

# Can management corporations stop parcel owners from operating Airbnbs?

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## Introduction

### Facts

### High court decision

### Court of Appeal proceedings

### Federal Court proceedings

### Comment

## Introduction

The emerging practice of the sharing economy, often known as the peer-to-peer economy, is well known. Airbnb and other short-term rental platforms are some examples of the disruptive sharing economy innovations for the hospitality industry. This has garnered the interest of property owners in listing their residential units with these platforms for short-term rental.

In the context of stratified properties, an issue arose in the recent Federal Court case of *Innab Salil v Verse Suites Mont Kiara Management Corporation*(1) as to whether the management corporation of a stratified development can introduce a new bylaw forbidding parcel owners from using their units to carry out short-term rentals, even if the express condition of the title of the properties stipulates that the building is a commercial building.

## Facts

The second appellant was an incorporated company running the business of short-term rentals and the first appellant was the majority shareholder of the second appellant. The third and fourth appellants were the parcel owners of Verse Suite and had leased their units to the second appellant for a short-term rental business.

The respondent was the management corporation of Verse Suites.

A directive was issued by the Commissioner of Building Kuala Lumpur on 18 November 2015 instructing all joint management bodies or management corporations to resolve the issue of short-term rentals.

Pursuant to this directive, the respondent convened an extraordinary general meeting, where a motion was overwhelmingly passed by the majority of parcel owners present to introduce a new bylaw (House Rule 3) forbidding parcel owners of the Verve Suites condominium from using their units to carry out the business of short-term rentals or homestays.

Aggrieved with the implementation of House Rule 3, an action was taken by some parcel owners against the respondent to challenge the validity of House Rule 3 at the Strata Management Tribunal proceedings. The action failed.

On the other hand, the respondent commenced an action in a high court, seeking for an order to injunct the appellants from breaching House Rule 3.

## High court decision

The appellants in the high court argued that House Rule 3 violated Section 70(5) of the Strata Management Act (SMA) 2013 as it restricts the right of a parcel owner to deal with their parcel.

However, the respondent argued that short-term rentals do not amount to a lease or tenancy exempted from registration and is merely a license.

The judge held that House Rule 3 does not violate the SMA as the short-term rental guests are merely licensees

## AUTHORS

[Min Lee Tan](#)



[Mun Yan Mah](#)



and short-term rental cannot be regarded as "dealing" as propounded under the National Land Code (NLC) 1965.

The appellants appealed to the Court of Appeal.

### **Court of Appeal proceedings**

The Court of Appeal upheld the decision of the high court and further found that the purpose of the SMA is to advance interest in communal living within a strata scheme. The majority of the parcel owners had voted against the business of short-term rentals and therefore it would go against the wishes of the majority of parcel owners if the appellants were allowed to use the units for short-term rental.<sup>(2)</sup>

### **Federal Court proceedings**

The Federal Court was asked to decide on two questions of law:

- Could the management corporation enforce a house rule to restrict the express land use found in the title pursuant to Section 120 of the NLC (first question)?
- Did House Rule 3 contravene Section 70(5) of the SMA (second question)?

#### ***First question***

The appellants put forward the following arguments:

- The express condition of the land provides that the building is to be used as a commercial building with the purpose of only service apartments and commercial enterprises.
- The implementation of House Rule 3 prohibits the usage of the commercial building as set out above, which is an express condition endorsed on the title.
- The state authority is empowered under Section 120 of the NLC to impose conditions and restrictions on the use of land, while the SMA is a specific statute governing strata living.

In interpreting the two statutes, the Federal Court held that the provisions must be construed harmoniously so that they do not diametrically contradict each other. Premised on this, the Federal Court held that:

*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.*

The Federal Court adopted the principle in *Weng Lee Granite Quarry Sdn Bhd v Majlis Perbandaran Seberang Perai*<sup>(3)</sup> – namely, that certain rights or interests in land are not unfettered and therefore are capable of being regulated for specific purposes. Also, the court held that House Rule 3 did not alter the express condition of the land, hence the passing of House Rule 3 was lawful.

The first question was therefore answered in the affirmative.

#### ***Second question***

The Federal Court held that short-term rental does not amount to "dealings" as provided in the SMA; and short-term rentals are merely licences as there is no proof that the short-term rental guests have exclusive possession of the parcel and that the use of the unit was merely for lodging purposes.

As such, the second question was answered in the negative to the extent that short-term rentals amounted to licences and not tenancies.

### **Comment**

Based on the Federal Court's rulings as outlined above, the judiciary in Malaysia has recognised that the SMA aims to promote the interests of communal living within a strata scheme. Thus, if the resolution passed by the owners does not contravene the provisions of the SMA, the majority rule will apply even if said resolution results in regulating the conditions of land use.

Until there is a specific regulation governing the business of short-term rental, short-term rental operators will have to run their businesses subject to the approval of the management corporation, which is in turn subject to the wishes of the majority.

More robust regulations may be implemented in Malaysia to regulate short-term rentals such as Airbnb due to this apex court's decision.

For further information on this topic please contact [Tan Min Lee](#) or [Mun Yan Mah](#) at Gan Partnership by telephone (+603 7931 7060) or email ([minlee@ganlaw.my](mailto:minlee@ganlaw.my) or [munyan@ganlaw.my](mailto:munyan@ganlaw.my)). The Gan Partnership website can be accessed at [www.ganlaw.my](http://www.ganlaw.my).

## **Endnotes**

- (1) *Innab Salil v Verse Suites Mont Kiara Management Corporation* [2020] 1 LNS 1131.
- (2) *Innab Salil v Verse Suites Mont Kiara Management Corporation* [2020] 3 CLJ 480.
- (3) *Weng Lee Granite Quarry Sdn Bhd v Majlis Perbandaran Seberang Perai* [2020] 1 MLJ 211.

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