IN THE COURT OF APPEAL OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO.:P-02(NCvC)(W)-1305-07/2024

BETWEEN

BADAN PENGURUSAN BERSAMA
GURNEY PARAGON RESIDENTAL …APPELLANT

AND

1. **HUNZA PROPERTIES (GURNEY) SDN BHD**
   (COMPANY NO.: 723943-A)
2. **HUNZA PROPERTIES (PENANG) SDN BHD**
   (COMPANY NO.: 440664-U)
3. **BEACHFRONT SERVICES SDN BHD.**
   (COMPANY NO.: 968888-M) …RESPONDENTS

[In the High Court of Malaya at Pulau Pinang
(Civil Division)
Civil Suit No. PA-22NCVC-247-12/2017

Between

Badan Pengurusan Bersama
Gurney Paragon Residential …Plaintiff

And

1. Hunza Properties (Gurney) Sdn Bhd
   (Company No.: 723943-A)
2. Hunza properties (penang) Sdn Bhd
   (Company No.: 440664-U)
3. Beachfront Services Sdn Bhd
   (Company No.: 968888-M)
4. Pengarah Tanah dan Galian Pulau Pinang …Defendants]

CORAM:

AZHAHARI KAMAL BIN RAMLI, JCA.

AHMAD KAMAL BIN MD. SHAHID, JCA.

ONG CHEE KWAN, JCA.

JUDGMENT OF THE COURT

Introduction

1. This appeal raises significant legal questions concerning the validity of a bifurcated management structure in a mixed development under the Building and Common Property (Maintenance and Management) Act 2007 ("**BCPA 2007**") and the Strata Management Act 2013 ("**SMA 2013**").

2. Central to the dispute is whether the developer and the commercial parcel owners were legally entitled to institute a regime of separate management and maintenance of the commercial parcels and the common property within the commercial component, thereby confining the Joint Management Body ("**JMB**") to the management of only the residential parcels and the common property appurtenant thereto.

3. The Court is further called upon to determine the consequences of such arrangements should the resolutions

passed at the first annual general meeting be found *ultra vires* and void, specifically, whether the JMB, is entitled to demand the surrender and handover of the commercial common property, and to recover arrears of maintenance charges and sinking fund contributions retrospectively from the developer's management period through to the present JMB management period.

4. Also arising for determination is whether residential parcel owners, who had paid charges imposed pursuant to the impugned resolutions, may seek refunds of the sums paid, and whether the Court may instead order that such payments be credited or adjusted against lawfully determined charges to be fixed at a proper general meeting to be convened by the JMB.

5. At its core, the appeal calls for clarification of the statutory framework governing common property, the indivisibility of management responsibilities, and the legal effect of resolutions that purport to depart from the scheme mandated by the BCPA 2007 and SMA 2013.

Background Facts

6. The Appellant ("**JMB**") is a joint management body established on 14.10.2014 for a development area, known as Gurney Paragon. The Appellant was established pursuant to the BCPA

2007 which was in force at the time the Appellant was established.

7. Gurney Paragon is a stratified *mixed* development under *one* lot comprising:

(a) 2 blocks of residential towers (East and West Tower) with 43 floors made up of 220 units ("**the Residential Component**");
(b) 1 block of office tower (Hunza Tower);
(c) 1 block of Gurney Paragon shopping mall with a retail podium
(e) 1 St Jo's Heritage Building; and
(f) Retail car park (basement and surface)

(the Hunza Tower, Shopping Mall, St Jo's Heritage Building, and the car park are collectively referred to as "**the Commercial Component**")

8. The 1st Defendant ("**D1**"), a wholly owned subsidiary of Hunza Properties Berhad ("**HPB**"), is the developer of Gurney Paragon.

9. The 2nd Defendant ("**D2**") is the original proprietor and also a wholly owned subsidiary of HPB and is the parcel owner of:

(a) Gurney Paragon shopping mall (**Parcel 1**);
(b) Office building (**Parcel 2**); and
(c) St Jo's Heritage Building (**Parcel 3**)

10. The 3rd Defendant ("**D3**") is a wholly owned subsidiary of D2 carrying on activities as an operator of the car park management providing valet services at the surface car park lots within Gurney Paragon.

11. At the 1st Annual General Meeting (**"1st AGM"**) held on 14.10.2014 pursuant to section 6 of the BCPA 2007, resolutions were unanimously passed, among others, for the management and maintenance of the Residential Component to be separated from the Commercial Component. More specifically, the following agendas were tabled and passed:

    (a) Agenda 2 – A separate Building Maintenance Fund was established strictly and exclusively for the management of the Serviced Condominiums for the management of common property and its common facilities;

    (b) Agenda 3 – The Serviced Condominiums' Building Maintenance Fund shall be managed by a committee to be elected from the owners/purchasers of the Serviced Condominiums; and

    (c) Agenda 4 – The respective owners of the Commercial Component shall establish their own respective separate Building Maintenance Funds and subcommittee for the management and maintenance of their respective parcels independently from the Serviced Condominiums.

12. Accordingly, it was unanimously resolved at the 1st AGM that the management and maintenance of the Residential Component (Serviced Condominiums) would be separated from the Commercial Component of Gurney Paragon.

13. As such, there would be 2 separate sets of maintenance and sinking accounts opened, one for the Residential Component and another for the Commercial Component to be managed by the JMB and the parcel owners of the Commercial Components, respectively.

14. The Resolutions are consistent with the clause in the Sale and Purchase Agreements ("**SPAs**") entered into between the relevant purchasers and the 1st and 2nd Respondents between 2007 and 2012, which expressly stipulate the separation of the management and maintenance of the Residential Component and the Commercial Component as follows:

> **"**Separate maintenance account and sinking fund account shall be opened and kept by the Vendor/the Proprietors for the Serviced Condominiums and the shopping complex. Similarly, income and expenditure account and balance sheet shall be separately prepared and kept. The Purchaser shall not be concerned with and shall not question the accounts apart from that of the Serviced Condominium."

15. It is also important to note that during the 1st AGM and in the subsequent AGMs held by the JMB:

    a. neither the 1st nor 2nd Respondents, i.e. the parcel owners of the Commercial Component, were invited;
    b. neither the 1st nor 2nd Respondents had voting rights as proprietors of the Commercial Component; and
    c. the 1st and or 2nd Respondents were merely in attendance as the developer's representative and not as Commercial Component owners.

