IN THE COURT OF APPEAL MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. W-02(NCvC)(W)-2214-11/2019

BETWEEN

SRI KELADI SDN. BHD. (IN LIQUIDATION)

(COMPANY NO: 124043-M) … APPELLANT

AND

BUKIT OUG CONDOMINIUM JOINT MANAGEMENT BODY

(REGISTRATION NO: JMB 418/2008) … RESPONDENT

[Civil Suit No: WA-22ncvc-178-04/2017

In the High Court Malaya At Kuala Lumpur

Between

Bukit Oug Condominium Joint Management Body

(Registration No: JMB 418/2008) … Plaintiff

And

Sri Keladi Sdn. Bhd. (In Liquidation)

(Company No: 124043-M) … Defendant]

CORAM

MOHAMAD ZABIDIN MOHD DIAH, (Now FCJ)

ABU BAKAR JAIS, JCA

NORDIN HASSAN, JCA

GROUNDS OF JUDGEMENT

Life is a journey, but don't worry, you'll find a parking spot at the end – Isaac Asimov

INTRODUCTION

[1] The dispute in this case is about who has the right to some car parks. The High Court decided these car parks as common property where the Respondent has the right to ownership and therefore the right to manage. Aggrieved by the decision of the High Court ("HC"), the Appellant came before us for the appeal against that decision.

BACKGROUND FACTS

[2] The Appellant is a housing developer and the Respondent is a joint management body. The Appellant developed 6 blocks of condominiums ("the development') known as Bukit OUG Condominium, comprising 1,536 residential parcels and 74 commercial parcels. Dewan Bandaraya Kuala Lumpur approved the building plans and layout plans for the Appellant. The Respondent is entrusted to manage the common property of the development.

[3] The development was completed in stages and vacant possession was delivered for the residential parcels.

[4] The Appellant was subsequently wound-up. Liquidators were then appointed for the Appellant.

[5] The liquidators conducted an audit exercise with the parcel owners of the development and found 149 surplus and unaccounted car parks.

[6] In order to realise the Appellant's assets, the liquidators placed an advertisement in the newspaper to sell the 149 surplus car parks. The intended sale of the car parks was by way of tender submission.

[7] The Respondent filed the action in court to claim the surplus car parks as the development's common property and asset. The Respondent claimed the surplus car parks as common property, under their management. The Respondent applied for a declaration that the car parks are part of common property and it has the ownership of the same. It essentially claimed that the Appellants cannot deal in any manner in respect of the car parks. However, to date, strata titles have yet to be issued.

[8] The Appellant submitted as no strata titles had been issued, the car parks are not part of the development's common property or asset. As such the Appellant contended the Respondent cannot claim the car parks to be under their management. As the land owner and developer, the Appellant said they have a right to deal with the car parks.

AT THE HC

[9] The learned HC Judge decided that the Respondent had proven that the surplus car parks are part of the property and asset of the development. The Appellant did not exclude these car parks prior to its sale to the parcel owners.

[10] The surplus car parks were only discovered by the liquidators during the audit exercise. The liquidators' audit exercise was still pending and the liquidators only came in because the Appellant was wound-up.

[11] The learned HC Judge also decided that parcel owners' rights were governed by the Sale and Purchase Agreements ("SPAs") because the same were signed prior to the coming into force of the Building and Common Property (Maintenance and Management) Act 2007 ("the BCPA"). The Development Order and Certificate of Fitness were also issued prior to the BCPA.

[12] Thus, the HC determined that BCPA is not applicable as the SPAs were signed prior to the BCPA. The SPAs should be looked at according to the HC to decide the rights of all parcel owners.

[13] The HC decided the 149 car parks formed part of the development and the same were intended for the exclusive use and enjoyment of the parcel owners.

[14] The definitions of the words "common property", "parcels" and "accessory parcels" in the SPAs meant the Appellant cannot claim the car parks as belonging to them. The Respondent instead is entitled to manage

the car parks. These car parks were contractually agreed by the contracting parties in the SPAs as forming part of the common property.

