IN THE HIGH COURT OF MALAYA AT PENANG
IN THE STATE OF PENANG, MALAYSIA
ORIGINATING SUMMONS NO. PA-24NCvC-469-05/2022

Dalam perkara Mesyuarat Agung Tahunan Ke-3 Badan Pengurusan Bersama Tropicana 218 Macalister yang telah ditetapkan untuk diadakan pada 05.06.2022

Dan

Dalam perkara Seksyen 144 Akta Pengurusan Strata 2013

Dan

Dalam perkara Jadual Kedua Akta Pengurusan Strata 2013

Between

TROPICANA MACALISTER AVENUE (PENANG) SDN BHD ... Plaintiff

And

BADAN PENGURUSAN BERSAMA TROPICANA 218 MACALISTER ... Defendant

GROUNDS OF DECISION

Introduction

1. The Plaintiff ("**P**") filed an Originating Summons ("**OS**") to seek for certain declaratory reliefs against the Defendant ("**D**"). D in turn filed a counterclaim to seek for certain declaratory reliefs against P ("**Counterclaim**"). I did not allow P's claim. With respect to the Counterclaim, I allowed some but not all of the reliefs sought for by D. Here are the grounds of my decision.

Plaintiff's Originating Summons

2. Vide the OS, P prayed for the following:

(i) A declaration that P is entitled to attend and vote at the Third Annual General Meeting of D which is scheduled to be held on 5.6.2022 ("**3rd AGM**");

(ii) An order that the duly elected Chairman of the 3rd AGM shall not prohibit or prevent P from casting its votes, and shall accept the votes of P in any motion or resolution proposed in the 3rd AGM;

(iii) Alternatively, in the event that this Originating Summons cannot be heard before 5.6.2022, an order that any Annual General Meeting held without the participation of P shall be null and void, of no effect and set-aside;

(iv) A declaration that the Notice of the 3rd AGM dated 12.5.2022 issued by D is irregular, and is therefore null and void;

(v) A declaration that the service of the Notice of the 3rd AGM dated 12.5.2022 issued by D is irregular;

(vi) A declaration that the motions deposited at the registered office of D on 10.5.2022 be included in the agenda of the next Annual General Meeting of D.

3. The OS was filed by P on Friday 27.5.2022. The subject-matter of the OS is the 3rd AGM that is to be held on the following Sunday on 5.6.2022. As the scheduled date of the 3rd AGM is about a week or so after the filing of the OS, the OS might not be heard before the 3rd AGM takes place. This is recognised in prayer (iii) above of the OS, which contained an alternative prayer in the event that the OS cannot be heard before 5.6.2022. To wit, that any Annual General Meeting of D which is held without the participation of P be declared void.

4. Anyway on Monday 30.5.2022, P filed an application for an interim injunction vide Enclosure 5 ("**Encl 5**"). Encl 5 prayed for the following:

(a) D be restrained from holding the 3rd AGM;

(b) D and the duly elected Chairman of the 3rd AGM be restrained from prohibiting or preventing P from casting its votes, and shall accept the votes of P in any motion or resolution proposed in the 3rd AGM.

5. Encl 5 was fixed for hearing before me on Wednesday 1.6.2022. At that hearing, P requested for an ad interim injunction while they file an affidavit in reply to the affidavit in opposition that had been filed by D. I declined to grant any ad interim injunction as that would have prevented the 3rd AGM from proceeding. Which is tantamount to granting the entire

relief sought for by P in Encl 5. Instead, I directed that Encl 5 be heard and disposed of on Friday 3.6.2022 (i.e. before the 3rd AGM takes place on Sunday 5.6.2022).

6. At the hearing of Encl 5 on 3.6.2022, I refused prayer (a) above. That is to say, I did not restrain D from holding the 3rd AGM. However, I allowed prayer (b) above. That is to say, I ordered that D and the duly elected Chairman of the 3rd AGM be restrained from prohibiting P from casting its votes at the 3rd AGM. I noted that prayers (a) and (b) above were alternative prayers. Prayer (b) kicks in only if prayer (a) is not granted. But if prayer (a) is granted, prayer (b) naturally falls away.

7. Later on, I was informed that the 3rd AGM did not take place as scheduled on 5.6.2022. Instead, it was postponed by D to a date that has yet to be determined. Thus, when the OS came up for hearing before me on 26.10.2022, I considered that the reliefs sought for therein had been rendered academic. This is because all the prayers that were sought for in the OS were specifically in relation to the 3rd AGM that was to be held on 5.6.2022, which date had passed. The intitulement of the OS speaks of D's *"Mesyuarat Agung Tahunan Ke-3 … yang telah ditetapkan untuk diadakan pada 5.6.2022"*.

