

JUDGMENT Express

Wawasan Raya (M) Sdn Bhd & Anor
v. Marc Service Residence Management
Corporation

[2025] 4 MLRA

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WAWASAN RAYA (M) SDN BHD & ANOR
v.
MARC SERVICE RESIDENCE MANAGEMENT
CORPORATION

Court of Appeal, Putrajaya
See Mee Chun, Lim Chong Fong, Wong Kian Kheong JJCA
[Civil Appeal No: W-02(NCVC)(W)-719-04-2023]
9 April 2025

Civil Procedure: *Court — Jurisdiction — Suo motu striking out by High Court of defendant's counterclaim — Whether High Court could on its own motion exercise any power under O 18 r 19(1) Rules of Court 2012 to strike out any pleading without application by relevant party — Whether High Court could decide on issues not agreed to by parties*

Land Law: *Strata title — Management Corporation — Whether 'management corporation' of 'development area' as defined in s 2 Strata Management Act 2013 could prohibit short-term rental of parcels in development area*

The respondent ('plaintiff') was the management corporation ('MC') of the Marc Service Residence ('apartment'). The 1st appellant ('1st defendant') was the registered owner of three parcels and had also rented five others, while the 2nd appellant ('203rd defendant') rented several parcels at the apartment. The plaintiff had applied for an injunction to, *inter alia*, compel the defendants, as parcel owners, to comply with its House Rules ('HR') and the by-laws in the Third Schedule to the Strata Management (Maintenance and Management) Regulations 2015 ('SMR'), which governed the use of the said parcels, and to restrain them from using their parcels for commercial purposes by renting them out for short-term rentals ('STR'). Only the 1st and 203rd defendants opposed the plaintiff's suit. The agreed issues to be tried before the High Court were: whether Resolution No 3 was lawfully passed at the plaintiff's 6th Annual General Meeting pursuant to s 70(2) of the Strata Management Act 2013 ('SMA'); whether, in view of Resolution No 3, the instant suit was not lawfully filed; whether the plaintiff should have prepared the latest HR to incorporate Resolution No 3; whether the plaintiff should have obtained the mandate and consent of its members before filing the suits given that Resolution No 3 was in force; whether, in accordance with the general rule that a party applying for an interlocutory injunction must provide an undertaking as to damages to the opposing party, the Court should consider the applicant's financial ability to satisfy the undertaking; and whether r 2.1(a) of the HR was contrary to the express land condition, and whether r 2.1(e) of the HR expressly allowed the use of the parcels in accordance with the guidelines issued by the Commissioner of Buildings of Kuala Lumpur. The High Court granted the injunction as prayed



for and on its own motion, struck out the 203rd defendant's counterclaim against the plaintiff and the members of its management committee with liberty to file afresh. The High Court also decided on several questions which were not part of the agreed issues to be tried and made no decision regarding the 2nd, 3rd, 4th and 5th agreed issues. Hence the instant appeal.

Held (allowing the 1st and 203rd defendants/appellants' appeal; ordered accordingly):

(1) The High Court could not on its own motion exercise any power under O 18 r 19(1) of the Rules of Court 2012 ('ROC 2012') given the absence of any express provision allowing the Court to act without an application by the relevant party. The High Court's *suo motu* striking-out order was unlawful and contravened the first rule of natural justice that a judge must be free from actual bias, and that it must be perceived by a 'fair-minded and informed observer' that there was no real danger of bias. Additionally, by not affording the 203rd defendant a right to be heard, the second rule of natural justice was also breached. (paras 21-23)

(2) In the interest of justice and to ensure the Court's impartiality and integrity were not questioned or doubted, no pleading should be struck out by the Court without an application by the relevant party. (para 24)

(3) The High Court's decision on issues not agreed to by the parties was an error of law and contrary to its own pre-trial case management directions pursuant to O 34 r 2(2)(k) of the ROC 2012 and warranted appellate intervention. Additionally, the omission to decide on the 2nd to 5th agreed issues was tantamount to a legal error. (paras 27-28)

(4) There was nothing in the SMA or SMR that expressly or by necessary implication prohibited STR. (para 29)

(5) There was nothing in s 59(1)(a) to (i) and (2)(a) to (j) of the SMA that conferred any duty or power on MCs including the plaintiff, to regulate or prohibit the use and occupation of parcels (as defined in s 2 of the SMA) for STR. The HR also did not contain any rules that allowed the plaintiff to prohibit STR. Further, by virtue of s 148 of the SMA, the Sale and Purchase Agreements between the purchasers of the parcels and the developer of the apartment, as well as the Deed of Mutual Covenants, ceased to have effect upon the enforcement of the HR. (paras 31, 32, 33 & 36)

Case(s) referred to:

Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation [2020] 6 MLRA 244 (folld)

Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors [1994] 1 MLRA 454 (refd)