[15] The Appellant did not inform the Respondent about these car parks. This is despite the Respondent being the authorised body in charge of the common property.

[16] Essentially, the HC decided the surplus car parks do not belong to the Appellant. Therefore, the Appellant has no right to sell these car parks.

SUMMARY OF THE APPELLANT'S SUBMISSION

[17] In the present appeal, the Appellant contended that the subdivision of the development into parcels and accessory parcels with separate strata titles is still incomplete. The Respondent's claim that the surplus car parks are the common property of the development is therefore premature and the HC should have dismissed the same.

[18] The learned HC Judge at the HC should not approbate and reprobate. On one hand, she decided the BCPA is not applicable but on the other, she had referred to the definition of "common property" in the same.

[19] The learned HC Judge erred in not recognising there were four different types of SPAs between the developer and purchasers. All four different types of SPAs show that the car parks are not a common property for the development. Since the car parks are not common property, the same should not come under the management of the Respondent.

[20] The learned HCJ did not explain what were the statutory provisions breached by the Appellant. In fact, there are no statutory provisions that the Appellant had infringed.

SUMMARY OF THE RESPONDENT'S SUBMISSION

[21] Before us, the Respondent submitted that as the SPAs were signed prior to the coming into force of the BCPA, the former should prevail over the latter.

[22] These car parks fall within the definition of "common property" in the SPAs. The Appellant was unable to dispute this. Hence, the Appellant has no right to these car parks.

[23] The definition of "common property" in the Strata Titles Act 1985 ("STA") is also consistent with the definition of the same in the SPAs. The STA was in force when the SPAs were signed.

[24] The car parks are generally defined as "accessory parcels". The STA does not allow for accessory parcels to be dealt with and disposed of independently of the parcels.

[25] The intended sale of the car parks by the Appellant is an attempt to dispose of the same before the issuance of the strata titles.

[26] The Appellant did not exclude these surplus car parks prior to the signing of the SPAs. The car parks were not excluded as the liquidators only discovered the same during the audit exercise.

[27] Anything not mentioned in clause 31 (c) the SPA by default would mean it is included as common property. Therefore, the 149 car parks are common property that should be retained by the Plaintiff.

[28] In the four types of SPA asserted by the Defendant, these car parks were not excluded as common property by the same.

[29] The audit exercise is incomplete. Only 78% of parcel owners responded to the audit exercise. Thus, the Appellant cannot claim these car parks belong to them exclusively.

ISSUES

[30] There are several identifiable issues with regard to the dispute in this case. They are as follows:

(a) What is the instrument or document governing the ownership of the car parks and;
(b) Would the car parks come under the definition of “common property” under the SPAs;

OUR DECISION

(a) What is the instrument or document governing the ownership of the car parks

[31] We note that even the Respondent do not dispute that the SPAs should be the instrument or document to be looked at to determine the ownership of the car parks in the present appeal.

[32] Besides, the SPAs are binding contracts between the developer and purchasers or parcel owners. The Court of Appeal case of **Perantara Properties Sdn Bhd v JMC-Kelana Square & Another Appeal [2016] 5 CLJ 367** is relevant in this regard. This case is also a dispute about car parks and whether the same should be considered as forming part of the common property. The SPA is also referred to in this case. The relevant excerpt of this case states:

> [15] The effect of the learned judge's construction of s. 44 read with the definition of "common properties" in s. 2 of the BCPA 2007 is a blatant amendment to the terms and conditions of the 1995 sales and purchase agreements. That said, His Lordship's view on face value can be said to have merit as s. 44 of the BCPA 2007 does contain the words "shall cease to have effect", giving rise to a reasonable inference that BCPA 2007 is a retrospective legislation to eradicate the practise of developers like the appellant from retaining car parks as common properties.
>
> …
>
> [18] Further it is significant that the 1995 sales and purchase agreements at that particular time were perfectly legal agreements. There were no common law or statute law which prohibited the same. Hence when the purchasers and the appellant entered into those agreements they were exercising their rights pursuant to the concept of "freedom of contract" as submitted by learned counsel. These rights are fundamental rights and the courts must presume that Parliament would not invade such rights unless clear words are used. We find no such clear words in BCPA 2007. The parties knew exactly what the bargains were when they entered into the 1995 sales and purchase agreements and it is trite law the courts cannot rewrite contracts when they are freely entered into.