8. Some of the prayers that were sought for in the OS had been superseded by Encl 5. Namely prayers (i), (ii) and (iii). Those prayers had already been dealt with in the disposal of Encl 5. Recall that my decision in Encl 5 was that P would be entitled to attend and vote at the 3rd AGM.

9. The other prayers of the OS pertain to the non-inclusion of the 2 motions proposed by P in the notice of the 3rd AGM that was issued by D, and the service of the said notice on P. Namely prayers (iv), (v) and (vi). Those have become academic given that the scheduled date of 5.6.2022 had passed without the 3rd AGM being held.

10. In the circumstances, I did not grant the reliefs that were sought for by P in the OS. It is noted that P did not lodge any appeal against my decision.

Defendant's counterclaim

11. Pursuant to Order 28 rule 7 of the Rules of Court 2012, D filed a counterclaim against P in this action. The Counterclaim sought for the following prayers:

(i) Suatu Deklarasi bahawa resolusi berkenaan dengan pengenaan caj penyelenggaraan dan caruman kepada kumpulan wang penjelas yang berlainan untuk hotel, kedai dan apartment yang diluluskan di Mesyuarat Agung Tahunan bertarikh 14.5.2019 dan Mesyuarat Agung Tahunan bertarikh 27.3.2021 adalah salah dan terbatal ab initio;

(ii) Suatu Deklarasi bahawa resolusi berkenaan dengan pengenaan caj penyelenggaraan atas kadar RM0.7532 per unit syer dan caruman kepada kumpulan wang penjelas atas kadar RM0.08 per unit syer terhadap P yang diluluskan di Mesyuarat Agung Tahunan bertarikh 14.5.2019 dan Mesyuarat Agung Tahunan bertarikh 27.3.2021 adalah salah dan terbatal ab initio;

(iii) Kalau Mahkamah yang Mulia ini mendapati Tribunal Pengurusan Strata tidak berkuasa untuk menentukan kadar caj penyelenggaraan dan caruman kepada kumpulan wang penjelas yang berpatutan setelah Tribunal Pengurusan Strata membatalkan resolusi yang berkenaan dengan kadar-kadar tersebut, suatu Deklarasi bahawa kadar caj penyelenggaraan yang terpakai untuk Tropicana 218 Macalister sejak penubuhan Badan Pengurusan Bersama Tropicana 218 Macalister adalah RM2.381 tiap syer unit yang diumpukkan dan RM0.24 tiap syer unit yang diumpukkan untuk kumpulan wang penjelas;

(iv) Secara alternatif kepada perintah (iii), satu perintah bahawa D dibenarkan untuk mengambil tindakan yang sewajar untuk menentukan dan menetapkan satu kadar (one rate) untuk caj penyelenggaraan dan caruman kepada kumpulan wang penjelas dikenakan yang bersesuaian dengan unit syer yang diumpukkan sejak pertubuhan Badan Pengurusan Bersama Tropicana 218 Macalister di mana kadar caj penyelenggaraan dan caruman kepada kumpulan wang penjelas tidak boleh kurang daripada bajet tahunan yang telah dikemukakan semasa Mesyuarat Agung Tahunan Pertama D;

(v) Satu perintah injunksi bahawa P adalah dihalang daripada mengambil sebarang tindakan untuk menetapkan dan/atau meluluskan sebarang resolusi untuk kadar yang berlainan caj penyelenggaraan dan caruman kepada kumpulan wang penjelas terhadap parsel yang berbeza di Tropicana 218 Macalister;

(vi) Satu perintah injunksi bahawa P adalah dihalang daripada mengambil sebarang tindakan untuk menetapkan dan/atau meluluskan sebarang resolusi yang mempunyai kesan yang menyebabkan pemilik-pemilik parsel di Tropicana 218 Macalister membayar kadar yang berlainan untuk caj penyelenggaraan dan caruman kepada kumpulan wang penjelas;

(vii) Selanjutnya, D adalah dibenarkan untuk memungut dan mengumpul (levy and collect) caj penyelenggaraan dan caruman kepada kumpulan wang penjelas terhadap P bagi semua tempoh masa yang lalu dan masa depan (all period in the past and in the future) berdasarkan kadar yang ditetapkan melalui perintah (iii) atau perintah (iv).

12. At the hearing of the Counterclaim on 26.10.2022, I granted the declarations sought for by D in prayers (i) and (ii) above. However, I did not grant prayers (iii) to (vii) above. D lodged an appeal against the latter part of my decision. Here are the grounds of my decision.

Background facts

13. P is a parcel owner of a development project known as Tropicana 218 Macalister ("**Development Project**"), located at Jalan Macalister, Penang. The Development Project consist of:

(a) a Hotel Block (29 parcels consisting of 208 hotel rooms);
(b) 211 units of Commercial Suites (Neo Suites);
(c) 88 units of Service Apartment and 20 units of Retail Shops.

