Badan Pengurusan Bersama Paradesa Rustika v Sri Damansara Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-99–12 OF 2012(W)
ZULKEFLI CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF, SURIYADI AND AHMAD MAAROP FCJJ
29 OCTOBER 2013

Building and Construction Law — Maintenance — Building Maintenance fund — Developer collected monthly maintenance and sinking fund charges from condominium unit purchasers before establishment of joint management body — Discovery of shortfall of sum collected — Reference of matter to commissioner of Buildings — Allegation that sum claimed was used to reimburse developer towards maintenance and rehabilitation of condominium — Whether sum owned from part building maintenance account — Building and Common Property (Maintenance and Management Act 2007 ss 22(1) & 24

Civil Procedure — Appeal — Appeal to Federal Court — Appeal against decision of Court of Appeal in reversing decision of High Court — Discovery of shortfall of sum collected — Reference of matter to Commissioner of Buildings ('commissioner') — Allegation that sum claimed was used to reimburse developer towards maintenance and rehabilitation of condominium — Whether commissioner had jurisdiction to decide on sum claimed — Building and Common Property (Maintenance and Management) Act 2007 s 16(5)

The appellant was the joint management body ('JMB') of Paradesa Rustika Condominium ('the condominium') while the respondent was the developer of the condominium. Prior to the appellant's formation, the respondent was responsible for collecting monthly maintenance and sinking fund charges from the purchasers of the condominium units. After the appellant's establishment, the respondent transferred a sum of RM151,206.99 to the appellant, being the sinking funds collected by it but the appellant discovered that there was a shortfall of RM505,722.36 ('the said sum'). The appellant proceeded to make a claim for the said sum from the respondent but the latter disputed the claim and the matter was subsequently referred to the Commissioner of Buildings ('the commissioner'). The commissioner demanded an explanation for the respondent's failure to transfer the said sum and the respondent replied that the said sum claimed was used to reimburse itself as the developer towards the maintenance and rehabilitation of the condominium. The commissioner rejected the respondent's explanation but had no power to take any action

A against the respondent when the latter failed to transfer the said sum. The appellant then commenced an action pursuant to s 41 of the Specific Relief Act 1950 ('SRA') and s 22(1) of the Building and Common Property (Maintenance and Management) Act 2007 ('the Act') in the High Court seeking a declaration that the respondent owed the appellant the said sum as B decided by the commissioner. The claim was allowed by the High Court. However, the decision was reversed by the Court of Appeal as it was held that the commissioner lacked jurisdiction under s 16(5) or any other provision of the Act to decide on the said sum claimed. The Court of Appeal further held that the respondent's consent or acquiescence in the proceedings before the C commissioner could not confer on him a power which had not been conferred on him by the Act. Hence, the present appeal against the decision of the Court of Appeal in reversing the High Court decision. The primary issues to be determined in this appeal were whether the said sum formed part of the respondent's building maintenance account ('BMA'); and whether the D commissioner had the jurisdiction under s 16(5) of the Act or any other provision of the Act to decide on the said sum claimed.

Held, dismissing the appeal with costs:

E (1) The main relief sought for by the appellant was a declaration under s 41 of the SRA that the respondent owed it the said sum as decided by the commissioner. The declaration could only be made if the commissioner had jurisdiction to make that decision. The Court of Appeal in its judgment was right in stating that it was not clear under which provision F of the Act which the commissioner made the decision. However, in view of the reference in the commissioner's letter to s 22(1) of the Act, the commissioner must have made his decision under s 16(5) of the Act which provided that where any dispute arose in respect of a BMA, the commissioner could resolve the dispute as he deemed fit and just (see para G 14).

(2) The provisions of the Act did not have retrospective effect. The requirement in relation to the opening and maintenance of the BMA did not apply to the respondent as the condominium had long been H completed and possession of the individual units had been handed over to the purchasers more than seven years earlier. The question of giving the provision of the Act a purposive interpretation did not arise as the provision of the law was very clear. It is a trite proposition that an Act of Parliament only comes into operation from the date the Act provides for I the same. There was therefore no basis or no room for an argument that the Act had retrospective application as there was no indication to the contrary within its four corners (see para 16).

