DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA
(SAMAN PEMULA NO : BA-24NCC-124-09/2018)

Dalam Perkara Seksyen 17 Akta Pengurusan Strata 2013

DAN

Dalam Perkara Perjanjian Jual Beli di antara Pemilik-pemilik Unit Pangsapuri Issoria dan M.K. Associates Sdn. Bhd.

DAN

Dalam Aturan 7, 28 dan 29 Kaedah-kaedah Mahkamah 2012

DAN

Dalam Perkara Seksyen 41 Akta Relief Spesifik 1950

ANTARA

1. **NOR AZMAN BIN HUSSEIN**
2. **KUAR BOON HUAT**
3. **LOW MEE MEE**
4. **LOW HUP SENG**

5. SEE KWONG MING

6. SARJIT SINGH A/L AMAR SINGH

7. KONG LIAN INDUSTRIAL PARK SDN BHD
(NO. SYARIKAT : 22600 – M)

8. TAN DANG @ TAN KEK SOO

9. ALLAN TAN SIR SHIUN

10. NEOH CHENG KON

11. CHEW LIAN SENG

12. STELLA A/P P.R XAVIER

13. LEE SIEW CHEOW

14. MANIKAN A/L SOKAN

15. WONG KUEI LIM

16. TOONG ME TING

17. LAI KWOK PHING

18. KAHAR BIN MOHAMED

19. DESMON ANAK RUSKON

20. ROSLI BIN BIDIN

21. TING KONG HOCK

22. PHAN MEE HEONG

23. ABD. RAHMAN BIN MAHMOOD

24. KHASHIMAH BINTI AB KADER

25. SITI AESAH BINTI KHALIDON ...PLAINTIF-PLAINTIF

DAN

1. BADAN PENGURUSAN BERSAMA ISSORIA APARTMENT

2. PESURUHJAYA BANGUNAN, BAHAGIAN PESURUHJAYA BANGUNAN MAJLIS DAERAH HULU SELANGOR

3. ULTIMATE ESSENCE SDN BHD
(NO. SYARIKAT : 953921 – A)

4. MAJLIS DAERAH HULU SELANGOR

……DEFENDAN-DEFENDAN

GROUNDS OF JUDGMENT

Introduction

By an Amended Originating Summons dated 28.9.2018 ("the Amended OS"), the Plaintiffs herein sought to obtain the following orders :

(i) a declaration that the formation of the 1st Defendant as the Joint Management Body is ultra vires, invalid, illegal and void for being in breach of the provisions of section 17 of the Strata Management Act 2013;

(ii) all decisions, claims made, meetings, agenda and acts carried out by the 1st Defendant is illegal and void ab initio; and

(iii) other ancillary reliefs.

Having given full consideration to the Amended OS, Affidavits and written submissions filed, I am of the considered view that there are no merits in the Plaintiffs' application to declare the 1st Defendant ultra vires, invalid/legal and void. I dismissed the Amended OS in Enclosure 67 against all the Defendants with costs.

Being dissatisfied with that decision, the Plaintiffs have appealed to the Court of Appeal. My reasons for the decision are elaborated below.

The Cause Papers

The related Affidavits in respect of the application in the Amended OS is as follows :

(i) Affidavit in Support by Low Mee Mee on behalf of the Plaintiffs affirmed on 2.10.2018 (Encl 2);

(ii) Affidavit In Reply (1) by the 1st Defendant affirmed by Mohd Ridhuan b Mohd Zin dated 19.10.2018 (Encl 26);

(iii) Affidavit in Reply by 2nd and 4th Defendants dated 2.11.2018 (Encl 33);

(iv) Affidavit in Reply by Low Mee Mee dated 7.11.2018 (Encl 34);

(v) Affidavit in reply by Low Mee Mee dated 21.11.2018 (Encl 36);

(vi) Additional Affidavit by Low Mee Mee dated 13.2.2019 (Encl 69);

(vii) Additional Affidavit in Reply by 1st Defendant dated 5.3.2019 (Encl 76); and

(viii) Affidavit in Reply by Plaintiff dated 18.3.2019 (Encl 83).

The Parties

The Plaintiffs numbering 25 of them are all purchasers of individual units of Issoria Apartment in Serendah, Selangor pursuant to Sale and Purchase Agreements entered into with the developer, M.K Associates Sdn Bhd (in liquidation).

The 1st Defendant is the Joint Management Body (JMB) of Issoria Apartment having been set up on 21.1.2017.