14. P was the developer of the Development Project and also the parcel owner of the Hotel Block. D is the Joint Management Body ("**JMB**") established under the Strata Management Act 2013 ("**SMA 2013**"), which manages the common property of the Development Project.

15. At the First Annual General Meeting of D that was held on 14.5.2019 ("**1st AGM**"), the following rates of maintenance charges were passed:

> **c) To determine the amount to be paid by a parcel purchaser as the Charges, and contribution to the sinking fund**
>
> Mr. Teoh (AGPS) announced that based on the budget prepared by developer the rate proposed is as follows:-
>
> Neo Suite/Service Apartment – RM4.842/share unit equivalent to RM0.45/sf
> Retail – RM6.456/share unit equivalent to RM0.60/sf
> Hotel – RM0.7532/share unit equivalent to RM0.07/sf

16. As can be seen from the extract of the minutes above, different rates were imposed in respect of the maintenance charges payable by Neo Suite/Service Apartment, Retail and Hotel.

17. At the Second Annual General Meeting of D that was held on 27.3.2021 ("**2nd AGM**"), the above rates which were passed during the 1st AGM were unanimously agreed to be maintained.

4.2 To decide whether to confirm or vary any amounts determine as charges to the Maintenance Fund and contribution to the Sinking Fund and if there is variation of the amount, the new billings will be implemented in the next quarter.

As the budget presented was not received and adopted, Mr Lim Soon Mun @ Albert (Hotel) concluded to remain the existing rate and was seconded by Mr Mak Wan Fui (RS-17) until the incoming JMC to prepare another budget with more details and to convene an Extraordinary General Meeting to revised the budget and to decide the rate of maintenance charges.

The general body unanimously agreed to maintain the existing rate until the in-coming committee to call for an EGM to present another budget.

Prayers (i) and (ii) of the Defendant's Counterclaim

18. The crux of prayers (i) and (ii) of D's Counterclaim lies on the issue of whether a JMB is empowered to fix different rates for different types of parcel. This question concerning the JMB's power to impose different rates of the maintenance charges and contribution to the sinking fund involves the interpretation of the provisions of the SMA 2013.

19. Section 25 of the SMA 2013 imposes a statutory duty on the JMB to collect charges from the parcel owners for the maintenance and management of the subdivided building and common property. The amount of the charges must be in proportion to the share unit assigned to each parcel.

20. Section 25 of the SMA 2013 reads:

> "25. Parcel owners to pay Charges, and contribution to the sinking fund, to the joint management body
>
> (1) Each purchaser shall pay the Charges, and contribution to the sinking fund, in respect of his parcel to the joint management body for the maintenance and management of the buildings or lands intended for subdivision into parcels and the common property in a development area.
>
> (2) The developer shall pay the Charges, and contribution to the sinking fund, to the joint management body in respect of those parcels in the development area which have not been sold, being a sum equivalent to the Charges, and contribution to the sinking fund, payable by the purchasers to the joint management body had the parcels been sold.
>
> (3) The **amount of the Charges** to be paid under subsections (1) and (2) shall be **determined by the joint management body** from time to time **in proportion to the allocated share units** of each parcel.
>
> (4) The amount of contribution to the sinking fund to be paid under subsections (1) and (2) shall be a sum equivalent to ten per cent of the Charges unless otherwise **determined by the joint management body** from time to time

at a general meeting which shall not be less than ten percent of the Charges."

21. Notably, section 25(3) of the SMA 2013 stipulates that the amount of the maintenance charges shall be *"determined by the joint management body"*. Section 25(4) of the SMA 2013 is more specific in stating that the determination by the JMB is *"at a general meeting"*. The significance of this will be discussed later.

22. In *Muhamad Nazri Muhamad v JMB Menara Rajawali & Anor* [2019] 10 CLJ 547 ("**Rajawali**"), the JMB resolved to impose a different rate of the maintenance charges at the proprietor's request. The Court of Appeal, in interpretating sections 21 and 25 of the SMA 2013, held that the JMB is only empowered to fix a single rate of the maintenance charges for all types of parcel. It was observed that imposing different rates would run counter to the legislative framework of the SMA 2013, which is intended to avoid discriminatory practice in determining the maintenance charges rate.