16. There were no challenges or amendments to the Resolutions passed during the 1st AGM, and no resolutions were passed at subsequent annual general meetings ("**the AGMs**") to invalidate the Resolutions. In fact, the Resolutions were confirmed at the 2nd AGM held on 12.12.2015.

17. The budget presented for each AGM (even until the recent AGM in 2024) only included items of expenses for the management and maintenance of the Residential Component and not the Commercial Component. The JMB's audited accounts only envisaged the maintenance and management of the Residential Component.

18. The JMB has not expended a single cent since its establishment towards the management and maintenance of the Commercial Component, and the rates charged in respect of the maintenance charges and the sinking fund contributions were

determined by the Residential Component owners solely. The Respondents, as the Commercial Component owners, never participated (in their capacity of the Commercial Component owners) and or exercised their statutory right to vote and determine the rates.

19. Notwithstanding the aforesaid, by way of a letter dated 3.1.2017, JMB's solicitors, Messrs Chee Hoe & Associates, wrote to the Commissioner of Buildings ("**COB**") alleging, *inter alia,* that the 1st Respondent had failed to pay the charges into the Building Maintenance Account (**"Charges"**) and contribute to the sinking fund (**"Contribution"**) of the JMB, pursuant to Sections 12 and 15 of the SMA 2013.

20. By this time, the BCPA 2007 had been repealed on 11.6.2015 and replaced by the SMA 2013, which was gazetted on 8.2.2013 and came into force on 12.6.2015 in Penang. Section 38 of the SMA 2013 stipulates that a joint management body or a joint management committee elected under the repealed BCPA 2007 shall be deemed to have been established or elected under the SMA 2013 and that the provisions of the SMA 2013 shall apply to such a body or committee.

21. By way of a letter dated 6.3.2017, the 1st Respondent's previous solicitors, Messrs JB Lim & Associates, wrote to the JMB's solicitors denying the 1st Respondent's alleged non-compliance with the statutory obligations to pay the Charges and Contribution. In the same letter, the 1st Respondent's previous

solicitors requested the Commissioner of Building ("**the COB**") to deliver its administrative decision and directives to the 1st Respondent and JMB.

22. Under the repealed BCPA 2007, section 16(5) 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*". There is no equivalent provision in the SMA 2013. Instead, a Strata Management Tribunal is established under section 102 of the SMA 2013, which provides the Tribunal to hear and determine any claims specified in Part 1 of the Fourth Schedule, and where the total amount in respect of which an award of the Tribunal is sought does not exceed RM 250,000.00 or such amount as may be prescribed to substitute the total amount.

23. By way of a letter dated 7.3.2017, the 1st Respondent's previous solicitors wrote to the JMB's solicitors, contending that the main objective of the JMB is to seek monetary contribution from the 1st Respondent for the maintenance of common property used exclusively by the JMB, which is:

    a. contrary to the Resolutions;
    b. legally and ethically unjustifiable;
    c. calculated to obtain a pecuniary advantage; and
    d. an abuse of process.

In the same letter, the 1st Respondent's solicitors requested the COB to exercise its powers to render the necessary rulings and directions to the dispute at hand.

24. On 7.4.2017, the COB, by a letter, decided on, *inter alia*, the following:

    a. pursuant to the Resolutions, the maintenance of the Serviced Condominium (Residential Component) is separate from the Commercial Component; and

    b. the JMB is only to collect maintenance charges for the Serviced Condominiums (Residential Component), whereas the Commercial Component would be managed by its respective proprietors

    (**"the COB's Decision"**).

25. By way of a Writ of Summons and Statement of Claim dated 14.12.2017, the JMB commenced the present action against the Respondents. The reliefs sought by the Appellant that are relevant to the present Appeal are as follows:

    (a) the outstanding Charges and Contribution due and owing by the 1st and or 2nd Respondents to the Appellant for the period October 2011 to November 2017, amounting to RM56,930,645.52; and

(b) Handing over of the common properties of Gurney Paragon to the JMB listed below:

i) various surface car parks;
ii) façade of mall;
iii) retail podium and alfresco area; and
iv) management and meeting rooms at the East and West Towers of the Serviced Condominiums.

The High Court Decision

26. At the conclusion of the trial below, the learned High Court Judicial Commissioner (as he then was) held that:

(a) the 1st and 2nd Respondents are not liable to pay the Charges and the Contribution into the Building Maintenance Account and the Sinking Fund Account, respectively, managed by the JMB; and

(b) the 2nd Respondent is to continue to maintain and manage its own Commercial Component common property.

27. More specifically, the learned High Court Judicial Commissioner (as he then was) found that it would not be 'just and reasonable' or 'fair and justifiable' for the JMB to impose the Charges and Contribution on the 1st and 2nd Respondents as the Charges and Contribution were determined solely by the purchasers of the residential parcels. At para [93] and [94] of the Grounds of

Judgment, the learned High Court Judicial Commissioner (as he then was) stated thus:

> "[93] I therefore find that it is not "just and reasonable" and not "fair and justifiable" for P (the JMB) to impose maintenance charges and sinking fund contributions which apply only to the residential parcels, and are determined only by the residential parcel owners through the JMB—on D1D2.
>
> [94] On Issue No. 1, I hold that D1D2 are not liable to pay into the Building Maintenance account and the Sinking Fund account. In other words, D1D2 are not liable to pay P the RM56.93 million claimed."

28. In allowing the 1st and 2nd Respondents to manage separate maintenance and sinking fund accounts for their Commercial Component, the learned High Court Judicial Commissioner (as he then was) was guided by the decision in *Aikbee Timbers Sdn Bhd & Anor v Yii Sing Chiu & Anor and Anor Appeal* [2024] 1 MLJ 948 interpreting the BCPA 2007 and SMA 2013 as "social legislations", where at para [98] of his Grounds of Judgment, the learned High Court Judicial Commissioner (as he then was) stated as follows:

> "[98] I am guided and bound to interpret the BCPA and the SMA as social legislations which are not rigid but flexible, to bring about what is "just and reasonable" and "fair and justifiable". This compels me to allow separate maintenance and sinking fund accounts for the Residential component as

against the Commercial component. And as resolved at the 1st AGM and decided by the COB—I permit P (the JMB) to maintain and manage the Residential component's common property for the residential parcel owners, and let D1D2 maintain and manage the Commercial component's common property for D2: the commercial parcel owner."

