DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR, DALAM NEGERI WILAYAH PERSEKUTUAN, MALAYSIA (BAHAGIAN SIVIL) [SAMAN PEMULA NO: WA-24NCVC-2452-12/2020]

Dalam Perkara Mengenai penetapan kadar caj penyenggaraan dan caruman kepada kumpulan wang penjelas yang berbeza bagi petak-petak pangsapuri dan petak- petak perdagangan iaitu kompleks runcit dan tempat letak kereta (petak lantai keseluruhan)

Dan

Dalam Perkara mengenai Mesyuarat Agung Pertama PEARL SURIA MANAGEMENT CORPORATION yang telah diadakan pada 26.1.2019 dan Mesyuarat Agung Kedua PEARL SURIA MANAGEMENT CORPORATION yang diadakan pada 8.8.2020

Dan

Dalam Perkara mengenai peruntukan- peruntukan relevan Akta Hakmilik Strata 1985 (Akta 318)

Dan

Dalam Perkara mengenai peruntukan- peruntukan Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 dan undang-undang subsidiarinya.

Dan

Dalam Perkara mengenai Seksyen-Seksyen 8, 9, 12, 21, 52, 59, 60, Jadual Pertama dan peruntukan-peruntukan relevan Akta Pengurusan Starta 2013 (Akta 757);

Dan

Dalam Perkara mengenai Aturan 7 Kaedah- Kaedah Mahkaman 2012

ANTARA

YII SING CHIU
(NO. K/P: 530318-13-5035) ... PEMOHON

DAN

1. **AIKBEE TIMBERS SDN BHD**
   (NO. SYARIKAT: 36911-K)

2. **SIT SENG & SONS REALTY SDN BHD**
   (NO. SYARIKAT : 52113-A)

3. PEARL SURIA MANAGEMENT CORPORATION

... RESPONDEN-RESPONDEN

JUDGMENT

Introduction

[1] The Plaintiff's Originating Summons ("OS") was premised on the provisions of the Strata Titles Act 1985, Housing Development (Control and Licensing) Act 1966 and Strata Management Act 2013.

[2] The 3 Defendants applied to strike out the Plaintiff's claim under Order 18 Rule 19 of the Court Rules 2012 ("the Rules").

The Brief Facts

[3] The Plaintiff is an owner of a condominium unit at Pearl Suria-Menara Pearl Point 2, Kuala Lumpur ("the premise"). The first Defendant is the developer of the premise, the 2nd Defendant is the owner of the car park whereas the 3rd Defendant is the Management Corporation of the premise.

[4] The premise is part of a project comprising 405 service apartments with their respective accessory units ("referred as apartment units"), a retail commercial unit and parking lots ("referred to as commercial units"). Each unit is further divided into shares.

[5] The main grievance of the Plaintiff is that the apartment units and commercial units are charged differing maintenance fees and charges to the sinking fund ("the charges"). This according to the Plaintiff is against the law. The Plaintiff contends that the charges must be calculated according to the shares owned regardless whether it is the apartment unit or a commercial unit.

[6] In the application to strike out of the 1st and 2nd Defendants the Defendants contend that the relationship between the Plaintiff and the Defendants is purely contractual as contained in the Sales and Purchase Agreement and the Deed of Mutual Covenant. The parties are therefore bound by the terms of the contract.

[7] All the Defendants also contend that the correct forum to air grievance if any by the Plaintiff is to the Commissioner of Buildings and not the Court.

The Issues

[8] In the Court's view the dispute at hand can be distilled into 2 issues. The first is whether the Court is the proper forum to bring this issue at the first instance. The second is whether the Defendants act of imposing differing charges between the apartment unit and the commercial unit against the law.

The Court the Proper Forum?

[9] The 1st and 2nd Defendants rely on section 12 of the Strata Management Act 2013 (SMA 2013) to argue that the Plaintiff must exhaust all remedies as stated under the statute before coming to Court.

[10] Section 12 states as follows:

> **7) Any purchaser who is not satisfied with the sums determined by the developer under subsection (3) or (4) may apply to the Commissioner for a review and the Commissioner may-**
>
> **(a) determine the sum to be paid as the Charges, or contribution to the sinking fund; or**
>
> **(b) instruct the developer to appoint, at the developer's own cost and expense, a registered property manager to recommend the sum payable as the Charges, or contribution to the sinking fund, and submit a copy of the registered property manager's report to the Commissioner.**

[11] The 3rd Defendant meanwhile relies on section 52(6) of SMA 2013 to argue that the Plaintiff cannot circumvent the Commissioner for a review before coming to Court.

[12] Section 52(6) of SMA 2013 states as follows:

> **6) Any proprietor who is not satisfied with the sums determined by the developer under subsection (2) or (3) may apply to the Commissioner for a review and the Commissioner may-**
>
> **(a) determine the sum to be paid as the Charges, or contribution to the sinking fund; or**
>
> **(b) instruct the developer to appoint, at the developer's own cost and expense, a registered**

property manager to recommend the sum payable as Charges, or contribution to the sinking fund, and submit a copy of the registered property manager's report to the Commissioner.

