IN THE COURT OF APPEAL MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO: W-02(NCVC)(W)-138-01/2018

BETWEEN

IDEAL ADVANTAGE SDN BHD ……APPELLANT

AND

PERBADANAN PENGURUSAN
PALM SPRING @ DAMANSARA ……RESPONDENT

(HEARD TOGETHER WITH)

IN THE COURT OF APPEAL MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO: W-02(NCVC)(W)-151-01/2018

BETWEEN

MUAFAKAT KEKAL SDN BHD ……...APPELLANT

AND

PERBADANAN PENGURUSAN
PALM SPRING @ DAMANSARA ……RESPONDENT

(In the High Court of Malaya at Kuala Lumpur

(Civil Division)

Civil Suit No: WA-22NCVC-756-11/2016

Between

Perbadanan Pengurusan Palm Spring

@ Damansara ...Plaintiff

And

1. Ideal Advantage Sdn Bhd
2. Muafakat Kekal Sdn Bhd ...Defendants)

CORAM:

BADARIAH SAHAMID, JCA

ZABARIAH MOHD YUSOF, JCA

HARMINDAR SINGH DHALIWAL, JCA

JUDGMENT

[1] There are 2 related appeals before us, namely:

i) W-02(NCVC)(W)-138-2018 (Appeal 138); and
ii) W-02(NCVC)(W)-151-2018 (Appeal 151).

Both appeals 138 and 151 arose from one suit in the High Court, which is Civil Suit 22 NCVC-756-11/2016. In this judgment parties will be referred to, as they were in the High Court.

[2] Appeal 138 is the appeal by the 1st defendant (D1) whilst Appeal 151 is the appeal by the 2nd defendant (D2). Both defendants appeal against the whole of the High Court decision which allowed the plaintiff's claim, after full trial, namely:

a) A declaration that the 40 sale and purchase agreements between D2 and D1 dated 7.12.2005 only in so far as the sale of the said 394 accessory parcels by D2 to D1 and any further transfers (if any) are invalid and unenforceable;

b) An order that the Registrar of Land Titles Selangor and/or the Director General of Land and Mines Selangor and/or the Land Administrator and/or the authority concerned to cancel the entry of the said 394 accessory parcels from the strata titles plan and the strata titles and that the said 394 accessory parcels are common properties owned and controlled by the plaintiff.

c) A declaration that 213 units of car parks in Palm Spring Condominium @ Damansara known as A588, A589, A590, A591, A593, A594, A595, A612, A613. A614, A615, A616, A617, A618, A619, A620, A621, A622, A623, A624, A625, A626, A627, A739, A740, A741, A742, A743, A744, A745, A746, A731, A732, A733, A734, A735, A736, A737, A738, A723, A724, A725, A726, A727, A728, A729, A730, A712, A713, A717, A718, A719, A720, A721, A722, A707, A708, A709, A710, A711, A660, A661, A662, A652, A653, A654, A655, A656, A657, A658, A659, A644, A645, A646, A647, A648, A649, A650, A651, A628, A629, A630, A631, A632, A633, A634, A635, A747, A748, A749, A750, A751, A494, A495, A496, A497, A498, A499, A500, A501, A502, A503, A504, A505, A506, A507, A508, A509, A566, A567, A568, A569, A570, A571, A572, A558, A559, A560, A561, A562, A563, A564, A565, A580, A581, A582, A583, A584, A585, A550, A551, A552, A553, A554, A555, A556, A557, A542, A543, A544, A545, A546, A547, A548, A549, A534, A535, A536, A537, A538, A539, A540, A541, A526, A527, A528, A529, A530, A531, A532, A533, A518, A519, A520, A521, A522, A523, A524, A525, A510, A511, A512, A513, A514, A515, A516, A517, A714, A715, A716, A573, A574, A575, A576, A577, A578, A579, A586, A587, A596, A597, A598, A599, A600, A601, A602, A603, A604, A605, A606, A607, A608, A609, A610, A611, A636, A637, A638, A639, A640, A641, A642, A643 are held under Title PN 26623, Lot 44938, Pekan Baru Sungai Buloh, Daerah Petaling, Negeri Selangor and/or from the units taken, are the Condominium Visitors' Car Park and are common

properties owned and controlled by the plaintiff and vested in the plaintiff;

d) A declaration that the defendants are not entitled to any rental collection for the car parks in Palm Spring Condominium @ Damansara including the 394 accessory parcels;

e) A perpetual prohibitory injunction against D1 and D2 to refrain and/or prohibit D1 and D2, through themselves or their directors, employees or representatives or others, from taking any action in rental collection or other profits from any of the car parks in Palm Spring Condominium @ Damansara including the 394 accessory parcels;

f) Taking of accounts, as at the date of the judgment, to be assessed by the Court for all rentals or profits collected and/or have been collected by D1 and/or D2 and/or agent or employee or nominee of D1 and/or D2 for any of the car park in Palm Spring Condominium @ Damansara including the 394 accessory parcels wherein the Directors of D1 and/or D2 respectively shall affirm, file and serve to the solicitors of the plaintiff, an affidavit stating all the rentals or profits which have been collected by the defendants through the 394 accessory parcels at all material times, within 8 days from the date of the judgment;

g) Judgment for the plaintiff for the sum assessed as stated in the paragraph above which has to be paid by D1 and D2 respectively to the plaintiff;

h) The sum of RM233,825.13 together with interest calculated based on the sum of RM231,160.00 at the rate of 5% per annum from 1.11.2010 until the date of full settlement shall be refunded by D1 to the plaintiff within 8 days from the date of the judgment;

i) General Damages to be assessed by the Court to be paid by D2 to the plaintiff with interest at 5% per annum from the date of the writ herein until full settlement;

j) D1 to pay the plaintiff costs of RM75,000.00;

k) D2 to pay the plaintiff costs of RM50,000.00; and

l) It was further ordered that the plaintiff be at liberty to apply for further orders/directions to give effect to the judgment.

[3] D1 and D2 each filed their appeal separately to the Court of Appeal against the decision of the High Court.

[4] There was no motion filed for the two Appeals to be consolidated but parties agreed that both the Appeals be heard together before the same panel, given the background facts and issues involved in both of the Appeals herein are substantially similar.

BACKGROUND:

[5] The plaintiff is the Management Corporation of Palm Spring @ Damansara condominium (condominium) located in Kota Damansara. The plaintiff was established on 8.1.2008 but only had its Annual General Meeting on 11.9.2011. The plaintiff could only function after 11.9.2011. Hence, prior to the plaintiff's formation, the condominium was under the management of the joint management body (JMB).

[6] D2 is the developer of the condominium which consists of 2180 units/parcels. Premised on the Development Order (DO) dated 9.10.2003 issued by Majlis Perbandaran Petaling Jaya (MPPJ), D2 was required to provide a minimum of 2398 (2180 + 218) car parks based on the formula of one car park per unit + 10%.

[7] D1 is a company which had purchased 45 units in the condominium from D2 vide 45 Sales and Purchase Agreements (SPAs) together with 439 accessory car park parcels. (41 SPAs dated 7.12.2005 and 4 SPAs dated 27.6.2005). Apart from 5 units of the condominiums with only 1 accessory car park parcels attached to each, the other 40 units have 8-15 accessory car park parcels each.

[8] The main dispute between the parties relates to D2's sale of 45 units in the condominium together with 439 car parks to D1. The plaintiff sought to impugn the purported sale and to claim ownership of the car parks as part of common property. A collateral issue arose in relation to the main issue, namely whether D1 may lawfully rent out the car parks to third parties.

[9] There have been previous proceedings and trials involving the same parties and substantially over the same subject matter, namely:

i) Suit S-22-58-2009 (Suit 58); and
ii) Suit 22NCVC-567-2013 (Suit 567).

Background of Suit 58
(reported as ***Ideal Advantage Sdn Bhd v Palm Spring Joint Management Body & Anor*** [2014] 7 MLJ 812***)***:

[10] This suit was filed by D1 against the JMB in relation to the 439 car parks.

[11] The JMB counterclaimed from D1, 213 accessory car parks (which they claimed as visitor's car parks) out of 439 accessory car parks parcels which were registered under D1's name and/or owned by D1. The JMB took the position that D1 was only entitled to have one car park per unit owned. Instead of 439 car parks, it could only have 45 car parks, premised on the fact that they only purchased 45 condominium units. Therefore JMB laid claim to the remaining 394 car parks (439 less 45 car parks).

[12] After a full trial, the High Court ruled in favor of JMB in respect of the 394 car parks and visitors' car parks, and dismissed D1's claim. D1 appealed against this decision of the High Court to the Court of Appeal, which was registered as Appeal **W-02-1358-06/2013**.