[33] It should be clear from the above case, that the determination of whether the car parks should be considered as common property would depend on the terms of the SPA. Thus, it is important to note the relevant provisions of the same in order to decide on the issue. This brings us to the second issue below.

(b) Would the car parks come under the definition of "common property" under the SPAs

[34] The HC referred to clause 31 (c) of the SPA for a parcel owner with the facility of a car park and without a car park. The clause states:

> "common property" means so much of the land as is not comprised in any parcel (including any accessory parcel), or any provisional block and the fixtures and fittings including lifts, refuse chutes, drains, sewers, pipes, wires, cables, and ducts and all other facilities and installations used or capable of being used or enjoyed in common by all the purchasers.

[35] As seen above, "common property" means so much of land that is not comprised in any parcel including accessory parcel. It is also so much land not comprised in any provisional block and fixtures and fittings. These includes refuse chutes, drains and sewers. It also includes other facilities and installations used or capable of being used or enjoyed in common by all the purchasers.

[36] The definition of common property above must mean it could not include additional car parks in this case. It ought to be emphasised that the purchasers who bought the parcel units with car parks have been catered for with the same. The issue in this case concerned not these car parks but the additional 149 car parks. The definition of common property as seen above cannot include additional or surplus 149 car parks. Since it is "additional", it exists more than what is required. Therefore, it cannot and must not be enjoyed by all as "common property". Hence it should follow the Respondent has no right and interest to manage the same.

[37] Further, the novel construction as suggested by the Respondent that what is not stated as "common property" should by default nonetheless be included as the same, is with respect misconceived. This construction is not supported by any authorities and would mean that everything else not defined as common property would have to be included. This with respect, would the very least be absurd. It would mean everything that is not stated as "common property" could be enjoyed by every unit purchaser, tenant or visitor of the condominiums. This is too wide a definition of "common property". In common parlance, this is "anything under the sun".

[38] The Appellant's claim that these car parks belong to them should also be determined by looking at the terms of the four types of SPAs. These are as follows:

(a) Schedule H SPA for residential units with car parks as accessory parcels;
(b) Schedule H SPA for residential units without car parks;
(c) Non-Schedule H SPA for residential units after issuance of the certificate of fitness for occupation; and
(d) SPA for commercial units.

[39] The first two types of SPAs above have identical terms in respect of "common property". These are clause 31(c) of these SPAs which has been narrated earlier. As a matter of convenience, we shall list down again that term below:

> "common property" means so much of the land as is not comprised in any parcel (including any accessory parcel), or any provisional block and the fixtures and fittings including lifts, refuse chutes, drains, sewers, pipes, wires, cables, and

ducts and all other facilities and installations used or capable of being used or enjoyed in common by all the purchasers.

[40] This clause also provides definitions as follows:

> "accessory parcel" means any parcel shown in the Site Plan and Storey Plan as an accessory parcel which is used or intended to be used in conjunction with the Parcel.
>
> "parcel" means one of the individual units comprised in the subdivided building which is to held under separate strata title.

[41] At this point in time, since there are no certified strata plans, the additional car parks could not be considered as parcels or accessory parcels. The same also could not be considered as forming part of "common property" and we have explained earlier why that is so.