[13] The Plaintiff's argument is off tangent and does not directly reply to the arguments forwarded by the Defendants. To the Court the argument by the Defendants is not based on the issue of ***res judicata*** as contended by the Plaintiff but more on exhausting remedies provided in the statute.

[14] To the Court the more important point that needs to be addressed here is whether the Court's jurisdiction is ousted when a remedy of review or appeal is provided for and available to the Plaintiff under the statute. In short should the Court only decide by way of a judicial review after a decision is made by the appropriate authority?

[15] Both the provisions contended by the Defendants are similar and by reading of the wordings itself especially the use of word "may" shows that the Plaintiff is not mandated to refer the matter to the Commissioner.

[16] In short it is the Court's decision that the Plaintiff can apply to the Court by way of OS to determine the issue at hand. The filing of the OS by the Plaintiff is therefore valid and proper.

Is the imposing of different charges legal?

[17] The 1st and 2nd Defendants contend that the Plaintiff is bound by contractual obligation under the Sales and Purchase agreement and the Deed of Covenant ("the contracts") to pay the charges as imposed.

[18] Clause 18 and Clause 19 of the Sales and Purchase agreement and sections 5.01, 5.02, 7.01, and 7.02 deals with the maintenance charges and payments to the sinking fund which has been fixed at RM0.22 per sq feet per month and RM0.03 per sq ft per month respectively.

[19] The Plaintiff contends that the rates imposed on the commercial units are different from the apartment units. The Plaintiff became aware of this discrepancy only during the 1st Annual General meeting of the management.

[20] The Plaintiff further contends that the differing charges between apartment unit and commercial unit flouts the provisions of Schedule 1 of the SMA 2013 which empowers the management body to impose charges ***"in proportion to the share units"***

[21] On this issue the Court agrees with the contention of the 1st and 2nd Defendants that the Plaintiff are bound by contractual relationship. The Plaintiff by signing the contracts is bound by the terms of the contracts.

[22] However the Court also notes that any contract must not be against the law. This is provided for under the Contracts Act 1950. Section 10(1) of the Contracts Act 1950 states as follows:

> **1) All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.**

[23] In other words the Plaintiff will not be bound by the contract if the contract or any part of the contract is against the provision

of the law. In this case the relevant law relied upon is the SMA 2013.

[24] The powers of the developer in managing the property can be best seen upon the reading of section 9 (1) and (2) (a), (b) of the SMA 2013 which are relevant to the determination of the issue at hand. The provisions are reproduced here for ease of reference and are as follows:

> **(1) Subject to the provisions of this Act, a developer shall, during the developer's management period, be responsible to maintain and manage properly any building or land intended for subdivision into parcels and the common property.**
>
> **(2) Without prejudice to the generality of subsection (1), the duties of the developer during the developer's management period shall be as follows:**
>
> > ***(a)*** **to determine and impose the Charges to be deposited into the maintenance account;**
> >
> > ***(b)*** **to determine and impose the contribution to the sinking fund to be deposited into the sinking fund account;**

[25] From the provision above it is dear that amongst the powers given to the Developer is the unfettered powers to maintain and manage the property and common area. In the Court's view the power to manage includes the power to demarcate and identify the various buildings and the use of such buildings. It is therefore within the powers of the developer to divide the property into various units as was done in this case where the 2

units identified were the apartment units and the commercial units.

[26] With the powers of managing the property the developer is also given the powers to determine the charges to he imposed on the various units whereby each owner is to pay according to the size of the property owned.

[27] In short here is nothing illegal in the 1st Defendant charging different rates for the different units identified. The Plaintiff's grouses of having to pay different charges from the commercial units are misplaced.

[28] Further having signed the contract she is bound by the terms of the contract. The Plaintiff by signing the agreement has subjected herself to whatever charges imposed by the developer and cannot now find ways to opt out of the contractual terms.

[29] Having regards- to the above factors the Plaintiff has no cause of action against the 1st and 2nd Defendants whether under the contract or under the law. Similarly her claim against the 1st and 2nd Defendant can be regarded as frivolous, vexatious and abuse of the process of court.

[30] The same powers given to the developer are given to the Management Corporation on the it's setting up. This powers which are similar as above are given under section 59 of SMA 2013.

[31] Therefore against the 3rd Defendant although there is no contractual relations with the Plaintiff the law gives the powers to the 3rd Defendant the powers to manage the property as well as impose the charges it deems fit

[32] For the same reason the Plaintiff has no cause of action against the 3rd Defendant and her claim is frivolous, vexatious and an abuse of the process of court.

Conclusion

[33] As Order 18 Rule 19 of the Rules allows a Plaintiff's claim to be struck out if there is no cause of action or is frivolous, vexatious and an abuse of the process of court, the Court allowed the Defendants application to strike out the Plaintiff's claim with a cost of RM3,000 for each of the application

[34] In allowing the Defendants application, effectively, the Plaintiff's OS in also dismissed.

Dated: 18 OCTOBER 2021

(AKHTAR TAHIR)
Judge
High Court of Malaya, Kuala Lumpur

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Legislation referred to:

Court Rules 2012, O. 18 r. 19

Strata Management Act 2013, ss. 9 (1), (2) (a), (b), 12, 52(6), 59, Schedule 1

Contracts Act 1950, s. 10(1)