



CASE REVIEW - INNAB SALIL & ORS V VERVE SUITES
MONT KIARA MANAGEMENT CORP

PARTIES:

The plaintiff is a Management Corporation (MC) that maintains and manages a residential development known as "Verve Suites" located at No 8, Jalan Kiara 5, Mont Kiara, 50480 Kuala Lumpur.

The D1 is a tenant in a unit of the Verve Suites and owns and has full control of D2 which is a company incorporated in Malaysia. D2 operates short term rental business in Verve Suites and the business is managed by D2. D2 had rented several units from parcel owners (D3-D7) at the Verve Suites and leased out the said units for short term rental and long term rental.

FACTS :

The Plaintiff on 20 April 2017 and 21 August 2017 has notified all parcel owners of the Verve Suites about the implementation of by-law rule which provides:

3.0 OCCUPANCY

3.1 Approved use of the Units

The unit shall be used only for the purpose of service suites and shall not be used for business or any other purpose (Illegal or otherwise) which may be detrimental to the credibility of Verve Suites Mont Kiara.

The use of any unit for short-term rentals is prohibited. For the purpose of these rules, a short-term rentals agreement shall be deemed unless proven otherwise if they fall within the following:

- (i) Any stay for which a booking was made through services/applications/websites etc such Airbnb, booking.com, agoda.com, klsuites.com and other similar services;*
- (ii) Any stay for which a signed and stamped tenancy agreement has not been filed with VSMO and tenants registered and issued with access cards;*
- (iii) Any unit rented out with a tenancy agreement that permits the tenant from subleasing the property.*

Any breach of the above shall attract a penalty RM 200 for each day the infringement continues. The Management reserves the rights to deactivate the access cards and barred the unit from facilities booking.

Any infringement found shall be deemed to be at minimum an overnight stay thus deemed as 2 days unless proven otherwise.

A unit owner shall be liable for the penalties incurred by his tenant if his tenant carries such activities as prohibited under these rules and shall be deemed notified of such charges if an email or sms has been sent to the address/number maintained in VSMO register. All fines collected under this section shall be used for the effort to combat the prohibited practice of short-term rentals.

(hereinafter referred to as “the Rule No. 3”). The rule is implemented via the motion that was passed by the majority of the parcel owners at the Extraordinary General Meeting.

The plaintiff then issued a fine of RM200 per day against parcel owners who failed to abide to the said rule vide the invoices dated 6 July 2017 and 4 August 2017. The Defendants, dissatisfied with the ruling, brought the matter before the Strata Management Tribunal (hereinafter referred to as “*the Tribunal*”) on the ground that the ruling is in violation of section 70(5) of the Strata Management Act 2013 (hereinafter referred to as “**SMA 2013**”). Section 70(5) of the SMA 2013 provides that:

(5) No additional by-law shall be capable of operating —

(a) To prohibit or restrict the transfer, lease or charge of or any other dealing with any parcel of a sub divided building or land; and

(b) To destroy or modify any easement expressly or impliedly created by or under the Strata Titles Act 1985. (Emphasis added.)

The claims made by the Defendant against the Plaintiff were dismissed by the Tribunal.

The Plaintiff then commenced a writ action against the Defendant in the High Court pursuant to Section 70(7) and the High Court granted the interim injunction for the Plaintiff. Section 70(7) of the SMA 2013 provides that:

(7) The management corporation or any Proprietor shall be entitled to apply to the Tribunal or a court of competent jurisdiction ---

(a) for an order to enforce or the performance of, or restrain the breach of, any by-laws by;

(b) to recover damages for any loss or injury to any persons or properties arising out of any by-laws from:

Any persons bound to comply with the by-laws.

On 20 February 2018, the Defendants registered a license with DBKL for the provision of short term rental and DBKL confirmed in their letter dated 16 March 2018 that there cannot be any prohibition for short term rental to be carried out in a property which is held under a commercial category.

The parties then proceed with the trial to determine the question of law whether the Plaintiff's enforcement of the Rule No. 3 had violated Section 70(5) of the SMA 2013. The learned judge of High Court ruled in favour of the Plaintiff but struck down the rule on the daily fine of RM200.00 for each day infringement continues as it violates section 70(2) of the SMA 2013 which only imposes a fine of RM200.00 for any breach of by-laws by the proprietor, occupant or invitee.

The Plaintiff and the Defendant then appealed against the decision made by the learned judge.

DISPUTE MATTERS:

(1) Whether MC has the right to enact the Rule No.3?

The court held that there is no issue for the MC to enact the by-laws since the duties and powers of the MC can be found in Section 59 (2)(g) subject to section 70(2) and Section 59(2) (j) of the SMA Act 2013.