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Intervenors) [2007] 1 MLRA 719 (refd)



Tan Kang Hai v. Slimming Sanctuary Sdn Bhd [2016] 5 MLRH 651 (refd)
YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd [1997] 1 MLRA 509 (folld)

Legislation referred to:

Civil Law Act 1956, s 11

Rules of Court 2012, O 15 r 6(2)(a), (b)(i), (ii), O 18 r 19(1), O 29 r 1(4),
O 34 r 2(2)(k), O 42 r 12

Strata Management Act 2013, ss 2, 59(1)(a), (b), (c), (d), (e), (f), (g), (h), (i),
(2)(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), 70(2), (6), 148

Strata Management (Maintenance and Management) Regulations 2015, Third
Schedule

Counsel:

*For the appellants: Chow Li Kian (Lee Jia Fu & Ho Yong Yi with him); M/s Josephine,
LK Chow & Co*

*For the respondent: Shahabudin Shaik Alaudin (Rosnida Che Ibrahim, Siti Nurazwani
Zulkeflee & Nadia Ahmad Suhaidin with him); M/s Shahabudin
& Rozima*

[For the High Court judgment, please refer to *Marc Service Residence Management
Corporation v. Wawasan Raya (M) Sdn Bhd & Ors* [2023] 6 MLRH 368]

JUDGMENT

Wong Kian Kheong JCA:

A. Two Novel Questions

[1] This judgment raises two novel issues, namely-

- (1) whether the “management corporation” (MC) [as defined in s 2 of the Strata Management Act 2013 (SMA)] of a “development area” (as understood in s 2 SMA) can prohibit “Short Term Rental” (STR) of “parcels” (within the meaning of s 2 SMA) in the development area; and
- (2) can a court on its own motion strike out a counterclaim by a defendant under O 18 r 19(1) of the Rules of Court 2012 (RC). This question also concerns the application of the two rules of natural justice.

[2] I had forwarded a draft of this judgment (Draft) to See Mee Chun and Lim Chong Fong JJCA. Both my learned sister and brother had expressed their agreement with the Draft.

B. Background

[3] We shall refer to the parties as they were in the High Court.



[4] The plaintiff (Plaintiff) is the MC of a development area known as “MARC Service Residence” (Apartment).

[5] The 1st defendant company (1st Defendant) is the registered proprietor of three parcels in the Apartment. The 1st Defendant also rented five parcels in the Apartment.

[6] On 26 June 2019, the Sixth Annual General Meeting of the Plaintiff was held (Plaintiff’s 6th AGM). At the Plaintiff’s 6th AGM, there was a dispute on what was passed with regard to Agenda no 8, resolution no 3. (Resolution No 3).

C. Proceedings In The High Court

[7] The Plaintiff filed a suit in the High Court (This Suit) against 202 defendants (Defendants) who own parcels (Parcels) in the Apartment (Parcel Owners).

[8] In This Suit, the Plaintiff’s Statement of Claim prayed for the following relief, among others:

- (1) an injunction to compel the Defendants to comply with the Plaintiff’s “House Rules” (HR) and the by-laws in the Third Schedule [By-Laws (3rd Schedule)] to the Strata Management (Maintenance and Management) Regulations 2015 (SMR) governing the use of the Parcels;
- (2) an injunction to restrain the Defendants from violating the HR and the By-Laws (3rd Schedule) by “managing, maintaining and/or operating” their Parcels for, among others, STR;
- (3) an injunction to restrain the Defendants from, among others “advertising, contracting for booking and/or allowing dealing” their Parcels for, among others, STR;
- (4) an injunction to compel the Defendants to remove all advertisements and listings from all Internet websites and other media which offer the use of the Defendants’ Parcels for, among others, STR;
- (5) the Defendants shall indemnify the Plaintiff if proceedings are taken by the authorities against the Plaintiff for violation of the HR and applicable laws;
- (6) an injunction to restrain the Defendants from interfering with or preventing the Plaintiff from performing the Plaintiff’s obligations under the SMA;
- (7) general damages; and
- (8) costs on an indemnity basis.



[9] On 20 December 2019, the Plaintiff obtained an *ex parte* interlocutory injunction from the learned High Court Judge to restrain the Defendants from using their Parcels for STR until the disposal of This Suit (*Ex Parte* Interlocutory Injunction).

[10] The High Court subsequently granted an *inter partes* interlocutory injunction on 21 February 2020 on the same terms of the *Ex Parte* Interlocutory Injunction (*Inter Partes* Interlocutory Injunction).

[11] The 2nd appellant company (2nd Appellant)-

- (1) rented several Parcels;
- (2) was not sued by the Plaintiff in This Suit; and
- (3) was aggrieved by the *Ex Parte* Interlocutory Injunction and *Inter Partes* Interlocutory Injunction. Hence, the 2nd Appellant applied to intervene in This Suit as the 203rd Defendant (203rd Defendant). The Plaintiff consented to the intervention of the 2nd Appellant as the 203rd Defendant in This Suit.

