

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA
SAMAN PEMULA NO.: WA-24NCVC-776-04/2018**

ANTARA

1) SALIL INNAB

(No. Passport: 87222134)

2) TENG KENG HAN

(No. K/P:630615-08-6215)

...PLAINTIF-PLAINTIF

DAN

1) BADAN PENGURUSAN BERSAMA SETIA SKY RESIDENCES

(Buku Berdaftar: JMB 785/2014)

2) KHOO BOO HIAN

(No. K/P:691020-20-5339)

3) PON LYE KWAH

(No. K/P: 720518-05-5010)

4) HASAN BIN HUSIN

(No. K/P: 481208-03-5617)

5) **CHE NORAN BINTI MOHD JELAS**

6) **SVETLANA PETROSYAN**

(No. Passport: AA6119559)

....DEFENDAN-DEFENDAN

JUDGMENT

[1] This was an application (Enclosure 4) by the Plaintiffs for interlocutory injunctions against the Defendants. By the application in Enclosure 4, the Plaintiffs sought the following injunctions:

- “(a) Bahawa satu perintah injunksi diberikan untuk menghalang Defendan-Defendan daripada membincangkan dan menentukan apa-apa resolusi untuk menghalang penyewaan jangka masa pendek di Setia Sky Residences dalam Mesyuarat Agung Tahunan Ke-5 yang akan diadakan pada 21.04.2018;
- (b) Bahawa suatu injuksi diberi untuk menghalang Defendan-Defendan dan/atau mana-mana pegawai-pegawai, kakitangan, pekerja-pekerja Defendan Pertama dan/atau wakil Defendan Pertama daripada mengganggu dan/atau menghalang dalam apa jua cara terhadap Plaintiff-Plaintif, pemilik-pemilik, penyewa-penyewa bagi sewaan jangkamasa pendek dan/atau mana-mana orang yang mewakili Plaintiff-Plaintif daripada menjalankan penyewaan jangka masa pendek di Setia Sky Residences;”

Background

[2] On the 20th of April 2018, an interim ex-parte injunction in terms of the application in Enclosure 4 was ordered by the High Court in Kuala

Lumpur. On 17th May 2018, an *ad interim* injunction as per (b) above was granted by this Court *vis a vis* only the 1st Defendant, pending the filing of affidavits by the parties. On the 17th of August 2018 after hearing the parties, an interlocutory injunction in terms of prayer (b) in Enclosure 4 was granted in respect of unit C-12-3A and 16 units identified in Exhibit S1-5 to the 1st Plaintiff's Affidavit in Support affirmed on 19th April 2018 (Enclosure 2) until disposal of the Originating Summons, subject to the usual undertaking as to damages by the Plaintiffs.

Material Issues

[3] The 1st Plaintiff is a tenant of an apartment unit owned by the 2nd Plaintiff. This apartment unit, described as unit C-12-3A, is an apartment unit in a building known as Setia Sky Residences in Jalan Raja Muda Abdul Aziz, Off Jalan Tun Razak, 50300 Kuala Lumpur.

[4] The 1st Plaintiff had rented unit C-12-3A from the 2nd Plaintiff pursuant to a tenancy agreement dated 25th September 2015 for the purposes of sub-letting the unit on short-term rental to third parties. The 1st Plaintiff is also a director of a company called Innab Trade Sdn Bhd. Through Innab Trade Sdn Bhd, the 1st Plaintiff had also rented other units in Setia Sky Residences for the purposes of sub-letting the same to members of the public.

[5] It is contended by the Plaintiffs that the 1st Defendant, which is the Joint Management Body of Setia Sky Residences, were aware of these arrangements and had agreed to these short-term rentals. The Plaintiffs maintain that there is in place a Short Term Rental Operators Standard Operating Procedure dated 25th March 2017 that would regulate the 1st Plaintiff and the employees of Innab Trade Sdn Bhd vis a vis the short-term rental services they provide. The Plaintiffs insisted that they had been complying with the operating procedure.