The 2nd Defendant is the Commissioner of Buildings appointed by the Government for the purpose of administering and carrying out the

provisions of the Strata Management Act 2013. The 2nd Defendant is responsible for issuing the Certificate for the establishment of the 1st Defendant as a JMB.

The 3rd Defendant entered into a Sale and Purchase Agreement with the liquidator of M.K. Associates Sdn Bhd to purchase all the unsold units of the apartment.

The 4th Defendant is the District Council for the whole of Hulu Selangor. The 4th Defendant is responsible for the issuance of the Certificate of Fitness for the occupation of the apartment units. The 4th Defendant is established under the Local Government Act.

The Background Facts

In order to have a proper understanding of the application for the declaration sought it is necessary to list down the rather convoluted background facts of this case as well as to trace the litigation chronology (where necessary) from the time of its commencement to now. From the number of affidavits filed by both sides, the salient background facts that can be sieved from these documents are as follows.

All the Plaintiffs entered into their respective SPA with M.K Associates Sdn Bhd sometime in 1993 or thereabouts.

M.K Associates Sdn Bhd was wound up on 5.12.2005. A court appointed liquidator, Mr. Neoh Chin Wah was appointed on 16.8.2010.

On 19.4.2012 the 3rd Defendant bought over all the unsold units of the apartment from M.K Associates Sdn Bhd. The 3rd Defendant has stated that they are not standing in the shoes of the previous developer (see

Affidavit dated 28.5.2019 (Encl 102). Instead they aver that they were only purchasers with the status of "*as is where is basis*" of all the remaining unsold units of the apartment from M.K Associates Sdn Bhd.

On 25.2.2003 the Certificate of Fitness for Occupation was issued by the 4th Defendant. It was issued after the Jabatan Bekalan Air Selangor informed the 4th Defendant they had no objections to its issuance. The Certificate of Fitness was sent to the Architect on 17.3.2003. The Architect's Certificate was duly issued.

Although it is disputed but there is documentary evidence to show that vacant possession had been delivered to all the purchasers by the developer in 2005 before it was wound up. Matters remained in abeyance until the year 2012when the 3rd Defendant entered into a SPA with the previous developers.

On 21.1.2017 the 1st Defendant was formed after the first AGM was called at the apartment premises. The attendance list showed the attendance of a number of the Plaintiffs, the 3rd Defendant and representatives from the 2nd and 4th Defendant besides the other unit owners. The 2nd Defendant issued the Certificate of incorporation for the 1st Defendant to operate as a joint management body from then on.

Thereafter a number of AGM/EGM were held resulting in disputes arising between the Plaintiffs and the 1st Defendant bringing forth this application for declaration and other interlocutory applications not discussed here in this Judgment.

As events unfolded there was a court initiated mediation carried out on 29.11.2018. As a result of that, there was an agreement by parties that

the Plaintiffs would be allowed to attend and cast their votes at the next AGM.

An interim injunction was granted by the Court on 14.3.2019 to prevent the 1st Defendant from holding an EGM scheduled on 17.3.219.

On 24 January 2019, the previous High Court Judge ordered the 2nd, 3rd and 4th Defendants to be included as parties to the Amended OS.

The above is in essence that which concerns the submissions and decision of this court with regard to the application for declaration in the Amended OS. Further details can be referenced from the numerous interlocutory applications and affidavits filed therein.

Plaintiff's Submissions

The main thrust of the Plaintiffs' contention in its application for the declaratory order is with regard to what the Plaintiffs say is the illegal status of the 1st Defendant. In essence it is the contention of the Plaintiff that the 1st Defendant was formed in contravention of Section 17 of the Strata Management Act 2013.

The Plaintiffs alleged that the 1st Defendant can only legally come into existence after vacant possession of the units in the apartment had been handed over. The Plaintiffs view vacant possession to have been achieved only after water and electricity supply had been facilitated to the apartment units. The Plaintiffs referred to Clause 23 of the SPA to support their stand.

According to the Plaintiffs Clause 23 specifies the manner for vacant possession to be delivered. Vacant possession is only delivered upon

the issuance of an Architects' Certificate certifying that construction has been duly completed and water and electricity supply has been connected and the developer has applied for the issuance of the Certificate of Fitness.

It is the contention of the Plaintiffs that vacant possession had not until todate been handed over by the developer because water and electricity supply had not been connected to the units. It is for this reason that they say the establishment of the 1st Defendant is null and void and illegal.