[12] The 203rd Defendant filed a counterclaim against the Plaintiff and the members of the Plaintiff's Management Committee (203rd Defendant's Counterclaim).

[13] The High Court, on its own motion, struck out the 203rd Defendant's Counterclaim with liberty to file afresh and with no order as to costs [High Court's *Suo Motu* Striking Out Order (203rd Defendant's Counterclaim)].

[14] Only the 1st and 203rd Defendants opposed This Suit. All the other defendants in This Suit (Other Defendants) agreed to comply with the *Ex Parte* interlocutory Injunction and *Inter Partes* Interlocutory Injunction. Hence, the Plaintiff discontinued This Suit against the Other Defendants.

[15] During the Pre-Trial Case Management (PTCM) of This Suit, upon the directions of the learned High Court Judge, the Plaintiff, 1st and 203rd Defendants agreed to the following issues to be decided by the High Court (Agreed Issues to be Tried);

- (1) at the Plaintiff's 6th AGM, was Resolution No 3 voted upon and an additional para 2.1(e) added to the HR? (1st Agreed Issue to be Tried);
- (2) whether This Suit was filed lawfully by the Plaintiff against the Defendants in this case (2nd Agreed Issue to be Tried);
- (3) whether the Plaintiff had prepared the latest HR [which incorporated the new para 2.1(e) in the HR after the Plaintiff's 6th AGM] and filed the latest HR with the Commissioner of Buildings of Kuala Lumpur (COB) (3rd Agreed Issue to be Tried);



- (4) whether the Plaintiff as an MC needs to obtain the mandate and consent of the members of the Plaintiff before filing This Suit against the Defendants (4th Agreed Issue to be Tried);
- (5) whether the Plaintiff is required to comply with the undertaking given by the Plaintiff during the interlocutory injunction application to pay damages to the 1st and 203rd Defendants (5th Agreed Issue to be Tried); and
- (6) whether r 2.1(a) HR (The units are constructed for private residential dwellings and shall be used exclusively for private residential purpose only) has contravened-
 - (a) the express condition of land use (Express Land Condition) on the title of the land on which the Apartment is erected (Land). According to the Express Land Condition, the Land should only be used for a high-rise commercial building for the purpose of serviced apartments; and
 - (b) additional r 2.1(e) HR (which was approved at the Plaintiff's 6th AGM)

(6th Agreed Issue to be Tried).

[16] At the trial of this case (Trial)-

- (1) two witnesses gave evidence for the Plaintiff, ie.-
 - (a) Encik Ruslan bin Zainal Abidin (PW1), the property services manager of the Apartment; and
 - (b) Datuk Affendi bin Zahari (PW2), the chairman of the Plaintiff from 2019 to 2021; and
- (2) the following four witnesses testified for the 1st and 203rd Defendants-
 - (a) Ms Foo May Lin (SD1), a practising Advocate and Solicitor. SD1 had acted for the Plaintiff as follows, among others-
 - (i) SD1 drafted Resolution No 3; and
 - (ii) SD1 attended the Plaintiff's 6th AGM as the Plaintiff's legal advisor;
 - (b) Encik Mohamad Akmal Nur Aliff bin Ahmad Tarmizi (SD2), the Plaintiff's building supervisor. SD2 was present at the Plaintiff's 6th AGM;



(c) Mr Ong Boon Cheow (SD3), the Managing Director of the 1st and 203rd Defendants. SD3 was one of the attendees of the Plaintiff's 6th AGM; and

(d) Mr Kek Soon Poh (SD4), the 17th Defendant and owner of one Parcel. SD4 had attended the Plaintiff's 6th AGM.

[17] After the Trial, the learned High Court Judge allowed This Suit and adjudged as follows:

- (1) all the residential Parcels in the Apartment were prohibited from being used for commercial purpose or STR;
- (2) a perpetual injunction was granted to compel all the Defendants to comply with the HR and to restrain them from using the residential Parcels in the Apartment for commercial purpose or STR; and
- (3) the 1st and 203rd Defendants were ordered to pay costs of RM50,000.00 to the Plaintiff (subject to allocatur fee of 4%)

(High Court's Decision).

[18] According to the written judgment of the High Court (High Court's Written Judgment), among others-

- (1) there is no definition of STR in law or any document which had been tendered in This Suit but in general terms, STR suggests the rental of the premises for a short period of six months or less — para 13 High Court's Written Judgment;
- (2) in a STR, the "intention of the parties is not to rent out the premises for purpose of residence in the ordinary sense of the word, but more to allow for a stay for a certain purpose. Once the purpose is achieved the person staying leaves after paying for the number of days of stay" — para 14 High Court's Written Judgment;
- (3) in paras 17 to 25 High Court's Written Judgment, the learned High Court Judge considered-
 - (a) the Sale and Purchase Agreements (SPAs) between the purchasers of the Parcels (Purchasers) and the developer of the Apartment (Developer); and
 - (b) the Deed of Mutual Covenants signed by the Purchasers and the Developer (DMCs).