(3) The account kept by the respondent for the condominium was not the BMA, which a developer was required to open and maintain under s 16

of the Act before delivery of vacant possession. Under s 21 of the Act, a developer of a development area which had been completed before or on the commencement of the Act who had collected and expended monies for the purpose of the maintenance and management of the common property and sinking fund prior to the commencement of the Act, must submit to the commissioner not later than six months after the commencement of the Act an account audited by a professional auditor. The failure to do so was an offence (see para 17).

(4) There was no provision under the Act which deems such account to be the BMA for the development area and there was no provision requiring any money still available in such account to be transferred to a BMA. As such, the requirement under sub-s 22(1) of the Act that not later than one month from the date of establishment of the JMB, any money remaining in the BMA after payment of any expenditure properly charged to that account, must be transferred to the JMB, could not apply to the respondent (see para 17).

(5) The said sum was in fact part of the sinking funds kept by the respondent under the deed of mutual covenant entered into by the respondent and the purchasers before the commencement of the Act. The commissioner, however, seemed to have wrongly applied the respondent's case under s 24 of the Act which imposed upon the JMB the duty to open and maintain a sinking fund from a portion of the monies in the building maintenance fund after its creation. Section 24 of the Act has no relevance to the usage by the respondent of the said sum. The dispute between the parties was clearly not a dispute in respect of a BMA. In the circumstances, the commissioner lacked jurisdiction under sub-s 16(5) of the Act, or under any other provision of the Act, to give any decision with regard to the sum the appellant claimed must be paid over to them (see para 18).

(6) No amount of consent or acquiescence by the respondent could confer on the commissioner a power which the Act had not conferred upon him. The powers and duties of the commissioner were circumscribed by the provisions of the Act and he did not have power which has not been granted to him under the Act (see para 19).

[Bahasa Malaysia summary

Perayu adalah badan pengurusan bersama ('BPB') Paradesa Rustika Condominium ('kondominium tersebut') manakala responden adalah pemaju kondominium tersebut. Sebelum penubuhan perayu, responden bertanggungjawab mengutip caj-caj penyenggaraan dan kumpulan wang pelepas bulanan daripada pembeli-pembeli kepada unit-unit kondominium tersebut. Selepas penubuhan perayu, responden telah memindahkan sejumlah RM151,206.99 kepada perayu, yang merupakan kumpulan wang pelepas yang

A dikutip olehnya tetapi perayu mendapati bahawa terdapat kekurangan sebanyak RM505,722.36 ('jumlah tersebut'). Perayu meneruskan dengan membuat tuntutan untuk jumlah tersebut daripada responden tetapi responden mempertikaikan tuntutan itu dan perkara itu kemudian telah dirujuk kepada Pesuruhjaya Bangunan ('pesuruhjaya'). Pesuruhjaya menuntut B penjelasan untuk kegagalan responden memindahkan jumlah tersebut dan responden menjawab bahawa jumlah tersebut yang dituntut telah digunakan untuk membayarnya balik sebagai pemaju untuk penyenggaraan dan pemulihan kondominium tersebut. Pesuruhjaya menolak penjelasan responden tetapi tiada kuasa untuk mengambil apa-apa tindakan terhadap C responden apabila responden gagal untuk memindahkan jumlah tersebut. Perayu kemudian telah memulakan tindakan menurut s 41 Akta Relief Spesifik 1950 ('ARS') dan s 22(1) Akta Bangunan dan Harta Bersama (Penyenggaraan dan Pengurusan) 2007 ('Akta tersebut') di Mahkamah Tinggi memohon D deklarasi bahawa responden berhutang dengan perayu untuk jumlah tersebut sebagaimana diputuskan oleh pesuruhjaya. Tuntutan itu telah dibenarkan oleh Mahkamah Tinggi. Walau bagaimanapun, keputusan itu telah diakas oleh Mahkamah Rayuan kerana memutuskan bahawa Pesuruhjaya tidak mempunyai bidang kuasa di bawah s 16(5) atau mana-mana peruntukan lain E kepada Akta tersebut untuk memutuskan tentang jumlah tersebut yang dituntut. Mahkamah Rayuan selanjutnya memutuskan bahawa kebenaran atau persetujuan responden dalam prosiding di hadapan pesuruhjaya tidak boleh memberinya kuasa yang tidak diberikan ke atasnya oleh Akta tersebut. Justeru, rayuan ini terhadap keputusan Mahkamah Rayuan yang mengakas F keputusan Mahkamah Tinggi. Isu-isu utama yang perlu ditentukan dalam rayuan ini adalah sama ada jumlah tersebut membentuk sebahagian daripada akaun penyenggaraan bangunan responden ('APB'); dan sama ada pesuruhjaya mempunyai bidang kuasa di bawah s 16(5) Akta tersebut atau mana-mana peruntukan lain kepada Akta tersebut untuk memutuskan tentang jumlah G tersebut yang dituntut.