It is the contention of the Plaintiff that it is a mandatory provision in the SPA that water and electricity must first be supplied to the units before vacant possession can be given. The Plaintiffs state that proof of this can be seen from the fact that the 1st Defendant only applied for water connection via its letter to *Syabas* dated 13.6.2018 (Exh LLM-6, Encl. 26).

The Plaintiffs claim that the 1st Defendant can only be properly and validly constituted after all of the above stated prerequisites have been met. The Plaintiffs attempted to show this by referring to section 17 of the Strata Management Act which they claim support their contention that a JMB shall be established only if vacant possession has been delivered. The Plaintiffs urged the court to construe the word 'vacant possession' in section 17 of the Strata Management Act to be equated with the definition of 'vacant possession' in the SPA.

As a result of this non-compliance the Plaintiffs' contended that the establishment of the 1st Defendant on 21.1.2017 by the 2nd Defendant is neither legal nor valid and hence all acts carried out by it prior to this

must be held to be improper, illegal, defective and does not bind any of the Plaintiffs.

The Plaintiffs also brought up the issue of what they contend is the illegal acts committed by the 1st Defendant before and during the EGM/AGMs that were scheduled to be held. The Plaintiffs contended that they were prevented from attending these AGM/EGMs and from exercising their right to vote in those meetings. The Plaintiffs contended that the 1st Defendant passed several resolutions on the agenda approving maintenance and renovation work to be carried out which incurred high costs of which the Plaintiffs as well as the other purchasers never agreed to.

The Plaintiffs accused the 1st Defendant of pressuring them to bear the costs of the renovation works arbitrarily carried out failing which legal action will be taken. The Plaintiffs contended that this has prejudiced them as they had never been informed/consulted nor have they approved of the purported works. In any event they denied there were any renovation works carried out as claimed by the 1st Defendant. They also contended that even if renovation works were required to be carried out, its costs should be borne by the 1st Defendant and not the unit owners.

There are a number of other complaints that the Plaintiffs raised against the 1st Defendant some of which are with regard to the lack of security services around the apartment area and the locking out of unit owners due to default/non-payment of maintenance fees. The Plaintiffs alleged that unknown persons attended the AGMs under the guise of being owners of the units to be the unit owners.

The Plaintiffs were also unhappy with the decision of the JMB to propose a name change of the apartment complex.

1st Defendant's Submission

The 1st Defendant's position in this regard is that its incorporation is legal and valid and in accordance with Section 17 of the Strata Management Act 2013. The 1st Defendant referred to the Certificate of Incorporation issued by the 2nd Defendant which proved that it were legally and validly incorporated. The 1st Defendant also referred to the Certificate of Fitness issued by the 4th Defendant which proved that vacant possession had been delivered for the apartment.

The 1st Defendant averred that the act of the 4th Defendant in issuing the Certificate of Fitness meant that the building has been completed and is fit and safe to be occupied. This was part of their reason for stating that they are a valid legal entity and entitled to act as the JMB apart from their claim that they were properly instituted.

It was also the contention of the 1st Defendant that the Plaintiffs' claim is based solely on substantive principles of public law which is in relation to the 2nd Defendant's jurisdiction, functions, rights and powers when issuing a Certificate to incorporate a JMB. Hence it was argued that the Plaintiffs had instituted the wrong mode of commencement of action against all the Defendants especially where the 2nd and 4th Defendants are concerned.

In furtherance of the above contention the 1st Defendant brought the court's attention to the fact that the Plaintiffs' challenge is with regard to the validity of the JMB. It is their contention that what the Plaintiffs had done is actually in effect a challenge on the decision of the 2nd

Defendant to issue the Certificate to incorporate the 1st Defendant as a JMB. On this score the 1st Defendant contended that the Plaintiffs' should have instituted a challenge by way of judicial review and not by way of OS.

It all boils down to the fact that the dispute is on the issue of the issuance of the Certificate by a public body. What the Plaintiffs are seeking now is to have the 1st Defendant's incorporation pursuant to the Certificate issued by the 2nd Defendant to be declared illegal, invalid, null and void.

It was the touchstone of their submission that if the Plaintiffs wished to rely on the contention that the 2nd Defendant had committed an error when approving the establishment of the 1st Defendant, the Plaintiffs should have done so by challenging that decision by the correct mode of proceedings i.e. by a judicial review.

According to counsel the application for declaratory reliefs against only the 1st Defendant is illegal, invalid and is futile without also challenging the Certificate of Incorporation. The only way they could do so was by way of judicial review not in this present mode.

