuant to s 98(1) of the BMSMA.

17 Further, the MCST’s argument that Mr Dhir has not appealed against the STB’s findings that Mr Dhir has failed to prove damage from the water leakages that came from the common property is inaccurate. The prayers in the Originating Summons by Mr Dhir states the following:⁴

6. The grounds in support of this Appeal herein are as follows:

...

(B) Applicable presumptions

6.1.9 That the Board erred in law by failing to apply the presumption that the RC flat roof was treated as common property on the basis that the MCST had previously managed, controlled, and maintained the same;

6.1.10 *That the Board failed to apply the presumption under Section 101(8), BMSMA.*

[original emphasis in bold; emphasis added in italics]

18 Leaving aside the merits of the appeal, I accordingly hold that both the Common Property Appeal and the Statutory Presumption Appeal raise points of law within the meaning of s 98(1) of the BMSMA, which this court can decide on.

My decision

Common Property Appeal

19 I first turn to my decision on the Common Property Appeal.

⁴ Originating Summons at para 6.1.10.

Relevant legal principles

20 As Mr Dhir’s proceedings were instituted on 15 January 2019, which was before the amended definitions of common property in the BMSMA (version as of 1 February 2019) which came into force on 1 February 2019, the definitions of common property in the BMSMA (version as of 14 December 2018) would apply for the purposes of the present appeal: see s 64(2) of Building Maintenance and Strata Management (Amendment) Act 2017 (No. 35 of 2017).

21 Section 2(1) of the BMSMA (version as of 14 December 2018) states the following:

“common property”, subject to subsection (9), means —

(a) in relation to any land and building comprised or to be comprised in a strata title plan, such part of the land and building —

(i) *not comprised in any lot or proposed lot in that strata title plan*; [(“the first limb”)] and

(ii) *used or capable of being used or enjoyed* by occupiers of 2 or more lots or proposed lots; [(“the second limb”)] ...

[emphasis added]

22 The most authoritative decision regarding the correct interpretation of “common property” under s 2(1) of the Act is the decision *Sit Kwong Lam v Management Corporation Strata Title Plan No. 2645* [2018] 1 SLR 790 (“*Sit Kwong Lam*”), where the Court of Appeal held that the first and second limbs should be read conjunctively and fulfilled in order to be considered as common property (*Sit Kwong Lam* at [46]).

23 The first limb of the definition of common property requires the common property to be “not comprised in any lot or proposed lot in that strata title plan”. The fact that the disputed property is *physically located* within the boundaries of the unit does not *ipso facto* mean that the said property is comprised in the unit: *Wu Chiu Lin v MCST Plan No 2874* [2018] 4 SLR 966 at [69].

24 The second limb of the definition of common property that common property must be “used or capable of being used or enjoyed by occupiers of 2 or more lots...” must be interpreted *broadly* (*Sit Kwong Lam* at [58]). The words “use” and “enjoy” are to be read in accordance with their ordinary dictionary meanings (*Sit Kwong Lam* at [58]) and based on their plain meanings, the word “enjoy” has a wider ambit than the word “use” (*Sit Kwong Lam* at [59]). Any area or installation that could *affect the appearance* of a building in a strata development, or that was *part and parcel of the fabric of the building*, could, by its mere presence, be “enjoyed” by some or even all subsidiary proprietors of the development (*Sit Kwong Lam* at [59]). There is also no need for the area or installation to be *physically accessible* by the subsidiary proprietors in order to be “enjoyed” by the said proprietors (*Sit Kwong Lam* at [59]). The second limb of the definition of common property in s 2(1) of the BMSMA would be satisfied so long as the area or installation in question was “capable” of being used or enjoyed by occupiers of two or more lots. This meant that an area or installation not comprised in any lot *need not at any particular point in time be used or enjoyed* by occupiers of two or more lots to be considered common property (*Sit Kwong Lam* at [60]).

25 With these principles in mind, I now turn to my decision on whether the RC flat roof and the Skylight satisfy the definition of common property set out in s 2(1) of the BMSMA.

RC flat roof

26 In my view, the STB erred in finding that the RC flat roof was not common property within the meaning of s 2(1) of the BMSMA.

Exclusive Use Test

27 First, the STB erred in law by considering whether the RC flat roof was exclusively used by Mr Dhir (“the Exclusive Use Test”) in coming to its decision (see GD at [26] and [28]). In *Sit Kwong Lam* at [57], the Court of Appeal held that the approach taken by the Judge in directing the inquiry to “whether or not the area or installation in question was for the exclusive use of the occupiers of a single lot, instead of whether the area or installation was used or capable of being used or enjoyed by occupiers of two or more lots, could not be sustained”.