29. The learned High Court Judicial Commissioner (as he then was) also opined that the common property in the mixed development can be segregated and managed separately from the JMB. At para [95] and [96] of his Grounds of Judgment, he opined that:

> "[95] On Issue No. 3—I find that D2 (as the Commercial component owner) is to continue to maintain and manage its own Commercial component common property. In other words, the maintenance and management of the Commercial component's common property are to remain at status quo.
>
> [96] In P's Re-Amended Statement Of Claim, prayer 66(ca) is for an Order that D1D2 "do forthwith deliver and surrender all common property as delineated in the strata plan submitted by [D1D2] to [P]". I accordingly dismiss prayer 66(ca)."

30. In conclusion, the learned High Court Judicial Commissioner also considered the alternative position to start over and rectify what was not done according to the BCPA 2007/SMA 2013. His Lordship then declined this alternative judgment as he felt that

it would bring about even more disputes between the JMB and the 1st and 2nd Respondents, which he opined would not be a desired outcome at all. This can be seen at para [99] and [100] where His Lordship said:

> "[99] An alternative judgment, as suggested by D1D2D3, is to start over and rectify what was not done according to the SMA, and determine one uniform rate for all parcel owners, based on share units, and have one maintenance account and sinking fund account. In other words, P (the JMB) is to hold a general meeting where all parcel owners—residential and commercial—attend and vote to determine the chargeable rate that will bind every parcel owner. The residential parcel owners have 24.4% share units and the commercial parcel owner has 75.6% share units. Allow the resolution or decision to be made based on these share unit proportions.
>
> [100] With that circumstance in mind, I find that it is very likely that such an alternative judgment will bring about even more disputes between P (the JMB) and D1D2 (developer and commercial parcel owner)—which is not a desired outcome at all. I therefore decline to make this alternative judgment".

31. Before us, the learned counsel for the JMB strenuously contended that the learned High Court's Judicial Commissioner's decision be set aside as being inconsistent with the *express* provisions of the repealed BCPA 2007 and the current provisions of the SMA 2013.

Court's Considerations

The Law

32. There is no dispute that the applicable statute governing the Gurney Paragon development at the relevant time was the BCPA 2007. More specifically, section 16 provides:

> "16(1) The developer of any building or land intended for subdivision into parcels shall, before the delivery of vacant possession, open, in respect of the development area on which the building is erected, a Building Maintenance Account in the name of the development area with a bank or financial institution licensed under the Banking and Financial Institutions Act 1989 [Act 372] or regulated by the Central bank under any other written law.
>
> (2) **One Building Maintenance Account shall be opened for each development area**.
>
> (3) Each Building Maintenance Account shall be maintained by the developer until the establishment of the Body for the building.
>
> (4) The developer shall not open and maintain a Building Maintenance Account together with any other building outside the development area.
>
> (5) Where any disputes arise in respect of a Building Maintenance Account, the Commissioner may resolve the disputes as he deems fit and just."

33. Sections 17 (a) and (b) further provide as follows:

> "17(1) A developer shall deposit into the Building Maintenance Account –
>
> (a) All charges received by him from the purchasers in the development area for the maintenance and management of the common property of the development area; and
>
> (b) All charges for the maintenance and management of the common property to be paid by the developer in respect of those parcels in the development area which have not been sold, being a sum equivalent to the maintenance charges payable by the purchasers to the developer had the parcels been sold.
>
> (c) … "

34. As can be seen, section 17 (1)(b) requires the developer to also pay into the Building Maintenance Account the charges for the maintenance and management of the common property in respect of parcels that have *not* been sold. The charges for these unsold parcels are stated as *" a sum equivalent to the maintenance charges payable by the purchasers to the developer had the parcels been sold*".

35. As regards the apportionment of the charges to be paid by the purchasers, section 23 provides as follows:

"23(1) The purchaser shall pay the charges for the maintenance and management of the common property.

(2) The apportionment of the charges to be paid by the purchasers shall be determined by the Body in proportion to the allocated share units.

(3) Any written notice served on the purchaser requesting for the payment of the charges shall be supported by a statement of the charges issued by the developer or the Body, as the case may be, stating in detail the categories of expenditure in respect of which the charges are to be paid.

(4) The purchaser shall, within fourteen (14) days of receiving a notice under subsection (3), pay the charges requested for.

(5) If the charges remain unpaid by the purchaser at the expiration of the period of fourteen days specified in subsection (4), the purchaser shall pay interest at the rate to be determined by the Body under paragraph 6(1)(d) but such interest shall not exceed 10 percent per annum."

36. The aforesaid sections deal with the period before the formation of the Joint Management Body at the 1st AGM ("**the Developer's Management Period**"). A statutory trust-like account is controlled by the developer during this period to protect the purchasers' contributions from being abused. The sums in the account must be later handed over to the JMB.

37. Although the BCPA 2007 was subsequently repealed by the SMA 2013 effective 1.6.2015, the equivalent provisions relating to the Developer's Management Period are preserved under the SMA 2013 through the concept of maintenance account under sections 10 to 15 of the SMA 2013. In fact, the transitional provisions in SMA 2013 (in particular section 40 stipulates that every account or fund established by the developer or the Joint Management Body under the repealed BCPA 2007 before the commencement of the SMA 2013 shall continue and be deemed to be established under the SMA 2013)

38. For our purposes, section 10 of the SMA 2013 provides:

> "10(1) **A developer shall open one maintenance account in respect of each development area** with a bank or financial institution –
>
> (a) If vacant possession of a parcel was delivered before the commencement of this Act, on the date of the commencement of this Act; or
>
> (b) If vacant possession of a parcel is delivered after the commencement of this Act, at any time before the delivery of vacant possession,
>
> but in any case, before the Charges are collected from the purchaser of any parcel in the development area.
>
> (2) Each maintenance account shall be operated and maintained by the developer until the expiry of the developer's management period.

(3) The developer shall deposit into the maintenance account-

(a) the Charges received by the developer from the purchasers in the development area; and

(b) **the Charges to be paid by the developer in respect of those parcels in the development area which have not been sold,**

and all such moneys shall be deposited into the maintenance account within three working days of receiving the moneys.