In this case the 1st Defendant pointed out that the Amended OS filed by the Plaintiffs included the 2nd and 4th Defendant as parties but did not however contain prayers/reliefs against the 2nd and 4th Defendants. According to counsel, without praying for relief/orders against the other Defendants, the court is ultimately handicapped when deciding on the matter at hand.

It is the contention of the 1st Defendant that the Plaintiffs' argument that vacant possession had not been effected as envisaged in Clause 23 of the SPA is misconceived because the clause referring to vacant possession in the SPA is meant only for the purpose of passing the rights and control over the property from the developer to the purchasers of the unit who then form the JMB to collectively manage the properties.

The 1st Defendant urged the court to consider the fact that the developer had been wound up and the project was left abandoned for a very long time. No one had taken any active step to connect water and electricity to the units until only recently after the 1st Defendant came into existence. The 1st Defendant urged the court to take a purposive approach and not to construe the Strata Management Act 2013 in the manner that the Plaintiffs wanted because doing so would lead to an illogical conclusion.

The Defendant lamented that the matter had long been pending for more than 20 years. If the 1st Defendant had not taken the initiative, the apartment units would still be without any water and electricity supply. Counsel for the 1st Defendant contended that the Plaintiffs were wrong when they averred that vacant possession had not been handed over.

Counsel referred to the *Affidavit Balasan* Defendant affirmed by Mohd Ridhuan b Mohd Zin on 19.10.2018 (Encl 26) where it is shown that the vendor had indeed issued notices to the purchasers which included the Plaintiffs to deliver vacant possession and to inform that the Architect's Certificate had been issued.

In the *Affidavit Balasan* it was averred that some of the Plaintiffs in this claim had even gone to the extent of inspecting their respective units

and making complaints regarding workmanship. They did not raise any complains about electricity or water issues. To compound the matter further the Defendant claimed that some of the unit holders had even filed suits against the developer to claim damages for late delivery. Thus it was the contention of the 1st Defendant that the Plaintiffs had not been truthful when they did not reveal this fact in their affidavit in support of the Amended O.S

Submissions of the 2nd and 4th Defendants

The 2nd and 4th Defendants strongly objected to the Plaintiffs' application to add them as parties to the Amended OS. They contended that the Plaintiffs had no cause of action against them and that the Plaintiffs had adopted the wrong method of challenging their action in the issuance of the Certificate of Fitness and the Certificate of Incorporation of the 1st Defendant.

The 4th defendant contended that the Certificate of Fitness for the apartment was issued correctly and properly and had never been challenged or set aside. They further contended that the 2nd Defendant had issued the Certificate of Incorporation on 21.3.2017 in compliance with Section 17 of the Strata Management Act 2013. They had not received any objections from any party when the Certificate of Incorporation was issued.

Furthermore the 2nd and 4th Defendants contended that it was improper of the Plaintiffs to add them as Defendants to the OS yet had elected not to pray for any relief/remedy against them. From their point of view the Defendants had carried out their statutory duties as per the authority provided to them under the relevant statutes.

The 2nd and 4th Defendants referred to the Public Authorities Protection Act 1948 and the Local Government Act 1976 and contended that limitation had set in and any action against them is time barred.

Findings of this Court

Whether the 1st Defendant is illegal/invalid

Section 17 of the Strata Management Act 2013 expressly stipulates a JMB shall be established upon the convening of the first AGM of that JMB not later than twelve months after delivery of vacant possession by the developer. Section 20 of the said Act explicitly states that upon an application submitted by the JMB to the Commissioner of Building, a Certificate will be issued by the District Office for the establishment of the JMB.

In this case the Plaintiffs have premised their application on the ground that vacant possession had not been delivered and therefore the 1st Defendant cannot be formed. The Plaintiffs defined vacant possession to have taken place only when the unit has been installed with water and electricity supply.

I have considered the averments in the various affidavits, the submissions and the material available. Based on them I make the finding that there is uncontroverted evidence of the following facts: Vacant possession has been given by the developer to all the purchasers. In the 1st Defendant's Affidavit In Reply dated 24.10.2018 (Encl 26) evidence has been adduced of members of the Plaintiff accepting vacant possession from the Developer. Exh MR 5 of the 1st Defendant's Affidavit shows that most of the Plaintiffs have signed their acceptance attached to the letter from the developer informing them that vacant possession was ready to be given.