23. The Court of Appeal said (at page 560):

> *"[25] In the light of the fact that three weightage factors have been applied in the calculation of share units for car park parcels and which calculation is premised on equitable considerations, it would appear that the* ***JMB is only empowered to fix one rate which is applicable to all types of parcels****. If that course is adopted, then the owners of different types of parcels will be paying maintenance charges in proportion to the allocated share units of their respective parcels because the rate per unit is the same. We are therefore inclined to agree with the plaintiff's argument that since the car park unit (whole floor parcel) is already enjoying a 40% discount by way of the calculation of its share units pursuant to the WF formula in the First Schedule, it will enjoy a further 42% discount given the lower maintenance charges for the car park units. This additional discount would, in our view, run counter to the* ***legislative framework which is intended to avoid inequitable, unfair and discriminatory practice in determining maintenance and maintenance charges rate****. Therefore, the* ***imposition of two different rates of maintenance charges for different types of parcels is incompatible with the meaning of "in proportion" in ss 21 and 25 of the SMA 2013*** *since there is no comparative relation, ratio or harmony between the two different rates and the different allocated share units of each parcel."*

24. It matters not that the resolution in relation to the maintenance charges and contribution to the sinking fund was passed unanimously at the 1st AGM and the 2nd AGM in the present case. The fact that the resolution was passed at an Annual General Meeting, unanimous at that, does not makes it legal for the JMB to fix and collect different rates of the charges.

25. This was decided by the Court of Appeal in *Rajawali*, which held that the JMB as a body corporate under the SMA 2013 can only fix charges which are mandated under the SMA 2013. It is ultra vires the SMA 2013 for the JMB, and for that matter the Joint Management Committee ("**JMC**"), to impose different rates of the charges. The JMC is the executive arm responsible for the implementation of the JMB's decisions and performance of the JMB's duties.

26. The Court of Appeal said (at page 564):

> *"[40] Be that as it may,* ***does the fact that the JMB's resolution was carried by a unanimous vote makes it perfectly legal and valid for the JMB and JMC to fix and collect the different rates*** *of the maintenance charges. The learned judge took the view that it would. However, we take a different view. The* ***JMB as a body corporate under statute can only determine charges which are mandated under the SMA 2013****. It will be* ***ultra vires the SMA 2013 for the JMB and the JMC to fix and impose the different rates*** *which are not sanctioned by statute. Further, the JMB does not have the inherent power nor can it arrogate to itself such power, even if the approval was obtained in a unanimous resolution at the AGM (Malaysia Shipyard & Engineering Sdn Bhd v. Bank Kerjasama Rakyat (M) Bhd, (supra)).*
>
> *[41] For the foregoing reasons, the JMB's resolution and the JMC's decision are hereby set aside for being invalid, null and void. The order of the High Court is set aside. We therefore allow prayers 1, 2, 3 and 4 of the originating summons. The appeal is allowed with costs."*

27. It is my finding that the resolution in relation to the maintenance charges and contribution to the sinking fund passed at the 1st AGM and the 2nd AGM, which has the effect of imposing different rates of the charges, is not in conformity with the SMA 2013. I consider the said resolution to be ultra vires the SMA 2013.

28. I therefore granted prayers (i) and (ii) of the Counterclaim. I declared that the resolution in relation to the maintenance charges and contribution to the sinking fund, which was passed at the 1st AGM and the 2nd AGM, to be void. It is noted that there is no appeal lodged against this part of my decision.

The Strata Management Tribunal award dated 10.3.2022

29. A parcel owner had filed a tribunal claim against D to challenge the different rates imposed. On 10.3.2022, the Strata Management Tribunal ("**Tribunal**") granted the following award ("**Tribunal Award**"):

Tindakan ini setelah didengar di hadapan **TUAN ANOOP SINGH A/L JAGIR SINGH, PRESIDEN TRIBUNAL** pada **10 MAC 2022**, Tribunal dengan ini memerintahkan:

(1) Resolusi yang diluluskan pada Mesyuarat Agung Tahunan bertarikh 14 Mei 2019 ("AGM tersebut") yang berkenaan pengenaan caj penyelenggaraan (*"maintenance charges"*) dan caj kumpulan wang penjelas (*"sinking fund"*) berlainan untuk hotel, kedai dan apartment, dibatalkan;

(2) Jumlah yang sepatutnya perlu dibayar oleh Pihak Yang Menuntut menurut AGM tersebut adalah RM2.381 untuk caj penyelenggaraan (*"maintenance charges"*) dan RM0.24 untuk caj kumpulan wang penjelas (*"sinking fund"*) untuk setiap unit syer yang diumpukkan (*"allocated share unit"*);

(3) Jumlah caj penyelenggaraan (*"maintenance charges"*) dan caj kumpulan wang penjelas (*"sinking fund"*) yang telah lebih dibayar oleh Pihak Yang Menuntut menurut resolusi AGM tersebut dibayar balik oleh Penentang kepada Pihak Yang Menuntut dalam masa 30 hari dari tarikh award ini; dan

30. In view of the Tribunal Award, the JMC of D called a meeting on 25.4.2022, where it was decided that D will comply with the one rate ruling as awarded by the Tribunal.