According to the High Court, from a reading of the SPAs and DMCs, the Parcels "are to be used for solely residential purposes" — paras 25 and 41 High Court's Written Judgment;



- (4) if a person (X) is not registered with the Plaintiff as a “resident” in the Apartment, X is a “trespasser” and cannot therefore reside in the Apartment — paras 26 to 29 High Court’s Written Judgment;
- (5) the learned High Court Judge gave reasons in paras 30 to 33 High Court’s Written Judgment that the heading of r 2.1 HR and r 2.1(a) HR do not allow STR;
- (6) in para 34 High Court’s Written Judgment, the learned High Court Judge held that the Plaintiff’s 6th AGM voted to impose a penalty of RM200.00 for each violation of the HR due to the frequency of the flouting of the HR as well as the “creations of nuisance of the unsupervised number of persons” in the Apartment due to the STR. The High Court dismissed the contention by the 1st and 203rd Defendants that Resolution No 3 was passed at the Plaintiff’s 6th AGM to allow STR — para 35 High Court’s Written Judgment;
- (7) the resolutions passed at the Plaintiff’s 6th AGM “cannot supersede or contradict” the provisions of the DMC and HR which disallow the Apartment to be used for commercial purposes — para 36 High Court’s Written Judgment;
- (8) the prohibition of STR in the HR cannot be overcome by the mere imposition of a penalty of RM200.00 or by passing a resolution in the Plaintiff’s 6th AGM — para 37 High Court’s Written Judgment;
- (9) covenant 3.02 DMC disallows nuisance in the Parcels and common property of the Apartment (Common Property) — para 38 High Court’s Written Judgment;
- (10) in para 39 High Court’s Written Judgment, the learned High Court Judge referred to HR which prohibits the residents in the Apartment from making any immoral, improper, offensive or unlawful use of the Parcels and Common Property (Parcels/ Common Property);
- (11) the learned High Court Judge found PW1 and PW2 to be “truthful and reliable witnesses” — para 12 High Court’s Written Judgment. The evidence of PW1 and PW2 showed that the use of the Parcels in the Apartment for STR had caused the following problems-
 - (a) abuse of the Common Property;
 - (b) immoral and illegal activities had been carried out in the Parcels; and



(c) total disregard of the peaceful enjoyment of the Parcels by their occupants

- paragraph 40 High Court's Written Judgment;

(12) the learned High Court Judge decided in para 42 High Court's Written Judgment that the "only way" to uplift the restriction on STR is for the Plaintiff to "repeal and terminate the entire DMC and the [HR]". However, the High Court in subsequent paras 43 to 46 High Court's Written Judgment, held that there is a "host of legislation" which regulates premises used for residential and commercial purposes. According to the learned High Court Judge, the By-Laws (3rd Schedule) prohibit the use of the Parcels to cause nuisance to the other Parcel Owners; and

(13) as the Apartment is a "purely a private residential accommodation", the Apartment "cannot be utilized as a hotel or motel or for any such commercial purpose and cannot be advertised as such" — para 47 High Court's Written Judgment.

[19] The 1st and 203rd Defendants had filed this appeal to the Court of Appeal against the High Court's Decision (This Appeal).

Our Decision

D. Was The High Court's *Suo Motu* Striking Out Order (203rd Defendant's Counterclaim) Valid?

[20] Order 18 r 19(1) RC provides as follows:

"O 18 r 19 **Striking out pleadings** and endorsements

(1) **The Court may at any stage of the proceedings order to be struck out** or amended **any pleading** or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, **on the ground that -**

- (a) it discloses no reasonable cause of action or defence, as the case may be;
- (b) it is scandalous, frivolous or vexatious;
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case maybe."

[Emphasis Added].



[21] Firstly, we are of the view that the court on its own motion cannot exercise any power provided in O 18 r 19(1) RC. This is because O 18 r 19(1) RC has not expressly provided that the court can exercise any of the powers in O 18 r 19(1) RC on its own motion. Order 18 r 19(1) RC is to be compared with, eg., O 15 r 6(2) RC which empowers the court to make an order “of its own motion” in O 15 r 6(2)(a), (b)(i) or (ii) RC. Reproduced below is O 15 r 6(2) RC:

“Order 15 r 6(2) Subject to this rule, at any stage of the proceedings in any cause or matter; the Court may on such terms as it thinks just and either of its own motion or on application -

- (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party to cease to be a party;
- (b) order any of the following persons to be added as a party, namely -
 - (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or
 - (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.”

[Emphasis Added].

