PERBADANAN PENGURUSAN PALM SPRING @ DAMANSARA

v.

MUAFAKAT KEKAL SDN BHD & ORS

High Court Malaya, Kuala Lumpur
Hue Siew Kheng J
[Civil Suit No: 22NCVC-567-10-2013]
27 April 2015

Civil Procedure: *Parties — Locus standi — Plaintiff was management corporation of condominium — Claim against developer of condominium, private company and Director of Land and Mines— Claim over property alleged to be common property of condominium — Whether only condominium unit owners could sue — Whether plaintiff had locus standi to sue*

Civil Procedure: *Res judicata — Principles — Two earlier suits by plaintiff withdrawn — Two earlier suits not heard or determined on merits — Third suit filed by plaintiff and up for hearing — Whether res judicata applicable*

Land Law: *Strata title — Application for title — Strata title over property including parcels declared common or joint property — Strata title issued to developer of condominium property — Whether strata title wrongly issued by Director of Land and Mines — Whether said Director protected under s 22 National Land Code — Building and Common Property (Maintenance and Management) Act 2007, s 2 — Strata Titles Act 1985, ss 42(1), 67D, 76(1)*

Land Law: *Title — Indefeasibility of title — Property including parcels declared common or joint property — Strata title over such parcels issued to developer of condominium property — Sale and purchase transaction over such parcels between developer and third party — Transaction not an arms length transaction — No bona fide purchase by third party — Evidence of "special relationship" between developer and third party — Title over such parcels transferred and registered in name of third party— Whether third party could acquire indefeasible title over such parcels — Contracts Act 1950, s 24*

Words & Phrases: *"common property" — Building and Common Property (Maintenance and Management) Act 2007 — s 2*

Words & Phrases: *"common property" — Strata Titles Act 1985 — s 42(1)*

The plaintiff was the management corporation of the Palm Spring Condominium ('the condo'). The 1st defendant ('D1') was the developer of the condo. D1 had agreed with the purchasers of units in the condo that common facilities would be completed within 30 months from the date of the sales and purchase agreements ('SPA'). The SPAs provided that common facilities would include a kindergarten ('taska/tadika'). The plaintiff contended that

according to the Development Order ('DO'), the kindergarten would consist of a two-storey building known as Block J and designated as part of the common property as provided for under the Building and Common Property (Maintenance and Management) Act 2007 ('BCPA') and/or the Strata Titles Act 1985 ('STA'). However, D1 had sold Block J together with 44 parking lots to D2 for RM200,000.00 through a SPA dated 20 September 2006. On D1's application for the strata title, D3 approved the subdivision of Block J and issued the strata title to D1. D2 became the registered owner of Block J and the 44 parking lots in the strata title on or about 3 November 2009. The plaintiff complained that the registration of the strata title of Block J in favour of D1 by D3 and the sale of the same by D1 to D2 was invalid, illegal and/or unlawful. The plaintiff thus sued *inter alia*, to declare Block J and the 44 parking lots as common property pursuant to the STA and the BCPA and to declare the SPA between D1 and D2 dated 20 September 2006 invalid and unenforceable. The plaintiff also sought orders to cancel the issued strata title to Block J in favour of D2 and instead for ownership of Block J and the 44 parking lots be given to the plaintiff as the management corporation of the condo which is entrusted to manage and maintain the common property. The plaintiff's predecessor had earlier filed two suits that had been withdrawn and not heard on the merits. The plaintiff claimed *locus standi* to file the instant action as the management corporation of the condo entrusted with the management and welfare of the residents/purchasers of the condo.

Held (allowing the plaintiff's claim with costs):

(1) It was clear from s 76(1) of the STA that the plaintiff was fully empowered to file the instant suit against the defendants as the issue raised was in respect of Block J which the plaintiff claimed was common property. Reading all the provisions of the STA collectively, it was crystal clear that the plaintiff had *locus standi*. D2's contention that only the individual unit owners could sue was baseless and wholly without merit as it was inconsistent with the law. (paras 34 & 36)

(2) The issue with regard to *res judicata* was untenable and baseless. For a defendant to successfully invoke the doctrine of *res judicata* even in the wider sense, the defendant had to show that the previous suit based on the same cause of action and reliefs sought in the present action had been decided on its merits. In the instant case, since the two earlier suits were summarily struck out without being heard, *res judicata* could not and did not apply. (*Lai Chooi v. Ho Seng Kung & Anor (refd)* and *Metroplex Holdings Sdn Bhd v. Commerce International Merchant Bankers Berhad (refd)*). (paras 37-39)

(3) The definition of "common property" described in the SPA encapsulates the definition of "common property" in s 2 of the BCPA. From the DO, it was clear that the whole of Block J was reserved for the taska/tadika. Block J was also firmly entrenched in the list of "Kemudahan Umum Yang Disediakan" and thus there was no reason or justification for saying Block J was not part of common property for the common use and enjoyment of all the occupiers of the building. The list "Kemudahan Umum" as in the

DO constituted "common property". The fact that "taska" was carved out, deliberately or otherwise, from the SPA entered into between D1 and D2 did not mean that Block J was excluded from the common properties of the condo because the DO clearly provided for Block J as part and parcel of the "Kemudahan Umum Yang Disediakan". D1 had to comply with the DO as it was duly approved pursuant to law, ie the Town and Country Planning Act 1976. (paras 45, 52, 54 & 56)