> Ms SM Kong stressed that the JMC must execute the Tribunal Award. Since there is no objection from the hotel, the JMC will proceed to follow one rate as awarded by the Tribunal. All the necessary documents have been sent to hotel to comply the one rate awarded by Tribunal on 12/4/22 via post. Notice to owners to inform of the one rate Tribunal Award will be sent out to all owners. The suggestion was proposed by Ms SM Kong and seconded by Mr Sivakumar.

31. On 12.4.2022, D issued a letter to P informing of the Tribunal Award. D claims that the Tribunal Award is applicable to P with regards to the rate of the maintenance charges and contribution to the sinking fund. D therefore demanded P to pay the difference between the maintenance charges and contribution to the sinking fund based on the Tribunal Award, and those earlier paid by P.

32. P disputed the purported rates imposed by D and refused to pay the same. P says that the Tribunal Award does not apply to them as they were not a party in the said tribunal proceedings. P avers that the Tribunal Award is specific to the actual litigant, as shown in the orders that were made in the Tribunal Award.

33. Paragraph 2 of the Tribunal Award speaks of the sum that ought to be paid by the *"Pihak Yang Menuntut"* (claimant) towards the maintenance

charges and contribution to the sinking fund. Paragraph 3 of the Tribunal Award refers to the amount of the maintenance charges and contribution to the sinking fund that had been overpaid by the *"Pihak Yang Menuntut"*. And ordered that the same be refunded by *"Penentang kepada Pihak Yang Menuntut"*.

34. Since they are not a party to the Tribunal Award, P asserts that the Tribunal Award is not enforceable against them. And that they are required to only pay the maintenance charges and contribution to the sinking fund according to the rates decided and resolved during the 2nd AGM.

35. As P refused to pay the purported rates imposed by D, D took the stance that P is not entitled to vote at the 3rd AGM. D relies on paragraph 21(2) of the Second Schedule of the SMA 2013, which states that a parcel owner shall not be entitled to vote if all or any part of the maintenance charges or contribution to the sinking fund due and payable by him are in arrears.

Only the JMB at a General Meeting can determine the rates of the maintenance charges and contribution to the sinking fund

36. I accept that the Tribunal has jurisdiction to nullify a resolution. Section 105 of the SMA 2013 sets out the jurisdiction of the Tribunal. It reads:

> "105 Jurisdiction of Tribunal
>
> (1) The **Tribunal shall have the jurisdiction to hear and determine any claims specified in Part 1 of the Fourth Schedule** and where the total amount in respect of which an award of the Tribunal is sought does not exceed two hundred and fifty thousand ringgit or such other amount as may be prescribed to substitute the total amount."

37. Part 1 of the Fourth Schedule of the SMA 2013 includes a claim for an order to nullify a resolution passed at a general meeting, as being within the jurisdiction of the Tribunal. It reads:

> "Jurisdiction of the Tribunal
>
> ...
>
> 7. A claim for an order to **nullify a resolution** passed at a general meeting."

38. Paragraph 1 of the Tribunal Award nullified the resolution in relation to the maintenance charges and contribution to the sinking fund that was

passed at the 1st AGM. I have no quarrel with the Tribunal's power to do so.

39. However, the Tribunal in setting aside the aforesaid resolution, has also imposed a rate of RM2.381 in respect of the maintenance charges and RM0.24 in respect of contribution to the sinking fund (as per paragraph 2 of the Tribunal Award). I have some qualms about that. In my opinion, the Tribunal has no power to determine and fix the rate of the maintenance charges and contribution to the sinking fund.

40. D argues that the Tribunal has power to make consequential orders and as such, the fixing of a new rate is under the jurisdiction of the Tribunal. D refers to paragraphs 8 and 9 of Part II of the Fourth Schedule of the SMA 2013 which reads:

> "Orders of the Tribunal
> …
> 8. The Tribunal may make any order of which it has the jurisdiction to make under Part 1 of this Schedule or any other order as it deems just and expedient.
>
> 9. The Tribunal may make such ancillary or consequential orders or relief as may be necessary to give effect to any order made by the Tribunal."

41. I disagree. My opinion is that only the JMB at a general meeting can determine and fix the rate of the maintenance charges and contribution to the sinking fund. D relies on the Tribunal Award to levy and collect the new rate of the maintenance charges and contribution to the sinking fund. That, in my view, is wrong. To my mind, the law does not permit any other body than the JMB at a general meeting to determine the rate of the maintenance charges and contribution to the sinking fund.