(4) …"

39. Further, section 11 of the SMA 2013 similarly provides:

"(1) **A developer shall open one sinking account in respect of each development area** with a bank or financial institution –

(a) If vacant possession of a parcel was delivered before the commencement of this Act, on the date of the commencement of this Act; or

(b) If vacant possession of a parcel is delivered after the commencement of this Act, at any time before the delivery of vacant possession,

but in any case, before the contribution to the sinking fund is collected from the purchaser of any parcel in the development area.

(2) Each sinking account shall be operated and maintained by the developer until the expiry of the developer's management period.

(3) The developer shall deposit into the sinking fund account-

(a) the contribution to the sinking fund received by the developer from the purchasers in the development area; and

(b) **the contribution to the sinking fund to be paid by the developer in respect of those parcels in the development area which have not been sold**,

and all such moneys shall be deposited into the maintenance account within three working days of receiving the moneys.

(4) …"

40. Section 12 (2) of the SMA 2013 further expressly stipulates that:

"(2) **The developer shall pay the Charges, and contribution to the sinking fund, in respect of those parcels in the development area which have not been sold, being a sum equivalent to the Charges, and contribution to the sinking fund, payable by the purchasers to the developer had the parcels been sold**".

41. Thus, whilst sections 10 and 11 mandate that the developer must *open and maintain* a maintenance account and a sinking account and deposit into the same the contributions from the

purchasers and the developer's share for unsold parcels until the expiry of the Developer's Management Period, section 12(2) obliges the developer *to pay* for the unsold parcels. The developer is obliged to pay for the unsold parcels to make sure that the maintenance and sinking fund accounts are not underfunded, even though not all parcels have been sold.

42. Further, in both the BCPA 2007 and SMA 2013, the determination of the maintenance charges and sinking fund contributions is placed in the hands of the developer before the Joint Management Body is formed [See sections 8 – 10 BCPA 2007; sections 9 – 11 SMA 2013]. Once a Joint Management Body is established, it is the Joint Management Body through its annual general meeting that is vested with the power to determine, impose, and collect the maintenance charges and sinking fund contributions [See: sections 19-23 BCPA 2007; section 21(1)(b) and (c) of the SMA 2013].

43. For completeness, after the Management Corporation comes into existence, the powers are vested with the Management Corporation to determine and impose the maintenance charges [See Part V of the SMA 2013, section 59(1)(b) and sinking fund contribution, section 59(1)(c), sections 60 and 61 SMA 2013].

44. Significantly, where a development area includes different components, for example, residential and commercial, under chapter 4 of the SMA 2013, a Subsidiary Management

Corporation or Sub-MC can be constituted to determine its own rates for the limited common property.

45. Notably, there are no provisions for the establishment of any subsidiary maintenance account and sinking fund account during the JMB Management Period at all. Instead, both the provisions in the repealed BCPA 2007 and the SMA 2013 provide for the Joint Management Body to manage the entire development area as a single entity, expressly stipulating for only *one* maintenance account and *one* sinking fund account. All contributions, expenditure and maintenance are centrally managed even if the development area is a mixed-use.

46. The aforesaid have an important bearing on what transpired at the 1st AGM in the present case, which we shall now turn to.

The 1st AGM

47. As alluded to above, before the 1st AGM, the developer controls the building, manages the common property, and operates the maintenance account and sinking fund accounts.

48. Under both the BCPA 2007 and SMA 2013, the 1st AGM marks a critical transition from the developer control phase to the purchaser control through the establishment of a management body. The 1st AGM establishes the Joint Management Body or the JMB, where the first Management Committee is elected by

the purchasers (under the SMA 2013, the purchasers elect the Joint Management Committee).

49. Thus, once formed, the JMB becomes responsible for the management and maintenance of the common property, and the developer is obliged to hand over the maintenance account and the sinking fund account to the JMB.

50. The developer is also obliged to hand over to the JMB the register of purchasers at the 1st AGM. This is provided for under section 8(1) of the BCPA 2007 and is mirrored in section 15(1)(a) of the SMA 2013. There is no option to delay the handover beyond the 1st AGM.

51. Under section 4(1) of the BCPA 2007, the 1st AGM must be convened within 12 months after vacant possession is delivered or when 25% of the aggregate share units are transferred, whichever occurs first. The 4th Schedule of the SMA 2013 sets out the procedures for the AGM, whilst the BCPA 2007 has far less detailed statutory structure for the AGM.

52. The Joint Management Body at the 1st AGM would proceed to determine the maintenance charges and the sinking fund contributions. In our case, this took place on 14.10.2014.

JMB's Determination of maintenance charges and sinking fund contribution

53. Section 9 empowers the JMB to determine the amount of the maintenance charges and the amount to be paid into the sinking fund. Parallel provisions are stated in sections 21(1)(b) and (c) of the SMA 2013.

54. The procedure for determining the charges and contributions for sinking fund entails the Management Committee or Joint Management Committee preparing the budget and proposed rates and tabling the same for discussions and deliberation, and for the actual rate for the maintenance charges and sinking fund contributions to be approved by ordinary resolutions.

55. Unlike under the SMA 2013, the concept of separating common property management for different classes of parcels is not recognised under the BCPA 2007 nor is it provided for during the JMB Management Period.

56. As stated above, SMA 2013 contemplates a later transition of the JMB to the Management Corporation ("**MC**") after the strata titles are issued. In this regard, sections 66 and 67 provide for the establishment of the Subsidiary Management Corporation ("**Sub-MC**") and limited common property. This is intended to handle mixed developments where residential and commercial parcels may have different needs and expenses. The statute allows for the creation of Sub-MCs for a subset of parcels,

where each Sub-MC can have its own maintenance and sinking fund accounts and levy contributions on its members. Thus, there could be a Sub-MC for only the commercial parcels. This is because residential and commercial parcels often share some common property but may have areas used exclusively by one class. Sub-MC allows separate accounting and charges for limited common property, but full separation of common property is only possible under the Sub-MC structure.

57. The JMB has no powers to provide for separate management of residential and commercial common property within the same development area under the BCPA 2007. The statute only recognises a single Joint Management Body managing all the common property with one maintenance management account and one sinking fund account. The Joint Management Body must manage all common property collectively and charges maintenance and sinking funds contributions proportionate to the share units across the parcels be it residential and commercial.