[22] There is a second reason why the High Court’s *Suo Motu* Striking Out Order (203rd Defendant’s Counterclaim) is unlawful. When a party (Y) does not file an application to strike out a pleading of the other party (Z) and the court on its own motion strikes out Z’s pleading, the first rule of natural justice may be contravened as follows:

- (1) according to the first rule of natural justice, a judge must be-
 - (a) free from actual bias; or
 - (b) perceived by “a fair-minded and informed observer” that there is no real danger of bias on the part of the judge — please refer to the judgment of the Federal Court delivered by Richard Malanjum CJ (Sabah and Sarawak) (as he then was) in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners)* [2007] 1 MLRA 719, at p 735;



- (2) in our adversarial system of litigation, it is up to parties to conduct their cases as they see fit. The judge should at all times remain an impartial umpire on the sidelines. If the court acts *suo motu* to strike out Z's pleading without any application by Y, the first rule of natural justice may be breached on the ground that there is actual bias by the court in favour of Y against Z; and/or
- (3) even if the judge has no actual bias against Z in Y's favour, applying the test of a fair-minded and informed observer, there exists a real danger of bias on the part of the judge in favour of Y against Z. This is because when the court struck out the 203rd Defendant's Counterclaim without any application by the Plaintiff, in the perception of a fair-minded and informed observer, there was a real danger of bias that the court had descended into the arena in favour of the Plaintiff to the detriment of the 203rd Defendant.

[23] Lastly, before the High Court's *Suo Motu* Striking Out Order (203rd Defendant's Counterclaim) was made, the 203rd Defendant was not afforded a right to be heard. There was a clear breach of the second rule of natural justice in this case.

[24] It is our hope that-

- (1) in the interest of justice; and
 - (2) to ensure that the court's impartiality and integrity are not questioned or doubted in any manner
- any pleading should not be struck out by the court without an application by the relevant party.

Even if a provision of written law has explicitly provided for the court to act on its own motion, we urge caution and the court should not act *suo motu*. This is because if the court acts on its own motion and a party (S) is aggrieved by a *suo motu* decision S may subsequently complain that the first rule of natural justice has been infringed, in such an event, there may not be a just, expeditious and economical disposal of the case.

E. Whether The High Court Could Decide On Issues Which Had Not Been Agreed To By The Parties

[25] The Agreed Issues to be Tried are prepared pursuant to the learned High Court Judge's own direction during PTCM according to O 34 r 2(2)(k) RC. We reproduce below O 34 r 2(2)(k) RC:

"O 34 r 2 [PTCM] when directed by the Court

- (1) ...



- (2) **At a [PTCM]**, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and **the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including -**

...

- (k) **the filing of a statement of issues to be tried;**"

[Emphasis Added].

[26] Despite the fact that the Plaintiff, 1st and 203rd Defendants had prepared the Agreed Issues to be Tried on the PTCM direction of the learned High Court Judge, the learned High Court Judge decided on the following questions which were not part of the Agreed Issues to be Tried:

- (1) the High Court relied on the SPAs and DMCs to hold that the Parcels were to be used solely for residential purposes;
- (2) if an occupant in a Parcel was not registered with the Plaintiff as a "resident, the occupant was a trespasser in the Apartment;
- (3) any resolution which is passed in the Plaintiff's AGM cannot override the DMC and HR;
- (4) learned High Court Judge relied on-
 - (a) nuisance;
 - (b) immoral and/or unlawful use of the Parcels;
 - (c) total disregard of the quiet enjoyment of the Parcels by their occupants; and
 - (d) abuse of the Common Property- to justify the High Court's decision;
- (5) to uplift the prohibition on STR, only the Plaintiff can repeal the DMC and HR; and
- (6) as the Apartment was a "purely a private residential accommodation", the Apartment "cannot be utilized as a hotel or motel or for any such commercial purpose and cannot be advertised as such"

[High Court's Decision (Issues which had not been agreed to by parties)].



[27] We are of the considered view that the High Court's Decision (Issues which had not been agreed to by parties) is an error of law which warrants appellate intervention (High Court's 1st Legal Error) because-

- (1) the High Court's Decision (Issues which had not been agreed to by parties) was contrary to the learned High Court Judge's own PTCM direction pursuant to O 34 r 2(2)(k) RC;
- (2) if a court wishes to decide on an issue which has not been previously agreed to by the parties during the PTCM (New Issue), in accordance with the second rule of natural justice, the court should inform all the parties regarding the New Issue so as to enable the parties to prepare and submit on the New Issue — please refer to *Tan Kang Hai v. Slimming Sanctuary Sdn Bhd* [2016] 5 MLRH 651, at [11]; and
- (3) our litigation is based on an adversarial system. If a court decides on a question which has not been previously agreed to by the parties pursuant to the court's own PTCM direction under O 34 r 2(2)(k) RC, this may offend the first rule of natural justice as follows-
 - (a) there may exist actual bias on the part of the court; or
 - (b) in the perception of a fair-minded and informed observer, there is a real danger of bias on the part of the court.