I accept the evidence of the 4th Defendant averred in their Affidavit In Reply dated 2.11.2011(encl 33) that M.K Associates Sdn Bhd had put in the necessary application for connection of water supply on 6.10.2000.

There is also a letter from Jabatan Bekalan Air Selangor (Exh SS1) stating that they had no objection to the issuance of the Certificate of Fitness after a visit to the site made on 20.9.2000.

There is a "*Laporan Pemeriksaan Sijil Layak Menduduki"* dated 20.9.2000 in which checks were carried out on all the apartment units and it was reported that all the installation of pipes and meter positions have met with the approved plans.

There is a letter from *Jabatan Perkhidmatan Pembentungan Kementerian Perumahan dan Kerajaan Tempatan* stating that they had no objections to the issuance of the Certificate of Fitness for Occupation to be issued. The Certificate of Fitness was duly issued on 25.2.2003. It appeared from the records that the 4th Defendant had met all the pre-conditions necessary before a Certificate of Fitness could be issued.

The first AGM could not have been convened if all the above had not taken place. In light of the fact that the 2nd Defendant had issued the certificate of incorporation and there was no challenge to its authenticity it follows that there was no reason for the 2nd Defendant to refuse to incorporate the JMB. It is evident that all the requirements for the setting up of the JMB had been fulfilled and therefore in these circumstances the 2nd Defendant was not wrong to issue the Certificate of incorporation.

It is my considered view that it is not the duty of the 2nd Defendant to go further to ensure that the terms and conditions contained in the SPA had

been fulfilled by the developer. There is significantly no duty providing for this under the Strata Management Act 2013. As such I am of the view that the 2nd Defendant cannot be faulted in exercising their power to issue the Certificate.

In determining the issue at hand the court also took note of the fact that the 2nd Defendant is not a party to the SPA between the purchasers and the developer. The SPA is a private contract between the purchasers and the developer and the 2nd Defendant is not a party to the contract. Therefore it would be unfair to place an added responsibility onto the 2nd Defendant to ensure compliance with the terms of the SPA which is a private contract not involving the 2nd Defendant.

In fact it would be ultra vires the Act if the 2nd Defendant were to do so. It is therefore incorrect to argue that the 2nd Defendant must ensure compliance with the terms of the SPA which has nothing to do with the 2nd Defendant. I fully agree with the contention of counsel for the 2nd Defendant when he argued that to do so would amount to asking the 2nd Defendant to have a supervisory role to ensure that the developer performs its contractual undertaking.

Before going any further it is important to state that the reason for this is because the Strata Management Act 2013 does not give the authority to the 2nd Defendant to supervise or to check whether vacant possession of the building had been delivered. There is irrefutable evidence that the 2nd Defendant had carried out its statutory duty in this case in compliance with the Act.

It is important to emphasize that the scope of its statutory duty in this matter is as per section 4(1) of the Strata Management Act which is for

"…..purpose of administering and carrying out the provisions of this Act." Section 125(1) of the Act provides that the 2nd Defendant's power is " to investigate the commission of any offence under the Act."

Be that as it may it is my finding that there is cogent evidence in this case that the developer had delivered vacant possession to the unit holders.

It is also noted that the exhibits in Exh MR5 found in the Affidavit in Reply of the 1st Defendant showed that none of the purchasers had complained of the lack of electricity and water supply at the time they signed the letter acknowledging vacant possession. It can therefore be inferred that vacant possession was validly and properly handed over to the purchasers.

The Plaintiffs have refused to believe or accept that evidence adduced. Instead they claim that the 1st Defendant is attempting to distort the facts and they accuse the other side of trying to "divert from the core issue of non-compliance with section 17 Strata Management Act 2013." It is my view that the Plaintiffs cannot ignore those letters and merely dismiss them from consideration.

I find that these are contemporaneous documents that support the Defendants' contention. There are merits in the 1st Defendant's submission when they asserted that the Plaintiffs had not been truthful when applying for the order for declaration. They had left out the fact that M.K Land Sdn Bhd had given vacant possession to the purchasers. This is a material fact. It cannot be gainsaid that parties must be truthful in their pleadings, be it favourable or unfavourable to their position. There must be full and frank disclosure. Failing to do so is a serious

matter and the lack of clean hands in seeking relief will render the application susceptible to be dismissed.

I reiterate here at the risk of repetition that I was satisfied of the following matters :
There is documentary proof that the vendor (M.K Associates Sdn Bhd) had issued notices to deliver vacant possession to the purchasers, a fact that the Plaintiffs did not mention in their affidavit in support of the application for declaration.

