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Who owns the surplus parking spots on a development?

Gan Partnership | Litigation - Malaysia

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Introduction

With the rise in land and property prices, many have chosen to live in condominiums where there are common properties and facilities shared between the residents, such as swimming pools and children's playgrounds. In a recent case – *Sri Keladi Sdn Bhd (in liquidation) v Bukit OUG Condominium Joint Management Body*[1] – the Court of Appeal was presented with an appeal against a High Court decision which ruled that the surplus carparks built within the development formed a part of the common property of the development.

Facts

The appellant was a housing developer who had been entrusted to develop the Bukit UOG Condominium, while the respondent was the joint management body responsible for managing the common property of the development.

After the appellant was wound up, an audit exercise was carried out and it was revealed that 149 of the parking spots at the development were surplus and unaccounted for. The liquidator then advertised the sale of the parking spots. This prompted the respondent to initiate an action claiming the 149 surplus parking spots as common property of the development given that the strata titles had yet to be issued.

High Court

The High Court judge decided that the respondents had proven that the 149 surplus parking spots were part of the property and an asset of the development. In coming to this decision, the Court decided that the parcel owners' rights were governed by the sale and purchase agreements (SPAs) as these were signed before the Building and Common Property (Maintenance and Management) Act 2007 (BCPA) came into force. As such, the BCPA was not applicable.

Upon perusing the SPAs, the Court decided that the definition of the words "common property", "parcels" and "accessory parcels" in the SPAs meant that the appellant could not claim the parking spots. Thus, as the parking spots did not belong to the appellant, they had no right to sell them.

Court of Appeal

The Court of Appeal had to decide on two issues:

- What was the instrument or document governing the ownership of the parking spots?
- Would the parking spots fall under the definition of "common property" under the SPAs?

First issue

The parties were not in dispute that the SPAs should be the instrument or document used to determine the ownership of the parking spots. The Court of Appeal also referred to another court case – *Perantara Properties Sdn Bhd v JMC-Kelana Square & another appeal*[2] – in agreeing that the determination of the parking spots would depend on the terms of the SPAs.

Second issue

The Court of Appeal re-examined clause 31(c) of the SPAs, which read as follows:

> *'common property' means so much of the land as is not comprised in any parcel (including any accessory parcel), or any provisional block and the fixtures and fittings including lifts, refuse chutes, drains, sewers, pipes, wires, cables, and ducts and all other facilities and installations used or capable of being used or enjoyed in common by all the purchasers.*

The Court concluded that "common property" could not include the surplus parking spots as the purchasers who had bought parcel units with parking spots had been catered for. The parking spots were surplus to requirement. Thus, they could not be considered by all as "common property". Accordingly, the appellant had no right to manage them.

The Court further referred to the definitions of the terms "accessory parcel" and "parcel" in clause 31(c) of the SPAs and held that, as there were no certified strata plans at that point in time, the surplus parking spots could not be considered parcels or accessory parcels.

In examining clause 31(c) of the SPAs with the second schedule of schedule H of the SPAs, which listed common facilities and services for the development, it became clear to the Court that the surplus parking spots should not be considered to be common property. This was supported by the testimony of the respondent's witness as to the effect of schedule H.

The Court went a step further by examining the SPAs for commercial units where the provisions differed from schedule H of the SPAs – particularly clause 32, where it clearly provided that the appellant would retain the ownership of the parking spots as the word "vendor" referred to the appellant. Thus, in reference to clause 31(c) when read with the second schedule of schedule H of the SPAs, and clause 32 read with the fifth schedule of the SPAs for commercial units, it became clear that the surplus parking spots were not intended to form part of the common property under the SPAs.

As the appellant was found to own the surplus parking spots, the Court found that there was no moral or legal duty for the appellant to reveal their existence at any given time to the respondent. It was also for the appellant to decide how it wished to deal with the surplus parking spots.

Comments

While it would generally be presumed that a facility or property within the common area of a condominium development would be a common facility or common property, this may not necessarily be the case.There may be instances where the lines are not clearly drawn, such as the present case. Purchasers and management corporations alike must be familiar with what constitutes a common facility or common property within a development. It may even be necessary to first identify what would constitute a "common area" and the SPAs. The as-built drawings may help to shed some light.

For further information on this topic please contact Tasha Lim Yi Chien at Gan Partnership by telephone (+603 7931 7060) or email (tasha@ganlaw.my). The Gan Partnership website can be accessed at www.ganlaw.my.

Endnotes

(1) [2023] 1 MLJ 34.

(2) [2016] 5 CLJ 367.