F. Whether High Court Had Omitted To Decide On Issues Which Had Been Agreed To By The Parties

[28] Regrettably, the learned High Court Judge did not decide on the 2nd, 3rd, 4th and 5th Agreed Issues to be Tried. Such an omission is tantamount to a legal error on the part of the High Court (High Court's 2nd Legal Error).

G. Is STR Prohibited By SMA And SMR?

[29] We have perused the SMA and SMR, in particular the By-Laws (3rd Schedule). There is nothing in the SMA and SMR, either expressly or by necessary implication, which prohibits STR. In fact, there is not even a definition of STR in the SMA and SMR. We rely on the following judgment of Mahadev Shankar JCA in the Court of Appeal case of *YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd* [1997] 1 MLRA 509, at p 546:

“Whether the contracts were illegal or otherwise is a matter for this court to decide. The trial judge found as a fact that these contracts were valid because prior to the KLSE circular, there was nothing in the KLSE rules prohibiting such contracts.

We agree. We would go further and state that what the law does not specifically prohibit, it permits.”

[Emphasis Added].



H. Whether MCs Can Prohibit STR With Regard To Parcels

[30] The “duties” and “powers” of an MC are stipulated in s 59(1)(a) to (i) and (2)(a) to (j) SMA. We reproduce below s 59(1)(a) to (i) and (2)(a) to (j) SMA:

“Section 59. Duties and powers of management corporation

(1) The duties of a management corporation shall be as follows:

- (a) to properly maintain and manage the subdivided building or land and the common property and keep it in a state of good and serviceable repair;
- (b) to determine and impose the Charges to be deposited into the maintenance account for the purposes of proper maintenance and management of the subdivided buildings or lands and the common property;
- (c) to determine and impose the contribution to the sinking fund to be deposited into the sinking fund account for the purposes of meeting the actual or expected expenditure specified under subsection 51(2);
- (d) to effect insurance according to this Act or to insure against such other risks as the proprietors may by special resolution direct;
- (e) to comply with any notice or order given or made by the local authority or any competent public authority requiring the abatement of any nuisance on the common property, or ordering repairs or other work to be done in respect of the common property or other improvements to the common property;
- (f) to prepare and maintain a strata roll for the subdivided buildings or lands;
- (g) to ensure that the accounts required to be maintained by the management corporation under this Act are audited and to provide audited financial statements for the information to its members;
- (h) to enforce the by-laws; and
- (i) to do such other things as may be expedient or necessary for the proper maintenance and management of the subdivided buildings or lands and the common property.

(2) The powers of the management corporation shall be as follows:

- (a) to collect the Charges from the proprietors in proportion to the share units or provisional share units of their respective parcels or provisional blocks;
- (b) to collect the contribution to the sinking fund from the proprietors of an amount equivalent to ten percent of the Charges;



- (c) to authorize expenditure for the carrying out of the maintenance and management of the subdivided buildings or lands and the common property;
- (d) to recover from any proprietor any sum expended by the management corporation in respect of that proprietor's parcel in complying with any such notice or order as referred to in para (1)(e);
- (e) to purchase, hire or otherwise acquire movable property for use by the proprietors in connection with their use and enjoyment of the common property;
- (f) to employ or arrange and secure the services of any person or agent to undertake the maintenance and management of the common property of the subdivided building or land;
- (g) subject to subsection 70(2), to make additional by-laws for the proper maintenance and management of the subdivided buildings or lands and the common property;
- (h) to borrow moneys required by the management corporation in the exercise of its powers or the performance of its duties;
- (i) to secure the repayment of moneys borrowed by it and the payment of interest thereon by negotiable instrument or by a charge of unpaid Charges to the maintenance account (whether already imposed or not), or by a charge of any property vested in it or by a combination of any of those means; and
- (j) to do all things reasonably necessary for the performance of its duties under [SMA] and for the enforcement of the by-laws."

[Emphasis Added].

[31] There is nothing in s 59(1)(a) to (i) and (2)(a) to (j) SMA which confers any "duty" and "power" on MCs, including the Plaintiff, to regulate the use and occupation of a "parcel" (as defined in s 2 SMA), let alone prohibit STR with regard to the Parcels. At the risk of repetition, there is no definition of STR in SMA.

[32] In our considered view, even before the voting regarding Resolution No 3 in the Plaintiff's 6th AGM, there is nothing in the HR which allows the Plaintiff to prohibit STR in respect of the use of the Parcels. Our reasons are as follows;

- (1) there is no definition of STR in the HR; and
- (2) according to r 2.1(a) HR-

"The Units are constructed for private residential dwellings and shall be used exclusively for private residential purpose only"

[Emphasis Added].