The Certificate of Fitness had been issued by the local authority and as far as the evidence stood the mechanics of vacant possession pursuant to the SPA providing for vacant possession had been met.

The Certificate of Incorporation is valid and had never been directly challenged and therefore its contents must be accepted.

As I have said earlier I have noted that the Plaintiffs do not accept the contents of the letters by the developer giving vacant possession to the individual unit holder. They claim the vacant possession referred to in those letter to be invalid because the manner of delivery of vacant possession had not been adhered to. They contended that the letters cannot defeat the mandatory provision of section 17 of the Strata Management Act 2013 and clause 23 in the SPA.

I do not agree with that contention because as far as this court is concerned the developer had given vacant possession and there were no objections raised at that point of time. In any event the 1st Defendant is not bound by the SPA. The provision for the manner of vacant possession only bind the two parties, the vendor and the purchasers.

I find merits in the 1st Defendant's submissions that the clauses for vacant possession in the SPA had to be inferred as serving the purpose of measuring the length of time for the parties to claim for late delivery charges only, for purposes of calculation for damages. I do not think it should be used to interpret the definition of vacant possession in the Strata Management Act 2013.

The said Act does not define what vacant possession entailed and therefore the 2nd Defendant was under no statutory duty to enquire specifically the manner of vacant possession.

From a perusal of the entire Strata Management Act 2013 and in particular section 17 it strengths my view that it cannot be interpreted to bring on the meaning of vacant possession as defined in the individual SPA signed between vendor and purchaser but rather it is a means to pass the rights and control of the property from the developer to a body of purchasers who form the JMB. The duty of the JMB is to collectively manage the property.

Hence it is my finding that the 1st Defendant in this case was validly and properly incorporated.

Whether the Plaintiffs have a Cause of Action against all the Defendants

The 2nd and 4th Defendants are statutory bodies. Therefore it goes without saying that any challenge on whether the 2nd and 4th Defendants were wrong in the exercise of their statutory and administrative powers to issue the Certificate of Fitness and the Certificate of Incorporation must involve the adopting of the correct mode of challenge in court.

Counsel for the Plaintiffs in their written submissions quite perplexingly argued that they were not challenging the Certificate of Incorporation of the 1st Defendant but they were against the formation of the 1st Defendant. In their Additional Written Submission in Reply (Enc 145) they stated :

> *"Plaintif-plaintif tidak mencabar sijil perakuan Defendan Pertama tetapi mencabar pembentukkan Defendan Pertama"*

This would essentially mean that the Plaintiffs did not dispute that the 2nd Defendant had correctly exercised their duty and powers to issue the Certificate. This is a paradox so to speak especially when it cannot be denied that the Plaintiffs' cause of action is premised on an alleged breach of section 17 of the Strata Management Act 2013 and the act complained of is solely linked to the actions of the 2nd Defendant when issuing a Certificate of Incorporation of the 1st Defendant. It is in those circumstances that the Plaintiffs argue that the 1st Defendant is not legally constituted.

In this case the Plaintiffs cannot escape the fact that their claim is based on the jurisdiction, functions, rights and powers of the 2nd Defendant in relation to the issuance of the Certificate to incorporate the JMB. The 2nd and 4th Defendants are statutory bodies therefore any claim will be based solely on substantive principles of public law. Thus any challenge made will have to be by way of application of judicial review.

In the case of **Ganda Oil Industries Sdn Bhd & Ors v Kuala Lumpur Commodity Exchange & Anor [1988] 1 CLJ 48** the Supreme Court held quoting the English Court of Appeal decision in **Regina v Panel on**

Take-overs and Mergers, ex parte Datafin pic & Anor [1987] 1 All ER 563 as follows :

> *"If the source of power is a statue, or subordinate legislation under a statue, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review."*

Therefore a distinction can be drawn whereby if the Plaintiff was seeking a claim against the developer pursuant to the SPA on the meaning of vacant possession then of course a declaration is an appropriate mode as opposed to a judicial review. However in this case, even though the Plaintiffs vehemently deny it their claim is without doubt a claim to have the incorporation of the JMB pursuant to the Certificate issued by the 2nd Defendant declared illegal and void.

It all boils down to the Plaintiffs' grievance relating to the decisions of the 2nd and the 4th Defendants made in carrying out their statutory duties. But the Plaintiffs chose not to claim for any relief/remedy against the 2nd and 4th Defendant.