42. The *Rajawali* case is authority for this proposition. Namely that the determination of the rate of the maintenance charges and contribution to the sinking fund can only be done at a general meeting of the JMB. The rationale being that this determination is a 'collective decision'. The Court of Appeal in *Rajawali* said (at page 563):

> *"[37] Under the clear statutory provisions, the **JMB is the decision-making body**, whereas the **JMC is the executive arm responsible for the implementation of the JMB's decisions and performance of the JMB's duties**. There is **no provision** in either the SMA 2013 or the STA 1985 **which confers the JMC with power to decide on the rates**; **or** for that matter, which **permits the JMB to delegate its decision-making duty** under sub-s. 21(1)(b) of the SMA 2013 to the JMC. We do not think that in this case, such powers can*

*be implied. In our view, the **duty to make the decision is a duty imposed on the JMB and that duty is non-delegable**. We say this because the **decision to determine the maintenance charges is made by the JMB at a general meeting** attended by the developer and purchasers; it is a **collective decision**. In short, the **decision to fix the maintenance charges must be made by the JMB**. It therefore follows that the **JMB's resolution to delegate its duty to the JMC is in excess of the JMB's powers** under statute. As such, the mandate given to the JMC is invalid, null and void."*

43. Hence, the determination of the amount of the maintenance charges cannot be delegated by the JMB to any other party (e.g. the JMC). If it cannot be delegated to the JMC, what more the Tribunal who is even further removed from the Development Project than a JMC to make these decisions.

44. This point is reinforced by the fact that the JMB's duty vis-à-vis determining the rate of the maintenance charges and contribution to the sinking fund are contained in the SMA 2013 as follows:

(a) The JMB has a duty under sections 21(1)(b) and (c) of the SMA 2013 to determine and impose the charges and contribution to the sinking fund to be deposited into the maintenance account for the purpose of the proper maintenance and management of the buildings or lands intended for subdivision into parcels and the common property;

(b) The JMB also has a duty under section 23(2)(b) of the SMA 2013 to administer and control the maintenance account which consists of all or any part of the charges imposed by or payable to the JMB;

(c) Sections 25(3) and (4) of the SMA 2013 states that the amount of the charges and contribution to the sinking fund to be paid by the parcel owners shall be determined by the JMB from time to time in proportion to the allocated share units of each parcel.

45. As mentioned earlier, section 105 of the SMA 2013 and Part 1 of the Fourth Schedule of the SMA 2013 sets out the jurisdiction of the Tribunal. While the Tribunal may vary the rate of late payment interest (paragraph 9 of Part 1) and the amount of insurance (paragraph 10 of Part 1), the SMA 2013 does not provide the Tribunal with any jurisdiction to determine the rate of the maintenance charges and contribution to the sinking fund.

46. Consider this. If a Tribunal Award is sufficient to determine a new rate of the charges, what is stopping another parcel owner from taking a fresh action against D to change the rate of the charges once again? I think it is paramount that this determination ought to be a 'collective decision' at a general meeting of the JMB.

47. The decision of the Court of Appeal in *Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corporation* [2019] 2 CLJ 592 is instructive. There, the Court of Appeal held that all the maintenance charges and contribution to the sinking fund which were imposed by the developer (during the preliminary management period) and the Management Corporation were unlawful as they were imposed on a per square foot basis. The Court of Appeal however said (at page 614) that the Management Corporation would nevertheless *"be at liberty to claim the arrears due from the defendant, at* ***whatever rate determined by the general meeting****, on a share unit basis"*.

48. For the avoidance of doubt, I did not interfere in any way with the Tribunal Award. This needs to be made clear because the opening words of prayer (iii) of the Counterclaim states:- *"Kalau Mahkamah yang Mulia ini mendapati Tribunal Pengurusan Strata tidak berkuasa untuk menentukan kadar caj penyelenggaraan …"*. Obviously the question of me overturning the decision of the Tribunal or setting aside the Tribunal Award does not arise at all. That must be so as this action does not involve any appeal or judicial review of the Tribunal Award.

49. That said, the opening words of prayer (iii) of the Counterclaim, as referred to above, perhaps indicate a realisation on the part of D that there could be a question regarding whether the Tribunal has power to fix the rate of the maintenance charges and contribution to the sinking fund.

Prayers (iii), (iv) and (vii) of the Counterclaim

50. Bearing the above in mind, I turn now to the prayers sought for by D in the Counterclaim which I did not allow.

51. In prayer (iii) of the Counterclaim, D wants me to declare that the applicable rate of the charges for the Development Project, since the establishment of the JMB, is RM2.381 per share unit in respect of the maintenance charges and RM0.24 per share unit in respect of contribution to the sinking fund. I declined to do so.

52. Firstly, because as explained earlier, that is the domain of the JMB in general meeting. Secondly, even if I was inclined to do so, the reality is that I am in no position to ascertain what the appropriate rate of charges should be. That exercise involves, at the very least, a scrutiny of the expenditure, operational costs and financial requirements of the

Development Project. Which are things that I am ill-equipped to evaluate. And perhaps a host of other factors that I may not even realise.