The dispute

[6] However, a controversy had arisen between the 1st Plaintiff and the 1st Defendant. The crux of the allegation, it would appear, is that the 1st Defendant had now taken a different view of the short-term rentals being provided. As a result, it is alleged that the 1st Defendant's officers had begun to interfere with and to obstruct the 1st Plaintiff and Innab Trade Sdn Bhd from providing short-term rental services at Setia Sky Residences. The Plaintiffs contend that the 1st Defendant's officers had been instructed to do so.

[7] Among the incidents complained of was the prevention by an officer of the 1st Defendant of one of the short-term tenants by the name of Joshua Daniel Gee from entering the unit he had rented in Setia Sky Residences. This incident appeared sufficiently significant that a police report was actually lodged by Joshua Daniel Gee. Another incident was the alleged prevention of an employee of the 1st Plaintiff from entering the building on the ground that the employee was said to have intimidated residents of Setia Sky Residences. It was also alleged that

the security guards in Setia Sky Residences had been instructed to scrutinise, presumably unreasonably, the actions of the 1st Plaintiff and his short-term tenants. To this is also included an allegation that one of the 1st Defendant's security guards, one Bishal, was forced to make a false report against the 1st Plaintiff. In paragraph 32 vi of his affidavit in reply of 30th May 2018, the 1st Plaintiff alleged that there were numerous instances of short-term rental tenants being blocked and/or prohibited by the security guards from entering the compound of Setia Sky Residences although the Plaintiffs had complied with the standard operating procedures by sending a list of the names of the short-term tenants to the 1st Defendant.

[8] In the affidavit filed by the 1st Defendant in response to the Plaintiffs' application in Enclosure 4, the cause of the controversy became clear. It is the 1st Defendant's contention that the business operated by the 1st Plaintiff, and the 1st Plaintiff through Innab Trade Sdn Bhd, at Setia Sky Residences is in reality a hotel business and not merely the business of letting out short-term tenancies. In so contending, the 1st Defendant made reference to how bookings for the short-term tenancies were made through the internet, how the units were described and marketed by using the name "KL Suites" and how they were portrayed in Innab Trade Sdn Bhd's website, including the contention that these "KL Suites" could be booked through other websites. It is contended that all of these are similar to and in effect, the management of a hotel service.

[9] As such, the 1st Defendant contends that the Plaintiffs are required to have a licence for the hotel from the Dewan Bandaraya under the Hotel Act 2003, to be registered as a tourist accommodation premises under the Tourism Industry Act 1992, to be registered as an operator operating accommodation premises under the Tourism Tax Act 2017, to have a Certificate by the BOMBA that would allow the units to operate as a hotel and to comply with the Registration of Guests Act 1965. In fact the 1st Defendant also contends that the 1st Plaintiff's tenancy agreement with the 2nd Plaintiff is null and void because it is illegal, being in reality an agreement to operate a hotel business.

[10] To the allegations of interference and obstruction by the 1st Defendant's officers, the 1st Defendant's Chairman, Jamsaini Bin Hashim, in paragraph 21 of his affidavit affirmed on 14th May 2018, made no clear denial. Instead, he sought to put the Plaintiffs to strict proof of the allegations made. This was then coupled with counter allegations that the 1st Plaintiff often caused problems for the 1st Defendant's employees resulting in various incident reports against the 1st Plaintiff. As for the complaint by Joshua Daniel Gee, the 1st Defendant alleged that this was due to the 1st Plaintiff's failure and refusal to comply with a Standard Operating Procedure which came into force on 1st April 2018. As regards the refusal to allow the 1st Plaintiff's employee to enter the building, this allegation was denied by the 1st Defendant. In addition there were counter allegations including an allegation that a cloned access card was used and the failure to register with the guards. As for the allegation that a security guard was forced to make a false report against the 1st Plaintiff, the 1st Defendant the 1st Defendant did not deny this allegation but instead, chose to put the 1st

Plaintiff to strict proof. A different version was then narrated by Jamsaini Bin Hashim in his affidavit.