(4) Pursuant to s 42(1) of the STA, Block J was a common property owned by the plaintiff. D3 or DW2, the Penolong Pegawai Tadbir, Unit Hakmilik Strata of D3 could not plead ignorance of the law for the STA was the very law they were administering. The application should not have been approved and a strata title issued. There was no basis for D3 to escape culpability by alleging that it was misled by D1. The requirements of the STA were willfully and cavalierly ignored and/or circumvented. (paras 62-64)

(5) Section 22 of the National Land Code did not afford any immunity to DW2 as it covered only acts or matters done by an officer under the NLC. There was no corresponding provision in the STA. The only immunity and/or protection under the STA was to be found in s 67D which only covered members of the Strata Titles Board. Since by virtue of s 42(1) of the STA the plaintiff was the legal owner of Block J, the strata title of Block J was unlawfully issued and D2 did not acquire an indefeasible title to Block J. (paras 65 & 66)

(6) D2 was not a *bona fide* purchaser. D2 had entered into the SPA with D1 even before any application for strata title was made, and in direct contravention of the DO. As such, the object and consideration of the SPA was unlawful and illegal. That being so, by virtue of s 24 of the Contracts Act 1950 the SPA was void. (paras 67-68)

(7) It was against public policy and the needs of the residents/purchasers of the condo for Block J to be privately owned by anyone being common property. Public policy consideration would be defeated and gravely prejudiced if D1 as a developer and D2 as a company were allowed to transact and deal with common property as they wished and in the manner that they did without regard to the residents of the condo and the law. (paras 78 & 80)

(8) In the instant case, there was not only evidence of a "special relationship" or "family arrangement" between D1 and D2, there was also a strong stench of a "special relationship" between DW2, acting for and on behalf of D3 and D2 as shown in the evidence adduced of the unlawful approval of Block J to D2, the unexplained approval of four additional units and the inappropriate allocation of a disproportionate number of car parks (44) allocated for one residential unit when the total approved number of car parks was only 278 for 2184 units of the condo. The transaction between D1 and D2 was not an arms length transaction. Neither was it a *bona fide* purchase for valuable consideration. D2 did not acquire an indefeasible title for Block J and the 44 car parks as it was unlawfully acquired. Section 340(2) read together with s 340(3)(a) and (b) and the proviso thereto of the NLC applied. (paras 83, 85 & 86)

Case(s) referred to:

Hampshire Residences Joint Management Body v. Zelan Development Sdn Bhd [2014] MLRHU 1372 (distd)

Lai Chooi v. Ho Seng Kung & Anor [2013] 4 MLRA 394 (refd)

Metroplex Holdings Sdn Bhd v. Commerce International Merchant Bankers Berhad [2013] 4 MLRA 478 (refd)

Legislation referred to:

Building and Common Property (Maintenance and Management) Act 2007, s 2

Contracts Act 1950, s 24

National Land Code, ss 22, 340(2), (3)(a), (b)

Rules of Court 2012, O 18

Strata Titles Act 1985, ss 4, 10(1)(aa), (c), (3)(c), (3A)(e), (4)(b), 39(3), 42(1), 67D, 76(1)

Counsel:

For the plaintiff: Justin TY Voon (Ng Li Kian with him); M/s Justin Voon Chooi & Wing

For the 1st defendant: Mohd Nor Md Deros; M/s Nasir, Kenzin & Tan

For the 2nd defendant: Ringo Low Kim Leng; M/s Ringo Low & Associates

For the 3rd defendant: Nik Haizie Azlin Nabidin, State Legal Advisor Assistant

JUDGMENT

Hue Siew Kheng J:

Introduction

The Parties

[1] The plaintiff is the management corporation of the Palm Spring Condominium ("the condo") in Kota Damansara, Selangor.

[2] The 1st defendant ("D1") is the developer of the condominium project.

[3] The 2nd defendant ("D2") acquired Block J ("the subject matter of dispute") of the condo from D1 pursuant to a sale and purchase agreement ("SPA").

[4] The 3rd defendant ("D3") is the Director of Lands and Mines of Selangor who had issued the strata title for Block J to D1.

The Dispute

[5] This whole case revolves around the validity of the issuance of the strata title by D3 to D1 in relation to Block J which was in turn transferred to D2 via a SPA dated 20 September 2006.

Agreed Facts

[6] It is not disputed that a development order ("DO") dated 9 October 2003 was approved by the local authority, Majlis Bandaraya Petaling Jaya ("MBPJ") in respect of the condo to D1.

[7] It was agreed between D1 and the purchasers of the units in the condo that the common facilities would be completed within 30 months from the date of the SPA.

[8] D1 had applied for the strata title for Block J and 44 accessory parcels (parking lots) to be subdivided and/or issued and the same was issued by D3 to D1.

[9] By a SPA 20 September 2006, D1 had sold Block J together with the 44 parking lots to D2 for a consideration of RM200,000.00.

Plaintiff's Claim

[10] The plaintiff contends that pursuant to the DO, D1 was obliged to provide as part of public amenities or common facilities a kindergarten ("taska/tadika") which is one unit parcel consisting of a two storey building known as Block J (or Building No M8) in the condo.