53. This reality is recognised in prayer (iv) of the Counterclaim, which speaks of the annual budget that was tabled at the 1st AGM. Also in the resolution that was passed at the 1st AGM. Which stated that the amount of the maintenance charges and contribution to the sinking fund, to be paid by the parcel owners, were proposed *"based on the budget prepared by the developer"*.

54. At the 2nd AGM, the motion was to decide whether to confirm or vary the amounts determined as the maintenance charges and contribution to the sinking fund. A decision was made to maintain the existing rates of the charges. This was because *"the budget presented was not received and adopted ... until the incoming JMC to prepare another budget with more details and to convene an Extraordinary General Meeting to revised the budget and to decide the rate of maintenance charges"*. If a more detailed budget is necessary before a decision can be made regarding an appropriate rate of the charges, how could I possibly make a peremptory order that the applicable rates are RM2.381 and RM0.24 (as proposed by D)?

55. Prayer (iv) of the Counterclaim is presented as an alternative to prayer (iii). Prayer (iv) seeks for an order that D be permitted to take appropriate action to determine and fix a suitable rate of the maintenance charges and contribution to the sinking fund since the establishment of the JMC. Which rate shall not be less than the annual budget that was tabled at the 1st AGM. Implicit herein is the recognition that factors such as the expenditure, operational costs and financial requirements of the Development Project needs to be taken into account. Which were presumably addressed when the said annual budget was prepared. Likewise here, the rate of the charges is for the JMB in general meeting to determine and fix, not for the court to order.

56. In prayer (vii) of the Counterclaim, D sought to be allowed to levy and collect the maintenance charges and contribution to the sinking fund from P for all period in the past and in the future. This is to based on the rate determined pursuant to paragraphs (iii) or (iv) above. Since paragraphs (iii) and (iv) were not granted, paragraph (vii) naturally falls away.

57. Recall that I had declared the resolution in relation to the maintenance charges and contribution to the sinking fund, which was passed at the 1st AGM and the 2nd AGM, to be void ab initio. That was

precisely what D themselves wanted, as per prayers (i) and (ii) of the Counterclaim. But a lacuna seems to have been created as a result. Consequent upon the aforesaid resolutions being declared void ab initio, it appears that there is no rate of the maintenance charges and contribution to the sinking fund that is determined by the JMB in general meeting.

58. One can imagine the practical issues that might arise. If there is no rate of the charges that is determined by the JMB in general meeting, then what would be the amount of the maintenance charges and contribution to the sinking fund that the JMB is to levy and collect? What would be the impact on all the past charges that had been levied and collected by the JMB? Perhaps in view of that, D wanted me to pronounce an order regarding the applicable rate of the charges for the Development Project. And backdate that to the time of the establishment of the JMB. In essence, D is asking me to determine and fix the rate of the charges. That is something which I cannot and will not do, as explained earlier.

Prayers (v) and (vi) of the Counterclaim

59. In prayers (v) and (vi) of the Counterclaim, D sought for an injunction to restrain P from taking any action to pass any resolution in relation to the maintenance charges and contribution to the sinking fund, which has the effect of imposing different rates of charges toward different types of parcels.

60. D complains that P (the Hotel) is paying substantially lower charges compared to the Neo Suite/Service Apartment and the Retail shops parcel owners. According to D, this is because the Hotel is owned by the developer of the Development Project, i.e. P. And due to the substantial voting right of P where the Hotel holds 43,119 allocated share units out of the total of 70,460 for the Development Project, amounting to approximately 61.2% of the voting rights. D alleged that P manipulated the rate of the charges to benefit itself.

61. D contends that an injunction to restrain P from taking any action to pass any resolution which has the effect of imposing different rates of charges toward different types of parcel, is necessary. Since P will have the power to unilaterally approve any resolution as it wishes, even if the resolution is not in compliance with the SMA 2013.

62. In this regard, D asserts that it is not a mere assumption that P will pass resolution which is not in compliance with the SMA 2013. D points

out that P has in fact attempted to include 2 motions into the agenda of the 3rd AGM, which has the effect of imposition of different rates of charges.

63. The 2 motions in question are:

(a) To consider and approve the restricted use of the designated parts of the common property pursuant to section 32 of the SMA 2013; and

(b) To determine the amounts to be paid by the owner/proprietor as the maintenance charges and contribution to the sinking fund for the management and maintenance of designated common property of which use is restricted to the owners/proprietors of the Hotel component.

64. It is useful to narrate the events surrounding the 2 motions.

(a) On 10.5.2022 (i.e. 26 days before the date of the 3rd AGM on 5.6.2022), P sent an email to D, attaching the 2 motions to be included in the agenda of the 3rd AGM.