28 The STB wrongly took into account the fact that Mr Dhir had used the usable area on the RC flat roof for “installing items for his exclusive use” such as his air conditioner condensers, electrical boxes and cables (GD at [21] and [26]). It matters not whether Mr Dhir had breached the relevant rules regarding the use of common property by failing to obtain permission from the MCST. The MCST could require Mr Dhir to rectify the breach. A breach cannot possibly convert common property into personal property. The STB wrongly applied the Exclusive Use Test in determining that the RC flat roof was not common property.

Appearance of the building/Part and parcel of the fabric of the building

29 Instead, the more crucial consideration is whether the RC flat roof is “capable” of being used or enjoyed by occupiers of two or more lots. The wide ambit of the word “enjoy” would include “any areas or installations that could *affect the appearance* of a building in a strata development, or that was *part and parcel of the fabric of the building*, could, by its mere presence, be “enjoyed” by some or even all subsidiary proprietors of the development” (*Sit Kwong Lam* at [59]). For instance, the flat roof and the ledges in *Sit Kwong Lam* were considered to be part and parcel of the fabric of the building and contributed to its appearance (at [64] and [65]).

30 Similarly, the RC flat roof is part and parcel of the fabric of the Unit. Further, the photographs of the RC flat roof demonstrate that the RC flat roof affects the appearance of the Unit in the strata development (*eg*, the uniformity of appearance with the other units in The Balmoral).⁵ As found by the STB, the two townhouse units (one of which is the Unit) are adjoined to each other along certain parts of the side walls (GD at [1(c)]). The existence of similar reinforced concrete flat roofs is common to the townhouse units in The Balmoral.⁶ Further, the MCST’s argument that the RC flat roof is not physically visible is also unpersuasive.⁷ Based on the aerial photographs of the RC flat roof and the elevation sketches of the strata lots in The Balmoral, the RC flat roof would be

⁵ Agreed Bundle of Documents (“ABD”) at pp 132, 350

⁶ Strata Title Plan ST 5701.

⁷ RR at para 54.

visible from the other units in The Balmoral.⁸ As such, the RC flat roof would be “capable” of being used or enjoyed by occupiers of two or more lots.

Not part of Strata Area

31 Further, despite recognising that the usable area on the RC flat roof was not part of the total strata area of the Unit (amounting to 715m²) that Mr Dhir paid for according to the Strata Title Plans ST 7501 (“ST 7501”), the STB still found that the RC flat roof was not common property and was for Mr Dhir’s exclusive use.

32 The *CS Directive on Cadastral Survey Practices* (version 5.0, September 2018) issued by the Singapore Land Authority (the “CS Directive”) sets out the procedures and practice relating to the conduct of cadastral surveys. The CS Directive states that “Storey Plans are not required for flat roof and other storeys that contain only common property and without any strata lots” (at para 5.6(ix)). According to ST 7501, the Storey Plan does not include the RC flat roof for the Unit (Strata Lot No 614/U79). The RC flat roof is not part of Mr Dhir’s strata lot.

33 In *Liew Soon Fook Michael and another v Yi Kai Development Pte Ltd* [2017] SGHC 88 at [24], the High Court made the following remarks:

... a cluster house has its own attached roof, whereas a conventional strata unit shares its roof as common property with other strata units on various levels. *Including the roof within the computation of a cluster house’s strata area means that the roof is not common property, and that the owner has exclusive ownership of the roof.* The owner may use the roof for his own benefit (although the uses may be limited in scope), and

⁸ ABD at pp 132, 227 (ST 7501), 350; ST 7497.

the owner is also solely responsible for its maintenance and repair. If, in consultation with the developer and the surveyor, *the roof of a cluster house is not included in the strata area, then the roof would necessarily constitute common property* – which then falls to be used, maintained and repaired by the management corporation of the development. [emphasis added]

34 The fact that the usable area on the RC flat roof is not part of the strata area of the Unit (and is therefore also not used to compute the management and sinking charges payable by Mr Dhir to the MCST) is determinative of whether the RC flat roof is comprised in Mr Dhir's strata lot. In the present case, the fact that Mr Dhir actually uses the usable area without the MCST's permission is not significant. As explained earlier, a breach does not equate to converting common property into a personal one. What is more crucial is that Mr Dhir does not own or pay for this usable area on the RC flat roof based on the 715m² of total strata area of the Unit. The RC flat roof clearly satisfies the first limb of the definition of common property as it is not comprised in Mr Dhir's strata lot. It is plainly contradictory for the STB to find that the RC flat roof was comprised in Mr Dhir's lot in the strata title plan despite accepting that the usable area on the RC flat roof was not part of the total strata area of the Unit (to contrast GD at [28] with [18]).