[11] The 1st Defendant also contended that the grant of an interim injunction in this case would be an error as it would be tantamount to granting a final relief without a full hearing on the merits. There was also much evidence led in regard to the 5th Annual General Meeting of the Setia Sky Residences Joint Management Body that was scheduled for 21st April 2018. In the agenda for this Annual General Meeting was a proposal in item 6(A) to approve a by-law to prohibit short-term rentals of all the units in Setia Sky Residences. There was also a proposal to impose a penalty on owners of units who breached this by-law (if approved). The evidence led in the 1st Defendant's Affidavit in Reply of 30th May 2018 describes the commotion that ensued at this AGM and how it had to be adjourned. Quite clearly the owners of units in Setia Sky Residences are divided on this issue of short-term tenancies. The 1st Defendant also contended that the ex parte order of 20th April 2018 which was granted had rendered the holding of the 5th Annual General Meeting as scheduled, untenable.

The injunction sought

[12] There were a total of some 16 affidavits filed by the parties with a barrage of allegations and counter allegations of infractions levelled against each other. In all these allegations and counter allegations, it is however important not to lose sight of the nature and ambit of the application and the injunction sought.

[13] The interlocutory injunction sought in Enclosure 4 had two components. By the time the application in Enclosure 4 came before this Court to be heard *inter partes*, the first prayer sought in paragraph (a) had become unnecessary. The 5th Annual General Meeting fixed for 21st April 2018 had passed and it was adjourned. Thus the only order that remained for consideration was that in prayer (b). In addition, prayer (b) was in relation only to the 1st Defendant and did not involve the 2nd to the 6th Defendants.

[14] The approach that a Court of law should take when considering an application for an interlocutory injunction is well settled. One would be hard put to do better than how the approach was described by Gopal Sri Ram JCA (as he then was) in *Keet Gerald Francis Noel John v Mohd Noor @ Harun Bin Abdullah & 2 Ors* [1995] 1 CLJ 293 at pp 305 to 306:

“To summarise, a Judge hearing an application for interlocutory injunction should undertake an inquiry along the following lines:-

first, he must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of Counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are

serious questions to be tried, he should move on to the next step of his inquiry;

second, having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, *inter alia*, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the Judge would be entitled to dispense with the usual undertaking as to damages (see: *Cheng Hang Guan v. Perumahan Farlim (Penang) Sdn. Bhd.* [1988] 1 CLJ 435 (Rep); [1988] 3 MLJ 90). Apart from such cases, the Judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee;

thirdly, the Judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] AC 130 and applied in *Cheng Hang Guan (supra)*. It is a judicial discretion capable of correction on appeal. Accordingly, the Judge would be entitled to take

into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A Judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.”

[15] Having regard to the injunction sought, I am satisfied that there is a serious issue to be tried. The allegations of interference with and obstruction of the 1st Plaintiff and his short-term tenants were, to my mind, not satisfactorily disputed, as alluded to above, to make the Plaintiffs' allegations clearly untenable.

[16] The 1st Defendant seems driven by the view that the 1st Plaintiff, in providing short-term tenancies, is actually running a hotel. Taking the view that this is not permitted, the 1st Defendant appears to have taken the law into its own hands. There is then the dispute whether the standard operating procedures had been complied with and there is a clear conflict of evidence on this issue.

[17] The other allegations levelled against each other by the parties, of which there are many, do not throw any more light on the issues relevant to the injunction sought. In fact, they were more to support what I would regard as the key prayer in this Originating Summons, which is a declaration that short-term tenancies are permitted at Setia Sky Residences sought by the Plaintiffs. In any event, the Court must eschew making any definitive finding of facts at this stage even

though this action was brought by way of an Originating Summons and most, if not all, of the affidavits have been filed. One obvious reason for this is that the parties have not been heard on the merits of the action. They have only been heard in respect of this application in Enclosure 4 which was of limited ambit compared to the main prayers in the Originating Summons.

[18] However, it is nevertheless pertinent to point to the fact that *ex facie*, the Deed of Mutual Covenants relied upon by the 1st Defendant does permit rental and leasing of units in Setia Sky Residences. There is no restriction as to the duration of the tenancies or leases that may be granted. In any event, whether the Plaintiffs are bound by the Deed of Mutual Covenants or are signatories to it, are issues still to be determined. As for the proposed resolution, at the 5th Annual General Meeting, to approve a by-law to prohibit short-term rentals, that has yet to be voted on. It is also relevant to mention that the proposal at the 4th Annual General Meeting of Setia Sky Residences Joint Management Body to regulate short-term rentals was defeated. There are thus serious issues to be tried, the first being in respect of the alleged interference with and obstruction of the 1st Plaintiff, his employees and his short-term tenants and the second, which is related to the first issue, whether short-term tenancies are in fact unlawful or prohibited in Setia Sky Residences.

[19] If the injunction sought is not granted, there is a real likelihood that the 1st Plaintiff's short-term tenants will be adversely affected. They are in reality victims of the conflict between the Plaintiffs and the Defendants. These short-term tenants would have paid for their

tenure and unwarranted impediments to their access to and egress from the units they have rented would pose unnecessary hardship to them as third parties. In addition, the continued interference with or obstruction of the 1st Plaintiff's short-term tenants would also be likely to cause irreparable damage to the goodwill that the 1st Plaintiff would have built in his business. Damage to goodwill built cannot be easily remedied with monetary compensation. Having regard to, *inter alia*, the fact that innocent third parties are involved – the short-term tenants – the balance of convenience also weigh in favour of granting the interlocutory injunction sought.

Conclusion

[20] In the circumstances of the case, I find that it would be just to maintain the *status quo* pending the hearing and outcome of the Originating Summons and for the injunction sought in prayer (b) of Enclosure 4 to be granted. However, rather than to allow what may be too general an order, learned counsel for the Plaintiffs was required to identify the relevant units which the 1st Plaintiff is renting out on short-term tenancies. To this, learned counsel for the Plaintiffs pointed out that the relevant units include the units set out in Exhibit S1-5 to the 1st Plaintiff's Affidavit in Support affirmed on 19th April 2018 (Enclosure 2) read in conjunction with paragraph 21.1 of the same affidavit.

[21] By reason of the foregoing, and upon the usual undertaking as to damages, the interlocutory injunction sought in prayer (b) of Enclosure 4 was granted specifically in respect of the units in Setia Sky Residences identified, that is to say, units C-12-3A, D-31-5, B-8-3A, D-

33-2, C-16-1, C-38-1, A-26-5, C-35-1, B-18-5, C-12-1, D-39-2, D-8-5, D-8-2, A-23-3A, C-16-3, C-35-3 and C-9-1, until disposal of the Originating Summons herein.

Dated this 17th Day of August 2018.

-sgd-

(YA TUAN DARRYL GOON SIEW CHYE)

Judicial Commissioner
High Court of Malaya
Kuala Lumpur
(Civil NCvC 2)

CASES CITED

Keet Gerald Francis Noel John v Mohd Noor b. Abdullah & Anor [1995]
1 CLJ 293

Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals [2012] 1 MLJ 761

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331

Arif v Yeo & Another [1990] 1 MLJ 218

Yeap Mah Ee v Kuan Kum Chiew & Anor [1988] 2 MLJ 389

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[1982] 2 MLJ 1982

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Sivaperuman v Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150

Adil Juta Sdn Bhd v Tenaga Nasional Bhd [2015] 9 MLJ 379

Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd [1987] 2 MLJ 192

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Tendler v Sproule [1947] 1 All ER 193

Caradon District Council v Paton and another [2000] 3 EGLR 57

Lord Nelson Hotel Company Limited v The City of Halifax [1956] S.C.R. 264

Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd [1980] 1 MLJ 21

Datuk Ong Kee Hui v Sinyium Anak Mutit [1983] 1 MLJ 36

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Badiaddin Bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393

LEGISLATION AND LEGAL TEXT CITED

Section 70(5) of the Strata Management Act 2013

Section 5 of the National Land Code 1965

Section 223 of National Land Code 1965

Article 13 of Federal Constitution

Section 2 of the Hotels (Federal Territory of Kuala Lumpur) Act 2003

Verve Suites House Rule

Words, Phrases & Maxims Legally Defined by Ananda Krishnan,
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Tourism Tax Act 2017

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Public Ruling No. 01/2018 issued by Royal Malaysian Customs

Registration of Guests Act 1965

Fire Service Act 1988

Peraturan-Peraturan Perkhidmatan Bomba (Perakuan Bomba) 2001

Contracts Act 1950

Strata Management Act 2013

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