[11] D1 had entered into sale and purchase agreements with purchasers of the condo units wherein it was provided that the common facilities to be built and completed would include a "taska/tadika".

[12] At all material times, the taska/tadika at Block J is "public/common facilities" and is part of common property as provided for in the Building and Common Property (Maintenance and Management) Act 2007 (BCPA) and/or the Strata Titles Act 1985 (STA).

[13] D1 had, at a time unknown to the plaintiff, made an application to D3 for the purpose of subdivision of Block J to obtain strata title for the said block although Block J is common property. D3 had wrongfully approved the subdivision of Block J and issued the strata title for Block J in favour of D1.

[14] Pursuant to the issuance of the strata title, D1 then sold Block J to D2 together with 44 parking lots ("the accessory parcels") to D2 for RM200,000.00. D2 was registered as the owner of Block J and the 44 accessory parcels by D3 in the strata title on or about 3 November 2009.

[15] It is the plaintiff's contention that the registration of strata title of Block J in favour of D1 by D3 and the sale of the same by D1 to D2 is invalid, illegal and/or unlawful for the following reasons:

(i) The defendants had breached the DO ("the approved development plan") issued pursuant to the Town and Country Planning Act 1976 approved by MBPJ in which the said plan had clearly

indicated that Block J is meant to be used in common for the operation of a "tadika/taska" and not for sale/transfer;

(ii) The defendants had wrongfully caused and/or allowed the sale and/or transfer of Block J and the 44 accessory parcels which are common property and are supposed to be commonly owned by the purchasers of the condo units; and

(iii) The defendants' conduct had breached the intention and the terms of the SPA entered into between D1 and the purchasers as well as the provisions of the law, ie the STA, Town and Country Planning Act 1976 and/or BCPA.

[16] The plaintiff further contends that any purported sale of the 44 car parks by D1 to D2 is invalid and/or unlawful for the following reasons:

(i) No lawful consideration exists as Block J essentially cannot be legally sold as it is part of the common facilities and ought to be part of common property;

(ii) No lawful consideration exists where the 44 car parks are tied together with the transfer of Block J which is invalid, illegal and/or unlawful;

(iii) 44 car parks is an exorbitant number where it is blatantly clear that it is not being used or intended to be used in conjunction with Block J; and

(iv) The value of each of the car parks in Palm Spring Damansara is about RM20,000.00 and therefore, it means that the 44 car parks worth about RM880,000.00 were in essence literally given to D2 by D1 without any consideration, considering that Block J was sold at the price of RM200,000.00.

[17] D2's purported title in Block J and the 44 accessory parcels is not indefeasible and ought to be set aside based on the aforesaid reasons including that it is "unlawfully acquired" or by means of "an insufficient or void instrument".

[18] The plaintiff being the management corporation of the condo and entrusted with the management and welfare of the Palm Spring @ Damansara Condominium and the welfare of the residents/purchasers of the condo has the locus and/or right to file this action.

[19] The plaintiff prays for the following orders:

(i) A declaration that Block J and the 44 accessory parcels are common property pursuant to the Strata Titles Act 1985 and/or Building And Common Property (Maintenance and Management) Act 2007;

(ii) A declaration that the SPA between D1 and D2 dated 20 September 2006 for the sale of the Block J and the 44 accessory car parks is invalid and unenforceable;

(iii) An order that the name of D2 be removed from the entries of strata title known as No Hakmilik PN 26623, No Lot 44938, Bangunan No M8, Petak 2184, Daerah Petaling, Negeri Selangor (together with the 44 accessory parcels in the said title);

(iv) An order that the strata title known as No Hakmilik PN 26623, No Lot 44938, Bangunan No M8, Petak 2184, Daerah Petaling, Negeri Selangor be cancelled and the ownership of Block J and the 44 accessory parcels be given to the plaintiff as the management corporation of Palm Spring @ Damansara which is entrusted to manage and maintain the common property and to maintain and manage the same as common property;

(v) Damages to be assessed by the Registrar of this court;

(vi) Interest at the rate of 5% per annum; and

(vii) Costs.

D1's Summary

[20] D1 contends that Block J is not part of the common facility of the condo. *Res judicata* is also pleaded as the plaintiff had earlier filed an originating summons vide Kuala Lumpur High Court No: 24NCVC-751-2010 (Suit 751) and Kuala Lumpur High Court Civil Suit No: 22NCVC-849-2011 (Suit 849).

D2's Summary

[21] D2's contention is that Block J was legally and lawfully acquired from D1 as it is a *bona fide* purchaser for valuable consideration pursuant to the SPA dated 20 September 2006. As such it had acquired an indefeasible title to Block J.

[22] D2 disputes that Block J is common property. It is D2's further contention that the plaintiff is estopped by the principle of *res judicata* in the wider sense from initiating this suit as the same reliefs had been sought by the plaintiff's predecessor namely the Palm Spring Joint Management Body (JMB) in Suit 751 and Suit 849 which were withdrawn with no liberty to file afresh. The plaintiff being the management corporation under the Strata Titles Act 1985 has no authority or *locus standi* to initiate this suit against the defendants.