Diputuskan, menolak rayuan dengan kos:

(1) Relief utama yang dipohon oleh perayu adalah deklarasi di bawah s 41 H ARS bahawa responden berhutang dengannya jumlah tersebut sebagaimana yang diputuskan oleh pesuruhjaya tersebut. Deklarasi itu hanya boleh dibuat jika pesuruhjaya mempunyai bidang kuasa untuk membuat keputusan itu. Mahkamah Rayuan dalam penghakimannya adalah betul dengan menyatakan bahawa adalah tidak jelas di bawah I peruntukan mana dalam Akta tersebut yang mana pesuruhjaya tersebut telah membuat keputusan. Walau bagaimanapun, berdasarkan rujukan dalam surat pesuruhjaya berhubung s 22(1) Akta tersebut, pesuruhjaya mungkin telah membuat keputusannya di bawah s 16(5) Akta yang memperuntukkan bahawa di mana terdapat apa-apa pertikaian yang

timbul berkaitan APB, pesuruhjaya boleh menyelesaikan pertikaian itu sebagaimana yang difikirkannya sesuai dan adil (lihat perenggan 14).

(2) Peruntukan Akta tersebut tidak mempunyai kesan retrospektif. Keperluan berkaitan pembukaan dan penyenggaraan APB tidak terpakai kepada responden kerana kondominium tersebut telah lama siap dan milikan unit-unit individu telah pun diserahkan kepada pembeli-pembeli lebih tujuh tahun lalu. Persoalan memberikan peruntukan Akta tersebut tafsiran secara maksud tidak timbul kerana peruntukan undang-undang adalah jelas. Adalah kenyataan yang tetap bahawa Akta Parlimen hanya beroperasi dari tarikh Akta memperuntukkan yang sama. Oleh itu tiada asas atau ruang untuk berhujah bahawa Akta tersebut mempunyai pemakaian retrospektif kerana tiada tanda menunjukkan ia adalah bertentangan (lihat perenggan 16).

(3) Akaun yang dijaga oleh responden untuk kondominium tersebut bukan APB, yang mana seorang pemaju perlu membuka dan menyelenggara di bawah s 16 Akta tersebut sebelum menyerahkan milikan kosong. Di bawah s 21 Akta tersebut, seorang pemaju untuk kawasan pembangunan yang telahpun siap sebelum atau pada penguatkuasaan Akta tersebut yang telah mengutip dan membelanjakan wang bagi tujuan penyenggaraan dan pengurusan harta bersama dan kumpulan wang pelepas sebelum Akta tersebut berkuat kuasa, hendaklah menyerahkan kepada pesuruhjaya tersebut tidak lewat daripada enam bulan selepas enam bulan Akta tersebut berkuat kuasa akaun yang telah diaudit oleh juruaudit profesional. Kegagalan untuk berbuat demikian adalah satu kesalahan (lihat perenggan 17).