Rule 2.1(a) HR does not confer any right or power on the Plaintiff to prohibit STR.

[33] As explained in the above paras 30 to 32, the learned High Court Judge had committed an error of law in deciding that the Plaintiff could prohibit STR in respect of the Parcels pursuant to the HR (High Court's 3rd Legal Error).

[34] Section 70(2) SMA provides as follows:

"70.(2) A management corporation may, by special resolution, make additional by-laws or make amendments to such additional by-laws, not inconsistent with the by-laws prescribed by the regulations made under s 150, for regulating the control, management, administration, use and enjoyment of the subdivided building or land and the common property, including all or any of the following matters:

- (a) safety and security measures;
- (b) details of any common property of which the use is restricted;
- (c) the keeping of pets;
- (d) parking;
- (e) floor coverings;
- (f) refuse control;
- (g) behaviour;
- (h) architectural and landscaping guidelines to be observed by all proprietors; and
- (i) imposition of fine not exceeding two hundred ringgit against any proprietor, occupant or invitee who is in breach of any of the by-laws,"

[Emphasis Added].

The 1st and 203rd Defendants had adduced sufficient evidence, namely-

- (1) video recordings of the Plaintiff's 6th AGM;
- (2) minutes of the Plaintiff's 6th AGM; and
- (3) the oral evidence of four witnesses who attended the Plaintiff's 6th AGM, ie., SD1, SD2, SD3 and SD4

- to prove on a balance of probabilities that the Plaintiff's 6th AGM had passed Resolution No 3 pursuant to s 70(2) SMA by way of a "special resolution" (defined in s 2 SMA as "a resolution which is passed at a duly convened general meeting of which at least twenty-one days' notice specifying the proposed resolution has been given, and carried by a majority consisting of not less than three-quarters of the valid votes cast at the general meeting by a



show of hands, or if a poll is demanded and taken, by a majority consisting of not less than three-quarters in number of the valid votes cast on such poll”).

Resolution No 3 stated as follows:

- “1. **The Unit Owner and lessee shall comply to [sic] the guideline (Prosedur Operasi Standard Aktiviti Penginapan Sementara Jangka Masa Pendek Kepada Pemaju/JMB/MC di Wilayah Persekutuan) issued by [COB KL] in line with [SMA],**
2. **To impose a penalty of RM200.00 for each non-compliance to [sic] [HR].**
3. All penalties shall be payable and a debt due to management corporation by the Unit Owner.”

[Emphasis Added].

[35] Resolution No 3 is significant because Resolution No 3 had been approved by way of a special resolution (as defined in s 2 SMA). The wishes of “not less than three-quarters of the valid votes cast at the Plaintiff’s 6th AGM (which approved Resolution No 3) should have been considered by the learned High Court Judge in this case (High Court’s 4th Legal Error). We rely on the following Federal Court’s judgment delivered by Tengku Maimun CJ in *Innab Salil & Ors v. Verve Suites Mont’ Kiara Management Corporation* [2020] 6 MLRA 244, at [26]:

“[26] The [SMA] is without doubt, a social legislation. It was passed to facilitate the affairs of strata living for the good of the community or owners of the strata title. Being social in nature, the provisions of the [SMA] which safeguard community interests ought to receive a liberal interpretation and not a restricted or rigid one. Accordingly, where two different interpretations are possible, it is the one which favours the interest of the community over the interest of the individual that is to be preferred. This is in line with the aforementioned decisions in *Ang Ming Lee and Hoh Kiang Ngan*.”

[Emphasis Added].

[36] We have not overlooked the SPAs and DMCs. The SPAs and DMCs, in our view, did not contain any prohibition of STR with regard to the Parcels. In any event, upon the enforcement of the HR, the SPAs and DMCs “shall cease to have effect” as provided by s 148 SMA. We reproduce below s 148 SMA:

“Section 148. **Non-application of other written laws, contracts and deeds**

On the coming into operation of [SMA], in a local authority area or part of a local authority area or in any other area, the provisions of any written law, contracts and deeds relating to the maintenance and management of buildings and common property in as far as they are contrary to the provisions of this Act shall cease to have effect within the local authority area or that other area.”

[Emphasis Added].



Premised on the above reasons, the learned High Court Judge had committed an error law in misconstruing the SPAs and DMCs in this case (High Court's 5th Legal Error).

I. Adequate Legal Remedies For Tort Of Private Nuisance And Illegal Use Of Parcels

[37] We have to emphasize that if any Parcel Owner or "occupier" of a parcel (as defined in s 2 SMA as a "person in actual occupation or control of the parcel or land parcel, but, in the case of a premises for lodging purposes, does not include a lodger") -

- (1) commits a tort of private nuisance which adversely affects the quiet use and enjoyment of the other Parcel Owners (Aggrieved Parcel Owners);
 - (2) uses or occupies the Parcel for an illegal purpose; and
 - (3) damages the Common Property;
- the Aggrieved Parcel Owners and Plaintiff may-
- (a) file a civil suit based on the tort of private nuisance; and/or
 - (b) lodge a police report.