D3's Summary

[23] D3 was merely performing its administrative function in processing the application for strata title by D1 and at all material times D3 had no knowledge of any alleged breach of contracts. The strata title was issued based on the information given to D3.

[24] The information given by D1 in Borang 1 dated 24 January 2007 listed all the following facilities as common property which included:

(a) Swimming pool;

(b) Hall/club house;

(c) Surau;

(d) Parking lots; and

(e) Playing field.

[25] The main issues for trial were:

(i) Whether Block J is common property pursuant to *inter alia* the Strata Titles Act 1985 (Act 318) and the Building and Common Property (Maintenance and Management) Act 2007?;

(ii) Whether D2 had acquired indefeasibility of title over Block J and the 44 accessory parcels?;

(iii) Whether the plaintiff has the authority or *locus standi* pursuant to the Strata Titles Act 1985 and/or the Building and Common Property (Maintenance and Management) Act 2007 to initiate the current suit against the defendants?; and

(iv) Whether the plaintiff's action is barred by the principle of *res judicata* in the wider sense when the plaintiff's predecessor namely Palm Spring JMB had filed, and then withdrew the Originating Summons No: 24NCVC-751-2010 on 10 February 2011?

Defence Of D1 Struck Out

[26] On the first day of trial (1 August 2014) D1's defence was struck out and D1 was precluded from defending when D1's witnesses were not present and learned counsel for D1 sought an adjournment of the case. D1's amended witness list and witness statements were also disallowed. D1's application to set aside this court's order of 1 August 2014 (encl 94) was dismissed on 2 September 2014. The reasons for dismissal are as set out in my judgment dated 28 November 2014.

Witnesses Called

[27] The following witnesses were called:

For the plaintiff:

(i) PW1 - Anwar bin Haji Monawar, Chairman of plaintiff

(ii) PW2 - Puan Sharipah Marhaini Syed Ali, Pengarah Jabatan Perancangan Bangunan (MBPJ) (subpoenaed)

(iii) PW3 - Koay Boon Hooi, owner of a unit in the condo

(iv) PW4 - Sumita Menon, council member of plaintiff

For D2:

(i) DW1 - Lee Hing Lee, Director and majority shareholder of D2

For D3:

(i) DW2 - Aziz bin Hairon, Penolong Pegawai Tadbir Unit Hakmilik Strata, PTG Selangor

[28] Before proceeding to address issues (i) and (ii) which pertain to the validity of the strata title for Block J which is the core issue, I propose to address the issues set out in (iii) and (iv) of *locus standi* of the plaintiff and *res judicata* first as D2 had raised these two as preliminary issues.

***Locus Standi* Of The Plaintiff**

[29] D2's position is that the plaintiff has no authority to commence this proceeding in light of the provisions of the STA. D2's contention is that the STA provides that the main responsibility of the plaintiff as a management corporation is that of managing and maintaining the common property.

[30] Furthermore, there is no provision that empowers the plaintiff to sue on behalf of the purchasers of the condo against the defendants for Block J to be declared as common property as it is essentially a contractual matter between the purchaser and the developer (D1) pursuant to the SPA. *Hampshire Residences Joint Management Body v. Zelan Development Sdn Bhd* [2014] MLRHU 1372 was cited in support.

[31] Hence, D2 submitted that the proper parties in this suit should be between the individual purchasers and the defendants and not the plaintiff which is a creature of statute.

[32] With respect, *Hampshire*'s case was decided on its own facts. In that case, the issue that arose in the O 18 Rules of Court 2012 application was whether the plaintiff as the Joint Management Body (JMB) was entitled in law to sue the defendant as developer for defects of common properties or facilities. The court held the view that the plaintiff as JMB and even the management corporation that was incorporated to replace the JMB had no *locus standi* as the claim was contractual in nature and the authority to sue lay in the hands of the individual unit owners of the condo.

[33] From a reading of the judgment it would appear that the court's attention was not drawn to the following provisions in the STA. Section 76(1) of the STA provides:

"Management corporation as representative of proprietors in legal proceedings

76. (1) Where proprietors are jointly entitled to take legal proceedings against any persons or are liable to have legal proceedings taken against them jointly, where such legal proceedings are proceedings for or with respect to common property, the legal proceedings may be taken by or against the management corporation, and any judgments or orders given or made in favour of or against the management corporation in any such legal proceedings shall have effect as if they were judgments or orders given or made in favour of or against the proprietors."

[34] It is clear from s 76(1) that the plaintiff is fully empowered to file this suit against the defendants as the issue raised is in respect of Block J which the plaintiff claims to be common property.

[35] The STA is very clear as to the powers and authority of the Management Corporation. In s 39(3) it is expressly provided that:

"The management corporation may sue and be sued."

Then, in s 42(1) the law provides that:

"The management corporation shall, on coming into existence, become the proprietor of the common property and be the custodian of the issue document of title of the lot."

[36] Reading all these provisions of the STA collectively it is crystal clear that the plaintiff has *locus standi*. D2's contention that only the individual unit owners can sue is baseless and wholly without merit as it is inconsistent with the law.

Res Judicata

[37] I similarly find the issue with regard to *res judicata* to be untenable and baseless for the following reasons:

(i) By paras 20-22 of the plaintiff's statement of claim, the facts giving rise to the filing of the 751 Suit and the subsequent withdrawal were set out.