(4) Tiada peruntukan di bawah Akta tersebut yang menganggap akaun sebegini adalah APB untuk kawasan pembangunan dan tiada peruntukan yang memerlukan apa-apa wang yang masih ada dalam akaun sebegitu untuk dipindahkan kepada suatu APB. Oleh itu, keperluan di bawah sub-s 22(1) Akta tersebut bahawa tidak lewat daripada sebulan dari tarikh penubuhan BPB, apa-apa wang yang tinggal dalam APB selepas bayaran apa-apa perbelanjaan yang dikenakan caj sewajarnya terhadap akaun tersebut, hendaklah dipindahkan kepada BPB, tidak boleh terpakai kepada responden (lihat perenggan 17).

(5) Jumlah tersebut sebenarnya sebahagian daripada kumpulan wang pelepas yang disimpan oleh responden di bawah surat ikatan perjanjian bersama yang dimasuki oleh responden dan pembeli-pembeli sebelum Akta tersebut berkuat kuasa. Pesuruhjaya tersebut, bagaimanapun, dilihat telah salah mengguna pakai kes responden di bawah s 24 Akta tersebut yang mengenakan ke atas BPB kewajipan untuk membuka dan menyelenggara kumpulan wang pelepasdaripada sebahagian daripada wang dalam dana penyelenggaraan bangunan selepas penubuhannya.

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Seksyen 24 Akta tersebut tiada kaitan dengan penggunaan jumlah tersebut oleh responden. Pertikaian antara pihak-pihak jelas bukan pertikaian berkaitan APB. Dalam keadaan berikut, pesuruhjaya tersebut tidak mempunyai bidang kuasa di bawah sub-s 16(5) Akta tersebut, atau di bawah mana-mana peruntukan lain Akta, untuk memberikan apa-apa keputusan berkaitan jumlah yang dituntut oleh perayu yang perlu dibayar kepada mereka (lihat perenggan 18).

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(6) Kebenaran atau persetujuan oleh responden tidak boleh memberikan pesuruhjaya kuasa yang tidak diberikan kepadanya oleh Akta tersebut. Kuasa dan kewajipan pesuruhjaya dibatasi oleh Akta tersebut dan beliau tidak mempunyai kuasa yang tidak diberikan kepadanya di bawah Akta tersebut (lihat perenggan 19).]

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Notes

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For cases on appeal to Federal Court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 870–893.

Legislation referred to

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Building and Common Property (Maintenance and Management) Act 2007 ss 4(1), 16, 16(1), (3), (5), 21, 21(1), 22, 22(1), 24
Interpretation Acts 1948 and 1967 s 19
Specific Relief Act 1950 41
Strata Titles Act 1985

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Appeal from: Civil Appeal No W-02 (NCVC)–1655 of 2011 (Court of Appeal, Putrajaya)

Malik Imtiaz (Eric Tan, Chan Wei June and Parendeep Singh with him) (Lim Soh & Goonting) for the appellant.
Porress Royan (BY Goh with him) (BK Goh & Goh) for the respondent.

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Zulkefli CJ (Malaya) (delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of the Court of Appeal in reversing the High Court decision given in favour of the appellant.

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BACKGROUND FACTS

[2] The relevant background facts of the case may be summarised as follows:

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(a) the appellant is the joint management body ('JMB') of Paradesa Rustika Condominium ('the condominium') established on 2 February 2008 pursuant to the provision of the Building and Common Property (Maintenance and Management) Act 2007 ('the Act'). The respondent was the developer of the condominium;

(b) prior to the formation of the appellant, the respondent was responsible for the collection of monthly maintenance and sinking fund charges from the purchasers of the units of the condominium. Vacant possession of the units in the condominium were delivered to the purchasers on or about 28 January 2000;

(c) shortly after the appellant was established the respondent transferred to the appellant a sum of RM151,206.99, being the sinking funds collected by it;

(d) the appellant discovered that there was a shortfall of RM505,722.36 ('the said sum') in the monies collected by the respondent towards the sinking funds. The appellant made a claim for the said sum from the respondent on or about 20 October 2008 at a meeting with its representative;