Black coloured lines in ST 5701

35 I start by explaining the significance of the colour of the lines in strata title plans. The CS Directive states at para 5.3(c) that "All text and line symbols shall be shown in black colour. Boundary shall be represented by firm lines and building and other details by broken lines". According to r 81(1) of the Land Surveyors Rules 1976 (S 143/1976), boundary lines shall be represented by firm black lines. The MCST's registered land surveyor, Ms Low, also testified that for older developments such as The Balmoral, the black firm lines would be

drawn to indicate the strata boundaries for each strata lot, and red lines would be used to indicate building lines and other building details.⁹ Ms Low's evidence was accepted by the STB (GD at [20]).

36 This is crucial because in ST 5701, the RC flat roof is delineated in red without any black lines in the diagrams. In contrast, the strata boundaries for the Unit was delineated in black lines. The STB reasoned that although the RC flat roof was delineated in red lines, not black lines, other features such as balconies, flower boxes, private internal staircases were also similarly delineated in red lines (GD at [27]). As such, the STB found that the RC flat roof was be a feature and "comprised in [Mr Dhir's] lot in the strata title plan", thus failing to satisfy the first limb of the common property definition (GD at [28]).

37 However, the STB failed to consider the key distinction between the RC flat roof and the other features such as balconies, flower boxes, private internal staircases. While delineated in red, the RC flat roof is drawn *outside* the firm black lines of Mr Dhir's private strata lot, while the balconies, flowers boxes and private internal staircases (delineated in red) are drawn *inside* the firm black lines of Mr Dhir's private strata lot (see Annex below at [A.3]).¹⁰

38 The STB made an *ex facie* error of law by giving reasons that disclosed its faulty legal reasoning by wrongly analogising the RC flat roof to features *within* the Unit such as the balconies, flower boxes and private internal staircases. The STB also relied on its finding that the RC flat roof is physically, together with the staircase, a main feature of the Unit (GD at [28]). However,

⁹ ROP at p 155.

¹⁰ ST 7501.

this does not *ipso facto* mean that the RC flat roof is comprised in the Unit: *Wu Chiu Lin v MCST Plan No 2874* [2018] 4 SLR 966 at [69].

39 Just like the RC flat roof, the other areas or installations that are obviously common properties in The Balmoral, such as the lobby, the games room, the clubhouse, the astro turf, the deck as well as the other reinforced concrete flat roofs, are also delineated in red and drawn *outside* the firm black lines delineating the private strata lots of other units within The Balmoral (see Annex below at [A.2]).¹¹

40 As such, I find that the RC flat roof satisfies the first limb of the definition of common property under s 2(1) of the BMSMA and it is not comprised in Mr Dhir’s private strata lot.

Not a roof

41 The STB’s also erroneously found that the RC flat roof is “not a roof” but a “feature within the strata boundary of the 4th storey and covers the small enclosed area beneath it”.

42 The STB reasoned that the RC flat roof only covers the small enclosed area beneath and serves Mr Dhir’s unit and no other unit. As such, it does not satisfy the ordinary meaning of roof: “the structure that covers or forms the top of a building” according to the Oxford Advanced Learning Dictionary (GD at [25]). Instead, the STB found that the roof of the Unit is the whole of the 4th storey as it forms the top and covers the whole of the Unit (GD at [25]).

¹¹ Strata Title Plan ST 7497 (“ST 7497”).

43 This classification of the RC flat roof as merely a feature because it only covers a small enclosed area beneath it is plainly illogical. The RC flat roof covers and protects the enclosed area around the staircase landing (for a staircase from the 3rd to 4th storey in the Unit). It protects that small usable space from the elements. Without the RC flat roof, rain would seep into the enclosed area around the staircase landing and potentially flood the 3rd storey. The removal of the RC flat roof, just like the flat roof in *Sit Kwong Lam* (at [65]), would “affect the structural integrity of the building”.

Accessibility of the RC flat roof

44 In coming to its decision, the STB also took irrelevant considerations into account by considering that the RC flat roof is accessible only from the 3rd storey within Mr Dhir’s unit (GD at [26]). As the Court of Appeal held in *Sit Kwong Lam* at [59], there is no need for the area or installation to be physically accessible by the subsidiary proprietors in order to be “enjoyed” by the said proprietors.