[13] However, before the Appeal **W-02-1358-06/2013** could be heard, the Federal Court in a separate proceedings in ***Palm Spring Joint Management Body & Anor v Muafakat Kekal Sdn Bhd & Anor*** [2016] 3 CLJ 665 declared the JMB as null and void. The Federal Court found that the plaintiff was established before the JMB was formed and therefore the constitution of the JMB after the plaintiff was established was contrary to law. Consequently, the JMB has no locus standi in **Suit 58** and Appeal **W-02-1358-06/2013.**

[14] In view of the findings of the Federal Court on the lack of locus standi of the JMB, the Court of Appeal allowed the Appeal **W-02-1358-06/2013**. However, it is common ground between the parties that Appeal **W-02-1358-06/2013** was never heard by the Court of Appeal on its merits but purely on the issue of locus standi of the JMB.

[15] After the disposal of Appeal **W-02-1358-06/2013**, D1 resumed the car park rental activities. It was alleged that D1 issued blank receipts for the car park rental without D1's names. It was the contention of D1 that all the 45 units in Palm Spring Condominium had been legally transferred to D1 through the 45 SPAs executed between D1 and D2. D1 is legally the registered owner of these condominium units as well as the accessory parcels vis-à-vis the car parks attached to these units. This is proven through the issuance of 39 strata titles in the name of D1. D1 asserts that by the issuance of these strata titles, D1 is the lawful and the legal owners of the condominium units and all accessory parcels which were attached to these 39 units of condominiums. Hence, these accessory parcels vis-à-vis car parks are not "common properties" within the meaning of Strata Titles Act

1985 (STA 1985). The other 6 units of condominiums which was purchased by D1 together with the accessory parcels were in the process of being transferred to D1's name. Therefore, pursuant to section 340 (2) of the National Land Code 1965 (NLC 1965), D1's titles to the 45 units as well as the accessory parcels vis-à-vis car parks are indefeasible. The car parks therefore belong exclusively to D1 which D1 has the lawful right to rent out to any entity.

[16] As a result, the plaintiff filed Suit **22NCVC-756-2016** (the Suit which is the subject matter of the present appeal before us). The parties agreed that the notes of evidence and documents of **Suit 58** would be used in the present appeal.

Background of Suit 567
(reported as ***Perbadanan Pengurusan Palm Spring @ Damansara v Muafakat Kekal Sdn Bhd & Ors*** [2015] 5 MLRH 426) :

[17] This suit was instituted by the JMB against 3 defendants, namely Muafakat Kekal Sdn Bhd (D2 in our present appeal), Top Fresh Sdn Bhd and the Director of Lands and Mines, Selangor. The suit relates to D2 carving out Block J (which was designated as a kindergarten) in a separate title and sold it together with 44 perimeter car parks to Top Fresh Sdn Bhd (a company associated with D2) vide a SPA entered between them. On D2's application for the strata title, the Director of Land and Mines, Selangor had approved the subdivision of Block J and issued a strata title to D2. D2 became the registered owner of Block J and the 44 parking lots in the strata title.

[18] The complaint of the plaintiff was that the registration of the strata title of Block J in favour of D2 by the Director of Land and Mines, Selangor and the sale of the same by D2 to Top Fresh Sdn Bhd was invalid, illegal and/or unlawful.

[19] The plaintiff sued for orders to:

i) declare Block J and the 44 perimeter car park parcels as common property pursuant to the STA 1985 and Building and Common Property (Maintenance and Management) Act 2007 (BCPA 2007);

ii) declare the SPA between D2 and Top Fresh Sdn Bhd invalid and unenforceable; and

iii) cancel the issued strata title to Block J in favour of Top Fresh Sdn Bhd and instead ownership of Block J and the 44 perimeter car park parcels be given to the plaintiff as the management corporation of the condominium.

[20] After a full trial, the High Court held that pursuant to section 42 (1) of the STA 1985, Block J was common property owned by the plaintiff. The High Court in its judgment held that the Penolong Pegawai Tadbir, Unit Hakmilik Strata, from the Office of Director of Land and Mines, Selangor could not plead ignorance of the law, for the STA 1985 was the very law they were administering. The application should not have been approved in the first place and strata title should not have been issued. The court found that

the requirements of the STA 1985 was “willfully and cavalierly” ignored and/or circumvented.

[21] The High Court also found that there was an 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 condominium. The transaction between D2 and Top Fresh Sdn Bhd was not at arms length transaction. Neither was it a bona fide purchase for valuable consideration. Top Fresh Sdn Bhd did not acquire an indefeasible title for Block J and the 44 car parks, as it was unlawfully acquired. The court held that section 340 (2) read together with section 340 (3) (a) and (b) and the proviso thereto of the NLC 1965 applied. The Court decided that as the DO was clear that Block J was reserved for the kindergarten, it was firmly entrenched in the list of “Kemudahan Umum Yang Disediakan” and there was no reason or justification for saying Block J was not part of common property. The defendants had to comply with the DO as it was duly approved pursuant to law, namely the Town and Country Planning Act 1976. Hence an order for the return of Block J to the plaintiff.

<u>The Findings of the High Court in the present Appeal:</u>

[22] From the grounds of judgment, the learned trial Judge made the following findings, inter alia:

a) The 394 accessory car park parcels were rented out by D1 to third parties, and were not used in conjunction with the main

parcel. D1 had dealt with the car parks separately from the main parcel;

b) D1's purpose and intent or "usage" of the car parks constituted a breach of:

   i) Section 4 of the STA 1985;
   ii) Section 34 (2) of the STA 1985;
   iii) Section 69 of the STA 1985;

c) The renting out of the 394 car parks by D1 is a "dealing" of the accessory parcels which is independent of the main parcels and is thus prohibited by sections 34 (2) and 69 of the STA 1985. The word "dealing" in the NLC 1965 includes tenancy as per section 5 of the same. The word "dealt with" used in sections 34 (2) and 69 of the STA 1985 includes any dealings by way of tenancies or rental of car-parks;

d) Since the 394 car parks were being dealt with, in a commercial manner and not appurtenant to the main parcel, and that it is not being used in conjunction with the main parcel, therefore it is illegal as the sale of the 394 accessory car park parcels by D2 to D1 falls within section 24 (b) of the Contracts Act 1950 and must accordingly be struck down. Thus the SPAs for the sale of the car parks are null and void;

e) There was no breach of the DO by D2, namely failure to give one car park per unit owner. The endorsement on the DO means that the developer has to ensure that there is at least one car park per dwelling unit. In terms of numbers, D2 appears to have built sufficient numbers of accessory car park parcels in accordance with the DO but the complaint was that some of the non-accessorized car parks were “allocated” or allowed by D2 to be used by some unit owners and in addition to 394 accessory car park parcels that were sold to D1;

f) There are sufficient numbers of car parks in the form of non-accessorized parcels which are common property to be owned by the plaintiff that can be used as visitor car parks **but** these were found to be “encumbered” pursuant to the issuance of letters by D2 to some of the unit owners “allocating” or allowing the usage of non-accessorized parcels to them, although no consideration was paid and they were not registered as an accessory parcel under the unit owners’ strata title;

g) As between D1 and D2, there is no commercial justification for the massive allocation of car parks by D2 to D1. It is clear that the purpose was to rent out the car parks, i.e. to commercialize the car parks. In law there is no restriction in the number of car parks that a developer can sell to a unit owner, but the problem will arise when the usage of car parks becomes commercial. It was found that the STA 1985 prohibits commercial usage of car parks in the manner that was done by D1 and D2;

h) Although the SPAs involved the sale of 439 car parks to D1, the plaintiff has not sought to impugn the entire 439 car parks that were purportedly sold to D1. The plaintiff took the stand that D1 should be entitled to keep at least one car park for each unit of condominium. The learned trial Judge accepted this as that is well within the election of the plaintiff, and since they concede to the fact that D1 is entitled to keep 45 car parks, there is no reason for the court not to accept that stand; and

i) The illegality lies in the prohibited usage of the 394 car parks (439-45). The allocation of 394 car parks by D2 to D1 resulted in an illegality because they were not used nor intended to be used in conjunction with the main parcels. Hence the intention and usage of the excessive car parks resulted in a breach of sections 34 (2) and 69 of the STA 1985. Therefore, the claim by the plaintiff for the 394 car parks is allowed and the car parks are declared as “common property”.

THE ISSUES IN THE PRESENT APPEAL:

[23] The main thrust of the appeal are:

i) The operation of section 340 (2) (b) & (c) of the NLC 1965 vis-a-vis the indefeasibility of D1’s registered title on the 394 car parks (Issue on indefeasibility of title); and

ii) The interpretation of the word “dealt with” of the accessory car park parcels in the context of sections 34 (2) and 69 of STA 1985.