[42] A similar provision as the above clause 31(c) of the SPA was referred to in the case of **Saluran Projek Sdn Bhd & Anor v Badan Pengurusan Bersama Krystal Point [2016] 1 LNS 728.** This case decided car parks should not be considered as common property and a clear explanation on this point was given by Lim Chong Fong JC then as follows:

> I have also noted that clause 31(c) of the standard sale and purchase agreement of the apartment units of Krystal Villa has the definition of "common property" to mean *"so much of the land that in not comprised in any parcel (including any accessory parcel) or any provisional block and the fixtures and fittings including lifts, refuse chutes, drains, sewers, pipes, wires, cables and ducts and all other facilities and installation used or capable of being used or enjoyed in common by all the purchasers."* It is clear to me this clause did not specifically include car parks and parking areas.

[43] Clause 31(c) of the SPA must be read together with the Second Schedule of Schedule H of the SPA. Reading both together, it becomes clearer that these additional car parks should not be considered as common property. This schedule lists down common facilities and services for the development and it does not include car parks. This schedule only lists the following as common facilities:

(a) 1 swimming pool and wading pool;

(b) 1 putting green;

(c) 2 tennis courts;

(d) 4 squash courts;

(e) 1 gymnasium room;

(f) 1 sauna;

(g) 1 child care centre;

(h) 1 reading room/library;

(i) 1 restaurant;

(j) 1 lounge;

(k) 1 fishing pond;

(l) 1 skating/multipurpose ring;

(m) 5 children playgrounds;

(n) BBQ pit;

(o) Housing development surrounded by greenery and jogging track;

(p) 24-hour security;

(q) Intercom system;

(r) Multipurpose hall;

(s) Shops.

[44] The learned HC Judge took this into account and found it does not include the unaccounted or additional car parks in her grounds of judgment. Yet, with respect, she erroneously said the 149 car parks form part of the common property. Thus, the learned HC Judge's finding is with respect, in error and inconsistent with the plain and clear words of the above schedule. We are of the considered opinion that we ought to intervene in correcting the error made in this respect.

[45] Further, even the Respondent's witness in court testified to the effect that the above schedule listed the common facilities. As we have earlier stated, this schedule does not mention car parks as common facilities. This means the 149 surplus car parks should also not be considered as common facilities or common property for the development. The relevant excerpt of the testimony of the Respondent's witness is as follows:

WFM	Now, I want you to look at page 23 now and page 23 and preamble of the Sale and Purchase Agreement. Look at preamble No. 4, it says, 'Whereas the vendor is developing the said land, as housing development known as Bukit OUG Surian Wangi Condominiums and it is complete thereon with common facilities as in the Second Schedule'. **My question is, do you agree that from the preamble, it is very clear that the common facilities in the Bukit OUG Condominium are the facilities as mentioned in the Second Schedule?**
YOUNG	**Correct.**
WFM	Correct. Now, I want you to look now at Clause 15 at page 30 where again it says that 'the vendor shall at its own cost and expense construct or cause to be constructed the common

facilities serving the housing development and provide services' and then, there are a few things, 'as specified in the Second Schedule'. Right, so this Clause again, is very clear, that what the developer needs to construct a common facility and **do you agree that the common facilities are those specified in the Second Schedule?**

YOUNG **Agree.**

[Emphasis Added]

[46] If the car parks are intended to be considered as common property under the SPA, they would have been listed in the Second Schedule of Schedule H of the SPA as shown above. This proposition is consistent with what was found in the Court of Appeal case of **Prestaharta Sdn Bhd v Ahmad Kamal Md Alif & Ors [2016] 1 LNS 255**. In this case the court too had referred to the Second Schedule of Schedule H and decided as follows:

> **Under the S&P, the plaintiffs were fully appraised of the fact that the common property or facilities of the Riviera Bay Resort Condominium (the RBRC) only consisted of the facilities specified in the Second Schedule thereto. These facilities were being enjoyed by the plaintiffs.** An important point to note is that these common facilities do not form part of the subject property comprising 22 facilities with an area of 78,943 sq. ft. acquired by the defendant together with 149 parcels from Pengurusan Danaharta Nasional Berhad (Danaharta). The subject property in fact, relates to the 'Additional Facilities', 22 altogether, set out in the Second Schedule to the DMC being facilities for the resort. These Additional Facilities were excluded from the common property defined in the S&P. The learned judge therefore made a fundamental mistake when His Lordship found that these Additional Facilities were common property of the RBRC. There is clearly a distinction between the common property or facilities with the additional facilities.
>
> [Emphasis Added]

[47] In respect of Non-Schedule H SPA for residential units after issuance of certificate of fitness for occupation, what is imperative to note is that this SPA is not subjected to Schedule H. For this SPA, there is no definition for "common property" and therefore no stipulation that car parks are to be treated as common property for the development.

[48] In respect of SPA for commercial units, the learned HC erred in not considering that this SPA contains different provisions from Schedule H SPA, especially Clause 32 which states:

> Notwithstanding the sale of the Premises to the Purchaser and any subsequent application made for the issuance of separate strata title in accordance with the Strata Titles Act 1985 any car park to be provided and constructed in at or forming part of the Building or the Project shall not be deemed to be part of the Common Property but shall at all times be and remain the property of the Vendor.

[49] There can be no dispute the word "Vendor" above means the developer i.e. the Appellant in this case. Thus, the above clause clearly provides that the Appellant shall retain the ownership of the car parks.

[50] In this regard, Saluran Projek Sdn Bhd (supra) had referred to a similar clause and decided as follows:

> 37. As to the next issue on the true ownership of the car parking bays, it is my view entirely dependent upon the true construction of the sale and purchase agreement between Saluran Projek and the purchasers of Krystal Point and the sale and purchase agreement together with the deed of mutual covenants between Saluran Projek and the purchasers of Krystal Villa.
>
> 38. In respect of the former, clause 33 of the sale and purchase agreement provides: "*Notwithstanding the sale of the said Parcel to the Purchaser and any subsequent application made for the issuance of a separate document of title, the car parking bays to be constructed in, at, under or around the said parcel shall at all times be and remain the property of the vendor and the vendor shall*

be at full liberty to deal with the said car parking bays in such manner as the vendor may deem fit and proper. "

…

40. **From the literal reading of both the aforesaid clauses, it is plain that the car parking bays belonged to the developer, to wit: Saluran Projek. It follows that it could neither belong to the purchasers nor be treated as common property as well**.

[Emphasis Added]

[51] Hence, the above is another authority recognising that car parks could not belong to the unit purchasers nor be taken as common property but only to be considered in the ownership of the Appellant as the developer.

[52] Further, this clause 32 ought to be read with the Fifth Schedule. This schedule in turn lists all the common facilities as follows:

(a) Swimming Pool and Wading Pool;
(b) Putting Green;
(c) Tennis Court;
(d) Squash Court;
(e) Gymnasium Room;
(f) Sauna;
(g) Creche;
(h) Reading Room;
(i) Cafeteria;
(j) Fishing Pond;
(k) Skating/Multipurpose Ring;
(l) Children Playgrounds;
(m) BBQ Pit;
(n) Housing development surrounded by greenery and jogging track;
(o) Security Service;
(p) Multipurpose Hall.

[53] As seen, car parks are not listed in the above schedule. Therefore, car parks should not be considered as common property under the SPA for commercial units.

[54] This is supported even by the witness of the Respondent who testified that the car parks belong to the Appellant when this clause was shown for the SPA for commercial units. The relevant excerpt of this testimony states as follows:

WFM	…**So, I put it to you that based on this clause and this S&P, that the Plaintiff is legally obliged to treat car parks as the assets of the developer except for those which are accessorised to the parcel. Agree or disagree?**
YOUNG	**Ok, agree.**
WFM	…So my question is based on the SPA, that clause at page 117, **do you agree that the car parks are the assets of the Defendant?** Based on the SPA.
YOUNG	Based on the SPA, this SPA?
WFM	Yes.
YOUNG	With the shop SPA, yes.
WFM	Yes. You agree?
YOUNG	**Yes, based on the shop SPA.**

[Emphasis Added]

[55] In this regard, the learned HC Judge with respect, erred in not considering the Respondent own witness's testimony above in deciding that the ownership of these additional car parks is with the Respondent and the same are common property under the SPA. Had this testimony been properly evaluated, there can be no other conclusion for the learned HC Judge except to find it is the Appellant and not Respondent that has the ownership of these car parks.