By para 23, the cause of action for the 849 Suit was set out.

(ii) Neither Suit 751 nor Suit 849 referred to in the statement of claim were heard on the merits.

(iii) There is no proof before this court that Suit 751 was withdrawn or struck out with no liberty to file afresh as alleged in para 10 of D2's defence.

(iv) Similarly there is no court order shown for Suit 849 and neither was it proved that it was withdrawn with "no liberty to file afresh".

(v) The issue of *res judicata* had already been canvassed before this court during D2's striking out application which was dismissed. No appeal was filed in respect of this decision.

(vi) No new facts arising on this issue were produced at trial.

[38] It is trite law that for a defendant to successfully invoke the doctrine of *res judicata* even in the wider sense, the defendant has to show that the previous suit which is based on the same cause of action and reliefs sought in the present suit had been decided on its merits (see *Lai Chooi v. Ho Seng Kung & Anor* [2013] 4 MLRA 394 and *Metroplex Holdings Sdn Bhd v. Commerce International Merchant Bankers Berhad* [2013] 4 MLRA 478).

[39] Since these two suits were summarily struck out without being heard, *res judicata* cannot and does not apply.

[40] I now proceed to address the core issue which is pivoted on the status of Block J.

Is Block J Common Property?

[41] D2 vigorously disputes that Block J is common property. D2's arguments can be summarised as follows:

(i) Block J is not a common property pursuant to the SPA between the unit owners and D1and the STA.

(ii) The DO does not provide that it is common property. As long as the kindergarten/taska facility was built, which was done, there is no breach of the DO.

(iii) It had been paying maintenance fees and sinking fund for Block J to the plaintiff.

(iv) There is a kindergarten operating at Block J wherein the operators had rented the premises from D2.

(v) It has acquired an indefeasible title as strata title was issued for Block J by D3 and the building is now registered in its name. It had acquired the building for valuable consideration from D1.

Definition Of 'Common Property'

[42] Section 4 of the STA briefly defines "common property" as "so much of the lot as is not comprised in any parcel (including any accessory parcel) or any provisional block as shown in an approved strata plan".

[43] Section 2 of the BCPA however provides for a more comprehensive definition:

> ""common property", in relation to a development area, means **so much of the development area as is not comprised in any parcel**, such as the structural elements of the building, stairs, stairways, fire escapes, entrances and exits, corridors, lobbies, fixtures and fittings, lifts, refuse chutes, refuse bins, compounds, drains, water tanks, sewers, pipes, wires, cables and ducts that serve more than one parcel, the exterior of all common parts of the building, playing fields and recreational areas, driveways, car parks and parking areas, open spaces, landscape areas, walls and fences, and **all other facilities and installations and any part of the land used or capable of being used or enjoyed in common by all the occupiers of the building.**"
>
> [Emphasis Added]

[44] The SPA entered into between the purchasers of the units and D1 contains this clause, which defines common property as:

> "harta bersama" ertinya **sekian banyak daripada tanah yang tidak terkandung dalam mana-mana petak (termasuk mana-mana petak aksesori), atau mana-mana blok sementara dan lengkapan dan lengkapan lif, saluran dan segala kemudahan dan pepasangan lain yang digunakan atau yang boleh digunakan atau dinikmati secara bersama oleh semua pembeli**."
>
> [Emphasis Added]

[45] It can be seen that the definition of "common property" as described in the SPA encapsulates the definition of "common property" in s 2 of the BCPA as it is defined as "so much of the land which is not comprised in any parcel (including any accessory parcel) or any provisional block and all other facilities and installations used or can be used or enjoyed in common by all the purchasers".

The Development Order

[46] PW2, MBPJ's Pengarah Jabatan Perancangan Pembangunan had testified that MBPJ had approved the development plan that was submitted by the condo. She confirmed that such approval was made pursuant to the Town and Country Planning Act 1976.

[47] She further testified (at pp 100-101):

> "PC: Adakah kemudahan-kemudahan umum ini termasuk Blok J tersebut? My lady if I can just add that part perlu disediakan adalah untuk kebaikan dan kebajikan penduduk-penduduk Condominium Palm Spring @ Damansara?
>
> A: Benar Yang Arif, **kemudahan umum adalah bagi tujuan kegunaan awam, penduduk-penduduk yang berada disana**.
>
> PC: Jadi, adakah syarat-syarat ini khususnya taska perlu disediakan di Blok J merupakan syarat/terma mandatory dan perlu dipatuhi oleh defendan pertama? Di sini defendan pertama adalah Muafakat Kekal Sdn Bhd yang merupakan developer?

A: Benar Yang Arif, **setiap pembangunan yang dikemukakan perlu mematuhi piawaian perancangan yang telah ditetapkan oleh majlis termasuk menyediakan kemudahan-kemudahan yang sepatutnya**.

PC: Jadi memandangkan kebenaran merancang ini adalah sebahagian daripada Akta Perancangan Bandar dan Desa 1976 seperti disahkan oleh Puan, adalah ia keperluan di bawah undang-undang di dalam khidmat Puan?

A: Pada khidmat (*sic*) saya dia dibawah keperluan undang-undang."

[Emphasis Added]

[48] When asked if there were any changes made to the Development Plan, she answered in the negative.