Corollary to the abovementioned are the following issues:

i) Whether there has been compliance with the provisions of the law/statutes by the defendants;

ii) Whether D1 has complied with the DO issued by Majlis Perbandaran Petaling Jaya; and

iii) The illegality issue.

Submission by the Defendants:

[24] The defendants submit that the learned trial Judge erred in law and fact when he decided that the usage of the car parks by D1 for commercial purpose, which was subsequent, is illegal. This cannot be used as a ground to defeat the indefeasibility of D1’s registered title. This begs the question of whether the ownership of the accessory car park parcels be:

i) Defeasible under section 340 (2) (b) & (c) of the NLC 1965; and

ii) Subsequently “forfeited” for the benefit of the plaintiff, the Management Corporation.

D1 submits that as the registered owner of the 45 condominium units together with the 439 accessory parcels in the condominium, it has acquired an indefeasible title over the 45 condominium units together with the 439 accessory parcels pursuant to section 340 (1) of the NLC 1965. The defendants submit that the said “usage” of the 394 (439 less 45 car parks) accessory car park parcels could not come within the ambit of section 340 (2) (b) & (c) of the NLC 1965.

[25] The defendant argued that at the material time of the transfer or registration of the 394 car parks, there was nothing illegal with the transaction nor was there any law prohibiting such transfer or registration of the 394 accessory car park parcels in the name of D1. Section 340 (2) (b) & (c) of the NLC 1965 was not to determine the defeasibility of the strata title or ownership to be dependent on the subsequent usage of the property. This, the defendant submits, is consistent with the learned trial Judge’s acknowledgement that there is no restriction in the numbers of car parks that a developer like D2 can sell to a unit owner or the number of accessory car park parcels that can be attached to a strata title.

[26] Even assuming that such transfer or registration of the 394 accessory car park parcels is prohibited under section 340 (2) (b) & (c) of the NLC 1965, the ownership of the 394 accessory car park parcels should have reverted to D2 and not the plaintiff, the Management Corporation which suddenly had been unjustly enriched.

[27] This is in line with the finding of the learned trial Judge that there has been no breach of the DO by D2 when the required number of car parks were built by D2 in this project.

[28] D2 further submits that there are sufficient non-accessorized parcels which are common property that can be used as 218 visitors' car parks. There is no passing of ownership of the non-accessorized parcels to the unit owners when the usage of the non-accessorized parcels was "allocated" to them.

[29] D2 contends that the learned trial Judge had unfairly prejudiced D2 in favor of the said unit owners. There is no legal basis under section 340 (2) (b) & (c) NLC 1965 for the court to extinguish the right of D2 and consequently D1 to the 394 accessory car park parcels due to the reason that the non-accessorized parcels had been "encumbered" by gratuitous use by certain unit owners.

[30] D2 in the alternative argued that:

i) the plaintiff while complaining about the absence of 218 visitors' car parks was usurping the right of D2 as the land owner/developer and unjustly enriched themselves when they claimed for more than 218 visitors' car parks namely a total of 394 accessory car park parcels; and

ii) in the event that the court is not with them, the declaration that the registration of 394 accessory car park parcels to be declared

invalid should only be limited to 218 car parks being the numbers of visitors car parks which the plaintiff claimed to be missing.

[31] With regard to the interpretation of the word “dealt with” in sections 34 (2) and 69 of the STA 1985, D1 submits that it should only be confined to the registration of ownership or interest under the NLC 1965 and not the transaction of renting of the 394 car parks. In short, D1 asserts that there is no breach of section 34 (2) and section 69 of the STA 1985 as the renting out of the car park units to third parties does not constitute “dealing” with the accessory parcels of car park separately from the condominium units because dealing in the context of the NLC 1965 means registrable dealings. The renting of the accessory car park parcels by D1 does not constitute a registrable dealing under the NLC 1965 and therefore would not be contravening sections 34 (2) and 69 of the STA 1985. In addition it does not have the effect of governing the contractual obligations between the parties i.e. landlord and tenant.

[32] D2 argued that sections 34 (2) and 69 of the STA 1985 are merely declaratory provisions with no penal consequences in the event of breach, as an attempt to deal with the accessory parcel separately and independently from the main parcel, will surely be rejected by the land office. Neither do the provisions provide for forfeiture of the accessory parcels or rescinding of ownership rights. These sections are only applicable after the acquisition of ownership rights and they do not play a role during the time of the purchase of the units of condominium with accessory parcels.

[33] D2 maintains that the word “dealt with” makes no distinction as to whether the dealings had to be commercial as what had been contended by the learned trial Judge and it does not distinguish whether the commercial venture will benefit one owner or all of the residents as in the plaintiff.

[34] Sections 34 (2) and 69 of the STA 1985 do not entail looking into the intention or purpose of the purchaser of such units of condominiums with more than one accessory parcel unlike what had been contended by the learned trial Judge.

[35] It is wrong for the plaintiff to have the power to determine that D2 can only have one accessory car park parcel per unit of condominium. D2 submits that this is a clear usurpation of the rights of D2 as the land owner and developer. It is submitted that if the learned trial Judge’s finding in respect of the issue of defeasibility and issue of interpretation of the word “dealt with” is allowed to stand, this would result in absurdity, uncertainty and injustice. Therefore D2 submits that such interpretation should be avoided.

[36] D1 submits that the learned trial Judge erred in law and fact when His Lordship decided that the usage of the car parks by D1 and/or the intention of D1 in purchasing the car parks, per se, results in the forfeiture thereof in favor of the plaintiff. Further it was contended by D1 that the learned trial Judge failed to take into consideration that the plaintiff’s contention of contravention or non-compliance of sections 4, 34 and 69 of the STA 1985 cannot cause the car park registered and owned by D1 to be forfeited and awarded to the plaintiff.

[37] D1 asserted the finding of fact by the learned trial Judge that D2 has complied with the DO and provided 2180 residents' car parks and 218 visitors' car parks at the condominium. Even assuming that the developer did not comply with the DO, it is an issue between the state authority and the developer. D1 as a purchaser for valuable consideration ought not be affected by such purported non-compliance.

OUR DECISION:

A: Whether there has been compliance with the provisions of the law/statutes by the defendants

[38] It is the submission of the plaintiff that the 394 car parks (439 less 45) cannot legally qualify as "accessory parcels" under the STA 1985 as they were sold as independent parcels of the main parcel units of the condominium. The main thrust of the plaintiff's challenge on the illegality aspect of the 439 car parks is premised on the use of those car parks for a commercial venture and not as accessory parcels to the main units of the condominium.

[39] In this regard it is instructive to refer to "Strata Title in Singapore and Malaysia" 4th Edition, by Teo Keang Sood, at page 131 which explains the position of accessory parcels after the introduction of the STA 1985 which reads as follows:

"A. Accessory Lot/Accessory Parcel and related Matters

…….under the former section 153 (3)(b) of the National Land Code, a parcel must be situated within a building shown on the storey plan. Hence, the boundary of a parcel may not extend beyond the subdivided building. Furthermore, there was no provision to enable an area representing, say, a car park or a store-whether located within or outside a subdivided building and which is to be used in conjunction with a parcel issued with a strata title-to be shown on the title itself.

The position is now different under the STA. Under section 10 (4) (c), 5 (a) and (b) of the STA, the concept of "accessory parcel" has been introduced to enable areas on the same lot of land and situated within or outside the subdivided building to be used in conjunction with a parcel which is issued with a strata title, and **on which the area concerned is shown in a strata plan as an accessory parcel**.." *(emphasis ours)*

This leads us to the relevant provisions in the STA 1985 as to the position of "accessory parcels" in strata development.

Section 4 of the STA 1985 provides that:

"'accessory parcel' means any parcel shown in a strata plan as an accessory parcel which **is used or intended to be used in conjunction with a parcel**."

The rights of the unit owners vis-à-vis his parcel, common property and accessory parcel is provided for in Section 34 of the STA 1985 which states:

"34. Rights of proprietor in his parcel and common property

(1) Subject to this section and other provisions of this Act, a proprietor shall have-

(a) in relation to his parcel (in the case of a parcel proprietor), the powers conferred by the National Land Code on a proprietor in relation to his land; and

(b) in relation to the common property, the right of user which he would have if he and the other proprietors were co-proprietors thereof;

(2) No rights in an accessory parcel shall be **dealt with** or disposed of **independently** of the parcel to which such accessory parcel has been made appurtenant.

(3) No rights in the common property shall be disposed of by a proprietor except as rights appurtenant to a parcel; and any disposition of a parcel by a proprietor shall without express reference include a like disposition of the rights in the common property which are appurtenant to the parcel.

(4) A proprietor is not allowed to apply for any amendment of the express conditions on his documents of strata title."