J. Our Answers To The Agreed Issues To Be Tried

[38] Premised on the evidence adduced in this case, we answer the Agreed Issues to be Tried as follows:

- (1) the 1st Agreed Issue to be Tried — Resolution No 3 had been lawfully passed at the Plaintiff's 6th AGM pursuant to s 70(2) SMA;
- (2) the 2nd Agreed Issue to be Tried — in view of Resolution No 3, This Suit had not been lawfully filed by the Plaintiff;
- (3) the 3rd Agreed Issue to be Tried — the Plaintiff should have prepared the latest HR (which should incorporate Resolution No 3 which had been passed at the Plaintiff's 6th AGM) and should have filed the latest HR with the COB within 30 days from the date of the passing of Resolution No 3 [as required by s 70(6) SMA];
- (4) the 4th Agreed Issue to be Tried — as Resolution No 3 is in force, the Plaintiff should have obtained the mandate and consent of the members of the Plaintiff before filing This Suit against the Defendants;



(5) with regard to the 5th Agreed Issue to be Tried-

- (a) as a general rule (General Rule), a party (T) who applies for an interlocutory injunction, be it an *ex parte* or *inter partes* interlocutory injunction, is required to provide an undertaking to pay damages (Undertaking) to the opposing party (U). This is clear from O 29 r 1(4) RC which provides for Form 53 in Appendix A to RC (Form 53) to be the form for an interim injunction. We reproduce below O 29 r 1(4) RC and Form 53-

Order 29 r 1(4)

An order for interim injunction shall be in Form 53.

Form 53

ORDER FOR INTERIM INJUNCTION (O. 29, r. 1)

(Title as in action)

Upon the application of and upon reading the affidavit filed the.....day of....., 20....., and upon hearing and the plaintiff by his said undertaking to abide by any order the Court or a Judge may make as to damages in case the Court or a Judge should hereafter be of opinion that the defendant..... shall have sustained any by reason of this order which the plaintiff ought to pay. It is ordered and directed that the defendant(s) (a) by himself (themselves) his (their) agents or servants or otherwise be restrained, and an Injunction is hereby granted restraining him (them) from”

[Emphasis Added].



- (b) in accordance with the General Rule, the court should consider Y's financial ability to satisfy the Undertaking and may exercise its discretion to order Y to fortify the Undertaking — please refer to the judgment of Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors* [1994] 1 MLRA 454, at p 461; and
 - (c) Y has to apply to court for an exemption to provide the Undertaking. The court has a discretion to dispense with the Undertaking — *Keet Gerald*, at p 461; and
- (6) as for 6th Agreed Issue to be Tried-
- (a) rule 2.1 (a) HR is contrary to the Express Land Condition; and
 - (b) the additional r 2.1(e) HR has expressly allowed the use of the Parcels in accordance with the guidelines issued by the COB with regard to “Aktiviti Penginapan Sementara Jangka Masa Pendek”. Rule 2.1(e) HR should prevail over r 2.1(a) HR because the former is the later provision passed by “not less than three-quarters of the valid votes cast” at the Plaintiff's 6th AGM. Such a decision is supported by the canon of construction, *lex posterior derogat non priori* (the subsequent provision shall prevail over the earlier provision).

K. Outcome of This Appeal

[39] Premised on the above evidence and reasons, especially the High Court's 1st to 5th Legal Errors, we allow This Appeal with the following order:

- (1) the entire High Court's Decision is set aside; and
- (2) we enter judgment in favour of the 1st and 203rd Defendants against the Plaintiff as follows-
 - (a) This Suit against the 1st and 203rd Defendants is dismissed;
 - (b) a sum of RM80,000.00 shall be paid by the Plaintiff to the 1st and 203rd Defendants as costs for This Suit and This Appeal;
 - (c) an assessment of damages [Assessment (Damages)] for all loss suffered by the 1st and 203rd Defendants due to-
 - (i) *Ex Parte* Interlocutory Injunction;
 - (ii) *Inter Partes* Interlocutory Injunction; and



(iii) the perpetual injunctions granted in the High Court's Decision

- shall be conducted by another High Court Judge or Judicial Commissioner (J/JC);

(d) the costs of the Assessment (Damages) shall be determined by the J/JC and shall be paid by the Plaintiff to the 1st and 203rd Defendants; and

(e) by virtue of s 11 of the Civil Law Act 1956 and O 42 r 12 RC, the J/JC has a discretion to award interest on the sum of damages assessed at the Assessment (Damages) and such interest shall be paid by the Plaintiff to the 1st and 203rd Defendants.