58. In the instant case and at the risk of repetition, at the 1st AGM on 14.10.2014, the JMB had passed the following resolutions:

(a) Agenda 2 – A resolution that a separate Building Maintenance Fund be established strictly and exclusively for the management of the Serviced Condominiums, namely the Residential Component, for the management of common property and its common facilities;

(b) Agenda 3 – A resolution that the Serviced Condominiums' Building Maintenance Fund shall be managed by a committee to be elected from the owners/purchasers of the Serviced Condominiums; and

(c) Agenda 4 – A resolution that the respective owners of the Commercial Component shall establish their own respective separate Building Maintenance Funds and subcommittee for the management and maintenance of their respective parcels independently from the Serviced Condominiums (Residential Component).

("**the Resolutions**")

59. Quite clearly, the Resolutions were intended to establish 2 separate and independent maintenance management accounts and sinking fund accounts, with one set of accounts, which is limited to the Residential Component, to be managed by the JMB and the other, which is limited to the Commercial Component, to be managed by the Developer or proprietors of the commercial parcels.

60. However, Gurney Paragon comprises *one* development area as all the buildings and common property in the development area come under *one* lot. Under the BCPA 2007, there can only be one Joint Management Body for each development area, and the Joint Management Body manages all common property

within the one development area, regardless of the residential and commercial mix. More specifically, section 16(2) of the BCPA 2007 expressly stipulates that only one Building Maintenance Account shall be opened for each development area. The BCPA 2007 did not provide for separate management of residential and commercial common property within the same development area.

61. Further, sections 9(1) and (2) of the BCPA 2007 provide that the Joint Management Body is to determine the maintenance charges and sinking fund contributions for *all* proprietors. Such charges and contributions shall be apportioned in proportion to the share units of the proprietors. In this regard, all proprietors are obliged to pay the maintenance charges and sinking fund contributions once the resolutions are approved and written notices of the same are issued to them. These provisions are mirrored in sections 10(1) and 11(1) of the SMA 2013,

62. As there are no statutory provisions under the BCPA 2007 to allow for 2 separate and independent sets of Building Maintenance Accounts and Sinking Fund Accounts, and for any other party besides the Joint Management Body to determine the maintenance charges and sinking fund contributions and to manage the common property, it is the judgment of this Court that the learned High Court Judicial Commissioner (as he then was) had erred when he concluded that the 1st and 2nd Respondents are permitted to determine and to manage

separate Building Maintenance Account and Sinking Fund Account for their Commercial Component.

63. In this regard, we are unanimous in our view that the BCPA 2007 and the SMA 2013 only recognise a single Joint Management Body managing all the common property in one development area during the JMB Management Period. There is no statutory mechanism like the SMA 2013 for forming Sub-MCs or segregating common property accounts under the BCPA 2007. Even under the SMA 2013, Sub-MCs are only permitted under the Management Corporation management period.

64. The 1st and 2nd Respondents are the developer and the original proprietor parcel owner and not a management body, and therefore are not allowed to open and maintain a Building Maintenance Account and Sinking Fund Account for the Commercial Component. Any resolutions seeking to vest in the 1st and 2nd Respondents such powers are *ultra vires* of the BCPA 2007 and SMA 2013 and treated as null and void.

65. The learned High Court Judicial Commissioner (as he then was) had also relied on the COB's Decision to permit the separate management and maintenance of the Residential Component and Commercial Component. In this regard, the COB had testified that his decision was based on the Resolutions at the 1st AGM, as the Resolutions being unanimously passed, in his view, are valid and legally binding on the parties.

66. With respect, the COB's supervisory powers under the BCPA 2007 and SMA 2013 do not and cannot include the power to validate an act that the statutes expressly prohibit. The COB's Decision could not transform an *ultra vires* resolution into a lawful one. The Resolutions passed at the 1st AGM, although unanimous, cannot validate an *ultra vires* act.

67. Parties are not allowed to contract out of the provisions of the BCPA 2007 and the SMA 2013. More specifically, section 45 of the BCPA 2007 and section 149 of the SMA 2013 respectively stipulate as follows:

> ***"S*. 45 Contracting out prohibited.**
>
> (1) 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.
>
> (2) **No agreement, contract or Arrangement**, whether oral or wholly or partly in writing, entered into after the commencement of this Act **shall operate to annul, vary or exclude** any of the provisions of this Act.
>
> **"S.149 SMA**
>
> (1) 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.

> (2) **No agreement, contract or arrangement**, whether oral or wholly or partly in writing, entered into after the commencement of this Act **shall operate to annul, vary or exclude any of the provisions of this Act"**

68. Based on the same provisions above, the SPAs entered into cannot contravene BCPA 2007. In fact, the Court of Appeal in the case of *Equiti Setegap Sdn Bhd v Plaza 393 Management Corporation [2019] 2 CLJ* ***592****,* has held that parties cannot contract out of the provisions of the legislation:

> "[35] **The agreement if upheld would result in a different common property being managed by the plaintiff and the defendant respectively. The defendant in this instance would act as if it is a management corporation under the STA or the Strata Management Act 2013 (SMA). The defendant also need not contribute to the management fund as the other proprietors. These would run counter to the statutory regime of the STA/SMA which does not envisage a strata development having multiple common areas or having more than one management corporation**. Neither does the STA/SMA envisages exempting certain proprietor from paying the maintenance charges or making contribution to the maintenance fund as resolved by the management corporation in its AGM."

69. In any case, once the BCPA 2007 was repealed, the COB no longer has the power to make decisions under section 16(5) of the Act. If the COB's Decision had been made *before* the repeal,

however, it would remain valid because the transitional provisions in the SMA do preserve past valid acts [See section 37 of SMA 2013]. However, section 42(2) of the SMA 2013 provides that only decisions made by the COB that are not inconsistent with the provisions of the SMA 2013 shall continue and be deemed to have been made under the new Act.