Section 69 of the STA 1985 prohibits any dealing with an accessory parcel in such a manner which is independent of the main parcel. It states:

"**No accessory parcel** or any share or interests therein **shall be dealt with independently of the parcel** to which such accessory parcel has been made appurtenant as **shown on the approved strata plan**." (emphasis ours)

[40] A harmonious reading of the aforesaid provisions of STA 1985, shows that any accessory parcel to the main parcel of the condominium is not to be dealt with "independently" or "separately" from the main parcel and must be used in conjunction with the main parcel. These "accessory parcels" are parcels shown in an approved strata plan as an accessory parcel which **is used or intended to be used in conjunction with a parcel**. The plain and

ordinary meaning of the words in the relevant provisions reflects the true intent and purport of Parliament in legislating the STA 1985.

[41] As far as the present case is concerned, no strata plan which had been approved by the authorities under section 10 (4) of the STA 1985, was tendered by D2 to show whether the car parks are accessory parcels to the main parcels of the condominium units or are common property. This approved strata plan is within the knowledge of D2. It was in evidence that such strata plan was available but was not produced. This was confirmed by witness for the defendant, DW 4.

[42] D1's position has always been that they bought the 45 units together with the 439 accessory car park parcels and there is no legal restriction for an owner of one unit of condominium to purchase more than one accessory car park parcel. We agree that there is no legal restriction for an owner of a condominium to purchase more than one accessory car park parcel, so long as it is used **in conjunction** with the main parcel unit. From the evidence, the 45 parcel units were purchased by D1 together with the 439 accessory car park parcels and the evidence also shows that the whole intention and purpose of D1 purchasing 439 car parks from D2 was not to use these car parks in conjunction with 45 units of parcel condominiums respectively but to deal with the additional car parks **independently and separately** by renting it out to different individuals. There is no denial by D1 that they are renting out the car park parcels and that these car park parcels are being utilized for commercial purposes to generate a substantial income to D1. Clearly, the intention of D1 at the time of the purchase of the 439 accessory parcels together with the 45 units of condominium was to run a car park

business at Palm Spring Condominium. It is never disputed that each of the condominium unit which is about 1000 square feet at most, would only require one or two car parks. Clearly, the remaining car parks attached to the particular unit were meant for D1's car park rental business. The same argument applies to the other condominium units which have between 8-15 accessory car park parcels attached. Therefore, the usage of these car park parcels, namely the excessive car parks, constituted a breach of sections 34 (2) and 69 of the STA 1985, namely that the accessory car park parcels is used or intended to be used not in conjunction with a parcel unit and the same was dealt with, independently of the main parcel unit to which such accessory parcel has been made appurtenant thereof.

[43] The STA 1985 prohibits commercial usage of car parks in the manner that the D1 and D2 are doing. D1 and D2 are using the car parks for commercial purposes by renting them out to third parties. As we have stated in the earlier paragraphs of this judgment, when the sale of the parcel units of condominiums and the accessory car park parcels between D1 and D2 were executed, apart from 5 units of the parcel units of condominiums which had only 1 car park (accessory parcel) attached to each, the other 40 units have 8-15 accessory parcels each.

[44] The purpose, object and restriction in sections 34 (2) and 69 of the STA 1985 prohibits the dealing/transfer of the accessory parcels separately or independently of the main parcel, as was done by D1 and D2. These car parks were transferred in bulk to D1 by D2. The Hansard of the parliamentary debate in the Senate during the tabling of the STA 1985 is testimony to this, which reads:

> "Petak Aksesori adalah istilah yang digunakan bagi petak-petak yang **digunakan bersama-sama dengan petak yang didiami tetapi terletak di luar petak** berkenaan ataupun di luar dari bangunan berkenaan, seperti tempat letak kereta."

[45] The word "accessory" connotes the usage of the accessory car park parcel as attached or annexed, connected or dependent on and/or used or intended to be used with the main parcel. It is not independent on its own. To allow the carrying out of a business venture of renting out the accessory car park parcels independently of the parcel units of the condominium, as what was done by D1, would defeat the very purpose and intent of Parliament in legislating the STA 1985 with regards to accessory parcel.

[46] To this extent, D1's purpose and intent clearly constitutes a breach of sections 4, 34 (2) and 69 of the STA 1985, which constitutes illegality. The court will not countenance an illegality at any stage of proceedings, even if it is not pleaded. (***Merong Mahawangsa Sdn Bhd v Dato' Shazryl Eskay bin Abdullah*** [2015] 5 MLJ 619 at page 620). We will elaborate on this issue of illegality in the later part of this judgment.

B: The interpretation of the word "Dealt with" in the context of section 34 (2) and section 69 of the Strata Titles Act 1985

[47] D1 and D2 alleged that the learned trial Judge erred in law and fact when he failed to appreciate the words "dealing" and "dealt with" in the NLC 1965 and sections 34 (2) and 69 of the STA 1985 do not include 'tenancy" which cannot be registered.

[48] On this issue, we refer to the provisions of section 5 of the NLC 1965 which defines “dealing” as follows:

> ““dealing” means any transaction with respect to alienated land effected under the powers conferred by Division IV, and any like transaction effected under the provisions of any previous land law, but does not include any caveat or prohibitory order;”

Section 205 of the NLC 1965 provides that:

> “(1) The dealings capable of being “effected” (*as opposed to “registered”)* under this Act with respect to alienated lands and interests therein shall be those specified in Parts Fourteen to Seventeen, and no others.”

A transaction under “Division IV” of the NLC 1965 includes Part 15 of the same which has provisions on “Tenancy” under sections 223 - 224. Part 14 of the NLC 1965 also deals with “transfer exempt tenancies” pursuant to section 220 of the same.

[49] Therefore, by plain and unambiguous language, the term “dealing” in the NLC 1965 includes “tenancy”. This definition is imported into the STA 1985, where the word “dealt with” appears in sections 34 (2) and 69 of the STA 1985. These provisions are to be read together with sections 5 (1) and 5 (2) of the STA 1985 which provide:

> “5. (1) This Act shall be read and construed with the National Land Code as if it forms part thereof.
>
> (2) The National Land Code and the rules made thereunder, in so far as they are not inconsistent with the provisions of this Act or the rules made

thereunder, or are capable of applying to parcels, shall apply in all respects to parcels held under the strata titles."

A reading of the aforesaid provision shows that the STA 1985 is to be read and construed as part of the NLC 1965. The provisions of the NLC 1965 (which is not inconsistent with the STA 1985) shall apply in all respects to parcels held under the STA 1985, which includes the act of "renting out".

Section 4 of the STA 1985 utilizes the words "use" or "intended to be used" which clearly includes the act of "renting out" or "tenancy" of an accessory parcel to a third party. This is consistent with the word "dealt" or "dealing" under the NLC 1965.

[50] The act of renting out 394 car parks by D1 independent of the main parcels, constitutes "dealing" of the accessory parcels, which is prohibited by sections 34 (2) and 69 of the STA 1985, which includes any dealings by way of tenancies or the rental of car parks.

[51] At this juncture, it is noted that the plaintiff in the court below, has not sought to impugn the entire 439 car parks that were purportedly sold to D1 as the plaintiff takes the position that D1 should be entitled to keep at least one car park per unit of parcel. Hence the claim is just limited to 394 car parks only. The learned trial Judge accepted the stand taken by the plaintiff and we have no reason to depart from this.

Issue on the Development Order (DO):

[52] The DO as embodied in the Approved Building Plan by Jabatan Perancangan Pembangunan, Majlis Perbandaran Petaling Jaya (MPPJ), signed by Pengarah of MPPJ (Puan Sharipah Marhaini) dated 9.10.2003 in relation to the residents condominium units of Palm Springs, states:

a) Palm Spring comprises 6 Blocks with a total of 2180 residential units;

b) 2449 car parks for residential units were provided for;

c) Each unit should have 1 accessory car park and 10% for visitors' car park - as stated in Approval Plan as *"Tempat Letak Kereta (1 TLK/unit + 10%)"*; and

d) 2398 units of car parks are required.

[2180 (one for each unit) and 10% for visitors' car park (218)]. (Therefore, there should be 51 extra car parks i.e. 2449 less 2398)

[53] There is the evidence of the Director of the Planning Department of MPPJ (DW 4 – Sharifah Marhaini Syed Ali) that D2 had complied with the DO. The endorsement on the DO shows that there should be one car park per unit which means at least one car park per dwelling unit. There must be at least 2180 car parks.

[54] D2 was also obliged to provide 218 visitors car parks. In terms of numbers, D2 appears to have provided the minimum car parks and visitors car parks. This was also the finding of the learned trial Judge when His Lordship found that there was compliance by D2 with the DO, in the sense to allocate one car park per unit owner.