45 There are many instances whereby common property (such as the ledges in *Sit Kwong Lam* at [64]) are not physically accessible by any subsidiary proprietor but can still be enjoyed by the subsidiary proprietors. Similarly, it matters not that the RC flat roof is accessible only from the 3rd storey within Mr Dhir’s unit.

46 For the above reasons, I overturn the STB’s finding that the RC flat roof is not common property. I accordingly hold that the RC flat roof is common property within the definition of s 2(1) of the BMSMA.

Skylight

47 I am also of the view that the Skylight is common property and the STB made similar errors of law in its decision on finding that the Skylight is not common property.

48 The STB wrongly considered that the Skylight was for Mr Dhir’s exclusive use as it extends from within the Unit and covers the main entrance of the 1st storey (GD at [29]). As explained above at [27], the Exclusive Use Test is the wrong test to apply. It is immaterial that the Skylight serves only Mr Dhir’s unit and no other unit.

49 Instead, the crucial test to apply for the second limb of the common property definition is whether the RC flat roof is “capable” of being used or enjoyed by occupiers of two or more lots. The Skylight clearly affects the appearance of a building in the strata development and would be “enjoyed” by some or even all subsidiary proprietors of the development (*Sit Kwong Lam* at [59]). The Skylight is visible by fellow residents in The Balmoral (see Annex below at [A.1]).¹² The appearance of the Skylight is also consistent with the other skylights of the other units in The Balmoral.¹³ In the present case, the Skylight would be analogous to the ledges in *Sit Kwong Lam* which were found to have contributed to the building’s appearance (at [64] and [65]). I so find that the Skylight satisfies the second limb of the definition of common property under s 2(1) of the BMSMA.

¹² ABD at pp 100, 124-125, 160.

¹³ ABD at p 250.

50 Further, the STB wrongly considered that the Skylight was “physically within the strata boundary of the 1st storey” in finding that the Skylight is comprised in Mr Dhir’s lot in the strata title plan. This does not *ipso facto* mean that the Skylight is comprised in the Unit: *Wu Chiu Lin v MCST Plan No 2874* [2018] 4 SLR 966 at [69]. The Skylight is delineated in red lines *outside* of the firm black lines delineating the strata lot boundary of the Unit (see Annex below at [A.2]).¹⁴ In ST 5701, the skylights of other units are also all consistently delineated in red lines *outside* the firm black lines which delineate the strata lot boundary of the other units in The Balmoral. I accordingly find that the Skylight also satisfies the first limb of the definition of common property under s 2(1) of the BMSMA.

51 I am of the view that the STB erred in finding that the Skylight is not common property and accordingly hold that the Skylight is common property.

Statutory Presumption Appeal

52 I now turn to the merits of the Statutory Presumption Appeal, where Mr Dhir submits that the STB had failed to apply the presumption and reversal of burden of proof under s 101(8) of the BMSMA, which states the following:

(8) In any proceedings under this section with respect to any *alleged defect in a lot or in any common property or limited common property situated immediately (whether wholly or partly) above another lot or any common property or limited common property, it shall be presumed, in the absence of proof to the contrary, that the defect is within that lot or common property or limited common property, as the case may be, above if there is any evidence of dampness, moisture or water penetration —*

¹⁴ ST 7501.

(a) on the ceiling that forms part of the interior of the lot, common property or limited common property, as the case may be, 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, common property or limited common property, as the case may be, immediately below.

[emphasis added]

53 In the present instance, the STB considered that there was no expert's report on tracing where the various leakages originated from, and was hence unable to make a finding on the evidence adduced that various leakages in the Unit originated from the three areas (*ie*, the RC flat roof, the Skylight and the fixed Windows) (GD at [33]).

54 However, it is evident from the STB's reasoning in its GD that it had misdirected itself as to the burden of proof and hence made an *ex facie* error of law (see above at [15]). The STB made no mention of the application or consideration of the presumption under s 101(8) of the BMSMA.

55 In the hearing below, the STB made the following remarks during the cross-examination of Mr Dhir, noting that the burden is on Mr Dhir and his lawyers to prove Mr Dhir's assertion or claim:¹⁵

Q. And that's all it shows, that there is water trapped inside the frames and it pours out.

A. So what happens, that water penetrates into --

Q. Yes, but we do not know how the water got there.

A. Oh, come on. Then I think you should do it, because by -- since 2005 --

¹⁵ ROP at p 135.

DEPUTY PRESIDENT: Just leave it.

MS HUI: Okay.

DEPUTY PRESIDENT: Do the submissions later on.

MS HUI: Yes, okay.