70. The Learned High Court Judicial Commissioner (as he then was) also opined that the Resolutions passed at the 1st AGM must be invalidated first. However, the Resolutions are *ultra vires* and void. In the Court of Appeal case of *Chan Kwai Chun v. Lembaga Kelayakan* [2002] 3 CLJ 231, the Court found that a decision which is *ultra vires* is regarded as void and will be treated as never having existed. As such, there is no need to revoke such a decision. This was also similarly held in the Court of Appeal case of *Leo Leslie Armstrong (Sebagai Presiden Pemegang JawatanThe Young Men's Christian Association of Kuala Lumpur) (Persatuan Pemuda Kristian Kuala Lumpur) v Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur (Yang Dahulunya Di Pegang Oleh Majlis Mesyuarat Kerajaan Negeri Selangor)* [2015] 2 CLJ 10.

71. Accordingly, it is our judgment that the resolution by the residential purchasers for a separate Building Maintenance Account to be established strictly and exclusively for the management of common property and its common facilities of the Residential Component, and the resolution that the respective owners of the Commercial Component shall

establish their own respective separate Building Maintenance Account and subcommittee for the management and maintenance of their respective parcels independently from the Residential Component are *ultra vires* the provisions of the BCPA 2007 and the SMA 2013.

72. Consequent upon our conclusion, it is necessary to now determine if the 1st and 2nd Respondents are liable to pay the Charges and Contribution retrospectively and whether the residential parcel owners can demand a refund of their respective payments towards the Charges and Contribution pursuant to the void Resolutions.

Whether 1st and 2nd Respondents are liable to pay charges and contributions for the period October 2011 to November 2017, amounting to RM56,930,645.52

73. It is not in dispute that both the 1st and 2nd Respondents fall under the definition of "developer" pursuant to Section 2 of the SMA 2013. The 2nd Respondent is the original proprietor. This means that the obligation to pay the Charges and Contributions includes both of them.

74. The JMB is claiming the payment of the Charges and the Contributions from the period October 2011 until November 2017 when the demands were made. This includes the period prior to the 1st AGM, during the Developer's Management Period.

75. Under the BCPA 2007, the developer is responsible for maintaining and managing the common property before the 1st AGM. This obligation arises under sections 4 to 7 of the BCPA 2007. During this period, the developer stands in the shoes of the unsold parcels and is responsible for the maintenance charges and sinking fund contributions attributable to these unsold parcels. The obligation continues until the parcels are sold or transferred.

76. If the developer did not pay, the JMB, once formed, takes over all management functions and is empowered to collect all maintenance charges and sinking fund contributions due and payable by the developer. This necessarily includes any arrears originating before the formation of the JMB.

77. The learned High Court Judicial Commissioner, however, was of the view that to permit the JMB to recover from the 1st and 2nd Respondents the arrears based on the one development–one account argument, would not result in "a just outcome". In particular, the learned High Court Judicial Commissioner found that in this case, when the Resolutions were made at the 1st AGM, the commercial parcel owners did not attend and had no opportunity to vote on the Resolutions. In addition, there was no opportunity for all the proprietors, both residential and commercial, to decide on whether there should only be one rate chargeable for all the parcels. Moreover, if indeed the resolutions are *ultra vires* as contended, this means that the rate

as determined is void, and therefore, there could be no obligation to pay.

78. It must be understood that the obligation or duty to pay the maintenance charges and the sinking fund contributions arises from the statutory provisions, in particular, section 16 of the BCPA 2007 and section 25 of the SMA 2013. The obligation is not contractual or arises from the determination at the 1st AGM. The 1st AGM only determined the rate, not the obligation to pay. The JMB must manage the common property for all parcels. This is because the parcels exist within one development area, and the developer is the owner of the unsold parcels.

79. This means that the parcel owners, whether residential or commercial, are liable to pay regardless of whether they attended or were absent at the 1st AGM, and whether they voted or objected to the same. Accordingly, the fact that when the Resolutions were made at the 1st AGM, the commercial parcel owners did not attend and had no opportunity to vote on the Resolutions, does not at all mean that they are exempt from the obligation to pay.

80. However, it is the 1st AGM that decides on the rate for the maintenance charges and the sinking fund contributions. Whilst it is true that at the 1st AGM, the commercial parcel owners did not have the opportunity to vote to decide on the rate payable for the Commercial Component, this does not mean that their liability to pay was extinguished. Instead, what this means is

simply that the rate can be fixed subsequently by the JMB and applies retrospectively to the date when the Charges and Contribution should have accrued.

81. We further opined that under the BCPA 2007, the 1st AGM must adopt a budget for the entire development area covering both the Residential Component and Commercial Component. If the developer or the JMB omitted the Commercial Component, such omission is an illegality that must be regularised. This is to be done by the JMB holding a general meeting where *all* parcel owners, residential and commercial, attend and vote to determine the chargeable rate that will bind every parcel owner.

82. In this regard, this Court in *Aikbee Timbers Sdn Bhd & Anor v Yii Sing Chiu & Anor and Anor Appeal* [2024] 1 MLJ 948 has held that the determination of the rate of charges must be based on the principle of "just and reasonable" under the SMA 2013 and "fair and justifiable" under the sale and purchase agreements to determine the proportions with respect to different parcels' owners having regard to the rights of use of the common facilities of the parcels concerned in a mixed development.

83. The Court further held that the wording of Section 52(2) of the SMA 2013 allows the developer to determine the charges. It concluded that the developer is entitled in law to impose different chargeable rates between the residential parcels and commercial parcels for the maintenance charges and

contribution to the sinking fund in the development during the preliminary management period.

84. In other words, the wordings in section 17(1)(b) of the BCPA 2007 and section 10(3)(b) of the SMA 2013 are capable of being interpreted to permit the imposition of different rates of charges for different rights of use of common property within a mixed development.

85. *Aikbee Timbers Sdn Bhd & Anor v Yii Sing Chiu & Anor and Anor Appeal s*uggests that the imposition of different rates in mixed development is *not* confined to the Management Corporation management period, and that it may be imposed by the developer and the Joint Management Body in situations where it is just, reasonable, fair and justifiable, in light of the social legislation approach in interpreting SMA 2013. To be clear, the imposition of different rates is a separate matter from the establishment of 2 different sets of Maintenance Building Account and the Sinking Fund Account.