[55] However it is also the findings of the learned trial Judge from the evidence which show that:

i) D1 obtained a big number of extra car parks for commercial business purposes, namely renting them out separately to different individuals at a rate of RM120.00 per month (evidence of D1's Managing Director);

ii) the non- accessorized parcels (alleged by D2 as 213 visitors' car parks) although strictly "common property" are factually "encumbered" due to the issuance of letters by D2 to unit owners giving them the right of usage over the car parks; and

iii) There is a critical problem of lack of car parks for the residents and visitors due to the aforesaid.

[56] The learned trial Judge conceded that in law there is no restriction in the number of car parks that a developer can sell to a unit owner, as that is a contractual matter between D2 and the unit owner. However the problem will arise when the usage of the car parks becomes commercial. The STA 1985 prohibits commercial usage of car parks in this manner.

[57] The learned trial Judge made a finding that D2 failed to comply with MPPJ's condition in the DO for there to be visitors' car parks as disclosed at the meeting on 23.3.2006, that visitor' car parks to be situated at the perimeters parking. As per MPPJ's letter dated 19.4.2006, D2 was required to mark out 239 visitors' car parks pursuant to the approved strata plan dated 23.12.2000. For convenience it is pertinent that we reproduced the relevant parts of the said letter herein below:

"Tarikh 19.4.2006.

Muafakat Kekal Sdn Bhd,

.....

Tuan,

…….

2. Sukacita dimaklumkan mesyuarat Aduan Penduduk Palm Spring @ Damansara yang telah diadakan pada 23.3.2006 dipengerusikan oleh Y.B Dato' Mohd Mokhtar B Hj Ahmad Dahlan **telah memutuskan untuk pemaju menandakan 239 petak letak kereta pelawat berdasarkan pelan kelulusan pada 23.12.2000.**

3. Sehubungan itu, pihak tuan diminta untuk menandakan 239 petak tempat letak kereta pelawat didalam pelan tatatur dan diatas tapak dalam tempoh 14 hari dari tarikh surat ini disampaikan.

Sekian, terima kasih,

(Sharifah Marhaini Syed Ali)

Pengarah,

Jabatan Perancangan Pembangunan.

b.p. Yang Dipertua

Majlis Perbandaran Petaling Jaya."

As a result of the meeting as stated in the letter, **out of the 239 uncovered car-park parcels, 213 were identified as the condominium's perimeter parking which are part of the 439 car parks that were allocated to the 45 condominium units of D1/D2.** There is no evidence that D2 did any marking of visitors' car parks at the perimeter parking after meeting with MPPJ on 23.3.2006 and 19.4.2006. There were disputes as to what actually transpired, the venue of the said meeting and who were present at the meeting but the learned trial Judge believed the evidence of PW2 that there were directives to mark out the visitors' car parks and we have no reason to depart from that finding of credibility as the learned trial Judge as the trier of fact of first instance had the audio visual advantage. It is also the finding of the learned Judge that, till the date of the judgment, there is no visitors' car parks at the condominium.

[58] We do not have the benefit of sighting the approved strata plan as it was not tendered by D2 to the court, although it was available. This approved strata plan will show where the common properties are located.

[59] The evidence show that all non-accessorized car parks have been encumbered pursuant to evidence of letters issued by D2 to unit owners. It was in evidence that the owners have been using the same car parks for the last 11 - 13 years and it is quite inconceivable for D2 to allege that these are visitors' car parks. How can it be, when it is being used by the unit owners. Effectively and essentially, there was no car park left to be used as visitors' car parks. The learned trial Judge had concluded that these 218 car parks at the basement while they are non-accessorized parcels and are strictly common property, they are factually encumbered due to the issuance of the

letters by D2 to unit owners, who are using the car parks as their own for a substantial number of years. If these are visitors' car parks as contended by D2 and it does not belong to the unit owners, why would D2 give them out to the residents for their use for more than 10 years. It appears to be a permanent arrangement as there is no time limit for the said usage. Surely the usage of the car parks to these "owners" deprived visitors of the availability of car parks. If indeed the "giving" of the car parks to the residents was merely for "usage" but not proprietory right, why did D2 not take them back from the residents when the plaintiff demanded for visitors' car parks. Surely D2 cannot expect the plaintiff to "wrestle" these car parks from the "owners" which had the peaceful and quiet enjoyment of the car parks for many years. Essentially these 218 car parks were not for D2 to "give" as it does not belong to D2 in the first place. If it is common property, its usage cannot be confined to any particular owner or individual, as what had happened here.

[60] Further, the learned trial Judge held that it is logical for the visitors' car parks to be at the perimeter car parks, rather than at the basement, for the following reasons:

i) The perimeter car parks, consisting of 263 (which includes 213 visitors' car parks, 6 OKU car parks and 44 car parks for Kindergarten Block J) surround the 6 Blocks of condominiums and it is convenient for visitors to visit and park at the nearest block which they intend to visit; and

ii) For security reasons, visitors' car parks should be located outside at the perimeter of the condominiums instead of, at the basement which has its own gate and security barrier/security passes which is meant for residents. This is to prevent strangers and the public from having access to the residents' units and cars.

[61] The learned trial Judge acknowledged that these were never visitors' car parks for the reasons aforesaid and concluded that these 218 car parks at the basement are non-accessorized parcels and were in the beginning "common property" but are subsequently "encumbered" due to the letters issued by D2 to the unit owners. Therefore the visitors' car parks are the perimeters car parks, which are not meant for residents private use, which is more logical as found by the learned trial Judge. We find that these findings of fact by the learned trial Judge was not plainly wrong and we do not think that it warrants any appellate intervention.

[62] D2 argued that they had provided more car parks than what was required under the DO. D2 alleges that 2871 car parks were built, however this was not proven. What is in evidence is that, the car parks are still insufficient after the allocation of one car park for the use of one unit of condominium plus the large number of car parks given to D1, resulting in no car parks available on the ground and no other purchaser can opt for an additional car park, if required for their family for each unit of condominium

[63] The requirement of the DO is a requirement under the law pursuant to sections 22 (2), 22 (3) and 22 (4) of the Town and Country Planning Act 1976. The contentions of the defendants that the Town and Country Planning

Act 1976 and MPPJ only concerns itself with the allocation on the "plan" and not what is actually used for, after it is constructed, is contrary to sections 27 (1) and 27 (2) (a) of the Town and Country Planning Act 1976 which provides:

> "27 (1) This section shall apply where it appears to the local planning authority that **any development has been** or is being undertaken or carried out in contravention of section 19.
>
> (2) If the local planning authority is satisfied that, had an application for planning permission or extension of planning permission in respect of the development been made under section 22 or 24 (3) before the development was commenced, undertaken, or carried out, it would have, in the proper exercise of its powers under those sections, refused to grant planning permission for the development, then the local planning authority shall-
>
> (a) if the development has been completed, served on both the owner and occupier of the land a notice in the prescribed form requiring both of them to comply, within the period specified in the notice or within such further period as the local planning authority may allow, with such requirements, to be specified in the notice, as the local planning authority thinks fit in order that the land be restored as far as possible to the condition it was in before the development was commenced".

Further, section 9 (1) (d) of the STA 1985 provides that any subdivision cannot be contrary to the provisions of the written law, where the DO is made pursuant to the Town and Country Planning Act 1976.

[64] The defendants' claim of ownership of the 394 accessory car park parcels is a breach of the provisions of STA 1985. The 394 accessory car park parcels were supposedly to be attached to the 45 units of condominiums

and/or main parcels purchased by D1 from D2. However, the evidence show that at the outset the purpose of the defendants acquiring the 394 accessory car parks parcels with the 45 unit of condominiums was to commence a car park rental business in Palm Spring Condominium. DW 1 admitted in evidence that:

(i) even a condominium unit which D1 had purchased from D2 with one bedroom and one study room and with only 100 square feet was allocated with 13 accessory car park parcels; and

(ii) the accessory car park parcels were to be rented out to different individuals who occupy Palm Spring Condominium units other than the 45 units owned by D1.

[65] There was also the evidence of the receipts of car parks rental produced in court which strengthened the contention that these accessory car parks were meant for rental at RM120.00 per month to the residents of Palm Spring Condominium.

[66] As a developer, D2 had breached the conditions of the DO dated 9.10.2002 made under sections 22 (3) and 22 (4) of the Town and Country Planning Act 1976 and the STA 1985. 10% of the 2180 car parks that D2 was supposed to provide, was part of the conditions of the DO applicable to Palm Spring Condominium with which D2 must comply.

[67] By the act of the defendants in dealing with the accessory car park parcels which were meant for visitors' car parks and/or which were meant to

be “common property” as defined under section 2 of the Building and Common Property (Maintenance & Management) Act 2007 (BCPA 2007), D2 had breached the mandatory conditions stipulated in the DO. Here we are not just talking about the numbers of car parks required to be built by D2. That appears to be regular on paper. However, the dealing of the car parks for business purposes which had caused an acute shortage of car parks, to the detriment of the residents of Palm Spring Condominium is clearly in contravention of the laws.