More importantly while the Plaintiffs have brought the 2nd and 4th Defendants in as parties to this Amended OS, they have not sought any order to quash and invalidate the decisions made by the 2nd and 4th Defendants in carrying out their statutory responsibilities. It is my view that the failure to do so made this application for declaration into a meaningless time wasting endeavour.

On this matter it is appropriate to refer to the words of Gopal Sri Ram JCA (as he then was) in the case of **Attorney General of Hong Kong v Zauyah Wan Chik & Ors And Another Appeal [1995] 2 MLJ 620** where he said :

"And no court will act in vain by granting meaningless declarations"

Since the Plaintiffs are aggrieved with the decision of the statutory body and they claim that the formation of the JMB is illegal, null and void, the Plaintiffs must file their claim in the correct mode and that is by judicial review.

I refer to the case of **Badan Pengurusan Bersama Mahkota Parade v Pesuruhjaya Majlis Perbandaran Melaka Bandar Bersejarah [2016] 1 LNS 1080** where the court opined :

> *"a person aggrieved by the decision of a public body concerning an infringed right protected under public law, then any legal challenge to that decision shall be by way of judicial review and as a general rule applications for relief against such decisions must be made in accordance to the procedures prescribed in O.53 of the Rules of Court 2012. Any failure to adhere to this strict procedural requirement would render the application being struck out for abuse of process."*

It therefore behoves upon the Plaintiffs to adhere to that proposition of law that any application to challenge the decision of a public authority can only be commenced by way of judicial review.

The case of **Badan Pengurusan Bersama Mahkota Parade v Pesuruhjaya Bangunan Majlis Bandaraya Melaka Bersejarah (supra)** is also a case on point. In that case the Plaintiff filed an O.S

seeking *interalia* a declaration that the proceeding, incorporation and appointment of the committee members of the JMB is valid, an injunction prohibiting the Defendant from calling for another AGM until the disposal of the court case in Melaka.

In dismissing the application the court is of the view that the individual decisions made by the 2nd and 4th Defendants were taken in the course of carrying out its statutory duties. Therefore the court is bound to take cognizance that the law is well settled that when a person is aggrieved by the decision of a public body concerning an infringed right protected under public law, then any legal challenge to that decision shall be by way of judicial review and as a general rule applications for relief against such decisions must be made in accordance to the procedure prescribed in O.53 of the ROC 2012. It is therefore well settled that any failure to adhere to this strict procedural requirement would render the application being struck out for abuse of process.

The Plaintiffs cannot choose to accept the Certificate of Incorporation but object to the formation of the JMB. The Plaintiffs cannot have their proverbial cake and eat it too.

However as aptly put by counsel for the 2nd and 4th Defendants “here lies the problem with the case of the Plaintiffs – they seek to challenge the Certificate to incorporate the 1st Defendant but the prayer sought in the Originating Summons did not include an Order to annul, quash, or invalidate the Certificate.”

It is to be observed that the Plaintiffs would never have surmounted the fact that any claim for a remedy to the courts will be defeated by limitation. In this case limitation had long set it. The 2nd and 4th

Defendants are protected by the provisions of the Local Government Act 1976/ Public Authorities Act 1948.

The following critical question then arises? What could the Plaintiffs do? To overcome that problem they now ingeniously contended that they are not seeking any order to impugn the decision of the 2nd Defendant, but they do not accept the formation of the JMB.

This has some bearing with the case referred to by counsel for the 2nd Defendant i.e. **Bencon Development Sdn Bhd v Majlis Perbandaran Pulau Pinang & Ors [1999) 8 CLJ 37** wherein the Plaintiffs, applied for planning permission for a project and the 2nd Defendant, the Jabatan Kerja Raya Pulau Pinang) recommended to the 1st Defendant, the local authority that a condition, i.e. to widen the existing bridge on Jalan Relau (the condition) be included in the planning permission.

The Plaintiffs appealed to the 2nd Defendant who rejected their appeal. The Plaintiffs appealed to the Appeal Board under the Town and Country Planning Act 1976 against the imposition of the condition. This appeal was dismissed. The Plaintiffs turn to the Civil Court and filed an O.S, praying for, inter alia, orders of declaration that :

(i) the Plaintiffs has satisfied all the requirements under the Town and Country Planning act 1976; and

(ii) that the decision of the Municipal Council Penang requiring the plaintiffs to widen an existing bridge is outside the powers of the Defendants and that the requirement and or condition is ultra vires the said Act.