[56] As the Appellant owns these car parks, there is no moral or legal duty for the Appellant to reveal the existence of these car parks at any given time to the Respondent. The ownership of these car parks rests with the Appellant and therefore there is no written or oral obligation on the part of the Appellant to disclose these car parks to the Respondent.

[57] The Respondent had also raised the issue that the Appellant is bound to follow the Housing Development (Control and Licensing) Act 1966 ("HDA"). However, the Respondent did not explain or plead how the Appellant had breached the provisions of HDA. It is only in the Respondent's written submission that the same argued that the Appellant could not offer these additional car parks by way of tender to the parcel owners as this would be infringing the HDA.

[58] There are three points that we observe from this submission. First, as stated this was not pleaded by the Respondent. Therefore, this should not be considered in the present appeal for the Respondent. The Respondent must state its case by pleading the same. The court should not step in assistance to the Respondent if it is not pleaded. In this regard, in the Federal Court case of **Pacific Forest Industries Sdn Bhd & Anor v Lim Wen Chih & Anor [2009] 6 MLJ 293** it is said as follows:

> [15] The facts pleaded will inadvertently be related to the legal principles that the party will be relying upon. It is not for the court to decide on what principle a party should plead. It should be left to the parties to identify it themselves…

[59] While in the Court of Appeal case of **Sen Media Sdn Bhd v Perunding Pakar Media Sdn Bhd & Ors [2015] 5 MLJ 759** it is pointed out that the alleged breach must be pleaded. This case states:

> [28] In the first place, the second third party never pleaded in its defence that there was a breach of treasury instructions. It was also never pleaded that as a result of such breach, the contract was invalidated. It is a well settled legal principle that the court should not decide on an issue that was not pleaded by the parties…

[60] Second, even if it is pleaded, more importantly, as the ownership of these car parks is with the Appellant, there is no reason to say the Appellant has no right to offer these car parks to the parcel owners to purchase even by way of tender upon its liquidation by the liquidators.

[61] Third, it is undisputed that the learned HC Judge did not explain at all which statutory provisions were breached by the Appellant. Since this was not clarified, it is unfair to say the Appellant did breach the provisions of the HDA or any other statutes.

[62] There is also no issue regarding the application of the Strata Title Act 1985 ("STA"). This is because it is undisputed that strata titles have not been issued in this case. The assertion of the Respondent that the Appellant is attempting to circumvent the operation of STA is not supported by evidence. The reasons we have given that the Appellant has the ownership of these surplus car parks would mean the Appellant need not in any event, try to circumvent the STA.

[63] Further, although the audit exercise may be incomplete and only 78% of parcel owners responded to the same, the fact remains that these were additional car parks in excess of what is already catered for the parcel owners. Thus, it is wrong to say the Appellant cannot claim these car parks as belonging to them exclusively.

CONCLUSION

[64] Based on all the reasons given, it is inevitable that it must be concluded that the surplus car parks belong to the Appellant and the same has ownership of these car parks. Thus, with respect, we could not agree with the HC that the Respondent has ownership of these additional car parks and therefore has the right to maintain and manage the same.

[65] Therefore, we are unanimous in allowing the appeal with costs against the Respondent.

Dated: 13 July 2022

- ***Sgd*** -

ABU BAKAR JAIS
Judge
Court of Appeal Malaysia
Putrajaya

For The Appellants:

Wong Fook Meng, Chew Lay Ling
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