[68] The learned trial Judge found that D2 did not comply with MPPJ’s condition in the DO for there to be visitor’s car parks and as discussed at the meeting on 23.3.2006 that the visitor’s car park was to be located at the perimeter parking. As per MPPJ’s letter dated 19.4.2006, D2 was required to mark out the visitor’s car parks. There has been no follow up by the JMB or the MC with MPPJ about the failure of D2 to mark out the visitor’s car parks. Although we agree with the learned trial Judge that there is no legal or factual basis to restrict the number of car parks that a developer can sell to a unit owner, but the issue in the present case is when the sales and purchase transaction of the car parks between D1 and D2 from the outset was for a business/commercial venture, which contravenes the provisions of the STA 1985. It was not the intent and purpose of the STA 1985 for the accessory parcels to be transferred in bulk in the manner that was done by D2 in this case.

C: Illegality

[69] D1 in its memorandum of appeal alleges that the learned trial Judge erred in law and fact when His Lordship failed to consider that the usage of the car parks by D1 was subsequent to the transaction between D1 and D2, therefore D1's intention to purchase the car parks cannot be accepted as a ground to declare the SPAs between D1 and D2 to be illegal.

[70] Clearly that proposition cannot stand premised on the DO, the Town and Country Planning Act 1976 and the plain and ordinary meaning of the provisions of the STA 1985. The plain meaning of the provisions of the STA 1985 supports the purpose and objective of the statute in protecting the interest of the residents and owners of the parcel units of the condominium. Any consideration for the alleged sale of the car parks under the 40 SPAs are therefore unlawful pursuant to section 24 of the Contracts Act 1950 which reads:

> "24. The consideration or object of an agreement is lawful, unless-
>
> (a) it is forbidden by law;
>
> **(b) it is of such a nature that, if permitted, it would defeat any law;**
>
> (c) ..
>
> (d) …
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. **Every agreement of which the object or consideration is unlawful is void."**

As the intention of the sale of the accessory car park parcels is to defeat the STA 1985, the 40 SPAs are therefore unlawful and consequently void (in so far as 394 perimeter car parks are concerned).

[71] Therefore the learned trial Judge did not err when he found that the sale of the accessory car parks are illegal and falls within section 24 (b) of the Contracts Act 1950.

[72] There was also evidence that the accessory car parks were not transferred or sold with any consideration and/or valuable consideration. (see section 26 of the Contracts Act 1950). It has been pleaded that the value of the car parks for each condominium which has more than one car park is much higher than the value of the selling price of the condominium. The evidence shows that the additional car parks were given by D2 to D1 for "free" and no valuable consideration was paid. Evidence of the pricing shows that the 45 units of condominiums were sold by D2 to D1 (about 1000-1200 square feet whereby the price per square foot was about RM100.00 - RM120.00). Each car park is worth RM20,000.00. 8 car parks or 15 car parks were given together with the units, the price per square foot is substantially the same. 8 car parks will cost RM160,000.00 and 15 car parks will costs RM300,000.00. The car parks' value is more than the purchase price of any of the 45 units of condominiums sold by the D2 to D1 which shows that the car parks were essentially given to D1 for free. Compare to what other purchasers have to pay for the other units in the same project before the 45 SPAs (which was dated in 2005), from 2001 - 2004 was approximately RM151.00 per square foot - RM201.00 per square foot with no car parks or at most one car park allocated to one unit. These details were pleaded

(paragraph 11 of the amended statement of claim) and were based on the contemporaneous SPAs and evidence of Lee Bee Kee (DW 1), D1's Managing Director. Therefore the pricing in 2005 for the 45 SPAs which was around RM100.00 - RM120.00 per square foot is highly unusual which was lower than the pricing in the year 2001 - 2004. This, in addition to the fact that many of the car parks were without any valuable consideration.

[73] The 40 SPAs were not at arms' length and not bona fide. Vacant possession of the 45 units of condominiums were given to D1 before the purchase price were fully paid. D1 took 3 years to pay for the purchase price (up to 2008) when the terms in the SPAs (dated 2005) provides a 3 month plus 1 month period to pay. In many instances the payment of 10% deposit were made after the balance of purchase price was paid. There had been no interest/penalty charged nor any warning letters issued by D2 to D1.

[74] The dealing between D1 and D2 is exceptional and not in accordance with the terms of the SPA which could only happen when they have close relationship and/or association between the defendants. A pertinent fact is that both the defendants are controlled by the "Lee family" where inter alia:

(a) Both defendants have the same registered address and share the same company secretary;

(b) Both defendants also have the same office address. This is evidenced from the SPAs;

(c) One of D2's shareholders (Lee Yuk Hui) is also the director and shareholder of D1's company; and

(d) Lee Yuk Hui is the brother of Lee Bee Kee who is D1's Managing Director.

These evidence put to rest D1's allegation of the "principle of separate corporate personality" (as can be found at paragraph 4 of D's supplemental Memorandum of Appeal), between D1 and D2. There is more than sufficient evidence of such a "sweetheart deal" between D1 and D2 and the lack of valuable consideration for the car park without the need to refer to such a principle.

[75] In addition, we had stated earlier in this judgment that D1's purpose and intent clearly constitutes a breach of sections 4, 34 (2) and 69 of the STA 1985, which leads to illegality. Given the aforesaid, we agree with the findings of the learned trial Judge that the sale of the accessory car parks are illegal under section 24 of the Contracts Act 1950 and ought to be struck down as being void.

D: Whether the 394 car parks are common property

[76] There is already a finding by the learned trial Judge that the impugned 394 car parks are found to be illegal and not lawful "accessory parcels" of the units parcels purchased by D1.

[77] The learned trial Judge after allowing the claim by the plaintiff for the 394 car parks declared them to be “common property”. Two issues arose from these findings. The defendants submitted that, if the court is to struck down the SPAs as being illegal, then it should only be limited to 218 car parks and the balance car parks should revert back to D2.

[78] D2 had argued that the plaintiff, whilst complaining about the absence of 218 visitors’ car parks was usurping the right of D2 as developer and had unjustly enriched itself, when it claimed for more than 218 visitors’ car parks, namely 394 car parks.

[79] D1 submitted that the impugned 394 car parks cannot be “common property” because the impugned 394 car parks were already comprised as accessory parcels in the strata titles. It was also in evidence by the defendants that the 439 car parks were just part of a commercial deal between D2 and D1. However, this argument by D1 can no longer hold as the sale of the 394 car parks has been declared to be illegal, and that the sale of the same by D1 to D2 falls within section 24(b) of the Contracts Act 1950 and therefore void. Any registration of the 394 car parks in the strata title in D1’s name is void ab initio and ought to be cancelled under section 340 (2) (b) and (c) of the NLC 1965 (which will be dealt with in the later part of this judgment) read together with section 5 of the STA 1985.

[80] D1 also relies on clause 27(b) of the SPAs between D1 and D2 which states:

> "…. "Common property" means so much of the land as is not comprised in any parcel or any provisional blocks…"

In addition to this, D1 relies on the third schedule attached to the respective SPAs which clearly list the common facilities and services and car parks are **not** at all mentioned as being part of common facilities.

However, as the SPAs have been struck down as illegal, the reliance by D1 on these clauses in the SPAs also suffer from a similar fate.

[81] We agree with the findings of the learned trial Judge on the illegality point of the SPAs. Our concern is the subsequent declaration by the learned trial Judge that all the impugned car parks are "common properties". Taking the argument on the illegality point, it is trite that the effect of any illegal transaction will result in the "loss will lie where it falls". A party that suffers loss due to an illegal contract, cannot sue the other contracting party to recover losses. The law will not afford relief to those who claim entitlements from an illegal act, although there had been exceptions practiced by the courts in certain situation premised on inter alia, public policy, seriousness of conduct, centrality to the contract, whether the illegality was intentional, proportionality and unjust enrichment (see ***Tinsley v Milligan*** [1993] 3 AER 65; ***St John Shipping Corporation v Joseph Rank Ltd*** [1957] 1 QB 267; ***Nelson v Nelson*** [1995] 184 CLR 538).

If we are to apply this principle of "the loss will lie where it falls", ordinarily and subsequent to the declaration that the SPAs are illegal and being struck down as being void, then the subject matter of the illegality, namely the

balance of car parks after the 239 car parks (based on strata plan dated 23.12.2000) were allocated as visitors car parks would revert to D2, (i.e. 394-239 = 155). The learned trial Judge failed to address this point and failed to provide justification for the declaration that all 394 car parks to be common properties and be reverted to the plaintiff.