The Court dismissed the O.s for declaration sought and held :

(a) prayers are worded in such a way as not to mention remedies of judicial review. But clearly, prayer (b) is an attempt in a roundabout way, to challenge the decision of the Appeal Board;

(b) the appeal to the Appeal Board was dismissed because the Plaintiffs appealed out of time, about 4 ½ years after the imposition of the condition when it should have been filed within one month thereof;

(c) the Plaintiffs must have realized that it could not succeed if it were to apply for judicial review to quash that decision by applying for the issue of a writ of certiorari. So, the Plaintiffs applied for a declaration which, if granted, would have the same effect; and

(d) furthermore, to apply for the issue of the writ of certiorari, leave would have to be obtained within six weeks from the date of the decision. The Plaintiffs was again out of time. To avoid these two hurdles, the Plaintiffs applied for an order of declaration.

From the facts and circumstances of the case presently before me, I am most inclined to agree with the contention of counsel for the 2nd Defendant of the underlying reason why the Plaintiffs did not seek any Order to quash the decision of the 2nd Defendant in issuing the Certificate to incorporate the 1st Defendant.

By process of elimination the inevitable conclusion that can be drawn would be that it can be for no other reason but the fact that the Plaintiffs very well knew that any challenge to the decision of the 2nd Defendant, a public body – must and can only be made via judicial review. So they attempt in a roundabout way to challenge that decision.

I agree with counsel's contention that adding the 2nd Defendant who issued the Certificate of Incorporation of the 1st Defendant without a prayer or order affecting the 2nd Defendant is meaningless. Since there is no prayer to include and bind the 2nd Defendant, the 2nd Defendant's act in issuing the Certificate is valid and unchallenged.

The same applies to the Plaintiffs' decision in not seeking an order to invalidate the issuance of the Certificate of Fitness by the 4th Defendant. It is meaningless to add the 4th Defendant as a party without seeking an Order against the 4thDefendant. It followed that the Certificate of Fitness is valid and is correct.

The Grievances of the Plaintiffs

This brings me to the next issue to be addressed which are the complaints raised by the Plaintiffs against the 1st Defendant which touched on oppression, their right to vote and unhappiness with the maintenance charges among others. With respect these are to my mind not leading factors that should be taken into account when considering the question as to whether the 1st Defendant is valid and legal.

As submitted by counsel for the 1st Defendant to which I accept, there are available remedies under the Strata Management Act 2013 which the Plaintiff can utilize to voice those complaints.

The Plaintiffs have recourse to refer their grievance on specific matters such as those raised by them to the Strata Management Tribunal which has the jurisdiction to address all these issues. There is also the democratic process of exercising their rights of voting at the AGM/EGM. Of course there must be acceptance that the choice of the majority supersedes the wants of the minority.

Finally counsel for the 1st Defendant exhorted the court to take a purposive approach in deciding the matter as they lament the Plaintiffs unreasonableness in their dogged refusal to acknowledge that vacant possession had been effectively complied with and the JMB was properly constituted.

The intention of establishing the JMB was none other than to revive the state of the apartments and to make it worthy for living. The JMB have taken measures to restore connection of water and electricity to all the units and contractors have been appointed to make repairs to improve the value of the property.

Closing down the JMB would clearly not be beneficial to all the purchasers of whom the Plaintiffs are but a minority. The matter is compounded by the fact that the initial developer has been wound up. The matter has been left in abeyance for 25 years. It is of course tempting to accede to the request of the Defendants but I decline it. There was no need to resort to that as I was firmly of the view that the Plaintiffs had failed to prove that the 1st Defendant was illegally constituted.

In the end analysis I wish to rely on the case of **Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham (executor of the estate of Loo Cheng Ghee) [1998] 4 CLJ 812; [1998] 4 MLJ 651**, where it was held that the remedy of declaration is discretionary in nature. The court can refuse granting a declaration where a plaintiff was guilty of laches, other inequitable conduct, 'cloaked declaration' for a collateral purpose or with an improper motive. The list is not exhaustive.

In this case the Plaintiffs have exhibited inequitable conduct in their omission to disclose documents and facts discussed earlier in this judgment. I exercise my discretion on the facts of this case to refuse to grant the declaratory reliefs prayed for in the Amended O.S.

Accordingly for all the reasons already discussed above, the Plaintiffs' application is dismissed with costs.

Dated 12 May 2020.

(**DATO' JULIE LACK**)
Judicial Commissioner
High Court of Malaya
Shah Alam, Selangor Darul Ehsan

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