The court further held that the MC has a wide power to enact by-laws but subject to the limitation as stated in section 70(5) of the SMA 2013. Once the by-laws are enacted, it will bind the MC and the Proprietors, charge, lessee, tenant and the occupier as provided in Section 70(3) of SMA 2013.

(2) Whether the Plaintiff enforcement of the Rule No. 3 had violated section 70(5) of the SMA 2013 and the word "dealings" in section 70(5) applies to short term rental?

The Defendant claimed that the prohibition of short term rental under Rule No. 3 has violated the provision under section 70(5) of the SMA 2013 as short term rental falls within the ambit of "any other dealing with any parcel of a subdivided building of land" of the said section.

As there is no definition of "dealings" in the SMA 2013, the Defendant further contended that short term rental falls within the meaning of a "tenancy exempt from registration" under division IV "Dealings" of the National Land Code.

The court held that the word "dealing" in section 70(5) of the SMA Act 2013, referring to the definition under section 5 of the NLC to mean any transaction with

respect to the alienated land such as transfer, lease and tenancies, creation of charges and easement which is subject to registration.

Therefore Section 70 (5) of the SMA Act 2013 would only refer to any dealings which are registered and not referring to short term rental. Hence, no violation of Section 70(5) of the SMA Act 2013.

The judge also discussed the word “lease” in Section 70(5) of the SMA Act 2013. In order to be considered as a “lease”, the lease granted must be for a term exceeding three years. Therefore the short term rental cannot be construed as “lease” under Section 70(5) of the SMA Act 2013 and the prohibition in section 70(5) has no application to Rule No. 3.

The court further held that it is absurd when the short term rental is regarded as the “tenancy exempted from registration” as in order to recognised such tenancy, it must be endorsed on the register document of title pursuant to Chapter 7 Part 18 of the NLC. Thus it is impractical for the Defendant to repeat the act of endorsement on the register document of title every time when there is a short stay guests at the parcel units.

The court also of the view that the word “lease” in Section 70(5) of the SMA 2013 is different from license arrangement since under license arrangement the licensor has an immediate right to evict the licensee and no legal or equitable interest over the property vest in the licensee.

(3) Whether the short term rental can establish a landlord and tenant relationship?

The Defendants claim that short term rental should be considered as a form of tenancy pursuant to Section 224(a) of the NLC as there is no requirement for the minimum period for tenancy stated in the provision.

Short-term rentals were merely arrangements in which the accommodation were of such temporary in nature that there was no relationship of landlord and tenant. Such arrangements could not be termed as ‘dealings’ or ‘leases’ or ‘tenancies exempt from registration’ whether under Section 70(5)(a) of the SMA 2013 or under the National Land Code (‘the NLC’). The Court also made reference to the terms and conditions used for the services offered by various internet platforms. The terms used indicate that the short term rental grant only limited licence of stay and never acquire an interest in the rented premises.

Any other interpretation would create an absurd situation and not be in accord with Parliament’s intention in enacting the SMA 2013. It would go against the concept of strata living where owners have joint ownership and peaceful enjoyment to the common property and facilities without outside interference from third parties or strangers.

(4) Whether the Rule No. 3 violates Article 13 of the Federal Constitution?

Article 13 of the Federal Constitution reads as follow:

Rights to property 13.

(1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation

The Court held that Rule No. 3 does not deprive the defendants' proprietary right and interest over the unit parcel since they continued to enjoy the ownership without interruption.

(5) Whether the by-laws enacted are not applicable to the commercial units.

It is contended by the Defendant that according to the land title of the Verve Suite, it is categorised as a commercial building. Thus the short term rental is not illegal and does not contravene with any existing law since the Defendants had obtained the licence from DBKL to operate a short term rental business.

This contention by the defendants is misconceived as the by-laws which are statutorily enacted in s 70(2) in SMA 2013 read together with regulation 5 and 28 of the Strata Management (Maintenance and Management) Regulation 2015 are applicable to both residential and commercial units under the SMA 2013.

(6) Whether MC can imposed fine of RM200.00 for each day infringement continues.

The court held that MC cannot do so unless there is clear and express provision. Since section 70(2) is silent on that, the court held that MC is not authorised to impose a fine of RM200 for each continuing infringement.

CONCLUSION:

The short term rental does not come within the connotation of the word "dealing" in Section 70(2) of the SMA 2013, since the said "dealing" is referring to any transaction which is subject to registration. The act of the MC enacting the Rule No. 3 is not in violation of laws since the MC has the power to enact by-laws pursuant to Section 59 (2)(g) subject to section 70(2) and Section 59(2) (j) of the SMA Act 2013.

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