IN THE FEDERAL COURT OF MALAYSIA AT PUTRAJAYA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO: 02(i)-74-10/2019(W)

BETWEEN

1. INNAB SALIL
(PASSPORT NO : 87222134)
2. INNAB TRADE SDN.BHD
(COMPANY NO : 1141143-P)
3. NG GAIK KIAN
(NRIC NO: 810608-08-5482)
4. TAN WYE CHUAN
(NRIC NO : 841109-14-6449) ... APPELLANTS

AND

1. VERVE SUITES MONT' KIARA
MANAGEMENT CORPORATION ... RESPONDENT

[In the Matter of the Court of Appeal at Putrajaya

Civil Appeal No: W-02(NCvC)(W)-1425-07/2018

Between

1. Innab Salil
   (Passport No: 87222134)
2. Innab Trade Sdn.Bhd
   (Company No : 1141143-P)
3. Go Wei Kok
   (Nric No : 840701-14-5045)
4. Mong Meng Wei
   (Nric No: 800403-07-5185)
5. Ng Gaik Kian

(Nric No: 810608-08-5482)
6. Tan Wye Chuan
(Nric No: 841109-14-6449)
7. Lim Yih Sheng
(Nric No: 840303-10-5099) … Appellants .

And

Verve Suites Mont' Kiara
Management Corporation … Respondent

In the High Court of Malaya In Kuala Lumpur

Civil Suit No. WA-22NCvC-461-09/2017

Between

Verve Suites Mont' Kiara
Management Corporation ... Plaintiff

And

1. Innab Salil
(Passport No : 87222134)
2. Innab Trade Sdn.Bhd
(Company No : 1141143-P)
3. Ung Su Hoe
(Nric No : 721120-08-6209)
4. Go Wei Kok
(Nric No: 840701-14-5045
5. Raja Arshad Bin Raja Tun Uda
(Nric No: 461202-10-5727)
6. Shen Jian Hui
(Passport No: G29805524)
7. Mong Meng Wei
(Nric No: 800403-07-5185)
8. Ng Gaik Kian
(Nric No : 810608-08-5482)
9. Ung Su Tiong
(Nric No : 680812-08-5663)

10. Mok Zhi Seong
(Nric No : 820923-06-5747)
11. Ng Kim Fong
(Nric No : 810506-01-5141)
12. Oriental Group International Limited
(Company No : 782337)
13. Chen Mei Ling
(Passport No : 740105-14-5526)
14. Tan Wye Chuan
(Nric No : 841109-14-6449)
15. Lee Chor Seng
(Nric No : 640305-08-5419)
16. Kan Siak Hong
(Nric No : 661018-10-5977)
17. Julius Lim Wee Ming
(Nric No: 771024-01-5609)
18. Lim Yih Sheng
(Nric No : 840303-10-5099)
19. Ung Su Ee
(Nric No : 700701-08-5826)
20. Yeoh Phee Lee
(Nric No : 690312-08-5121) …. Defendants

CORAM:

TENGKU MAIMUN BINTI TUAN MAT, CJ
ROHANA BINTI YUSUF, PCA
MOHD ZAWAWI BIN SALLEH, FCJ

JUDGMENT OF THE COURT

Introduction

[1] This appeal relates to the appellants'/defendants' use of their apartment units for commercial purposes by letting them out for short-term rental. The dispute arose when the respondent/plaintiff took issue with the appellants/defendants using their respective premises for such purposes.

[2] The respondent/plaintiff is a management corporation incorporated under the Strata Titles Act 1985 ('the STA 1985') to maintain and manage a development known as "Verve Suits" ('Verve Suites') located at No 8, Jalan Kiara 5, Mont Kiara, 50480 Kuala Lumpur. Verve Suites was built on a plot of land held under GM 8661, Lot 67344, Mukim of Batu, District of Kuala Lumpur ('Land'). The category of land use is 'Building' with the express condition that the Land shall be used for commercial building with the purpose of service apartments and commercial only.

[3] The 1st appellant/1st defendant is a Swedish national and a tenant in Verve Suites. He owns 999.900 shares in the 2nd appellant/2nd defendant. The 3rd and the 4th appellants are the 8th and the 14th defendants respectively in the High Court. The other defendants are parcel owners in Verve Suites who leased out their units to the 2nd appellant/2nd defendant for short- and long-term rental. The other defendants either settled the suit at the High Court or chose not to appeal to this Court. The 1st and 2nd appellants/1st and 2nd defendants, in addition to leasing some units, managed the enterprise either for some or all of the other defendants as they originally were in the High Court.

[4] For ease of reference, in this judgment, parties will be referred to as they were in the High Court.

The background facts

[5] On 18.11.2015, the Commissioner of Building Kuala Lumpur ('COBKL') issued COBKL Circular 2015/2016 ('Circular'), instructing all joint management bodies or management corporations to curb the prevailing issue of the use of buildings in and around Kuala Lumpur for short-term rental.

[6] Following the Circular, the plaintiff held an Extraordinary General Meeting on 25.3.2017 proposing a resolution to enact 'House Rule No. 3', which reads:

> "3.0 OCCUPANCY
>
> 3.1 Approved use of the Units
>
> The unit shall be used only for the purpose of service suites and shall not be used for business or any other purpose (Illegal or otherwise) which may be detrimental to the credibility of Verve Suites Mont Kiara.
>
> The use of any unit for short-term rentals is prohibited. For the purpose of these rules, a short-term rentals agreement shall be deemed unless proven otherwise if they fall within the following:
>
> i. Any stay for which a booking was made through services/applications/websites etc. such as Airbnb, booking.com, agoda.com, klsuites.com and other similar services;

ii. Any stay for which a signed and stamped tenancy agreement has not been filed with VSMO and tenants registered and issued with access cards;

iii. Any unit rented out with a tenancy agreement that permits the tenant from subleasing the property. Any breach of the above shall attract a penalty RM200 for each day the infringement continues. The Management reserves the rights to deactivate the access cards and barred [*sic*] the unit from facilities booking.

Any infringement found shall be deemed to be at minimum an overnight stay thus deemed as 2 days unless proven otherwise. A unit owner shall be liable for the penalties incurred by his tenant if his tenant carries such activities as prohibited under these rules and shall be deemed notified of such charges if an email or SMS has been sent to the address/number maintained in VSMO register. All fines collected under this section shall be used for the effort to combat the prohibited practice of short-term rentals."

[7] House Rule No. 3 was passed with an overwhelming majority of 96-4 votes. The plaintiff asserted that the House Rule was passed for the purposes of regulating, controlling, managing and administering the use and enjoyment of Verve Suites' residential units and common property, and for matters relating to the safety, security and use of the individual units and to protect the common property. The more targeted purpose was to prohibit entirely all forms of short-term rental activities involving Verve Suites' residential premises, i.e. when units would be advertised to tourists and holidaymakers seeking short-term accommodation via internet platforms, booking websites and other related mediums.

[8] On 20.4.2017 and 21.8.2017, the plaintiff duly notified residents of Verve Suites of the implementation of House Rule No. 3. Notwithstanding the two notifications, the defendants, in defiance of House Rule No. 3,

continued to engage in short-term rental activities. Vide two invoices dated 6.7.2017 and 4.8.2017, the plaintiff fined the defendants RM200.00 for every day of their failure to abide by House Rule No. 3.

[9] Eventually, some of the defendants initiated Strata Management Tribunal proceedings against the plaintiff seeking to challenge its implementation of House Rule No. 3. The action failed. The plaintiff, in turn, commenced a writ action in the High Court, where the plaintiff essentially sought to injunct the defendants from breaching House Rule No. 3 and to enforce the same. The writ action formed the basis of this appeal.

Proceedings in the High Court

[10] In the High Court, before the commencement of the trial, parties mutually agreed that the following question of law may be tried first pursuant to Order 33 rule 2, Rules of Court 2012 ("ROC 2012"):

> "Whether based on the pleadings filed by the parties herein the plaintiff's enforcement of the House Rule No. 3 had violated s. 70 (5) of the Strata Management Act 2013 (the 2013 Act)."

[11] The above question of law also constituted the primary defence against the plaintiff's action. In the event the question of law is resolved in favour of the plaintiff, the plaintiff applies for final judgment against the defendants for, among others, the following reliefs:

(i) that the defendants are enjoined by an injunction to abide at all times by the House Rules governing the use of all or any of the residential units in the Verve Suites;

(ii) that the defendants be restrained by an injunction from advertising, contracting for, booking and/or allowing, dealing with all and/or any of the residential units in Verve Suites to be used for business including paid short term rental and/or similar transient use or tourist, or hotels; and

(iii) that the defendants are directed to remove all and/or any advertisement(s) and listings from all internet websites and other media whether or not directly controlled or maintained by the defendants including klsuites.com and/or booking.com that offer the use of the defendants' residential units in Verve Suites for business including paid short-term rental and/or similar transient use or tourist, or hotels.

[12] Essentially, it was the defendants' argument that their right to rent out their premises short-term is allowed within the ambit of 'any other dealing' as provided for in section 70(5) of the SMA 2013. For ease of reference, section 70(5) is reproduced below:

> "(5) No additional by-law shall be capable of operating —
>
> (a) to prohibit or restrict the transfer, lease or charge of, or any other dealing with any parcel of a subdivided building or land; and
>
> (b) to destroy or modify any easement expressly or impliedly created by or under the Strata Titles Act 1985."

[13] 'Dealing' is not defined in the SMA 2013. Nonetheless, section 3 of the SMA 2013 stipulates that the SMA 2013 shall be read and construed with the Strata Titles Act 1985 ("STA 1985") insofar as their provisions are not inconsistent. Section 5 of the STA 1985 in turn provides that it shall be read and construed as part of the National Land Code 1965 ("NLC

1965"). In section 5 of the NLC 1965, "dealing" has been defined as follows:

> ""dealing" means any transaction with respect to alienated land effected under the powers conferred by Division IV, and any like transaction effected under the provisions of any previous land law, but does not include any caveat or prohibitory order;"

[14] Under section 213 of the NLC 1965 which is contained in Division IV of the NLC 1965, a 'tenancy exempt from registration' is a 'dealing'. The defendants classify their transactions as 'dealings' on the basis that their short-term rental constitute 'tenancies exempt from registration' under section 213 of the NLC 1965. Applying these various provisions of the law, the defendants argued that House Rule No. 3 violates section 70(5) of the SMA 2013 and that House Rule No. 3 is *ultra vires* section 70(5) of the SMA 2013 because it impinges on the defendants' right to deal with their land.

[15] In response, the plaintiff argued that the impugned short-term rentals do not amount to either a lease or a tenancy exempt from registration. They are instead mere licences. Accordingly, the defendants' various arrangements with holidaymakers and tourists for the short term rentals are not to be regarded as 'dealings' and as such, are not caught by section 70(5) of the SMA 2013. The plaintiff maintained that it has the power to regulate and even prohibit entirely short-term rentals through House Rule No. 3.

[16] The learned High Court Judge accepted the plaintiff's arguments. Her Ladyship's findings may be summarised thus:

(i) The defendants' likening of short-term rentals to 'tenancies exempt from registration' is tantamount to saying that hotel guests are tenants exempt from registration. Being house guests, Her Ladyship opined that the relationship between the houseguests and the defendants is, like that of hotel guests, one of licensee and licensor. This is further compounded by the terms of Clause 8.2.1 of Airbnb's terms of service which states that the holidaymaker or short-term renter merely holds a licence.

(ii) The plaintiff's pleadings and affidavits set out numerous incidents where the defendants' house guests had misused common facilities and caused a nuisance to the residents and compromised the safety and security measure put in place by the management corporation;

(iii) The SMA 2013 constitute social legislation. The duties and powers of the management corporation are set out in section 59 of the SMA 2013 and section 70(2) of the same Act empowers the management corporation, by special resolution to make by laws, for among others safety and security measures; and

(iv) In that regard, the interest of the community in the strata body prevailed over the individual commercial interests of the defendants. Moreover, all parcel owners had respectively signed a Deed of Mutual Covenants ('DMC') comprising certain positive and negative commitments which tally with House Rule No. 3.

[17] The High Court thus decided the question of law in favour of the plaintiff. House Rule No. 3 was held to be validly enacted and on the documentary evidence before the Court, the defendants had breached it. The learned Judge therefore allowed the plaintiff's application under Order 33 rule 2 of the ROC 2012 in terms of their prayers for injunctive relief.

[18] Aggrieved, the defendants appealed to the Court of Appeal.

DECISION OF THE COURT OF APPEAL

[19] The Court of Appeal upheld the decision of the High Court. It agreed with the High Court that the relationship between the defendants and the short-term renters is one of licensor and licensee, and not one of landlord and tenant. The Court of Appeal opined that in determining the nature of the occupancy, it matters not what label parties ascribed to their transaction or even the length of the stay by the short-term renters. What matters is the nature of the stay.

[20] For convenience, we reproduce below the relevant part of the judgment of the Court of Appeal:

> "[134] Consistent with the findings of the learned High Court Judge with regard to the nature of the stay as a mere licence, the learned High Court Judge found the argument by the defendants that short-term rentals should be considered as "dealing" within the meaning of the NLC, as absurd, as short-term rental guests can be equated to hotel guests. We are of the view that there is no flaw in such findings by the learned High Court Judge because, if every booking for short-term stay is regarded as "dealing" then such bookings are in fact tenancies exempt from registration within section 213 of the NLC, with the undesirable consequences of a hotel as the "landlord" and its guests as "tenants". Such construction is absurd when the proviso of section 213(3) of the

NLC is considered. The proviso in the section provides that for tenancy exempt from registration to be recognized, it must be endorsed on the register of document of title pursuant to Chapter 7 Part 18 of the NLC. The rationale behind the need for endorsement is for the tenancy exempt from registration to enjoy the same protection in law as provided in the NLC for all other dealings such as lease, charge and easement (See *Len Nyan Hon v Metro Charm Sdn Bhd* [2009] 6 CLJ 626.)

[135] Further, sections 316-318 of the NLC sets out the application for endorsement of tenancy exempt from registration, the application procedure and the cancellation thereof. It is inconceivable and impractical for the defendants to endorse a short stay by the guests on the register document of title and cancel the same every time guests register for the rental and upon departure. It is unthinkable that these endorsement regime would have to be repeated over and over again each time a guest came in and depart for the short term rental of the parcel units.

[136] Tenancy exempts (*sic*) from registration as found in the NLC is not intended to cover short-term stay such as the one operated by the defendants where the nature of the stay is merely temporal and transient, which the House Rules was specifically enacted to prohibit.".

[21] Having agreed with the High Court and having found that the learned Judge did not err in her findings, the Court of Appeal dismissed the defendants' appeal.

Proceedings in the Federal Court

[22] The defendants obtained leave to appeal to this Court on the following questions:

"**Question 1**

Whether as a matter of law, a Management Corporation established under the relevant statutes to maintain and manage commercial service suites built upon a land held under category of "Building" and express condition of "Commercial Building", may enact and pass House Rules to prohibit the owners of the commercial service suites from commercial usage, in particular, for short-term rental (i.e. for a day or part thereof), which is consistent with the express land use found in the document of title?

Question 2

Whether as a matter of law, a Management Corporation established under the relevant statutes to maintain and manage commercial service suites, built upon a land held under category of "Building" and express condition of "Commercial Building", and who has enacted and passed House Rules to prohibit the owners of the commercial service suites from using their property for short-term rental (i.e. for a day or part thereof), are in violation of Section 70(5) of the Strata Management Act 2013 when enforcing the said prohibition in the House Rules against the said owners?"

Question 1

[23] Question 1 essentially pertains to whether the House Rules may override and supersede the express land use on the title imposed by the State Authority under section 120 of the NLC 1965.

[24] The determination of the above question would necessarily involve the wholesome interpretation of section 120 of the NLC 1965 vis a vis section 70 of the SMA 2013. But before we do that, we bear in mind the decision of *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 ('*Ang Ming Lee*'). In *Ang Ming Lee*, based on a settled line of

precedents, this Court construed the Housing Development (Control and Licensing) Act 1966, which was passed to protect house buyers from developers, as a social legislation.

[25] A statute is said to be a 'social legislation' when Parliament passes the statute for a beneficent reason with the intention to ease or facilitate the affairs of, or protect a certain section or group of persons (see *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369; *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141).

[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. Accordingly, where two different interpretations are possible, it is the one which favours the interest of the community over the interest of the individual that is to be preferred. This is in line with the aforementioned decisions in *Ang Ming Lee* and *Hoh Kiang Ngan*.

[27] For brevity, we do not wish to repeat the submissions of the parties before us. In respect of Question 1, suffice that we summarised the defendants' arguments as follows:

(i) the apartment units in Verve Suites are held under a title which has a category of usage: Building with an express condition that the Land shall be used for commercial building with the purpose of service apartments and commercial only;

(ii) the express condition endorsed on the title for usage as commercial building and with the purpose of service apartments and commercial only is clearly prohibited by House Rule No. 3; and

(iii) as such, the legality and legitimacy of House Rule No. 3 are in question.

[28] The defendants contended that House Rule No. 3 cannot trump the express land use on the title of the Land as imposed by the State Authority and that House Rules only ought to regulate and not prohibit entirely the defendants' business of short-term rentals.

Question 2

[29] As for Question 2, as aptly put by learned counsel for the defendants, the crux of the question posed is whether the management corporation's enforcement of the House Rule No. 3 is in violation of section 70(5) of the SMA 2013. In this regard, it was argued by the defendants that –

(i) tenancies exempt from registration are dealings;

(ii) contractual dealings are recognised under section 206(3) of the NLC 1965; and

(iii) exclusive possession creates tenancy.

Our Decision/Analysis

Question 1

[30] The power of the State Authority to impose express conditions and restrictions of use of any land is governed by section 120 of the NLC 1965. Put differently, section 120 of the NLC 1965 provides for the general power of the State Authority to determine and impose the conditions and restrictions of use of any particular land or any part thereof. The SMA 2013 on the other hand is a more specific statute governing strata living and all other matters related thereto. On the face of it, there appears to be a conflict between House Rule No. 3 and the express condition of the Land use and by extension, conflict between section 70 of the SMA 2013 and section 120 of the NLC 1965.

[31] In this regard, we shall firstly consider section 70(2) of the SMA 2013 which details the substance of the by-laws that a management corporation may make, as follows:

> "(2) A management corporation may, by special resolution, make additional by-laws or make amendments to such additional by-laws, not inconsistent with the by-laws prescribed by the regulations made under section 150, for regulating the control, management, administration, use and enjoyment of the subdivided building or land and the common property, including all or any of the following matters:
>
> (a) safety and security measures;
>
> (b) details of any common property of which the use is restricted;
>
> (c) the keeping of pets;
>
> (d) parking;

(e) floor coverings;

(f) refuse control;

(g) behaviour;

(h) architectural and landscaping guidelines to be observed by all proprietors; and

(i) imposition of fine not exceeding two hundred ringgit against any proprietor, occupant or invitee who is in breach of any of the by-laws."

[32] Sub-section (3) of section 70 of the SMA 2013 explains the binding effect of an enacted by-law as between the management corporation on the one side and the proprietors of the parcels on the other, as follows:

"(3) The additional by-laws made under subsection (2) shall bind the management corporation and the proprietors, and any chargee, lessee, tenant or occupier of a parcel to the same extent as if the additional by-laws —

(a) had been signed or sealed by the management corporation, and each proprietor and each such chargee, lessee, tenant or occupier, respectively; and

(b) contained mutual covenants to observe, comply and perform all the provisions of these additional by-laws."

[33] To resolve the apparent conflict between section 120 of the NLC 1965 and section 70 of the SMA 2013, the provisions must be read harmoniously such that they do not diametrically contradict each other. The effect of harmonious construction of these two provisions is this: the grant of powers or rights by one particular provision in a law does not mean that such rights may not at the same time be restricted by other

provisions of the law. Hence, simply because the State Authority has issued conditions and restrictions of use in the title of the land, that does not preclude the management corporation from promulgating further rules, regulations or by-laws for the purposes provided for by law, in particular the purposes stipulated in section 70(2) of the SMA 2013.

[34] Support for this proposition is found in section 225 of the NLC 1965 which reads:

> "**225. General restrictions on powers conferred by this Chapter**
>
> (1) The powers conferred by this Chapter shall be exercisable in any particular case subject to –
>
> (a) any prohibition or limitation imposed by this Act or any other written law for the time being in force;
>
> (b) any restriction in interest to which the land in question is for the time being subject; and
>
> (c) so far as they are conferred on lessees, sub-lessees and tenants, the provisions, express or implied, of the lease, sub-lease or tenancy in question.
>
> (2) Without prejudice to paragraph (a) of sub-section (1), no lease or tenancy may be granted to two or more persons or bodies otherwise than as trustees or representatives."

[35] Reading section 225 in its ordinary meaning, it is clear that despite Part Fifteen, Chapter 1 of the NLC 1965 granting certain rights and protections in respect of leases and tenancies, such rights may be subject to other rules and conditions stipulated by any other written law.

[36] In *Weng Lee Granite Quarry Sdn Bhd v Majlis Perbandaran Seberang Perai* [2020] 1 MLJ 211 ('*Weng Lee Granite*'), for some 30 years the appellant had carried on quarrying activities nearby a dam in Seberang Perai when it received a stop work order from the respondent, the relevant local authority. By the stop work order issued under section 70A of the Street, Drainage and Building Act 1974 ('the SDBA 1974'), the appellant was only allowed to resume works upon successfully obtaining an earthworks plan approval from the respondent, which the appellant did. However, 11 years later the appellant was met with another stop work order. The respondent imposed a condition that the appellant ought to obtain a new earthworks plan approval from the respondent.

[37] The effect of both stop work orders was essentially to prohibit the appellant from quarrying until and unless the relevant approval was first obtained from the respondent. Dissatisfied with these circumstances, the appellant brought an action against the respondent seeking, among others, a declaration that by virtue of Condition B of its title issued pursuant to the National Land Code (Penang and Malacca Titles) Act 1963, the appellant is exempt from section 70A of SDBA 1974.

[38] Condition B in the title provided as follows:

> "The land comprised in this title:
>
> (B) Shall not be affected by any provision of the National Land Code or any other written law prohibiting mining or the removal of specified materials beyond the boundaries of the land."

[39] It was the appellant's argument that the stop work order imposed on it pursuant to the SDBA 1974 contravened Condition B as it was

prohibitory in nature. In response, the respondent argued that section 70A of the SDBA 1974 was intended to be regulatory and not prohibitory and accordingly its provision could apply to restrict the appellant's actions despite what the language of Condition B might suggest.

[40] Speaking for this Court, this was what Azahar Mohamed FCJ (as he then was), said at pg 235:

> "[67] It can be seen from the foregoing analysis that if one looks at the matter as a question of principle and policy, for all intents and purposes, s 70A relates to the regulation and supervision of earthwork activities. The point which has a strong bearing on this issue is that the approval of earthwork plans (*sic*) is required to enable the respondent as the local authority to control, regulate and supervise operations such as supervision of hill slope cutting, supervision of hill gradients; supervision of cleanliness; supervision of public safety; supervision of the water, silt and sediment flow; and supervision of the boundaries and the interests of adjoining land owners. Since earthworks directly threatens physical harm to persons or property, and may undoubtedly touch on numerous aspects of human life and is capable of giving rise to considerable environmental impacts, as the controlling authority, the respondent is empowered to grant or withhold granting earthworks plan approval or imposing certain legal limitations on the land. Unmistakably, the respondent has a public policy interest in controlling the earthworks.
>
> [68] Simply put, s 70A in our opinion is regulatory and not prohibitory, in that it only regulates the procedure for carrying out earthworks. Section 70A does not prohibit earthworks absolutely. Clearly the total effect of this section is regulating not only the appellant but also others who carry out any earthworks including quarry activities. It imposes the procedure for carrying out earthworks including quarry activities. The requirement for earthworks approval under s 70A does not amount to prohibition of quarrying since the purpose of s 70A is to regulate the way quarrying is to be conducted so as not to endanger or harm the environment, and is essentially for public good. The restriction placed

> merely ensures that the proprietary rights of the appellant over the subject lands are exercised in a proper and responsible manner."

[41] Premised on the above reasoning, this Court arrived at the following conclusion at pg 236, which is pertinent to the factual matrix of the present appeal:

> "[69] We therefore agree with the Court of Appeal that s 70A does not prohibit quarrying activities but merely regulates such activities. Condition B only gives the appellant the right to quarry but it does not mean that the appellant can carry out quarry activities in any manner, as it likes. Condition B does not exempt the appellant as landowner of the subject lands from having to comply with the provisions of s 70A of the 1974 Act, which regulate and supervise quarry activities."

[42] *Weng Lee Granite* revolved primarily around the question whether section 70A of the SDBA 1974 was in the nature of being prohibitory or regulatory. Notwithstanding, it is our view that *Weng Lee Granite* is also authority on the issue that confronts us, i.e. where a law confers a right to do something, whether some other law can operate to restrict or prohibit entirely that very activity.

[43] The decision of this Court in *Weng Lee Granite* clarifies that, generally speaking, even if a particular statute confers a certain right or interest in land, such right is not unfettered and as such, is capable of regulation for specific purposes. On the facts of that case, regulation was deemed expedient on the basis that there were certain pressing environmental and safety concerns as regards the appellant's quarrying. Extrapolating the logic of the case to the facts of the present one, we can infer, by parity of reasoning that rights and interests imposed by section

120 of the NLC 1965 are not absolute. When viewed in this context, section 70 of the SMA 2013 is no different from section 70A of the SDBA 1974. While in *Weng Lee Granite* section 70A of the SDBA 1974 was interpreted to ensure that the proprietary rights of the appellant over the subject lands are exercised in a proper and responsible manner so as not to harm or endanger the environment for the good of the public, so too here. By-laws passed pursuant to section 70 of the SMA 2013 for the reasons stipulated in subsection (2) thereof are similarly justifiable on the basis that they exist for the good of the strata community. In other words, in the present appeal, even if the State Authority permits the use of the Land for commercial purposes, such use is still subject to other laws in force, in particular to section 70 of the SMA 2013. Hence, the passing of House Rule No. 3 is not unlawful.

[44] The defendants, in support of their case, had also made reference to a letter from Dewan Bandaraya Kuala Lumpur ('DBKL') dated 16.3.2018 ('DBKL's Letter'). Paragraph 3 of the said letter states:

> "3. Berdasarkan kepada pekeliling yang diberikan oleh Pihak Kementerian Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan (KPKT) ianya adalah bersifat umum. Pada pandangan pihak COB, sekiranya syarat nyata tanah sebagaimana yang diperuntukkan di bawah Kanun Tanah Negara 1965 ialah komersial, maka tiada halangan untuk penyewaan jangka pendek tersebut dilaksanakan. Namun demikian, sekiranya syarat nyata tanah sepertimana peruntukan dibawah Kanun Tanah Negara 1965 adalah sepenuhnya untuk kediaman, maka pekeliling tersebut perlu diikuti dengan sewajarnya demi keharmonian bersama."

[45] By the above letter, DBKL opined that so long as the condition of use of the land is not purely for residential purposes, there is no

impediment to the defendants using their parcels for the purpose of short-term rentals.

[46] With respect, we are of the view that the DBKL's letter merely represents DBKL's opinion or advice which is not binding and not having any force of law, as opposed to House Rule No. 3 which was passed in accordance with section 70 of the SMA 2013 which has the force of law. As such, the said House Rule which was enacted in accordance with the procedure established by law would prevail over DBKL's advice or mere opinion.

[47] The defendants had also argued that –

(i) the NLC 1965 is a complete code;

(ii) the condition of use of the Land is an imperative condition and accordingly, the House Rule, being a restriction, must expressly be endorsed on the title; and

(iii) the House Rule represents the obligations contained within the DMC thereby rendering it contractual and contractual provisions cannot override the NLC 1965.

[48] While the contents of House Rule No. 3 may be reflective of the DMC, its legal force is derived not from the contract but from the SMA 2013. Applying the rationale in *Weng Lee Granite*, the restrictions imposed by the House Rule are additional conditions for purposes of regulation under section 70 of the SMA 2013 and not for the purpose of revoking or altering any pre-existing express condition in the title of the Land.

[49] For the foregoing reasons, we answer Question 1 in the affirmative.

Question 2

[50] Question 2 deals more specifically with the question of the enforceability of the House Rule.

[51] In gist, the plaintiff contended that the various arrangements between the defendants and their short-term tenants were merely one of a licence and hence, not collectively a "dealing" caught within the confines of section 70(5)(a) of the SMA 2013. The defendants rejected the contention and maintained that those arrangements are tantamount to 'tenancies exempt from registration' and hence constitute collectively a "dealing".

The 'Test' To Distinguish a Tenancy from a Licence

[52] The term 'tenancy', in common parlance, is sometimes used loosely to describe the relationship between a person who lets out his premises, or a part of it (the landlord) to another person (tenant), for a consideration with the intention that the tenant will have exclusive use of it for an ascertainable period of time. Such an arrangement is a lease if it exceeds three years but not more than ninety-nine years (for the whole of it) or thirty-years (for a part of it) (see section 221(3) of the NLC 1965). If it is for a period less than three years, it is known as a 'tenancy exempt from registration' (see section 223(2) of the NLC 1965).

[53] For purposes of the present discussion, the term 'tenancy' is used loosely to describe both leases and tenancies exempt from registration as opposed to mere licences.

[54] The law on what constitutes a lease, tenancy exempt from registration or a licence is very much trite. Learned authors Teo Keang Sood and Khaw Lake Tee in their acclaimed treatise *Land Law in Malaysia – Cases and Commentaries (Third Edition, LexisNexis 2012) (*'Teo and Khaw') have this to say at page 353:

> "A lease is an interest in land granted by the lessor, whether he is the owner of the land or not, to a lessee for a certain period. There are three essential characteristics of a lease or a tenancy. First, the lessee or tenant is given the right to exclusive possession of the demised premises during the term of the lease or tenancy. If there is no grant of a right to exclusive possession of the premises, then there is no lease or tenancy. A person who is granted a right to occupy premises but is not given exclusive possession, as where the grantor retains the right to enter the premises at will or if he remains in general control of the premises, may only be a licensee or the holder of a lesser interest but not a lessee or a tenant."

[55] At pages 359-361, Teo and Khaw explain the difference between a lease or tenancy and a licence. The learned authors indicate that there are two different approaches for making that distinction. The first and the more traditional test is the exclusive possession test. The second test is to determine the intention of the parties. In the second test, exclusive possession is still an important element but the Courts are more concerned with whether parties intended for their arrangement to constitute more than just a licence.

[56] The distinction between a tenancy and a licence is fundamental as a licence is merely a step above trespass in that it confers a right to the occupier to enter or remain on someone else's land or premises for consideration, without committing trespass. A tenancy or a lease on the other hand grants more than mere contractual rights because it confers certain other protections to the tenant under statute. For instance, under section 221 of the NLC 1965, a lease is a registrable interest and once registered, confers a right *in rem* to the lessee.

[57] On the point of distinction between a tenancy and a licence, it would be instructive to refer to *Street v Mountford* [1985] AC 809 ('*Street*'). The facts as summarised in the head notes are as follows. By a written agreement dated 7.3.1983 which was styled as a 'Licence Agreement', Mr Street (the respondent) granted Mrs Mountford (the appellant) the right to occupy two rooms for rent payable weekly. The written agreement stipulated certain rights and obligations of the appellant and further placed certain restrictions on her and it contained the following declaration signed by the appellant:

> "I understand and accept that a licence in the above form does not and is not intended to give me a tenancy protected under the Rents Acts."

[58] The respondent took out an action in the County Court for a declaration that the appellant's occupation was merely that of a licensee and not of a tenant. The County Court Recorder held that it was a tenancy and not a licence. On appeal, the Court of Appeal reversed the decision of the County Court resulting in the appeal before the House of Lords.

[59] Upon examination of a string of English authorities, the House of Lords unanimously allowed the appeal. It was held that in spite of the label and the declaration, by virtue of the fact that it conferred exclusive possession on the appellant, the agreement was a tenancy and not a licence. Lord Templeman said the following at pg 816-818:

> "… there is no doubt that the traditional distinction between a tenancy and a licence of land lay in the grant of land for a term at a rent with exclusive possession. In some cases it was not clear at first sight whether exclusive possession was in fact granted. For example, an owner of land could grant a licence to cut and remove standing timber. Alternatively, the owner could grant a tenancy of the land with the right to cut and remove standing timber during the term of the tenancy. The grant of rights relating to standing timber therefore required careful consideration in order to decide whether the grant conferred exclusive possession of the land for a term at a rent and was therefore a tenancy or whether it merely conferred a bare licence to remove the timber.
> …
>
> In the case of residential accommodation there is no difficulty in deciding whether the grant confers exclusive possession. An occupier of residential accommodation at a rent for a term is either a lodger or a tenant. The occupier is a lodger if the landlord provides attendance or services which require the landlord or his servants to exercise unrestricted access to and use of the premises. A lodger is entitled to live in the premises but cannot call the place his own. …
>
> If on the other hand residential accommodation is granted for a term at a rent with exclusive possession, the landlord providing neither attendance nor services, the grant is a tenancy; any express reservation to the landlord of limited rights to enter and view the state of the premises and to repair and maintain the premises only serves to emphasise the fact that the grantee is entitled to exclusive possession and is a tenant. In the present case it is conceded that Mrs. Mountford is entitled to exclusive possession and is not a lodger. Mr. Street provided neither attendance nor services and only reserved

the limited rights of inspection and maintenance and the like set forth in clause 3 of the agreement. On the traditional view of the matter, Mrs. Mountford not being a lodger must be a tenant.

There can be no tenancy unless the occupier enjoys exclusive possession; but an occupier who enjoys exclusive possession is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier. To constitute a tenancy the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments. The grant may be express, or may be inferred where the owner accepts weekly or other periodical payments from the occupier.".

[60] At pg 823, Lord Templeman further said:

"Exclusive possession is of first importance in considering whether an occupier is a tenant; exclusive possession is not decisive because an occupier who enjoys exclusive possession is not necessarily a tenant. The occupier may be a lodger or service occupier or fall within the other exceptional categories mentioned by Denning L.J. in *Errington v. Errington and Woods* [1952] 1 K.B. 290."

[61] What can be gathered from the judgment of Lord Templeman in *Street* is this: where it is proved or conceded that the tenant enjoys exclusive possession of the premises that in itself is sufficient to conclude the existence of a tenancy unless the landlord or owner of the premises can prove exceptional circumstances negating that inference. Their Lordships in *Street* were ready to conclude, on the basis of the concession of fact on exclusive possession, that there was a tenancy and it was in this sense that there was no reason for them to dive deeper into the law to consider the intention of the parties or to consider whether the nature and quality of the occupancy constitute a tenancy.

[62] In the case of *Radaich v Smith* (1959) 101 CLR 209 ('*Radaich*'), Windeyer J (sitting in the High Court of Australia) stated thus at pg 221-222 on lease and licence:

> "The distinction between a lease and a licence is clear. "A dispensation or licence properly passeth no interest, nor alters or transfers property in anything but only makes an action lawful which without it had been unlawful": *Thomas v Sorrell* (1673) Vaugh. 330 [124 E.R. 1098]. Whether when one man is allowed to enter upon the land of another pursuant to a contract he does so as licensee or as tenant must, it has been said "be in the last resort a question of intention", per Lord Greene M.R. in Booker v Palmer (1942) 2 All E.R. 674, at p. 676. But intention to do what? – Not to give the transaction one label rather than another. – Not to escape the legal consequences of one relationship by professing that it is another. Whether the transaction creates a lease or a licence depends upon intention, only in the sense that it depends upon the nature of the right which the parties intend the person entering upon the land shall have in relation to the land. When they have put their transaction in writing this intention is to be ascertained by seeing what, in accordance with ordinary principles of interpretation, are the rights that the instrument creates. If those rights be the rights of a tenant, it does not avail either party to say that a tenancy was not intended. And conversely if a man be given only the rights of a licensee, it does not matter that he be called a tenant; he is a licensee. What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a *legal right of exclusive possession* of the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the creation of such a right is a demise. To say that a man who has, by agreement with a landlord, a right to exclusive possession of land for a term is not a tenant is simply to contradict the first proposition by the second. A right of exclusive possession is secured by the right of a lessee to

maintain an ejectment and, after his entry, trespass. A reservation to the landlord, either by contract or statute, of a limited right of entry, as for example to view or repair, is, of course not inconsistent with the grant of exclusive possession. Subject to such reservations, a tenant for a term or from year to year or for a life or lives can exclude his landlord as well as strangers from the demised premises. All this is long-established law.".

[63] In *Marchant v Charters* [1977] 2 All ER 918 ("*Marchant*"), at pg 922 Lord Denning said:

"Gathering the cases together, what does it come to? What is the test to see whether the occupier of one room in a house is a tenant or a licensee? It does not depend on whether he or she has exclusive possession or not. It does not depend on whether the room is furnished or not. It does not depend on whether the occupation is permanent or temporary. It does not depend on the label which the parties put on it. All these are factors which may influence the decision but none of them is conclusive. All the circumstances have to be worked out. Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room, whether under a contract or not, in which case he is a licensee?"

[64] The above passage was cited by Lord Templeman in his speech in *Street* to which his Lordship responded as follows, at page 825:

"But in my opinion in order to ascertain the nature and quality of the occupancy and to see whether the occupier has or has not a stake in the room or only permission for himself personally to occupy, the court must decide whether upon its true construction the agreement confers on the occupier exclusive possession. If exclusive possession at a rent for a term does not constitute a tenancy then the distinction between a contractual tenancy and a contractual licence of land becomes wholly unidentifiable."

[65] We are mindful of the fact that we must be circumspect in our reliance on English or other foreign authorities in the interpretation of our NLC 1965 given that the statute is to be taken as a complete Code (see *Collector of Land Revenue, Johor Bahru v South Malaysia Industries Sdn Bhd* [1978] 1 MLJ 130, at page 133). Nevertheless, the NLC 1965 does not spell out the law on contractual licences or attempt to explain how it may differ from tenancies. Hence, in that respect, reliance on similar foreign case law would bridge the gap.

[66] Having said that, two local decisions merit reference. Both are decisions of the former Federal Court, delivered within the same year and with a similarly constituted coram. The first is the judgment of Raja Azlan Shah Ag CJ (Malaya) (as his Majesty then was) in *Woo Yew Chee v Yong Yong Hoo* [1979] 1 MLJ 131 ('*Woo Yoo Chee*') and the other is the judgment of Chang Min Tat FJ in *Mohamed Mustafa v Kandasami* [1979] 2 MLJ 109 ('*Mohamed Mustafa*').

[67] In *Woo Yew Chee*, the appellant was the occupier of a shop-house built before 1948, where he carried on the family business dealing in textile and cosmetics. The appellant entered into an agreement with the respondent on 27.7.1968. By this agreement, the appellant allowed the respondent to occupy the front left portion and a middle portion of the ground floor for a period of 10 years with monthly rental. Subsequently, differences arose between them. On 15.6.1972 the respondent filed a suit claiming the return of a certain amount of money which was allegedly paid to the appellant as 'tea-money'.

[68] The appellant counterclaimed for possession of the premises alleging breaches of the tenancy agreement. The learned trial judge found

in favour of the respondent and ordered the appellant to return the tea-money. The judge further found that there was no evidence to support the appellant's case that the respondent had committed breaches of some of the terms of the agreement. The defence and the counterclaim was thus dismissed.

[69] There were however other matters raised in the defence which were not dealt with the learned trial judge, namely (i) that the agreement was only a sharing arrangement and a licence; (ii) that the licence was void owing to non-registration and (iii) that the Rent Act did not apply as the premises had become decontrolled when the appellant and his father purchased it in 1962. Aggrieved by the decision of the trial judge, the appellant appealed to the Federal Court.

[70] One of the issues before the Federal Court was whether the arrangement between the appellant and the respondent was a tenancy or merely a licence. In addressing this issue of law, this is what Raja Azlan Shah Ag. CJ (Malaya) held at pg 133:

> "I now turn to the crux of the matter: was the transaction a licence or a tenancy? What is the test to be applied? It is now well known that the law will always look beyond the terminology of the agreement to the actual facts of the situation (see *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513). The reason is because of the number of sham agreements purporting to create no more than mere licences which are designed to circumvent the protective provisions of the Control of Rent Act. It is no longer a question of words, but substance. It is no longer a question whether the occupation is permanent or temporary. All these are factors which may be relevant in arriving at a decision whether a particular transaction is a licence or a tenancy but none of them is conclusive. The ultimate test is the nature and quality of the occupancy: whether it is intended that the occupier should have a stake in the premises sub-let or

whether he should have only a personal privilege. Mohamed Azmi J. applied this test in *Chin See Lian v Ng Wan Pit* [1973] 1 MLJ 115. That seems to me to be the correct principle, and it is entirely in accordance with the view taken by Lord Denning MR in *Marchant v Charters* [1977] 3 All ER 918…"

[71] His Lordship then proceeded to examine the relationship and arrangement between the parties to ascertain whether it was something more than that of a licensor and licensee. The examination was as follows, at pg 133:

"Applying this principle, I turn first to the agreement itself. The said agreement was executed at the office of an advocate and solicitor. The appellant was described as "the chief tenant" and the respondent as "the sub-tenant", although there was no clear evidence to show that appellant was such as that described in the document. There were various restrictions on the part of the sub-tenant notably clause 3(3) which expressly permitted the chief tenant to enter on the premises to inspect its condition; clause 3(4) which permitted the sub-tenant to assign, sub-let or part with possession of the demised premises with the written consent of the chief tenant; clause 3(5) which allowed any alteration or additions with written consent; clause 3(7) which restricted the sub-tenant to carry on the business of a Chinese druggist store only; clause 3(9) which prohibited against partitioning the demised premises so that the passage-way separating it from the landlord's portion of the ground floor should remain free and accessible at all times to the parties, members of their families and invitees; clause 3(11) which restricted the use of the middle portion for storage purposes only and, perhaps most cogent of all, there was a term for termination of the tenancy upon breach of covenant, and for continuation of the tenancy on giving six months' notice before expiry of the current tenancy. There was also a covenant for quiet and uninterrupted enjoyment.

Those provisions seem to me to point to a tenancy**.** Looking at the indications in the terms of the agreement as a whole I find in fact that a relationship of landlord and tenant was intended.".

[72] On the above facts the Federal Court found that the nature and quality of the occupancy manifested an intention to create a tenancy as opposed to a mere contractual licence. The above findings were made irrespective of whether the occupier had or did not have exclusive possession of the premises, as observed by the Federal Court at pg 134:

> "Next it was said that this was a sharing arrangement only and nothing else. The respondent had no exclusive occupation of the portion sub-let because the key to the main door was always with the appellant, indicating that he had control and dominion of the premises sub-let. This contention is based on a false premise. Possession of keys of the premises is neither here nor there…
>
> … In any event exclusive possession is no longer a decisive test. That is an old law which is now gone. The nature and quality of the occupancy must be looked at with a view to determine its true character. In *Somma v Hazelhurst* [1978] NLJ 463 the court considered the terms of the agreement before it and concluded that whether or not an arrangement constitutes tenancy or licence is no longer a matter of exclusive possession, or even any of the traditional indicators of tenancy, but simply that of the intention of the parties.
>
> I think it is plain that in this case there was nothing in the evidence to negate and much which supported the view that there was a tenancy under the Control of Rent Act, 1966."

[73] For the record, we do have some reservations on His Lordship's finding that the test of exclusive possession or exclusive occupation is now gone, in light of subsequent decisions in the Commonwealth.

[74] With that, we move to the case of *Mohamed Mustafa*, where the respondent alleged that he was given a tenancy of a premises by the appellant. There was a subsequent written agreement between the parties

which recited that the "lessor wishes to lease to the lessee the said business of an eating house together with the use of the ground floor" but which stated that the "lessor hereby lets to the lessee the ground floor only of the said premises together with the full right and liberty to the lessee to carry on the business of an eating house on the said premises". Clause 5 of the agreement states that the relationship of landlord and tenant did not exist between the parties. The respondent sought a declaration that he was a tenant of the said premises and that he was protected under the Control of Rent Act, 1966. Premised on their conduct and the surrounding circumstances, the learned trial judge found that the true relationship between the parties was that of a landlord and tenant and not that of a licensor and licensee. Judgment was thus granted in favour of the respondent. The appellant appealed.

[75] The Federal Court disagreed with the trial judge that the agreement constituted a tenancy. The learned appellate judges arrived at the conclusion that the agreement manifested an intention to only create a relationship of licensor and licensee. Chang Min Tan FJ found that even though the agreement contained clauses that made it appear to be a tenancy agreement, upon closer examination, the intention of the parties suggests that they expected it to be only a licence. In the Court's view, the appellant had not given up exclusive possession of the ground floor which was let to the respondent, and the *habendum* to the agreement itself suggested the negation of any intention to create a tenancy.

[76] We reproduce below the observation of Chang Min Tat FJ at page 118:

> "This court has, in Federal Court Civil Appeal No. 64 of 1978, between *Woo Yew Chee and Yong Yong Hoo* [1979] 1 MLJ 131 decided that exclusive possession is no longer a decisive test to determine that a tenancy has been

> created. *Hill* and *Redman's* Law of Landlord and Tenant (15th Edition) at page 17 puts it this way: Firstly, if there is no right of exclusive possession the transaction cannot be a lease. Secondly, if there is a right of exclusive possession the transaction may be either a lease or a licence depending on all the relevant circumstances. The test that this court in Woo Yew Chee's case, supra, applied is "the nature and quality of the occupancy: whether it is intended that the occupier should have a stake in the premises sub-let or whether he should have only a personal privilege" and applying this test, it came to the conclusion that the respondent Yong Yong Hoo's interest in a half-portion of the ground floor was a tenancy. The same conclusion was reached in *Addiscombe Garden Estates Ltd. v. Crabbe* supra. Each case must of course be considered on the facts pertinent to it."

[77] The Federal Court reversed the decision of the trial judge on the basis that although the agreement entered into between the appellant and the respondent was largely consistent with the terms of a lease/tenancy, clause 5 of the same manifested an intention to create a licence.

[78] On further appeal to the Privy Council, the decision of the Federal Court was reversed (see *Kandasami v Mohamed Mustafa* [1983] 2 MLJ 85). The Privy Council found that the bulk of the evidence in the High Court turned on the oral testimony of the parties which were relevant to determine the true nature of the subsequent written agreement between them. The High Court had accepted the evidence of the plaintiff/tenant and found that the defendant/landlord was not a witness of truth.

[79] The Privy Council emphasised that pre-eminent weight must be attributed to a trial judge's finding of fact based upon the credibility of witnesses whom he has seen and heard under examination and cross-

examination, particularly in relation to a question of fact the answer to which is wholly dependent on the testimony of such witnesses.

[80] Despite the Privy Council's reversal, it appears that there was little to no adverse comment by the Board of the test adopted by the Federal Court in the determination of the question whether the arrangement was a tenancy or a licence. The decision was only overturned on an application of the law to the facts.

[81] Learned authors Teo and Khaw suggest that post the decisions in *Marchant*, *Woo Yew Chee*, *Mohamed Mustafa* (Federal Court and Privy Council) and *Street*, Malaysian Courts seem to apply the two tests, i.e. the exclusive possession test and the intention of the parties test together in tandem without distinguishing the two (see for example: *Lim Cheang Hock & Anor v Tneh Poay Lan* [2007] 4 MLJ 228 and *Tan Chee Lan & Anor v Dr Tan Yee Beng* [1997] 4 MLJ 170). And that it is unclear which of the two tests Malaysian Courts apply though there is an indication that they prefer the second test, namely, the intention of parties test. Whereas the English Courts, upon the decision of the House of Lords in *Street* (supra), prefer the first test, that is, the one of exclusive possession.

[82] For purposes of the present appeal, we do not find it necessary to determine definitively which of the two tests is to be preferred. Whichever of the two it is, what is clear is that both tests place emphasis on the requirement of exclusive possession. Having said that, whether an occupancy is a tenancy or a licence will depend on the particular facts and circumstances of the case.

[83] Be that as it may, the following principles may be distilled from the English and Malaysian cases pre *Street* and read together with *Street*, on the test to distinguish between a tenancy and a licence:

(i) Courts must first ask whether there is proof that the owner of the premises granted the occupier the right to exclusive possession of the premises. If the occupier can prove that he enjoys exclusive possession, then it is highly likely that the arrangement is a tenancy and not a licence. It would be for the other side, namely the grantor, to prove exceptional circumstances that despite the grant of exclusive possession to the occupier, parties did not intend to establish a tenancy.

(ii) Where the occupier is not conferred or is unable to establish that he has exclusive possession of the premises, the Court must nonetheless determine the nature and quality of the occupancy. This includes analysing the terms of any written or oral agreement between parties as to whether they intended for the nature and quality of the occupancy to be more consistent with the rights of an occupier under a tenancy.

(iii) 'Intention' or 'nature and quality' here refer to specific indicators such as whether parties intended the occupier to have certain rights and obligations which are consistent with that of a tenant under tenancy laws – including but not limited to control of rent, and other relevant protections sufficient to create an interest in the land.

(iv) Where there is no proof of exclusive possession and there is not manifest any intention that the nature and quality of the

occupancy do constitute a tenancy, it would be appropriate for the Court, in those circumstances, to conclude that the arrangement was intended to be merely a licence and not a tenancy.

(v) Whatever labels parties use to describe their arrangement or the occupancy, for example, ‘lease’, ‘tenancy’ or ‘licence’ is relevant in the determination of their intention and the nature and quality of the occupancy, but is neither decisive nor conclusive. Accordingly, Courts and Judges must be mindful of the peculiar facts and circumstances of each and every case that comes before them.

(vi) In each and every case, particular emphasis needs to be paid to the substantive obligations parties have under the agreement, whether written or oral, and not so much the language and labels they ascribed to the words. This is important because unscrupulous parties might attempt to disguise the true nature of their agreement by bending the language they use to disguise it as one form of occupancy over another.

[84] From the above, it is clear that there is no singular test to determine whether an occupancy is a tenancy or a licence. Instead, the Court will have to consider the whole circumstances of each case to determine the question of whether the agreement to occupy is in law and in fact a tenancy or a licence.

Whether the Defendants' Short-Term Rentals Are Tenancies or Licences

[85] As stated earlier, the High Court found that the short-term rental guests are merely transient lodgers and that they may be likened to hotel guests. The learned Judge was fortified in her view by clause 8.2.1 of the Airbnb Terms of Service which expressly states that the accommodation booking it facilitates is a "limited licence" granted by the host. There appeared to be no discussion on exclusive possession.

[86] The point of exclusive possession was first canvassed in and addressed by the Court of Appeal. Before us, the defendants maintained that their arrangements with their house-guests do confer on them the rights to exclusive possession and by that token, the short-term rentals are tenancies as opposed to mere licensees. In support of their proposition, the defendants relied on the decision of the Supreme Court of Victoria in *Swan v Uecker* [2016] VSC 313 ('*Swan*').

Swan and Related Cases

[87] In *Swan*, one Catherine Swan (the applicant) had leased her two-bedroom apartment to the respondents. There was a clause in the written lease that the respondents were not permitted under the written provisions of the lease to sub-let the premises. The respondents conceded to the fact of sub-letting.

[88] The applicant accordingly moved the Victorian Civil and Administrative Tribunal ('VCAT' or 'Tribunal') to evict the respondents for breach of the sub-letting condition of the lease and for an order of

possession of the premises. The VCAT found that the third-party guests' possession of the premises was not exclusive and that based on the terms of the Airbnb agreement that the respondents were able to access the rented premises during each Airbnb stay, the arrangement between the respondents and the third-party Airbnb guests was a licence and not a tenancy. The applicant's application was accordingly dismissed on the basis that it was licence, and not a subsequent tenancy in breach of the written lease. Dissatisfied, the applicant appealed to the Supreme Court of Victoria.

[89] The learned Judge disagreed with the VCAT Member and held that the relationship between the respondents and their guests was a tenancy and not a licence. The Supreme Court accordingly allowed the appeal and granted the order for possession. Central to Croft J's decision was his Honour's affirmative finding that there was a grant of exclusive possession by the respondents to the third-party guests. At paragraph 46 of the judgment (which was heavily relied upon by the defendants), Croft J said:

> "Finally, in this context and in the context of the broader considerations flowing from the authorities which have been considered, I am of the view that the hotel room analogy is not appropriate in the present circumstances. The evidence and the provisions of the AirBnB Agreement indicate, in my view, that although the occupancy granted to the AirBnB guests was, in this case, for a relatively short time, the quality of that occupancy is not akin to that of a "lodger" or an [*sic*] hotel guest. Rather, it was the possession - exclusive possession - that would be expected of residential accommodation generally. In the present circumstances, it is no different from the nature of the occupancy - the exclusive possession - granted to the tenants, the Respondents, under the Lease from the Applicant. They have, by means of the AirBnB Agreement, effectively and practically passed that occupation, with all its qualities, to their AirBnB guests for the agreed period under the AirBnB Agreement."

[90] Before Croft J, this was how the arguments were framed, per paragraph 55 of the judgment, on the issue of access by the respondents to the premises:

> "Notwithstanding these matters, the Respondents submit that it was open to the Tribunal to conclude that the tenants retained the right to enter the Apartment because:
>
> …
>
> a. The fact that the AirBnB agreement says "the Host is entitled to make the Guest leave" presupposes the Host has retained possession. There is no mention of regaining possession in the AirBnB agreement.
>
> b. The agreement does not explicitly give the AirBnB guests a "demise" or exclusive possession; and
>
> c. The surrounding circumstances dictate that the defendants would still have access. It can be inferred that the tenant's personal possessions were still in the apartment. These stays were short. It was open for the Tribunal member to find that if the defendants needed, for example, to access a document, or any of their personal possessions that they had left behind, the guests could not have stopped them doing so."

[91] The other issue raised in *Swan* was the manner in which the third-party guests could be evicted should they overstay their welcome. It was argued on behalf of the applicant that there is a clause in the Airbnb agreement to suggest that should the Airbnb guests refuse to leave the premises upon the expiry of the occupancy period, the respondents could immediately proceed to evict them. This, according to the appellants was typical of a licence as opposed to a lease where an order for possession would be required.

[92] In our view, the argument raised in *Swan* in respect of the issue of access is no different from how hotels operate and how they would proceed to evict overstaying guests. Yet, Croft J found to the contrary, i.e. that there was nothing in the evidence to suggest that the respondents could access the premises at any time to diminish the force of the argument that the third-party guests have exclusive possession of the premises. His Honour appeared to hold that despite what the Airbnb agreement itself states, there had to be some other form of evidence to suggest that the respondents could interrupt the exclusive possession of the premises by the third-party in a way that is not typical of leases.

[93] Croft J's judgment is not without criticism. One author, Bill Swannie in '*Airbnb and Residential Tenancy Law: Do 'Home Sharing' Arrangements Constitute a Licence or a Lease?'* (2018) 39 *Adelaide Law Review* 231 ('Bill Swannie'), observed as follows at page 246:

> "In *Swan*, the Court simply stated that the 'hotel room analogy is not appropriate in the present circumstances', and that the occupancy granted to Airbnb guests was 'not akin to that of a "lodger" or hotel guest'. It is clear, however, that the arrangement in *Swan* had many similarities to that of a hotel guest, and was unlike a conventional tenancy arrangement. First, Airbnb guests had limited use of the premises, such as strict Check In and Check Out times, and were subject to strict House Rules (including restrictions on noise and smoking). These restrictions on the use of the premises are not consistent with the general right to undisturbed use of the premises that a tenant ordinarily enjoys. Second, guests were provided significant services by the host, such as tourist information, clean linen and towels, house cleaning and basic food items such as tea and coffee. In summary, the arrangement appeared to be a lodging or boarding arrangement, which has traditionally been characterised as a licence rather than a lease."

[94] Perhaps what makes it difficult to accept Croft J's reasoning, with respect is because His Honour correctly followed several Australian authorities including *Radaich* (supra), *Western Australia v Ward* (2002) 213 CLR 1 and the decision of the House of Lords in *Street* for the principle that Courts will not decide the nature of the occupancy solely on the basis of the labels parties use in the agreement. However, His Honour extended the ratio too far by essentially holding that the Court is at liberty to ignore the effects of certain provisions of the obligations of the parties and instead to focus on the actual facts and circumstances as to whether there was interruption by the landlord/grantor of the occupier's use of the premises to dislodge any inference on exclusive possession.

[95] For example, this is what his Honour held at paragraphs 67-68:

> "More generally, at common law a landlord has the ability to make an overstaying tenant leave the property in the same way as a licensor can evict an overstaying licensee. Consequently, at common law a person's ability to make an overstaying guest leave does not tend in favour or against a finding of exclusive possession prior to that entitlement arising - the commencement of the overstaying period. Moreover, the fact that the Act requires a landlord to give a notice to vacate does not alter that conclusion. Thus, if the AirBnB Agreement were subject to the Act, the provision in question would be invalid and the Respondents could not make the overstaying guest leave without first giving a notice to vacate.
>
> The Tribunal, in determining whether the AirBnB guests had exclusive possession of the Apartment, "took into account" the ability of the Respondents to make an overstaying guest leave the property. This is, in my view, clear from a reading of para 45(iv) of the Tribunal's reasons - which should be read in the manner I have previously indicated. By taking into account the Respondents' ability to make an overstaying guest leave the Apartment, the Tribunal appears to have assumed that the AirBnB Agreement was a licence, because, if it were

> a lease, the Respondents would not have had that ability without first giving a notice to vacate. In assuming that the AirBnB Agreement was a licence, the Tribunal did, in my opinion, impermissibly assume the answer to the very question it had to determine. For these reasons, whether the Respondents were able to make an overstaying guest leave the Apartment was not relevant to the question of whether that guest was in exclusive possession of the Apartment during their stay**.**"

[96] With respect, it appeared that Croft J had deviated from the *ratio* of prior decided cases such as *Street*. To elucidate, Blackburn J in *Allan v Liverpool Overseers* (1874) LR 9 QB 180 at pages 191-192 took a contrary view to Croft J's opinion. The following dictum of Blackburn was cited with approval by Lord Templeman in *Street*, at page 818:

> "A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger."

[97] The above refers to the providence of any attendance by the landlord to the occupier which Lord Templeman observed as follows in *Street*, which we again reproduce for ease of reference:

> "If on the other hand residential accommodation is granted for a term at a rent with exclusive possession, the landlord providing neither attendance nor services, the grant is a tenancy; any express reservation to the landlord of limited rights to enter and view the state of the premises and to repair and maintain the premises only serves to emphasise the fact that the grantee is entitled to exclusive possession and is a tenant. In the present case it is

> conceded that Mrs. Mountford is entitled to exclusive possession and is not a lodger. Mr. Street provided neither attendance nor services and only reserved the limited rights of inspection and maintenance and the like set forth in clause 3 of the agreement. On the traditional view of the matter, Mrs. Mountford not being a lodger must be a tenant."

[98] Thus, in concluding whether an agreement was a tenancy or otherwise, judges cannot simply rely on the face of the language used. Instead, the nature of the obligations conferred under the agreement must be analysed, as done by Raja Azlan Shah Ag CJ (Malaya) in *Woo Yew Chee* (supra), when his Lordship examined the obligations of the parties, as set out in para [71] above.

[99] Upon considering the terms of the agreement, the Court may, where there is an ambiguity in the agreement or there is, for example, an oral amendment or novation to the same, examine the conduct of parties by way of extrinsic evidence to determine whether what was intended by them was a tenancy or a licence. That this is permissible is supported by the dictum of Lord Greene MR in *Booker v Palmer* [1942] 1 All ER 674 at pg 677 which was cited with approval in *Street* at page 819 as follows:

> "To suggest there is an intention there to create a relationship of landlord and tenant appears to me to be quite impossible. There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind. It seems to me that this is a clear example of the application of that rule."

[100] A practical example of an application of this principle is the decision of the Privy Council in *Mohamed Mustafa* (supra). It will be recalled that in that case, parties had entered into a written agreement where one of

the clauses of the agreement had contradicted other clauses of the same. It was in this context that their Lordships of the Board further relied on the subsequent conduct of the owner to ascertain that the agreement was intended to be a tenancy and not a mere licence. This is apparent at pages 88-89, as follows:

> "Although later events can only play a limited role in the assessment of earlier events, their Lordships do not wish to part with this appeal without observing that the conclusion reached by the trial judge was amply borne out by events which were subsequent to the July Document. In March 1971, when a dispute arose as to arrears of rent, the defendant applied to the magistrate's court for a warrant of distress for rent, a procedure which would not have been available to a licensor...
>
> On July 18, 1972, which was 10 months after the issue of the writ in this action, the defendant issued a summons in the Sessions Court to recover possession of the premises. The first sentence of his statement of claims reads "The defendant is the plaintiffs monthly tenant in respect of the ground floor of premises No. 43 Penang Street… The said premises are subject to the Control of Rent Act 1966." In the light of these later events, it is difficult to suppose that the defendant then thought that he had granted to the plaintiff a mere licence to occupy the ground floor of No. 43."

[101] Reverting to the instant appeal, although the Court of Appeal did not examine in detail the *Swan* decision which was relied heavily by the defendants, it did nonetheless compare *Swan* with other analogous judgments such as that of the Privy Council in *O'Connor (Senior) & Ors v The Proprietors, Strata Plan No 51* [2017] UKPC 45 ('O'Connor') in addition to other tribunal level decisions. Suffice that we reproduce the following analysis of the Court of Appeal as contradicting the rationale of the Supreme Court of Victoria in *Swan*:

"[154] The decision in *O'Connors (Senior) & Ors* (*supra*) [*sic*] traces the legislative intent on the prohibitions and the restrictions which formed the pivotal dispute in the appeal before the Privy Council. Likewise in our present appeal. The Privy Council traces the reasons behind the enactment of section 20(4) of the STO that is similar to the New South Wales's Conveyancing (Strata Titles) Act 1961, which to some extent is similar to our section 70(5)(a) of the SMA 2013.

[155] The intent of Parliament in enacting section 70(5) (a) of the SMA 2013 is purely to maintain the marketability of the units in strata living and not to restrict the ability of parcel owners to transfer or assign the same for financing proposal. From the reading of House Rule No. 3, there is nothing in it that restrict or prohibit the right of parcel owners to deal with their ownership including transfer and/or assignment of the parcel units.

[156] *O'Connors (Senior) & Ors* (*supra*) [*sic*] had referred to *Byrne* (*supra*) with approval which supports the contention of the plaintiff that the correct law with regard to whether strata schemes in Australia could adopt by-laws prohibiting short-term rentals. We agreed with the submission of the plaintiff that the decision of the Privy Council in Byrne (supra) has brought certainty to the law with regard to whether by-laws preventing short-term rentals could be enacted by Owner Corporation in Australia. The Privy Council held that the appeal before them turned on the construction of the relevant by-laws. *O'Connors (Senior) & Ors* (*supra*) [*sic*] held that the construction must be done benevolently taking into account to their purpose in assisting the good management of the development for the benefit of its residence as a whole, and with a view if possible to avoiding inconsistency with the governing statute.

[157] The Board approved the decision of the English Court of Appeal in *Caradon District Council* (*supra*), when it went on to consider whether a covenant requiring a house not to be used other than as a private dwelling was breached when the occupant used the same for short period. The Board referred to that part of the decision of Latham LJJ which stated:

> "Both in the ordinary use of the word and in its context, it seems to me that a person who is in a holiday property for a week or two would not describe that as his or her home. It seems to me that what is required in order to amount to use of a property as a home is a degree of permanence, together with the intention that should be a home, albeit for a relatively short period, but not for the purposes of a holiday.""

[102] In light of all the above, we hold the view that the decision of the Supreme Court of Victoria in *Swan* is not in accordance with the larger body of principles articulated by decided cases in Australia, England and Wales, and even our own Malaysian authorities and hence does not lend much support to the arguments advanced by the defendants. In our judgment, *Swan* is not the authority to overcome the analogy that the defendants' guests are akin to mere lodgers or hotel guests and therefore are mere licensees.

The Evidence

[103] The defendants argued that exclusive possession creates tenancy. In this respect, we now proceed to examine whether on the evidence, the defendants have successfully established that the third-party short-term renters are tenants as opposed to mere licensees, on the basis that the renters were in exclusive possession of the premises.

[104] The learned High Court Judge had referred to clause 8.2.1 of Airbnb Terms of Service which provides:

> "You understand that a confirmed booking of an Accommodation ("**Accommodation Booking**") is a limited license granted to you by the Host to enter, occupy and use the Accommodation for the duration of your stay, during which time the Host (only where and to the extent permitted by applicable law)

> retains the right to re-enter the Accommodation, in accordance with your agreement with the Host."

[105] Putting aside the label of "license" used in the above clause, it is crucial to observe that the clause specifically informs the occupant that in the event that they fail to leave the premises on time, the host retains the right to re-enter and remove them. This is inconsistent with tenancy rights in that even if a tenant holds over, he cannot be removed except in accordance with an order of possession.

[106] Another pertinent provision in the Airbnb agreement is clause 8.1.3 which reads:

> "If you book a Host Service on behalf of additional guests, you are required to ensure that every additional guest meets any requirements set by the Host, and is made aware of and agrees to these Terms and any terms and conditions, rules and restrictions set by the Host. If you are booking for an additional guest who is a minor, you represent and warrant that you are legally authorized to act on behalf of the minor. Minors may only participate in an Experience, Event or other Host Service if accompanied by an adult who is responsible for them."

[107] The above clause clearly negates any inference that the defendants granted their third-party guests exclusive possession of their premises. The fact that the defendants can, by virtue of the Airbnb Terms of Service, regulate the number of guests the short-term renters can allow into the premises, indicates that the said renters do not have the right to manage their own use of the premises to the exclusion of the defendants.

[108] At this juncture, the labels used by the parties, though not entirely conclusive, do in this regard, establish the true intention of the defendants

vis-à-vis Airbnb. At all material times relevant to this appeal, the defendants let out their premises to third-party vacationers or lodgers for commercial purposes. The purpose of the letting, as can be gauged from the terms of the Airbnb Terms of Service and as dictated by common sense, suggests that the defendants intended their premises to be used like a hotel or a lodging facility. The terms such as 'Host' used to describe the defendants and 'Guests' to describe the short-term renters therefore mean exactly what they say.

[109] It is therefore safe to assume that be it via Airbnb, klsuites.com or any other booking site, these platforms were only intended to be vehicles for the singular activity of short-term rentals for profit. There is no proof by the defendants of exclusive possession on the part of short-term renters nor does the evidence suggest that the nature and quality of the occupancy of the said renters was ever intended to be a tenancy.

[110] One other point worth considering is the length of stay. *Swan* explained that the shortness of the length of stay in itself is not indicative of an intention to deny exclusive possession and hence does not by itself negate the creation of a tenancy. In this regard, we note that section 223(2) of the NLC 1965 recognises tenancies created by word of mouth and that section 224(a) allows week-to-week tenancies. Thus, we agree that the fact that the duration of stay is short in itself is not lack of proof of the creation of tenancy.

[111] The length of stay however is still a relevant consideration in determining whether exclusive possession is conferred or whether the nature or quality of the occupancy is that of a tenancy. For instance, in *Street*, the agreement to let was that of a week-to-week and the House of

Lords was satisfied that it amounted to a tenancy. That the length of stay is a relevant factor to distinguish tenancies from licences is borne out by the dictum of Lord Carnwath of the Privy Council in *O'Connor v The Proprietors, Strata Plan No. 51* [2017] UKPC 45 as follows:

> "18. In the Board's view, the limitation to one month can be seen as designed to provide some definition of what is meant by "use as a residence" for this purpose. The character of the use is clearly affected by the length of occupation. Short-term use by holiday-makers is different in kind from longer-term residential use, even if it may be difficult to draw a clear dividing line.
>
> 19. As already noted, this is a familiar problem in the law. For example, in an English case, *Caradon District Council v Paton* (2001) 33 HLR 34, the Court of Appeal had to decide whether a covenant requiring a house not to be used other than as a private dwelling-house was breached by use for occupation by holidaymakers under tenancies for short periods. Latham LJ said:
>
> > "Both in the ordinary use of the word and in its context it seems to me that a person who is in a holiday property for a week or two would not describe that as his or her home. It seems to me that what is required in order to amount to use of a property as a home is a degree of permanence, together with the intention that that should be a home, albeit for a relatively short period, but not for the purposes of a holiday.""

[112] In the present appeal, the defendants do not actually dispute that the occupancies they have allowed via the online booking sites are no different from the arrangements that hotels make with their guests. The defendants attempted to argue that there was exclusive possession but apart from their reliance on paragraph 46 of *Swan,* there is nothing in the documents before the Courts below and before us to support the fact of exclusive possession. Neither is there in the alternative, any indication that the defendants and the short-term renters intended for the nature and

quality of the occupancy to amount to a tenancy. We entirely agree with the following observation of the Court of Appeal:

> "[140] … The decision of the learned High Court Judge has been broadly explained when Her Ladyship said that there can never be a landlord and tenant relationship in short term rental meant for a brief/short stay between parties contracting online. The terms and conditions of such services offered by the various platforms via the internet as indicated is sufficient to determine the temporal nature of the arrangement, without the need to go for full trial, as contended by the defendants.".

[113] For the above reasons, we hold that the said arrangements are nothing more than mere licences and therefore do not amount in law to "dealings" within the ambit of section 70(5) of the SMA 2013. Accordingly, House Rule No. 3 is not *ultra vires* section 70(5). As concurrently found by the High Court and the Court of Appeal, the said House Rule was enacted for the many legitimate purposes under section 70(2) or for that matter, for the purposes under which the plaintiff was established under section 59 of the SMA 2013.

[114] As such, we answer Question 2 in the negative to the extent that the said short-term rentals amount to licences and not tenancies.

Conclusion

[115] Premised on the aforementioned, we dismiss the appeal with costs and we uphold the concurrent decisions of the courts below.

Dated: 5th October 2020 signed

(**TENGKU MAIMUN BINTI TUAN MAT**)
Chief Justice
Federal Court of Malaysia

Counsel/Solicitors

For the Appellants:

Manpal Singh, (Tan Weng Hung, Vinu a/l Kamalanathan and Conrad Lopez with him)
Messrs Manjit Sachdev,
Mohammad Radzi & Partners

For The Respondent:

Shahabudin bin Shaik Alaudin (Rosnida binti Che Ibrahim, Siti Norazwani binti Zulkifli with him)
Messrs Shahabudin & Rozima