DEPUTY PRESIDENT: **Because Mr Dhir asserts or claims a certain thing --**

MS HUI: No, it's --

DEPUTY PRESIDENT: **The burden is on you to prove.**

A. Yah, I know but --

DEPUTY PRESIDENT: Let your lawyer do --

[emphasis added in bold]

56 Even if the STB did actually consider the presumption under s 101(8) of the BMSMA in determining that the water leakages and termite damage could not be traced to the alleged defects in the three areas above (*ie*, the RC flat roof, the Skylight and the fixed Windows), the STB gave reasons in the GD which did not fulfil its express duty to give reasons, which would give rise to an *ex facie* error of law (see above at [15]). The STB did not provide reasons explaining why the presumption did or did not apply or whether the MCST provided sufficient or insufficient evidence to the contrary to rebut this presumption.

57 Accordingly, I allow Mr Dhir's Statutory Presumption Appeal. I so exercise the appellate powers of the High Court pursuant to s 98(2) of the BMSMA to remit the matter to the STB for rehearing and reconsideration with the following directions: the STB is to consider the application of the presumption under s 101(8) of the BMSMA in coming to its decision on Mr Dhir's claim based on the evidence placed before the STB.

Conclusion

58 For the aforesaid reasons, I allow both the Common Property Appeal and the Statutory Presumption Appeal.

59 As for costs, I order the MCST to pay costs of the appeal to Mr Dhir fixed at \$5,000 plus reasonable disbursements. I also set aside the costs below of \$18,000 including disbursements that the STB awarded to the MCST (GD at [38]). As the matter is to be reconsidered and reheard by the STB, and as there is likely to be considerable overlap for the getting up and work done for the first hearing with that for the re-hearing, I will reserve to the STB to decide both the costs (including disbursements) for the first hearing and the re-hearing together.

Chan Seng Onn
Judge

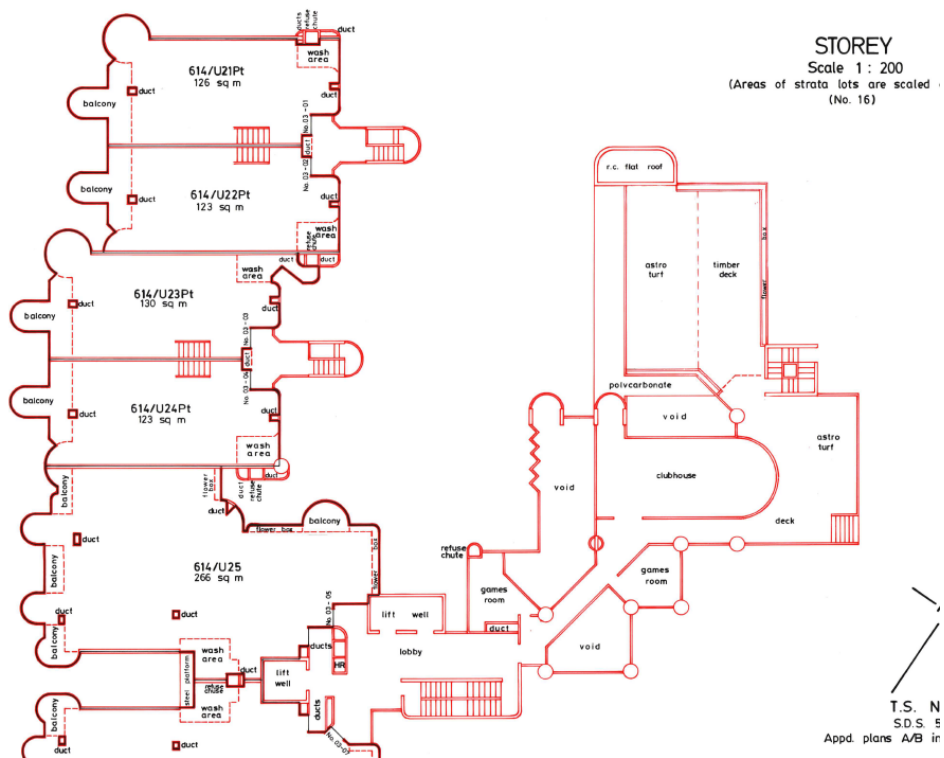
Carolyn Tan Beng Hui, Leong De Shun Kevin and Au Thye Chuen
(Tan & Au LLP) for the appellant;
Hui Choon Wai and Leong Hern Wei (Wee Swee Teow LLP) for the
respondent.

Annex

A.1 Photograph of the Skylight



A.2 ST 7497



A.3 ST 5701