86. Accordingly, because the Resolutions passed at the 1st AGM are *ultra vires,* and since only the JMB or the Management Corporation, as the case may be, is vested with the powers to determine the rates of the maintenance charges and the sinking fund contributions, it is necessary for the JMB to convene a general meeting to be attended by all the parcel owners, comprising both the Residential Component and the Commercial Component, to present a proper budget in respect

of the common property of the entire development area with a breakdown of actual expenses attributable to the residential and commercial components including the utilities usage, cleaning, security, lift maintenance, parking management and any extra costs to be borne by any particular component. If different rates are proposed for the Residential Component and the Commercial Component, the proposed resolution must state the proposed different rates, the reasons for the differential rates, and the effective date for the same. The rates charged must be ascertainable, consistent, and uniform in that parcels of the same types in terms of similar use and share units are charged according to the same budget and the same rate formula. All parcels with the same share units must be charged the same amount.

87. We are aware that the learned High Court Judicial Commissioner (as he then was) had expressed his reason for not adopting the aforesaid decision, namely, directing the holding of an annual general meeting to table a fresh resolution, on the ground that *"… it is very likely that such an alternative judgment will bring about even more disputes between*" the JMB and the commercial parcel owners. He was concerned that the residential parcel owners have only 24.4% share units, whilst the commercial parcel owners have 75.6% share units, and the fact that the resolutions would be based on these share units.

88. With respect, the disparity in the share unit ratio cannot be a valid reason to avoid convening a general meeting to vote on

the rates for the maintenance charge and sinking fund contributions. In a mixed development, it is not uncommon for commercial units to have a higher share of units due to larger floor areas, higher intensity use, and more facilities. This fact alone cannot justify withholding a general meeting where the proposal for differential rates is to be made. The SMA 2013 does not provide for any exception allowing the JMB to skip an annual general meeting to vote just because one sector has a large share unit block.

89. Even if the commercial owners control the votes, they cannot legally impose unfair charges. The Charges and Contribution must be “fair and equitable”, having regard to the use and cost of the common property. Under both the SMA 2013 and the BCPA 2007, there are safeguards to check any charges that may be oppressive or discriminatory. More specifically, under section 86 of the SMA 2013, the COB may appoint one or more persons to act as managing agent to maintain and manage the common property for a period to be specified by him. The aggrieved party may also avail itself of the Tribunal constituted under the SMA 2013.

90. The Courts have consistently approached the BCPA 2007 and the SMA 2013 as social legislation, designed to protect the interests of a community and not just corporate governance legislation (this theme shall be further discussed below). If the majority seeks to impose charges beyond what is necessary for the maintenance and management of the common property or

discriminate unfairly between residential and commercial parcels, the Courts will readily respond to protect the weaker parcel owners and set aside any resolutions that may be oppressive, inequitable, or contrary to statutory duties.

Refunds of Payments by Residential parcel owners pursuant to *ultra vires* resolutions

91. We are conscious that by declaring the Resolutions of the 1st AGM as *ultra vires* and invalid, this may prompt the residential owners to seek the refund of all payments previously made based on the charges determined at the said meeting. This, if permitted, will destabilise the property management operations of the development and create financial chaos for the JMB.

92. To our mind, this is where the character of the BCPA 2007 and the SMA 2013 as social legislation becomes relevant. In *Innab Salil & Ors v Verve Suites Mont' Kiara Management Corp* [2020] 12 MLJ 16**,** the Federal Court held as follows:

> "[26] The SMA 2013 is without doubt, a social legislation. It was passed to facilitate the affairs of strata living for the good of the community or owners of the strata title. Being social in nature, the provisions of the SMA 2013 which safeguard community interests ought to receive a liberal interpretation and not a restricted or rigid one".

93. Although the Resolutions are *ultra vires* and invalid, it is our judgment that the residential parcel owners ought to be

prohibited from claiming any refunds of the payments previously made thereunder. This is because, in our opinion, even though the Resolutions are invalid, it only means that the determination of the rates in respect of the maintenance charges and the sinking fund contributions was illegal and invalid, but the residential owners' obligation to pay the charges and contributions is imposed by the statutes. In other words, the payments that were made were made under a statutory obligation, save that only the *rates* were improperly calculated.

94. Furthermore, the residential parcel owners had received the benefits of the maintenance and the capital expenditure paid and spent by the JMB in respect of the common property used and enjoyed by them. It will not be right in equity to permit the payments to be refunded now that the Resolutions are declared *ultra vires* and invalid. There is also a need for continuity in maintaining the common property, and the difficulty, not to mention the prejudice, in unwinding years of accounts if refunds were to be permitted.

95. The position is similarly applicable to the payments made by the developer in respect of the unsold parcels, if any.

96. Thus, once the JMB has properly determined the new and valid rates pursuant to resolutions properly passed at its annual general meeting, which is directed to be convened, adjustments will have to be made to the residential parcel owners who had made the payments under the void Resolutions. If there are

overpayments, credits will have to be given and such credits can be off-set against future charges. Similarly, where there has been underpayment or even no payment, the arrears will be calculated using the new, validly determined rates, retrospectively.

97. In this regard, the commercial parcel owners may seek reimbursement for any expenses that were necessary and reasonably incurred for the genuine maintenance of the common property of the Commercial Component during the period from October 2011 to November 2017 that benefitted the development as a whole and subject to proper documentary proof and invoices. In this regard, the JMB may appoint auditors to verify whether the works or services rendered and incurred related to common property, were necessary and properly priced. Once determined and approved at the general meeting, the reimbursement may be by direct payment or credit against arrears calculated under the retrospective valid rates.

98. Being social legislation, the provisions of the BCPA 2007 and SMA 2013 ought to be construed purposively and in the light of the stated object as *"An Act to provide for the proper maintenance and management of the buildings and common property, and or related matters"*. The underlying purpose of the statute is clearly to ensure proper management, maintenance, and equitable contribution toward the common property. Towards this end, there should be no unjust enrichment, and there must be fairness between parcel owners, always having

into consideration the need for a functioning, financially healthy management body.

99. We do not see any express provisions in the BCPA 2007 and the SMA 2013 that prohibit the accounting adjustments that are ordered in this judgment. In fact, the JMB is obliged to keep "proper accounts" and to maintain "proper accounts", any sums unlawfully collected must be regularised or credited when the valid rates are fixed. In our view, this Court has broad equitable power to adjust payments, order reimbursements, correct accounts, and issue such directions as may be necessary to ensure the fair allocation of charges and contributions, thereby promoting fairness, equity, and avoiding unjust enrichment.