(b) On 12.5.2022, D replied P's email and acknowledged receipt of the 2 motions. D stated that the 2 motions raised by P are to be considered as motions to be given by parcel owners 7 days before the Annual General Meeting. Following from the above, D stated that P's 2 motions need not be included in the notice of the 3rd AGM.

(c) On the same day on 12.5.2022, P responded to D via email stating the following:

(i) P's letter dated 10.5.2022, enclosing the 2 motions, served as an official requisition for the 2 motions to be included at the next Annual General Meeting (i.e. the 3rd AGM to be held on 5.6.2022);

(ii) the 2 Motions were sent as early as 10.5.2022 to provide D sufficient time to comply with the 21 days' notice to be given to all parcel owners before an Annual General Meeting is held, as required under the law; and

(iii) as the 2 motions were sent and received prior to D's issuance of the Notice of the 3rd AGM, D is obligated to include the 2 motions to be considered at the 3rd AGM.

65. P relies on the following as the basis for the 2 motions to be added into the Notice of the 3rd AGM.

(a) Paragraph 13 of the Second Schedule of the SMA 2013 states that any proprietor may, by notice in writing deposited at the office of the Management Corporation (i.e. the JMB (D) in the present matter) not less

than 7 days before the time for holding the meeting, require inclusion of a motion as set out in such notice in the agenda of the next general meeting.

(b) Paragraph 12 of the Second Schedule of the SMA 2013 states that where a notice of motion has been given, it shall be submitted at a general meeting.

66. But recall that I did not grant prayer (vi) of P's OS because it had become academic. Namely P's prayer for a declaration that the 2 motions be included in the agenda of the next Annual General Meeting of D (i.e. the 3rd AGM that was to be held on 5.6.2022). As a result, I think prayers (v) and (vi) of the Counterclaim has likewise been rendered academic. D complains that the 2 motions proposed by P has the effect of imposition of different rates of charges. But since I did not make any order for the 2 motions to be included in the agenda, the question of prohibiting P from taking any action to pass those 2 motions does not arise.

67. Furthermore, giving a prohibitory injunction in the terms sought for by D, in my view, is too wide and uncertain. There should be an actual resolution before me, in order for me to decide whether to injunct or prohibit the same. Otherwise, whether or not a resolution 'has the effect of imposing different rates of charges toward different types of parcel' could be open to dispute. The enforcement or implementation of such an injunction would be problematic, if not impossible.

68. My view is this. A prohibitory injunction cannot be given in a vacuum. Nor can it be granted as an academic exercise based on a hypothetical situation. There must be an actual act or in the instant case, an actual resolution that is sought to be restrained. Here, there is no such actual act or actual resolution in existence. In the premises, I refuse to grant a prohibitory injunction in the wide and uncertain terms as sought for by D.

69. Moreover, the right of a parcel owner to vote at a general meeting of the JMB is a right conferred by statute i.e. the SMA 2013. Such a right is not to be lightly interfered with.

70. It is noteworthy that section 60(3)(b) of the SMA 2013 empowers a Management Corporation to fix different rate of charges. It reads:

"(3) Subject to section 52, for the purpose of establishing and maintaining the maintenance account, the management corporation may **at a general meeting**-

...

(b) raise the amounts so determined by imposing Charges on the proprietors in proportion to the share units or provisional share units of their respective parcels or provisional blocks, and the **management corporation may**

determine different rates of Charges to be paid in respect of **parcels which are used for significantly different purposes** and in respect of the provisional blocks;"

71. Granted that only a Management Corporation, and not a JMB like D in the present case, is empowered to determine different rate of charges. But it does raise the question of whether the prohibitory injunction sought for by D, which seems to be in the nature of a perpetual injunction, would be appropriate. Conceivably, it might not be appropriate if a situation should arise where the Development Project has a Management Corporation, which invokes section 60(3)(b) of the SMA 2013 to fix different rates of charges.

Conclusion

72. For the reasons above, I did not grant prayers (iii) to (vii) of D's Counterclaim. I made no orders as to costs.

Dated 14 December 2022

Quay Chew Soon
Judge
High Court of Malaya, Penang
Civil Division NCvC 1

Counsels
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Cases cited
Muhamad Nazri Muhamad v JMB Menara Rajawali & Anor [2019] 10 CLJ 547
Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corporation [2019] 2 CLJ 592

Legislation cited
Order 28 rule 7 of the Rules of Court 2012
Sections 21, 23, 25, 32, 60 and 105, paragraphs 12, 13 and 21(2) of the Second Schedule, paragraphs 7, 9 and 10 of Part I of the Fourth Schedule, paragraphs 8 and 9 of Part II of the Fourth Schedule, of the Strata Management Act 2013