(e) the respondent disputed the claim made by the appellant. Consequently, the matter was referred to the Commissioner of Buildings ('the commissioner') pursuant to the provision of the Act. The commissioner, by way of letter dated 26 December 2008 to the respondent, requested an explanation for the respondent's failure to transfer the said sum claimed to the appellant;

(f) the respondent replied by way of letter dated 13 January 2009 that the said sum claimed was used to reimburse itself as the developer towards the maintenance and rehabilitation of the condominium;

(g) the commissioner rejected the respondent's explanation and by way of letter dated 21 January 2009 demanded that the respondent return the said sum claimed to the appellant;

(h) as the respondent still did not pay the said sum, the appellant made a complaint to the commissioner. However the appellant was informed that the commissioner had no power under the Act to take any action in respect of such failure.

PROCEEDINGS IN THE HIGH COURT

[3] The appellant commenced an action by way of originating summons pursuant to s 41 of the Specific Relief Act 1950 and s 22(1) of the Act in the High Court seeking a declaration that the respondent owed the appellant the said sum as decided by the commissioner. The learned judge of the High Court allowed the appellant's claim. In her grounds of judgment the learned judge, inter alia, held:

(a) the respondent's argument that the commissioner had no jurisdiction to entertain or determine the matter was misconceived because of the

A respondent's conduct in not challenging the commissioner's lack of jurisdiction at the time when he made the decision;

(b) the commissioner was empowered to resolve disputes in relation to the building maintenance account by virtue of s 16(5) of the Act; and

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(c) the said sum formed part of the respondent's building maintenance account and the commissioner was empowered under s 22 of the Act to order the respondent as the developer to transfer that said sum into the appellant's building maintenance fund.

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DECISION OF THE COURT OF APPEAL

D **[4]** In a unanimous judgment, the Court of Appeal allowed the respondent's appeal on the ground that the commissioner lacked jurisdiction under s 16(5) of the Act or any other provision of the Act to decide with regard to the said sum claimed by the appellant. The Court of Appeal also held that the respondent's consent or acquiescence in the proceedings before the E commissioner could not confer on him a power which had not been conferred on him by the Act.

[5] The Court of Appeal's reasoning in arriving at its decision, inter alia, are:

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(a) the decision of the commissioner could only have been made under s 16(5) of the Act. However the Act does not have retrospective effect;

(b) the requirement in relation to the opening and maintenance of the building maintenance account did not apply to the respondent as the G condominium had been completed and possession given to the parcel owners in the year 2000 which was seven years before coming into force of the provisions of the Act;

(c) the account kept by the respondent for the condominium was not the H building maintenance account which a developer was required to open and maintain under s 16 of the Act before delivery of vacant possession;

(d) under s 21 of the Act, it is the duty of a developer of a development area completed before the commencement of the Act and who has collected I and expended monies for the maintenance and management of the common property and sinking fund prior to the commencement of the Act, to submit to the commissioner a professionally audited account of all such monies within six months of the commencement of the Act;

(e) there is no statutory provision which deems the abovesaid account to be

the building maintenance account. Neither is there a statutory provision requiring monies in the abovesaid account to be transferred to the building maintenance account; and

(f) the said sum claimed by the respondent was in fact part of the sinking funds kept by the respondent under the deed of mutual covenant entered into between the respondent as the developer and the purchaser of the condominium units before the commencement of the Act and thus the reference by the commissioner to s 24 of the Act was misplaced.

LEAVE TO APPEAL TO THE FEDERAL COURT

[6] On 12 November 2011 leave to appeal was granted to the appellant in respect of three questions of law as follows:

(a) in construing s 16 of the Act in its proper perspective and giving the Act a purposive interpretation as a whole, whether a developer as defined in the Act is required to open a building maintenance account when vacant possession of the development area has been delivered before commencement of the Act?