[49] She confirmed that as Block J was approved in the development plan for a "taska" it cannot be used for residential purpose.

[50] As noted earlier, the definition of "common property" in the SPA is consistent with s 2 of the BCPA which includes "all other facilities and installations and any part of the land used or capable of being used or enjoyment in common by all the occupier of the building".

[51] The DO (B3 p 293) list out the Kemudahan Umum Yang Disediakan as follows:

Kemudahan Umum Yang Disediakan

Atas Tanah				
Bil	Jenis	Unit	Tkt	Total GFA (msq)
1	Kelab & Dewan – Blok H	1	1	1607msq (17290sq ft)
2	Surau – Blok I	1	1	247msq (2660sq ft)
3	Taska – Blok J	1	2	560msq (6028sq ft)
4	Kiosk – Blok K	1	1	251msq (2702sq ft)
5	Pondok Pengawal – Blok L	2	1-2	269msq (2895sq ft)
6	Pelupusan Sampah – Blok M	3	1	405msq (4359sq ft)
7	Studio Pelawat	4		340msq (3660sq ft)
8	Kolam Renang	7		1920msq (20671sq ft)
	Jumlah			

[52] It will be seen at a glance that Item (3) is "Taska-Block J". It is not disputed that Block J is a double storey building. From the DO, it is clear that the whole of Block J (dua tingkat) is reserved for the "taska" similar to Block I being reserved for the "surau" and Block K for the "kiosk".

[53] As can be seen from the definition of "common property" in s 2 of the BCPA it includes structural elements of the building like stairs and lifts "that serve more than one parcel" and playing fields and recreational areas and car parks and "all other facilities and installations for the common use and enjoyment of all the occupiers of the building".

[54] Out of this list of "Kemudahan Umum" there is no quarrel or quibbling over the other items therein, eg the clubhouse and hall, surau or swimming pool that these items are common property of the condo and to be managed by the plaintiff. Since Block J is firmly entrenched in the list of "Kemudahan Umum Yang Disediakan" there is no reason or justification for saying that Block J is not part of common property for the common use and enjoyment of all the occupiers of the building.

[55] The BCPA was specifically legislated "to provide for the proper maintenance and management of buildings and common property and for matters incidental thereto": see long title of the Act. Since the BCPA is the law governing matters relating to the maintenance and management of buildings and common property, the definition of "common property" as set out in s 2 should be applied in this case.

[56] I therefore find that "Kemudahan Umum" as listed in the DO is "common property". The fact that "taska" was carved out, deliberately or otherwise, from the SPA entered into between D1 and D2 does not mean that Block J is excluded from the common properties of the condo because the DO clearly provides for Block J as part and parcel of the "Kemudahan Umum Yang Disediakan". And as confirmed by PW2, D1 must comply with the DO as it was duly approved pursuant to law, ie the Town and Country Planning Act 1976.

Strata Title Of Block J

[57] The DO was issued pursuant to the Town and Country Planning Act 1976. DW2, the Penolong Pegawai Tadbir, Unit Hakmilik Strata of D3 was the officer who issued the impugned strata title for Block J pursuant to the STA. According to DW2, Borang I of the STA must be submitted together with the DO. Borang I is the application for subdivision of building or building and land pursuant to s 10 of the STA.

[58] He had said in his witness statement (Q&A 7):

> "(S)(7): Boleh encik terangkan apakah tujuan Pelan Pembangunan tersebut diserahkan kepada Bahagian Strata semasa permohonan pecah bahagi bangunan tersebut?
>
> (J): Semasa pemohonan pecah bahagi bangunan, pihak yang berkepentingan atau tuan tanah akan mengesahkan bangunan-bangunan atau struktur bangunan kekal yang ada pada lot hakmilik tersebut sebagai harta bersama atau tidak. **Pengesahan itu akan disemak berdasarkan kepada Pelan Pembangunan yang dilampirkan bersama permohonan pecah bahagi bangunan tersebut.**

Pihak yang berkepentingan atau tuan tanah boleh untuk tidak mengesahkan suatu bangunan atau struktur bangunan kekal untuk disahkan sebagai harta bersama walaupun pelan bangunan menyatakan wujud suatu bangunan atau struktur kekal tersebut. Pelan Bangunan hanya menyatakan bangunan dan struktur bangunan kekal yang perlu dibina pada lot tersebut. Ini kerana, pihak tuan tanah mempunyai hak untuk bangunan atau struktur bangunan kekal itu diniagakan atau dikelaskan sebagai harta bersama.

[Emphasis Added]

[59] I found DW2's evidence to be inherently incredible and illogical as well as self serving. Being the officer who had issued the impugned title, his evidence had to be received and treated with extreme caution as he not only ignored the DO but attempted to justify his action by saying that D1 had the right ("hak") whether to classify Block J as a "common property" in total disregard of the law. As can be seen from his answer, he had at first admitted that verification of the common property of the condo had to be done by checking the DO submitted together with Borang I. He then goes on to say that the landowner or interested party can override the DO! (see answer in italics).