Common Property

100. Common property is defined as in section 2 of the SMA 2013 as:

> "(a) in relation to a building or land intended for subdivision into parcels, means so much of the development area
>
> (i) as is not comprised in any parcel or proposed parcel; and
> (ii) used or capable of being used or enjoyed by occupiers of two or more parcels or proposed parcels; or

(b) in relation to a subdivided building or land, means so much of the lot

(i) as is not comprised in any parcel, including any accessory parcel, or any provisional block as shown in a certified strata plan; and
(ii) used or capable of being used or enjoyed by occupiers of two or more parcels;"

101. The JMB is the sole body to manage and maintain the common property of Gurney Paragon until the Management Corporation is formed. The Respondents cannot be permitted to continue to take over the management and maintenance of the common property, even if the common property is within the Commercial Component of the development area.

102. In this case, the 1st and 2nd Respondents, being the developer having the prerogative in drawing up the common property on the strata plans, have only lodged the finalized strata plan as one Common Property. Since there is only one Common Property (delineated in yellow), it must be administered by the joint management body or management corporation, the JMB in this case. The 2nd Respondent thus cannot claim and control the common property.

103. In this regard, the learned High Court Judicial Commissioner (as he then was) decided that the 2nd Respondent is entitled in law

to continue managing and maintaining its own Commercial Component common property. At para [95] and [95], his Lordship said:

> "[95] On Issue No. 3 — **I find that D2 (as the Commercial component owner) is to continue to maintain and manage its own Commercial component common property. In other words, the maintenance and management of the Commercial component's common property are to remain at status quo**
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> .
>
> [96] In P's Re-Amended Statement Of Claim, prayer 66(ca) is for an Order that D1D2 "do forthwith deliver and surrender all common property as delineated in the strata plan submitted by [D1D2] to [P]". I accordingly dismiss prayer 66(ca)."

104. With respect, the conclusion by the learned High Court Judicial Commissioner is wrong and must be set aside.

105. Accordingly, we hereby direct that the Respondents are to surrender the management and maintenance of the common property within the Commercial Component to the JMB. Towards this end, we order that the 1st and 2nd Respondents provide and deliver to the JMB the following documents:

a) the Strata Plans (as approved by the relevant authority) of the development area that indicate the boundaries of

individual parcels and the areas classified as common property;

b) the Schedule of Parcels and Share Units that shows the allocation of share units between residential and commercial components, which would enable the JMB to apportion maintenance charges and the sinking fund contributions;

c) the Register of Parcel Owners to enable the JMB to identify who owns which parcels and who has rights over parts of the property;

d) the Details of Facilities and Services that would provide all information about common facilities (lift systems, utility connections, fire safety, security) that the JMB will manage.

(collectively referred as "**the Documents**")

106. From the Documents, the JMB will be able to identify the common property to be surrendered and owners of the commercial parcels to whom the invoices for the payment of the Charges and Contribution can be issued.

Conclusions

107. In the premises, we set aside the decision of the learned High Court Judicial Commissioner (as he then was) and make the following orders:

a) A declaration that the Resolutions are *ultra vires* and void;

b) the JMB is to convene a general meeting as soon as practicable to be attended by all the parcel owners, comprising both the Residential Component and the Commercial Component, present a proper budget in respect of all the common property of Gurney Paragon with a breakdown of actual expenses attributable to the residential and commercial components for the determination by the JMB through proper resolutions, the maintenance charges and the sinking fund contributions payable by the parcel owners. If different rates are proposed for the Residential Component and the Commercial Component, the proposed resolution(s) must state the proposed different rates, the reasons for the differential rates and the effective date for the same. The rates charged must be ascertainable, consistent, and uniform in that parcels of the same types in terms of similar use and share units are charged according to the same budget and the same rate formula. All parcels with the same share units must be charged the same amount;

c) once the maintenance charges and the sinking fund contributions are duly determined at the aforesaid general meeting, each of the parcel owners shall be liable to pay the charges so determined in proportion to their respective share units retrospectively from October 2011;

d) the residential parcel owners are prohibited from claiming any refunds of the payments previously made under the 1st AGM on 14.10.2014. Once the JMB has properly determined the new and valid rates pursuant to resolutions properly passed at the general meeting ordered herein, adjustments will have to be made to the residential parcel owners who had made the payments under the Resolutions declared void. If there are any overpayments, credits will have to be given, and such credits can be offset against future charges. Similarly, where there is underpayment or even no payment, the arrears will be calculated using the new, validly determined rates, retrospectively;

e) the Respondents may seek reimbursement for any expenses that were necessary and reasonably incurred for the genuine maintenance of the common property of the Commercial Component during the period from October 2011 to November 2017 that benefitted the development as a whole and subject to proper documentary proof and invoices. The JMB may appoint auditors to verify whether the works or services rendered and incurred related to the common property were necessary and properly priced. Once determined and approved at the general meeting, the reimbursement may be made by direct payment or credit against arrears calculated under the retrospective valid rates;

f) the Respondents are to surrender the management and maintenance of the common property within the Commercial Component to the JMB within 14 days from the date of this judgment;

g) the 1st and 2nd Respondents are to provide and deliver to the JMB within 14 days from the date of this judgment the following documents:

i) the Strata Plans (as approved by the relevant authority) of the Gurney Paragon development area that indicate the boundaries of individual parcels and the areas classified as common property;

ii) the Schedule of Parcels and Share Units that shows the allocation of share units between residential and commercial components, which would enable the JMB to apportion maintenance charges and the sinking fund contributions;

iii) the Register of Parcel Owners to enable the JMB to identify who owns which parcels and who has rights over parts of the property;

iv) the Details of Facilities and Services that would provide all information about common facilities (lift systems, utility connections, fire safety, security) that the JMB will manage.

(collectively referred to as "**the Documents**")

h) the Respondents, jointly and severally, to pay the Appellant the costs of this appeal, fixed at RM50,000.00, subject to allocator. The costs ordered by High Court is set aside.

DATE: 3 February 2026

-sgd-

ONG CHEE KWAN
JUDGE
COURT OF APPEAL

For the Appellant	:	1. Mr. Lai Chee Hoe; 2. Ms. Deyvinah Ganesalingam; and 3. Mr. Low Yen Hau (Messrs. Chee Hoe & Associates)
For the Respondents	:	1. Mr. Ashok Kumar Mahadev Ranai 2. Mr. Lim Chin Lun (Messrs. Skrine)