(b) if the answer to (a) is in the negative, whether a developer prior to commencement of the Act is required to open and maintain an account to deposit all monie s 21 of the Acts from the purchasers for purposes of maintenance and management of the common property and sinking funds ('the account') pursuant to? and

(c) if the answer to (b) is the affirmative, whether the commissioner of Buildings has the powers and jurisdiction to determine any dispute arising from the account maintained by a developer prior to commencement of the Act?.

DECISION OF THIS COURT

[7] The principal issue to be determined in this appeal relates to the status to be accorded to the monies collected by the respondent as the developer for the purposes of repairs and maintenance of the condominium prior to the coming into force of the Act. It is a question of whether the said sum forms part of the respondent's building maintenance account. In this regard the issue is also related to the question as posed by the Court of Appeal as to whether the commissioner has the jurisdiction under s 16(5) of the Act or any other provision of the Act to decide with regard to the said sum.

A

[8] It is to be noted at the outset that s 4(1) of the Act contemplates the establishment of the JMB consisting of the developer and the purchasers in two situations. The first situation is where a building has been completed before the commencement of the Act and vacant possession of the parcels has been delivered by the developer to the purchasers but the management corporation (established under the Strata Titles Act 1985) has not come into existence, the JMB shall be established not later than 12 months from the commencement of the Act. The second situation is where a building has been completed on or after the commencement of the Act, the JMB shall be established not later than 12 months from the date of delivery of vacant possession of the parcels to the purchasers.

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[9] Section 16(1) of the Act mandates the developer of any building, before delivery of vacant possession, to open a building maintenance account in respect of the development area in which the building is erected and by s 16(3) of the Act, that account shall be maintained by the developer until the establishment of the JMB for that building.

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[10] It is also to be noted that the Act contemplates the opening and maintenance of three accounts as follows:

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(a) building maintenance account which is to be opened and maintained by the developer in respect of the development area in which the building is erected after the commencement of the Act but before the delivery of vacant possession of the units;

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(b) building maintenance fund which is to be maintained by the JMB under s 22 of the Act to which any surplus monies in the building maintenance account shall be transferred by the developer not later than one month after the establishment of the JMB; and

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(c) sinking fund to be opened and maintained by the JMB under s 24 of the Act and into which shall be paid such portion of the contribution to the building maintenance fund as may be determined by the JMB.

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[11] Learned counsel for the appellant amongst others submitted before us that the respondent as a developer was obliged to account for such monies to the commissioner pursuant to s 21(1) of the Act which contemplated an account of monies collected prior to the coming into force of the Act. It was contended for the appellant that the learned judges of the Court of Appeal were wrong in concluding that the Act was only to apply prospectively. The duty to account is not limited to monies in the building maintenance account. Section 21(1) of the Act imposes such a duty with respect to all monies collected and expended for the purposes of maintenance and management of the common property and sinking funds, if any, prior to the commencement of the Act.

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[12] It was also contended for the appellant that once a JMB has been established, it was required under s 24 of the Act to open and maintain a sinking fund into which shall be paid such portion of the contribution to the building maintenance fund as may, from time to time, be determined by the JMB for the purposes of meeting its actual or expected liabilities.

[13] It was further contended for the appellant that s 16 of the Act should not be interpreted literally. Literal interpretation of a statute is not applicable in all cases. The nature and purpose of a particular legislation must be considered when construing its various provisions so as not to defeat the intention of Parliament. Statutory provisions are to be construed harmoniously with other provisions of the statute and they are to be interpreted purposively.

[14] With respect to the above contention of learned counsel for the appellant we are not in agreement with him. The main relief sought for by the appellant was a declaration under s 41 of the Specific Relief Act 1950 that the respondent owed it the said sum as of 31 July 2008 as decided by the commissioner based on his letter dated 21 January 2009. In our view that declaration could only be made if the commissioner had jurisdiction to make that decision. The Court of Appeal in its judgment was right in stating that it was not clear under which provision of the Act the commissioner made the decision. However, in view of the reference in the commissioner's letter dated 26 December 2008 to s 22(1) of the Act, the commissioner must have made his decision under s 16(5) of the Act which provides that where any dispute arises in respect of a building maintenance account the commissioner may resolve the dispute as he deems fit and just.