[60] Section 9 of the STA provides:

"Conditions of approval

9. (1) The Director shall not approve the subdivision of any building unless the following conditions are satisfied:

(a) ... ;

(b) that, in the case of any building for the erection of which planning permission was required:

(i) it has been certified by an architect registered under the Architects Act 1967 (Act 117) or by professional engineer registered under the Registration of Engineers Act 1967 (Act 138) that the building was constructed in accordance with the plans and specifications by reference to which that permission was given, starting therein the date on which such permission was given and the reference number thereof (if any); or

(c) ... ;

(d) that the subdivision would not be contrary to the provisions of any written law for the time being in force, and that any requirements imposed with respect thereto by or under any such written law have been complied with."

[61] The STA itself contains sufficient provisions (see ss 10(1)(aa) and (c), 10(3)(c) and 10(3A)(e), 10(4)(b)) to reinforce the requirements in respect of the application and approval of any subdivision and issuance of strata title. This was acknowledged indirectly by DW2 in his witness statement when

he said "Pengesahan akan disemak berdasarkan Pelan Pembangunan yang dilampirkan bersama permohonan pecah bahagi bangunan tersebut".

[62] Block J being a common property is owned by the plaintiff. This is clearly provided for in s 42(1) of the STA which reads:

> "42. (1) The management corporation shall, on coming into existence, become the proprietor of the common property and be the custodian of the issue document of title of the lot."

[63] D3 or DW2 cannot plead ignorance of the law for the STA is the very law they are administering. A cursory check of the DO will show that Block J is "common property" being listed under "Kemudahan Umum". Despite D1 not listing Block J in Borang I, it was incumbent upon DW2 to verify Borang I with the DO in respect of common property and not blame D1 for "misleading". The application should not have been approved and a strata title issued.

[64] There is no basis for D3 to escape culpability by alleging that it was misled by D1. The requirements of the STA were willfully and cavalierly ignored and/or circumvented.

Section 22 Of The National Land Code

[65] Section 22 of the National Land Code does not afford any immunity to DW2 as it covers only acts or matters done by an officer under the NLC. There is no corresponding provision in the STA. The only immunity and/or protection under the STA is to be found in s 67D which only covers members of the Strata Titles Board.

[66] In the circumstances, taking into consideration that by virtue of s 42(1) of the STA the plaintiff is the legal owner of Block J, I find the strata title of Block J to be unlawfully issued and D2 did not acquire an indefeasible title to Block J.

Is D2 A *Bona Fide* Purchaser?

[67] I do not find D2 to be a *bona fide* purchaser for the following reasons.

[68] D2 had entered into the SPA with D1 even before any application for strata title was made, and in direct contravention of the DO. As such, the object and consideration of the SPA is unlawful and illegal. That being so, by virtue of s 24 of the Contracts Act 1950 the SPA is void.

[69] DW1, one Lee Hing Lee, a Director and majority shareholder of D2, was not a truthful witness. In his witness statement, he had stated categorically (in Q&A 7(iv) & (v) and Q&A 9):

> "Q7: ...
>
> A: ...

(iv) Based on the Development Order by Majlis Bandaraya Petaling Jaya dated 9 October 2003 ("Development Order"), Block J has not been ear marked as common property.

(v) I am also not aware of any action taken by Majlis Bandaraya Petaling Jaya against the 1st defendant for the violation of the said Development Order in respect of Block J.

...

Q9: Can you tell the court the current status of Block J?

A: Block J is currently owned by the 2nd defendant and being rented by Butai Education Sdn Bhd to operate as a tadika as reflected in the tenancy agreement between the 2nd defendant and Butai Education Sdn Bhd dated 1 January 2013. The tenancy period has been extended to 28 February 2015. I believe that would satisfy the requirement under the Development Order of the need for the developer to provide a tadika for its residence there at.

[70] However under cross-examination, he denied all knowledge of the DO, and claimed not to have seen the DO or even been told about the DO as he is illiterate. Even when shown a copy of the DO he still insisted he had not seen it before.

[71] DW1 was clearly lying, either in his witness statement or under cross-examination in court.

[72] Be that as it may, his answer in Q&A 9 that Block J was being rented out to Butai Education Sdn Bhd via the tenancy agreement dated 1 January 2013 clearly shows and confirms D2's propensity to act in violation of the law as the strata title which was issued provides expressly that Block J is classified as "Residential" and not "Commercial". By renting Block J to Butai, D2 had contravened the express condition of use in the strata title.

[73] DW2 admitted that his relatives owned D1. And that he had, through his many other companies, purchased other units from D1. It is significant to note that the SPA executed between the purchasers of the units and D1 had "taska" included in the list of common facilities but was conspicuously omitted in the SPA between D1 and D2.

[74] The condo consist of 2180 units of residential condominiums according to the DO.

[75] However, D3 through DW2 had allowed four extra units, ie 2184 units to be applied for, and approved. DW2 could not give any satisfactory explanation for the inconsistency.

[76] When pressed, DW1 could not confirm that he would "guarantee" that Block J would be rented out for the operation of a kindergarten because he admitted that one day he may sell off Block J. DW1's contention that as long

as there is a kindergarten in the condo the DO is complied with is ludicrous in light of his own evidence. DW1 has conveniently overlooked the fact that the DO has to be complied with by D1, as the developer and not D2.