[82] In pith and substance, the claim by the plaintiff vis-à-vis 394 car parks is a claim for the recovery of ownership of car parks as "common property". Section 4 of the STA 1985 define "common property" as:

> "'common property' means so much of the lot as **is not comprised in any parcel (including any accessory parcel**), or any provisional block **as shown in a certified strata plan**."

Therefore, *"car parks which are indicated on an approved strata plan as accessory parcels will not be common property. Also, such car parks which would have been made appurtenant to the respective parcels shown on the approved strata plan cannot be dealt with independently of such parcels. Where they are not so indicated on the approved strata plan, they would form part of the common property."* ("Strata Title in Singapore and Malaysia" 4th Edition, by Teo Keang Sood, at page 158).

[83] We had pointed out earlier in this judgment that there is no approved strata plan adduced by D2, the developer, to show whether the car parks are accessories to the main parcels of the condominium or are common properties. It was in evidence by DW 4, that such strata plan was available to D2 but was not produced and it is within the knowledge of D2. Therefore, an adverse inference under section 114 (g) Evidence Act 1950 ought to have

been invoked by the learned trial Judge against D2 as D2 failed or refused to show their strata plan, which had been approved by the authorities under section 10 (4) of the STA 1985 applicable at that time which will show where all the “common properties” are located. This strata plan ought to follow the DO (section 9 (1)(b)(i) and section 10 (1)(c) of STA 1985). In the absence of the strata plan, there is no evidence adduced by D2 to show that the remaining car parks are “accessory parcels” or “comprise in any parcel” to exclude it as “common property” as defined by section 4 of the STA 1985.

[84] The SPAs entered into between the purchasers of the units and D1 contains clause 35 (d) 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.”

The definition of “common property” under the SPAs is consistent with the definition as encapsulated in section 2 of the BCPA 2007 which defines ‘common property” 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.”

[85] Adverse presumption under section 114g of the EA had been invoked against D2 for failure to tender the strata plan to show which are the car parks comprised in any parcel, and which are common properties. Hence, there is no evidence to show that the 394 car parks are comprised in any parcel.

[86] The plaintiff submits that, in the absence of such evidence then considerable weight ought to be given to the contention of the plaintiff that the 394 car parks are common properties, which do not belong to D2. Therefore, the plaintiff asserts that the argument of the defendants that the car parks ought to be returned to D2, fails.

[87] It was in evidence by DW 3 that in the Palm Spring Condominium project, the condominium was marketed as such that the car park was to be sold separately from the condominium unit. The purchasers of the condominium were offered to purchase the car park separately at the rate of RM20,000.00 per unit to be included as an accessory parcel in their individual strata title. Subsequently after the issuance of the strata title for the respective condominium unit, those unsold car parks will become common property pursuant to the operation of the STA 1985. After the issuance of strata title for the respective condominium unit on 1.8.2008, D2 no longer has the rights to sell the unsold car park. It is then up to the plaintiff, as the management corporation to manage the unsold car parks as common property.

The evidence of DW 3 in this respect is in line with the provisions of the STA 1985 where ownership of the common property under the STA 1985 is

vested in the management corporation on the opening of a book of the strata register. From the date of registration of the strata title, the legal ownership of the common property is vested in the body corporate, namely the management corporation (refer to Strata Title in Singapore and Malaysia, 4th Edition by Teo Keang Sood at pages 169 & 170). In this regard sections 17 (1) and 42 (1) of the STA 1985 are relevant which provide as follows:

> "**Effect of opening of book of strata register**
> 17 (1) On authenticating the statement in Form 3 required to be contained in any book of the strata register, the registrar shall make on the register and issue documents of title to the lot in question a memorial to the effect that the book has been opened, and that the common property is vested in the management corporation and shall return the issue document to that corporation."

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

[88] Hence, as the 40 SPAs between D2 and D1 dated 7.12.2005 (in so far as the sale of the said 394 car parks by D2 to D1) had been found to be invalid and unenforceable, the 394 car parks would no longer be attached to the 40 condominium units. As strata title had been issued for the 40 condominium units, these 394 car parks will then become common property which comes under the management of the plaintiff. Therefore, the learned trial Judge did not err when he allowed the plaintiff's claim for the 394 car parks and declared them to be "common properties".

E: The Issue On The Indefeasibility Of Title

[89] D1 submits that it is the registered owner of the 45 parcel units and 439 car parks accessory parcels and hence its title is indefeasible under section 340 (1) of the NLC 1965.

[90] Admittedly, the intention of D1 from the beginning is to rent the car parks separately and independently from the parcel units to third parties. We had alluded in the aforesaid paragraphs that:

(i) there was no consideration given for the SPAs of the 394 car parks (439-45) and hence they are void (section 26 of the Contracts Act 1950);

(ii) such "sale" of the 394 car parks are in breach of the DO, the Country and Town Planning Act 1976, STA 1985 and the NLC 1965, which constitutes illegality; and

(iii) the 394 visitors' car parks are common properties.

The plaintiff submits that, the learned trial Judge had correctly concluded that the "sale" of the excessive car parks which are accessory parcels registered in D1's name become null and void as the titles of the accessory parcels were obtained vide insufficient and void instrument or they are unlawfully acquired under section 340 (2) (b) & (c) of the NLC 1965 (read with section 5 (1) and (2) of the STA 1985). However, a reading of the grounds of the learned trial Judge does not appear to be so. The learned trial Judge only

mentioned in passing that the excessive car parks which are accessory parcels registered in D1's name becomes null and void and is defeasible under section 340 NLC 1965, without specifying under which limb of the section he is relying on.

[91] In any event we found it necessary to address this particular point, as it had been submitted by the plaintiff and the defendants in their respective submissions before us and even in the court below. Section 340 (2) (b) and (c) of the NLC 1965 reads:

> "340 (2) The title or interest of any such person or body shall not be indefeasible-
>
> ……
>
> (b) where the registration was obtained by forgery, or by means of an insufficient or **void instrument**; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law."

This sub section has the effect of attacking the instrument of dealing itself rather than the registration of the dealing. With regards specifically to this subsection (2) of section 340 of the NLC 1965, in jurisdictions which modelled along immediate indefeasibility, the use of "insufficient or void" instrument is irrelevant, as registration will cure any inherent defect. Unlike our law, under this subsection, "registration is irrelevant and reference is made back to the instrument itself as under deferred indefeasibility, registration does not cure the defect" (refer to National Land Code, A commentary, 2nd Edition, Judith Sihombing at page 818).

[92] Pursuant to section 340 (2) (b) of the NLC 1965, registration which is obtained by way of an insufficient or void instrument does not confer indefeasibility on the title or interest acquired. It is unfortunate that the phrase "insufficient or void instrument" has not been judicially defined and case laws does not seem to distinguish the words "insufficient" or "void". Often the instrument was referred to as "insufficient and void" (see ***Appoo s/o Krishnan v Ellamah d/o Ramasamy*** [1971] 2 MLJ 201).

Case laws are also not clear as to whether the word should be read conjunctively or disjunctively. The learned authors, Teo Keang Sood & Khaw Lake Tee in Land Law in Malaysia, Cases and Commentary, 2nd Edition, page 169, preferred to read it in a disjunctive fashion. We are of the view that it could be read disjunctively and conjunctively. Therefore, an instrument of dealing may be both, i.e. insufficient and void or insufficient though not necessarily void, for failure to comply with certain procedures as laid down in the NLC 1965, e.g. sections 207-211.

An instrument which is forged, or which is contrary to any restriction in interest to which the land is subject, or to any prohibition or statutory provisions under the Code or any written law, or for non compliance with the provisions of the Code, are all void instruments. Examples of void dealings are: dealings effected in favour of or by minors (see ***Tan Hee Juan v The Boon Keat*** [1934] MLJ 96); dealings in contravention of any restriction in interest to which the land or interest in land is subject (see ***UMBC v Syarikat Perumahan Luas Sdn Bhd (no. 2)*** [1988] 3 MLJ 352); transactions in contravention of Moneylenders Ordinance 1951 (***Apavoo s/o Krishnan v Ellamah d/o Ramasamy*** [1974] 2 MLJ 201); or Malay Reservations

Enactments; dealings effected in contravention of section 433B NLC 1965 in favor of foreign companies and persons who are not citizens; dealings not in compliance with the NLC 1965 (***M &J Frozen Food Sdn Bhd v Siland Sdn Bhd & Anor*** [1994] 1 MLJ 294.

[93] Coming back to our present appeal, we form the view that as the instrument of dealing (i.e. the SPAs) effected pursuant to the transaction which is carried out are illegal, being in contravention of the DO, the Country and Town Planning Act, STA 1985 read with the provisions of the NLC 1965, the instrument of dealing falls under the category of being "insufficient or void instrument". Therefore, since the registration of D1's title is obtained by way of an insufficient or void instrument, it does not confer indefeasibility under section 340 (2) (b) on the title or interest acquired by D1.