[15] It is provided for under sub-s 16(1) of the Act that where a developer undertakes the development on one lot which is intended to be subdivided into individual units ('parcels') which is held or will be held under a strata title ('development area'), he must open and maintain a building maintenance account for such development area before delivery of vacant possession. The account must be maintained until the establishment of a JMB for the building. The said Act came into operation in Selangor, in which the condominium is situated, only on 12 April 2007 pursuant to Gazette Notification No PU(B) 147/07, but vacant possession of the units in the condominium were already delivered to the purchasers on or about 28 January 2000. In other words, the Act came into operation more than seven years after possession of all the units in the condominium had been delivered by the respondent to the purchasers.

[16] It is therefore clear that the provisions of the Act do not have retrospective effect. The requirement in relation to the opening and maintenance of the building maintenance account in our view did not apply to the respondent as the condominium had long been completed, and possession

A of the individual units had been handed over to the purchasers more than seven years earlier. On this point the question of giving the provision of the Act a purposive interpretation as suggested by learned counsel for the appellant does not arise as the provision of the law is very clear. It is a trite proposition that an Act of Parliament only comes into operation from the date the Act provides for B the same. Section 19 of the Interpretation Acts 1948 and 1967 provides that:

> (1) The commencement of an Act or subsidiary legislation shall be the date provided in or under the Act or subsidiary legislation or, where no date is provided, the date immediately following the date of its publication in C pursuance of section 18.
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> (2) Acts and subsidiary legislation shall come into operation immediately on the expiration of the day preceding their commencement.

There is therefore no basis or no room for an argument that the Act has D retrospective application as there is no indication to the contrary within its four corners.

[17] We are of the view that the account kept by the respondent for the condominium was not the building maintenance account, which a developer is E required to open and maintain under s 16 of the Act before delivery of vacant possession. Under s 21 of the Act, a developer of a development area which had been completed before or on the commencement of the Act who had collected and expended monies for the purpose of the maintenance and management of the common property and sinking fund prior to the commencement of the F Act, must submit to the commissioner not later than six months after the commencement of the Act an account audited by a professional auditor. The failure to do so is an offence. However there is no provision under the Act which deems such account to be the building maintenance account for the development area and there is no provision requiring any money still available G in such account to be transferred to a building maintenance account. As such the requirement under sub-s 22(1) of the Act that not later than one month from the date of establishment of the JMB, any money remaining in the building maintenance account after payment of any expenditure properly charged to that account, must be transferred to the JMB, could not apply to the H respondent.

[18] It is also to be noted that the said sum was in fact part of the sinking funds kept by the respondent under the deed of mutual covenant entered into by the respondent and the purchasers before the commencement of the Act. I The commissioner however seemed to have wrongly applied the respondent's case under s 24 of the Act which imposed upon the JMB the duty to open and maintain a sinking fund from a portion of the monies in the building maintenance fund after its creation. On this point we agree with the Court of Appeal that s 24 of the Act has no relevance to the usage by the respondent of

the said sum. The dispute between the parties was clearly not a dispute in respect of a building maintenance account. In the circumstances, we are of the view that the commissioner lacked jurisdiction under sub-s 16(5) of the Act, or under any other provision of the Act, to give any decision with regard to the sum the appellant claimed must be paid over to them.

[19] On the learned judge of the High Court's finding that the respondent's conduct in not challenging the commissioner's lack of jurisdiction would appear to indicate that the respondent had accepted the commissioner's jurisdiction to determine the matter, we are in full agreement with the Court of Appeal's view that no amount of consent or acquiescence by the respondent could confer on the commissioner a power which the Act had not conferred upon him. The powers and duties of the commissioner are circumscribed by the provisions of the Act and he does not have power which has not been granted to him under the Act.

[20] For the reasons abovestated the answers to questions (1) and (2) posed before this court ought to be in the negative and since question (2) is answered in the negative, question (3) therefore need not be answered. The appeal by the appellant is consequently dismissed with costs.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor