DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
[RAYUAN SIVIL NO: W-02-1326-08/2014]

ANTARA

PERANTARA PROPERTIES SDN BHD ... PERAYU

DAN

JMC-KELANA SQUARE ... RESPONDEN

[RAYUAN SIVIL NO W-02(W)-1655-10/2015]

JMC-KELANA SQUARE ... PERAYU

DAN

PERANTARA PROPERTIES SDN BHD ... RESPONDEN

(Dalam Mahkamah Tinggi Malaya di Kuala Lumpur
(Bahagian Sivil)
Guaman No. S-22-291-2010

ANTARA

JMC-KELANA SQUARE ... PLAINTIF

AND

PERANTARA PROPERTIES SDN BHD ... DEFENDAN

CORUM

DAVID WONG DAK WAH, JCA

UMI KALTHUM ABDUL MAJID, JCA

PRASAD SANDOSHAM ABRAHAM, JCA

JUDGMENT OF THE COURT

Appeal 1326

1. This appeal raises a short but an important and interesting point relating to the manner as to how provisions in a statute should be construed. The statute in question is the Building and Common Property (Maintenance and Management) Act 2007 ("BCPA 2007").

2. The relevant factual context in which this dispute is premised on is simply this. The Appellant was the developer of Kelana Square which comprised of commercial units and car parks. The Respondent is the Joint Management Body of Kelana Square formed under the BCPA 2007.

3. Upon the forming of the Respondent, the Appellant handed over to the same various facilities of the development to the Respondent save and except the car parks. The reason for the exclusion of the car parks was that they had been excluded from the common property through the sales and purchase agreements of the commercial units in Kelana Square entered between the

purchasers and the Appellant around 1995. The Appellant was then able to rent the car parks out back to the purchasers or third parties for a fee.

4. The relevant provision of the sales and purchase agreements excluding the car parks is Clause 5.08 which reads as follows:

> **5.08. Retention of Car Park, Food Court and Deli**
> Notwithstanding the sale of the Unit to the Purchaser and the sale of the parcels of office and/or retail units comprised in the Shopoffice Project, the Purchaser agrees and confirms that all surface car parks and covered car parks (including the basement parking and any other parking) in the Shopoffice Project and the food court and deli situated on the ground level and plaza level respectively shall belong to the Vendor and shall not be included into the sale of the Unit herewith whether as an accessory unit or Common Property.

5. When BCPA 2007 came into force on 12 April 2007, section 2 defined "common property" as this:

> "common property", in relation to a development area, means so much of the development area as is not comprised in any parcel, such as the structural elements of the building, stairs, stairways, fire escapes, entrances and exits, corridors, lobbies, fixtures, and fittings, lifts, refuse

shutes, refuse bins, compound drains, water tanks, sewers, pipes, wires, cables and ducts that serve more than one parcel, the exterior of all common parts of the building, playing fields and recreational area, driveways, car parks, and parking areas, open spaces, landscape areas, walls and fences, and all other facilities and installations and any part of the land used or capable of being used or enjoyed in common by all the occupiers of the building;"

Parliament thus had seen it fit to make car parks in any development with common facilities as common property.

6. Contrast to the aforesaid definition is the definition contained in the sales and purchase agreements entered between the Appellant and the purchasers which prescribed as follows:

"Common Property"

means, in relation to the Shopoffice Project, so much of the area in the Shopoffice Project as is not comprised in any Unit (including any accessory Unit) or any provisional blocks as shown in the approved Building Plans, including but not limited to such facilities and services stipulated in the Fifth Schedule hereto which are reserved for the use and enjoyment of the purchasers of the Units comprised in the Shopoffice Project, but excluding:-

(a) all surface car parks demarcated or constructedin or about the Shopoffice Project and all covered car parks (including the basement car parks and any other car parks); and

(b) the food court and deli which are situated on the ground level and Plaza level;

in the Shopoffice Project".

7. Two other relevant provisions of the BCPA 2007 in this dispute are section 44 of BCPA 2007 which provides as follows:

> "On the coming into operation of this Act, 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."

and section 45 (1) of BCPA 2007 which provides as follows:

> The provisions of this Act shall have effect notwithstanding any stipulation to the contrary in any agreement, contract or arrangement entered into after the commencement of this Act.

8. The dispute is of course the ownership of the car parks.

9. The Appellant's contention before the High Court and here is simply that it is the owner of the car parks by virtue of the sales and purchase agreements entered prior to the enactment of the BCPA 2007. Further the provisions in BCPA 2007 cannot have a retrospective effect to override the provisions in the 1995 sales and purchase agreements.

10. As for the Respondent, it is contending that by virtue of the enactment of the BCPA 2007 car parks are deemed to be common properties and hence, since the BCPA 2007 required common properties to be managed by the joint management body, the car parks must be returned back to the Respondent. The aforesaid contention is premised on section 2, 44 and 45 of the BCPA 2007 which in the view of the Respondent's counsel had the retrospective effect of changing the provisions of the 1995 sales and purchase agreements.

11. The learned Judge in the High Court sustained the contention of the Respondent. This is what he said:

> *"**51.** The question to be answered in this case is what is the position prior to the coming into force of BCPA 2007 in respect of the SPA to exclude car parks as common property? In my judgment, the exclusion of car parks as*

common property as defined in the SPA are contrary to the provisions of this BCPA 2007 and the exclusion shall cease to have effect.

52. *The definition of the common property in the agreements is inconsistent with the definition of common property under the BCA 2007. As such, based on this inconsistency alone, the definition under the agreements shall cease to have effect and the car parks ought to be surrendered to the Plaintiff together with the income that the Defendant has generated from renting out the car park since the incorporation of the Plaintiff until to date.*

53. *Section 44 of BCPA 2007 uses the words* ***shall*** *cease to have effect within the local authority area or that other area. Therefore it is imperative to find that it is the intention of the Legislature to require that the definition of common property in the Act relating to the maintenance and management of buildings and common property must be followed. The Legislature further intended that provisions of any written law, contracts and deeds which are contrary to the provisions of this Act shall cease to have effect. My considered opinion is that the intention of the Legislature is to have the uniformity and well organised maintenance and management of buildings and common property and to keep it in a state of good and serviceable repair which duty is imposed on the Plaintiff as the Joint Management Body of Kelana Square after it has formed to do.*

54. *Further, I agree with the Plaintiff's submission that the National Land Code, the Strata Titles Act 1985 and the BCA 2007 do not recognise any ownership of land other than that which is held under a title, strata title or common property.*

55. *There can only be parcels, accessory parcels and common property. The Defendant in this suit is attempting to create a fourth unrecognised claim to property for the car parks but has not provided any evidence of title (or applications for title) to the same during the trial."*

12. The learned Judge then made the following orders:

(1) That the car parks in Kelana Square are part of the common property of Kelana Square;

(2) The car parks be surrendered to the Plaintiff (Respondent) together with the income generated from renting out the car park from the date of incorporation of the Plaintiff (Respondent) until to date;

(3) That the Plaintiff (Respondent) is to take immediate action to conduct the necessary test to determine the cause of defects and to rectify the defects and damages at the 3rd basement of the car parks in Kelana Square; and

(4) Costs of RM30,000.00.

(5) The Defendant's/Appellant's counterclaim is dismissed with costs.

Our Opinion:

13. As stated in our opening remark, the task before us is one of interpretation of statute and the starting point must be section 17A of the Interpretation Acts 1948 and 1967 which reads as follows:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

14. Section 17A embodies the concept of purposive approach which was explained by the House of Lords in *Pepper v. Hart* [1993] AC 593 (by majority) through Lord Griffiths as this:

> *"The ever increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the*

> *language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."*

We are fully aware that England does not have a section 17A but what Lord Griffiths said above describes what we understand as the purposive approach to interpreting statute. With that we now look at the aforesaid provisions.

15. The effect of the learned Judge's construction of section 44 read with the definition of "common properties" in section 2 of BCPA 2007 is a blatant amendment to the terms and conditions of the 1995 sales and purchase agreements. That said, his Lordship's view on face value can be said to have merit as section 44 of 2007 does contain the words "shall cease to have effect", giving rise to a reasonable inference that BCPA 2007 is a retrospective legislation to eradicate the practise of developers like the Appellant from retaining car parks as common properties.

16. On the finding of the retrospective effect of BCPA 2007 by the learned Judge, we with respect find ourselves bound by the decision of the Federal Court in *Badan Pengurusan Bersama*

Paradesa Rustika v. Sri Damansara Sdn Bhd [2013] 9 CLJ 813 ("*Rustika*") where Zulkefli Makinudin Chief Judge of Malaya said as follows:

> ***"[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 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 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 pursuance of section 18.*
>
> *(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 retrospective application as there is no indication to the contrary within its four corners.

17. We are aware that the learned Judge had sought to distinguish the aforesaid case but with respect we agree with the submission of learned counsel for the Appellant that the Judgment of *Rustika* cannot be distinguished from this case. For clarity, this is what the learned counsel for the Appellant said:

"30. In Rustika, the Federal Court had unequivocally concluded ***that the provisions of the BCPA do not have retrospective effect.*** *In supporting its said conclusion, the apex court had noted that there "ïs no indication to the contrary within its four corners" to say otherwise.*

30.1. Rustika concerned the decision of the Commissioner of Buildings pursuant to section 16, BCPA, who decided that the developer owed the JMB a certain sum. The sum owed was in relation to a shortfall in monies collected by the developer towards the sinking funds, which formed part of the building maintenance account[35];

30.2. The principal issue in the Federal Court was 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 BCPA***[36]***;***

30.3. *A central argument put forth by counsel for the Appellant in the appeal was that the BCPA could be applied retrospectively so as to oblige the developer to account for such monies to the Commissioner pursuant to s. 21(1), BCPA*[37]*;*

30.4. *In addressing that argument, the Federal Court had undertook a clear and cogent analysis as to the retrospective application of the BCPA. The court ultimately decided that the BCPA does not have retrospective effect*[38]*.*

31. *It is therefore not correct to say that Rustika was concerned only with the maintenance account and the Commissioner of Building's Jurisdiction. It is apparent that one of the main arguments taken before the Federal Court was that the BCPA could be applied retrospectively. It is equally clear that in considering that contention, the Federal Court undertook a comprehensive evaluation of the BCPA to determine whether it could be applied retrospectively. This would necessarily mean that the Federal Court considered section 44 and 45, BCPA. Further, the court did not limit its said analysis to the sections of the BCPA that were in issue. The determination of the Federal Court on the point of retrospectivity was as such very much a part of the ratio decided of the decision."*

18. Further it is significant that the 1995 sales and purchase agreements at that particular time were perfectly legal agreements. There were no common law or statute law which prohibited the same. Hence when the purchasers and the Appellant entered into those agreements they were exercising their rights pursuant to the concept of "freedom of contract" as submitted by the learned counsel. These rights are fundamental rights and the Courts must presume that Parliament would not invade such rights unless clear words are used. We find no such clear words in BCPA 2007. The parties knew exactly what the bargains were when they entered into the 1995 sales and purchase agreements and it is trite law the Courts cannot rewrite contracts when they are freely entered into.

19. There is no doubt that should we sustain the Respondent's contention, we would be taking away the proprietary rights in the car parks of the Appellant. Could this be done by an Act of Parliament? It must not be forgotten that we have a democratic system where the Federal Constitution is supreme as opposed to Parliamentary democracy where Parliament is supreme. Hence in construing provisions of statute regard must be given to the Federal Constitution. The relevant presumption here is simply that

Parliament did not intend to invade the rights accorded in the Federal Constitution. The relevant Article in the Federal Constitution here is Article 13 which reads as follows:

> "(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."

20. Hence it is our view that to sustain the Respondent's contention, the provisions contained in BCPA 2007 would contravene Article 13 of the Federal Constitution. So as not to invalidate the provisions in BCPA 2007, we hold that the aforesaid provisions do not apply to the 1995 sales and purchase agreements. Thus the proprietary rights in the car parks of the Appellant remain with it pursuant to the sales and purchase agreements signed with the purchasers. We are fortified in our approach by the Privy Council through the advice of Lord Denning in *Kanda v. Government of Malaya* [1962] MLJ 169 where he said:

> *In a conflict of this kind between the existing law and Constitution, the Constitution must prevail. The Court must*

apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution.

21. Accordingly, we allow the appeal only in respect of the issue of car parks with costs in the sum of RM30,000.00 for here and below. We also order that High Court orders pertaining to the car parks be set aside. As for the dismissal of the Appellant's counterclaim by the learned Judge, there was no appeal and hence it is affirmed. Finally, we order that the deposit to be refunded to the Appellant.

Appeal by Respondent -1655

22. This appeal by the Respondent relates to the refusal by the learned Judge to order the Appellant to repair the defects and damages at the basement car parks in Kelana Square. The refusal of the learned Judge is premised on his finding that the defect liability had expired on 1.12.2001.

23. Learned counsel for the Respondent however referred us to the cases of *Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors* [1995] 2 MLJ 663 and *Hancock and Others v.*

B.W. Brazier (Anerley) Ltd [1996] 1 WLR 1317. In the latter case, Lord Denning MR held:

"..if a builder has done his work badly, and the defects afterwards appear, he is not excused from liability except by clear words. I am of the opinion that clause 11 is no defence to the builder here. It applies only to defects which the purchaser discovers within six months, not those which discovers afterwards ....There is nothing in clause 11 to take away the right of a man to sue in respect of structural defects which were not discoverable within six months. It does not, therefore take away the right of the purchaser here."

24. We have no doubt that what was stated by Lord Denning represents the law in this country. However, when we asked learned counsel for the Respondent whether there is any evidence tendered in Court that the defects were not discoverable within the defect period of 12 months, we were given a "negative" answer. That being the case, we are constrained to and do dismiss the appeal of the Respondents with no order as to costs.

Alternative relief:

25. The Respondent had in its statement of claim included an alternative prayer of reimbursement of monies spent on maintenance of the car parks by the Respondent if the Court found

that the car parks belong to the Appellant. At the High Court, the learned Judge had found that the car parks belong to the Respondent, hence this alternative prayer did not come into play.

26. As we have now allowed this appeal, we must give effect to the alternative prayer contained in prayer 14(vi) in the statement of claim. Respective counsels, after discussion between counsels and the Court, agreed that the alternative prayer 14(vi) be remitted back to High Court to determine the quantum of the compensation, which we do so order now.

Dated: 4 MARCH 2016

(DAVID WONG DAK WAH)
Judge
Court of Appeal Malaysia

Counsel:

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For the respondent - Su Tiang Joo (R Jeyasingam & Nasema Jalaludheen with him); JMC-Kelana Square; BH Lawrence & Co

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For the appellant - Su Tiang Joo (R Jeyasingam & Nasema Jalaludheen with him); JMC-Kelana Square; BH Lawrence & Co

For the respondent - Malik Imtiaz Sarwar (Ashok Kandiah & Surendra Ananth Perantara with him); Properties Sdn Bhd; Kandiah Partnership

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