[77] As stated by PW4 (in Q&A 9):

> "Q9: The Development Order specifically stated that Block J must be used as a premise for taska/tadika ie a common facilities, if the 2nd defendant uses Block J as a premise for taska/tadika or caused Block J to be used for the same, does it means that the 1st defendant had indirectly complied with the said Development Order?
>
> A: Clearly not. First of all, I wish to emphasise that Block J ought to be part of common property and it cannot be legally sold or transferred in any circumstances. The position remains the same even if the 2nd defendant uses Block J as a premises for taska/tadika.
>
> The Strata Titles applied for by the 1st defendant and issued by the 3rd defendant states the "Syarat Nyata" as "kediaman" which is inconsistent with the requirement of "taska/tadika" in the Development Order.
>
> I believe that there is a clear contravention of the Development Order.
>
> **If the 1st defendant can be allowed to circumvent the Development Order in such a way, then it would also mean that almost all the common facilities, ie swimming pool, gymnasium and/or the club house can be privately own by someone. There is no assurance to the residents of Condominium @ Palm Spring that one of the common facilities available at all material times is the "taska/tadika" at Block J as required by law in the Development Order. Clearly, this does not make any sense at all.**
>
> **Further, the sale of Block J by the 1st defendant is for private profit and any rentals received by the 2nd defendant is also for private profit. This is contrary to the requirement in the Development Order that the Block J is part of "common facilities/property.**"
>
> [Emphasis Added]

[78] I concur with the plaintiff that it is against public policy and the needs of the residents/purchasers of the condo for Block J to be privately owned by anyone being common property. As reflected by the number of units, ie 2184, it is a significantly high density condo which would mean that families occupying the units would need a kindergarten for their young children.

[79] Each and every sale and purchase agreement entered into between the 1st defendant and individual purchasers represents that there is a "taska" as part of the common facilities. All these sale and purchase agreements were entered into in accordance with the law. The DO specifically provided for the taska as a common facility for the use and enjoyment of all the residents/purchasers of the condo.

[80] Public policy consideration will be defeated and gravely prejudiced if D1 as a developer and D2 as a company are allowed to transact and deal with common property as they wish and in the manner that they did without regard to the residents of the condo and the law.

The 44 Accessory Parcels (Car Parks)

[81] Furthermore the evidence shows that the sale of Block J as a residential unit came with 44 car parks.

[82] DW2 admitted that only 275 accessory parcels, ie car parks were applied for where the DO required 2398 car parks. Despite the glaring shortage of car parks for the 2184 units approved, D3 nonetheless approved 44 car parks for Block J alone!

[83] I find in this case, not only evidence of a "special relationship" or "family arrangement" between D1 and D2 (as revealed in evidence under cross-examination), there is also a strong stench of a "special relationship" between DW2, acting for and on behalf of D3 and D2 as shown in the evidence adduced of the unlawful approval of Block J to D2, the unexplained approval of four additional units and the inappropriate allocation of a disportionate number of car parks (44) allocated for one residential unit when the total approved number of car parks was only 278 for 2184 units of the condo.

[84] Given that each car park is worth about RM20,000.00, the 44 car parks would be worth around RM880,000.00 which far exceeds the purchase price of RM200,000.00 for the whole of Block J. With an area of 12,055 sq feet this works out to only RM16.59 per sq feet (which is cheaper even than a low cost unit) whilst the other units were being sold for between RM150.00-RM170.00 per sq feet.

[85] The price of RM200,000.00 for Block J and the 44 car parks defies all logic and beggars belief. This is no arms length transaction. Neither was it a *bona fide* purchase for valuable consideration.

[86] In view of the foregoing, I hold that D2 did not acquire an indefeasible title for Block J and the 44 accessory parcels as it was unlawfully acquired. Section 340(2) read together with s 340(3)(a) and (b) and the proviso thereto of the NLC applies.

[87] The plaintiff's claim is allowed with costs.

[88] The following orders are allowed:

(a) A declaration that Block J (also known as Building No M8) and the 44 accessory parcels thereof at Palm Spring @ Damansara are Common Property pursuant to Strata Titles Act 1985 and/or Building And Common Property (Maintenance And Management) Act 2007 and/or the laws in force;

(b) A declaration that the sale and purchase agreement between the 1st defendant and the 2nd defendant dated 20 September 2006 for the sale of Block J and the 44 accessory car parks at Palm Spring @ Damansara is invalid and unenforceable;

(c) An order that the name of the 2nd defendant be removed from the entries of strata title known as No Hakmilik PN 26623, No Lot 44938, Bangunan No M8, Petak 2184, Daerah Petaling, Negeri Selangor (together with the 44 accessory parcels in the said title);

(d) An order that the strata title known as No Hakmilik PN 26623, No Lot 44938, Bangunan No M8, Petak 2184, Daerah Petaling, Negeri Selangor be cancelled and the ownership of Block J and the 44 accessroy parcels of Palm Spring @ Damansara be given to the plaintiff as the management corporation of Palm Spring @ Damansara which is entrusted to manage and maintain the common property and to maintain and manage the same as common property;

(e) Damages to be assessed by the Registrar of this Honourable Court and to be paid by the defendants to the plaintiff;

(f) Interest at the rate of 5% per annum calculated from the date of this writ on the amount assessed under the aforesaid para (e) until the full settlement; and

(g) Costs to be paid by the defendants to the plaintiff.