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# Significance of share units in strata development - part two

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IN this second part of the article, the Conveyancing Practice Committee member of the Bar Council analyses the recent Court of Appeal's decision in Muhamad Nazri Mukamad v. JMB Menara Rajawali & Anor (JMB Menara Rajawali) which decided that a joint management body (JMB) cannot fix different rates of charges for different types of parcel units in a stratified building.

**Charges are paid for maintenance of the common property**

When strata owners pay charges, they are essentially for maintaining the common property in good condition. Common property means so much of the development area as is not comprised in any parcel and is used or capable of being used or enjoyed by occupiers of two or more parcels. In other words, strata owners do not pay charges to maintain their respective own parcels, but to maintain areas outside of all parcels. The fact that a strata owner does not actually use or enjoy these areas outside of his parcel is not relevant.

An important concept in ownership of strata properties is that the common property is for the benefit of all strata owners, unless part of the common property is designated as limited common property for the exclusive benefit of the strata owners of two or more parcels under the provisions of the Strata Titles Act ,1985 (STA) and the Strata Management Act, 2013 (SMA).

In a development area on one lot of land, there can only be one common property, whether or not, the common property is located in the block of building in which a strata owner's parcel is situated or is located in another block or another component of the same development area.

For example:

> A parcel comprising a whole floor of car park may be without any common property inside the parcel, save for structural beams and columns, but the strata owner of that whole floor car park parcel is paying charges not only for maintaining the structural beams or columns inside his parcel, but also for maintaining the common property, outside of his whole floor parcel.

> An en-bloc office tower parcel may not have any common property in the parcel, save for the building structural elements, but the strata owner of the office tower is required to pay charges for maintaining the common property outside of the office tower.

> In a mixed development comprising retail and residential parcels, the strata owner of a retail parcel is required to pay charges for maintaining the common property of the retail components as well as the common property of the residential component, as there is only one common property.

**Charges to be in proportion to share units**

As stated in part one of this article, share units determine the amount payable by a strata owner and, the amount payable shall be determined in proportion to the share units of each parcel. If strata titles have not been issued, the share units are referred to as "allocated share units" and when strata titles have been issued, they are referred to simply as "share units".

In respect of the mode of determining charges, it is helpful to look at the Court of Appeal decision in Equiti Setegap Sdn Bhd v. Plaza 393 Management Corporation (Plaza 393), delivered on March 21, 2018. The court held that any basis to determine the quantum of contributions to the management fund other than by way of share units would be contrary to section 45(3)(b) of the STA (now repealed) and is thus illegal. The fact that the charges levied on a sq ft basis are in accordance with resolutions passed at a general meeting is immaterial, given that the management corporation (MC) cannot act beyond the provisions of the STA. The now repealed section 45(3)(b) of the STA had provided that the MC may levy contributions on the proprietors in proportion to the share units of their respective parcels.

The writer is of the view that although the Court of Appeal's decision in Plaza 393 is on provisions of the STA, that decision on the illegality of charges based on any other method, is still applicable to the SMA, as the words used in the STA and in the SMA are similar.

**Can a JMB impose different rates?**

On Oct 14, 2019, the Court of Appeal in Muhamad Nazri Mukamad v. JMB Menara Rajawali & Anor held that a JMB may not determine different rates of charges for different types of parcels. In arriving at its decision the court considered section 21(2)(a) of the SMA which empowers the JMB to collect charges from parcel owners in proportion to the allocated share units of their respective parcels, and also section 25(3) which provides that the amount of charges to be paid shall be determined by the JMB from time to time in proportion to the allocated share units.

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The main issue before the court is whether the JMB or the joint management committee (JMC) may determine a rate of RM2.80 per share unit (psu) for residential parcels and a rate of RM1.68 psu for car park parcels. The writer is in total agreement with the Court of Appeal's decision in JMB Menara Rajawali in its interpretation of existing law. The reasons given by the court may be summarised as follows:

> In assigning the allocated share units for the residential parcels and the car park parcels, weightage factors have been taken into consideration, in that less weightage factors have been applied to the car park parcels;

> Imposition of two different rates for the residential parcels and the car park parcels is incompatible with the meaning of "in proportion" in sections 21 and 25 of the SMA;

> A lower rate for car park parcels will be inequitable, unfair and discriminatory practice in determining charges and the rate of charges, in the light that weightage factors have already been applied in the calculation of the allocated share units for the car park parcels, which calculation is premised on equitable considerations;

> Both the STA and the SMA have set out a comprehensive, transparent, equitable and uniform regime to allocate and calculate the share units of each parcel; and

> Sections 21 and 25 of the SMA only empower the JMB to determine and fix a single rate of charges to be applied to all types of parcels in proportion to the allocated share units.

The Court of Appeal's decision in JMB Menara Rajawali has received mixed reactions from various industry stakeholders. However, it must be borne in mind that:

> The duty of the court is limited to interpreting the words used in the SMA and to give effect to the words used;

> Where the language used is clear and unambiguous, it is not the function of the court to re-write the SMA in a way which it considers reasonable, and the court has no power to fill in any gaps disclosed; and

> What the SMA does not expressly or impliedly authorise is to be taken as prohibited.

Hence, in the case of management of a strata development by the JMB, the law is clear and unambiguous that "one size fits all". The writer is of the view that Parliament did not intend to empower the JMB to impose different rates for different types of parcels or to designate limited common property for the exclusive benefit of a certain group of strata owners. The following may be the reasons:

> In the general legislative scheme of the SMA, the JMB is intended only for an interim period until the MC comes into existence;

> In a homogenous residential development area, where vacant possession may only be delivered by a developer to a strata owner when the strata title to his parcel has been issued, there will be no more JMB, as the MC would have come into existence;

> In a mixed development which contains a residential component, when strata titles are issued for the residential component, it is inevitable that strata titles or provisional strata titles for provisional blocks shall also be issued at the same time, and the MC would have come into existence, unless the residential component forms the last phase of development; and

> In a development comprising only a commercial component, the JMB may still have to be established, but the developer or the original proprietor of the lot of land must be pushed to apply for strata titles for the parcels, as soon as possible.

**Change in the law may be required**

The writer is of the humble view that the Court of Appeal in JMB Menara Rajawali did not err. If at all, it is the law that has erred in not looking after the divergent interests of strata owners. If that is the case, then the industry stakeholders should engage with and convince the appropriate authorities to change the law, for example:

> If the weightage factors in the First Schedule Formula or the formula in the STR are not equitable to cater for modern and complex mixed developments, where the common facilities situated in a particular component require much more maintenance than the common facilities situated in other components, then additional weightage factors should be taken into consideration when assigning share units;

> To allow the developer before the sale of a parcel to designate limited common property or to allow the JMB to do so;

> Notwithstanding that charges are to be imposed in proportion to share units, to allow the developer or the JMB to impose different rates of charges for different types of parcels;

> In imposing different rates, specific criteria and factors to be considered ought to be set out in the SMA, so as to prevent abuse by a certain group of strata owners; or

> To make it easier for any MC to apply to the appropriate authorities to amend the share units assigned before the formula in the Strata Titles Rules by the PTG in the certified strata plan, if the MC can show that the share units so assigned are now no longer equitable.

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## SUMMARIES

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