[94] Indefeasibility is also not conferred in a situation where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law pursuant to section 340 (2) (c) of the NLC 1965. The facts of our present appeal show that the registration of the dealings in the name of D1 by the Registrar of Titles is in contravention of the provisions of the STA 1985, sections 5, 205 (1), part 14 of the NLC 1965.

[95] Judith Sihombing in her book, National Land Code, A commentary, 2nd Edition said at page 824 that:

> "….the paragraph might operate in those cases where the registration has been obtained irregularly under the Code, for example where there has been

> non-compliance with statutory provisions. In ***Teh Bee v Maruthamuthu*** [1977] 2 MLJ 7, where a title was registered on alienation in situation where the statutory provisions had been disregarded. The Federal Court refused to set aside the registration as it said that the registration acted as probity of the regularity of the alienation and the "register is everything".

The Federal Court in ***Teh Bee v Maruthamuthu (supra)*** felt that it was improper to investigate the antecedents of registration. Although that may be so, the learned author Judith Sihombing is of the view that the decision of the learned Judge of the first instance, Ajaib Singh J is to be preferred to that of the Federal Court which affirmed ***Frazer v Walker*** [1967] 1 AER 649 as that decision enforces immediate indefeasibility when the system in Peninsular Malaysia is deferred indefeasibility. Ajaib Singh J, the Judge of first instance in his judgment had this to say:

> "where the state authority purports to act in pursuance of a power for which no provision is made anywhere in the National Land Code then I think that the registration of title which follows the unauthorized act of the state authority is illegal and nullity….
>
> As a matter of public policy clear and obligatory provisions of the National Land Code particularly those which provide for the very basis of the powers of the state authority to approve the alienation of state land ought to be given effect and should not be simply sacrificed on the altar of indefeasibility of title. (at pages 10-11)"

[96] Therefore, applying the principle as postulated in the aforesaid cases, the registration of the car parks in the strata titles had been obtained irregularly under the NLC 1965, as there had been non-compliance with statutory provisions. We therefore agree with the submissions of the plaintiff

that the excessive car parks registered in D1's name are null and void as the titles are obtained vide insufficient/void instrument or they are unlawfully acquired under section 340 (2) (b) and (c) of the NLC 1965 read together with section 5 (1) and (2) of the STA 1985.

F: Whether the plaintiff has the locus standi to sue the defendants

[97] The defendants contend that the learned trial Judge erred when he held that the plaintiff has locus standi to institute this suit against the defendants in the High Court. It was argued for D1 that the plaintiff who was not privy to the sale and purchase agreements between D1 and D2, does not have the requisite locus standi to challenge the sale and purchase transactions. The plaintiff failed or refused to recognize the parties' rights to freedom of contract.

[98] There was evidence of a resolution signed by all council members of the MC authorizing the filing of the present suit. This was one of the reasons held by the learned trial Judge that form his decision.

[99] Further section 143 (2) and (3) of the Strata Management Act 2013 (SMA 2013) (encapsulating formerly section 76 (1) of the STA 1985) provides that the plaintiff can lawfully sue for the recovery of common property. For clarity we reproduced section 143 (2) of the SMA 2013 which provides as follows:

> "(2) Where all or some of the parcel owners or proprietors of the parcels in a development area-

(a) **are jointly entitled to take proceedings for or with respect to the common property** in that development area against any person or are liable to have such proceedings taken against them jointly;

…….

the proceedings may be taken-

(A) in the case of paragraph (2) (a), **by** or against the joint management body or **management corporation**:

……

as if the joint management body, management corporation or subsidiary management corporation, as the case may be, were the parcel owners of the proprietors of the parcels concerned.

(3) Any judgment or order given or made in favor of or against the joint management body, management corporation or subsidiary management corporation, as the case may be, in any proceedings referred to in subsection (2) shall have effect as if it were a judgment or an order given or made in favor of or against the parcel owners or the proprietors, as the case may be."

[100] The defendants referred to section 17 (3) STA 1985 which provides:

"(3) Upon the opening of a book of the strata register in respect of a subdivided building or land there shall, by the operation of this section, come into existence a management corporation consisting of all the parcel proprietors including in the case of phased development, the proprietors of the provisional block or blocks and the Registrar shall issue a certificate certifying the establishment of the management corporation as a body corporate constituted under this Act on the day specified in the certificate."

However, a reading of section 17 (3) of the STA 1985 shows that it is a general provision conferring the corporate entity of the management corporation upon its establishment. Whereas section 143 (2) and (3) of the

SMA 2013 is a specific provision conferring on the plaintiff the right to sue or institute proceedings.

[101] Therefore the learned trial Judge was not plainly wrong when His Lordship held that plaintiff can sue for the recovery of the common property premised on the resolution signed by all council members of the MC which authorized the filing of the suit and also based on section 143 (2) and (3) of the SMA 2013.

G: Judicial Review Issue

[102] This concerns the issue of illegality which is a private law issue. We find no merits in the argument that the plaintiff should have commenced Judicial Review against the Administrator of Land and Mines for registering 394 car parks as accessory parcels in the D1's name. The illegality emanated from the existence which disclosed D1's intention and actual usage of the excessive car parks in a manner which is independent of the main parcels.

[103] In other words, it is mainly the conduct of D1 and D2 and/or the wrongful acts of D1 and D2 which are the subject matter of dispute here not the conduct or acts of the public authorities.

[104] There is no basis for Judicial Review against MPPJ in respect of alleged non compliance of the DO, as the non compliance was due to the acts of D2/D1.

H: Limitation Issue

[105] Car parks are an integral part of land and the limitation period applicable in relation to recovery of land is 12 years (Refer to section 9 of the Limitation Act 1953).

[106] Further section 79 STA 1985 states that the Limitation Act 1953 do not extend to common property. Section 79 STA 1985 provides as follows:

> "79. No action shall be brought by any person claiming title by adverse possession to the common property of a lot or to any accessory parcel or any part thereof created under this Act, and the provisions of the Limitation Act 1953 relating to adverse shall not extend to such common property and accessory parcel."

I: Other Issues

[107] It was submitted by D1 that the learned trial Judge erred in law and fact when he decided that the plaintiff is entitled to rent the car park to third parties when the Court ordered the car parks to be returned to the plaintiff. It would be the same situation when D1 was renting the same to third parties. Clearly the defendants had misunderstood the effect of the order of the court.

[108] Once the 394 impugned car parks are found to be illegal and/or not lawful "accessory parcels", it would form part of common property. When the Court ordered the return of the 394 car parks to the plaintiff, it was returned as "common property" and any proceeds of rental from the said

car parks could be used for the common good of the condominium and all parcel owners as opposed to the personal profit/gain accumulated by D1 alone, at the expense of the residents of Palm Spring Condominium @ Damansara. Such car parks are no longer part of a strata title and they are no longer accessory parcels and thus sections 4, 34 and 69 of the STA 1985 do not apply against the plaintiff, the Management Corporation.

[109] D1 argued that as the impugned car parks are already comprised as accessory parcels in the strata titles and therefore cannot be "common property". We have addressed this issue, but what needs to be taken note of is this; the fact that the car parks are already comprised in the strata titles alone, is not the determining factor that they do not form "common property". The facts of the case need to be scrutinized. If we are to agree with the submissions of the defendants in this regard, it will produce an absurd result, namely that, any party like a developer can take advantage of the situation by "accessorizing" property which should have been "common property" and then claim that it is indefeasible.

[110] Another relief which is being sought for by the plaintiff is the refund of RM233,825.13 which was kept by D1's solicitors previously as stakeholder in Suit 58 which consists of previous rentals collected by the plaintiff over the disputed car parks and paid over to D1's solicitors vide a Court Order. The learned trial Judge found that this amount was due and payable to the plaintiff. Our scrutiny of Suit 58 with regard to this particular point, reveal that the Court there ordered in the following terms:

"[4]……..

(f) for all accounts to be taken in respect of these 213 accessory parcels up to 20 December 2008 and for all rentals collected by the plaintiff to be paid to the first defendant. Those rentals collected by the plaintiff in respect of other accessory parcels which were assigned to the 40 units of condominiums purchased by the plaintiff to be returned to the tenants and/or occupants of the condominiums who rented these accessory car park parcels from the plaintiff."

We found that the learned trial Judge did not err in this respect and hence we do not disturb such findings.

J: Conclusion

[111] From the aforesaid, we found that the learned trial Judge did not err in allowing the claim by the plaintiff against the defendants. The respective appeals by the respective defendants, Appeals 138 and 151 are dismissed with costs. The decision of the learned trial Judge is affirmed.

Signed by:
Zabariah Mohd Yusof,
Judge,
Court of Appeal,
Putrajaya
Date: 16.7.2019

COUNSEL:

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