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When flat is not really flat

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REHDA

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PETALING JAYA: The Property Real Estate Lawyers Association said the decision by the Court of Appeal to decide in favour of a serviced apartment owner was fair and correct.

Association president Datuk Pretam Singh Darshan Singh said under the Strata Management Act 2013 (Act 757), the maintenance charges to be paid by property owners are calculated based on share units, and different weightage factors are given to the different types of property in a mixed-use development.

Under the first schedule for example, the residential portion has a weightage factor of one while the retail complex has a weightage factor of two, and the car parking facilities, a factor of less than one.

All three types of properties enjoy minor adjustments, depending on whether the property in question has the benefit of a lift, escalator or air conditioning facilities.

"The weightage factor, therefore, determines the final payment that is to be paid. Parliament, in its wisdom, has fixed the weightage factors," said Pretam.

He said the word "flat" rate has been misconstrued and "cannot be taken literally" because of the differences in weightage factors assigned to the different types of properties.

"It is important to fix one rate and let the weightage factors determine the final payment that is to be paid," Pretam said.

Early last week, StarBiz reported that the fixing of a single "flat" rate for the different components, as granted by the Court of Appeal to a serviced apartment owner in mixed-use development Menara Rajawali, would "create chaos and confusion."

At an Oct 15 press conference organised by the Malaysian Institute of Property and Facility Managers (MIPFM), president Adzman Shah Mohd Ariffin said it was not equitable to have a "flat rate" in a mixed-use development when different types of properties exist together.

He highlighted that the operational cost for

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Association: Flat rate for mixed-use developments fair and correct



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retail mall space is RM2 to RM3 per square foot (psf), serviced apartment 30 to 40 sen psf and office space, 80 to RM1.00 psf per month.

Over the years, Adzman said mixed-use integrated projects have grown to incorporate increasingly more types of properties - residential, mall, retail shops, hotel and hospital among others - in a single development.

There are many permutations.

The National House Buyers Association (HBA), the property survey division of the Royal Institution of Surveyors Malaysia (RISM), and the Association of Valuers, Property Managers, Estate Agents and Property Consultants in the Private Sector Malaysia (PEPS) were present at the same event.

All four property-related entities were of the view that with property development being so diverse today, with several components existing side by side in projects built on

commercial and residential land, a "flat" rate was inequitable. "One size does not fit all," said HBA. In his press release, Adzman said:

"The conversion to share units at (the) same rate will be highly inequitable and will cause disharmony among owners and JMBs as there will be element (s) of subsidisation between the parties."

For perspective, Menara Rajawali serviced apartment owner Muhamad Nazri Muhamad took his JMB and the car park owner to court when the JMB fixed maintenance rate for residential and retail owners at RM2.80 per share unit, and car park maintenance charges at RM1.68 per share unit.

Nazri's lawyer Raymond Mah said whether residential, commercial or mixed developments, JMBs cannot determine or fix different maintenance charges rates per share unit for different parcels.

He said the duties and powers of a JMB is to determine, impose and collect the maintenance charges in proportion to the allocated share units of their respective parcels. The words "in proportion" requires the JMB to determine and fix only "one consistent" rate per share unit and apply that to all parcels.

"The actual amount paid is determined by the share units allocated to that parcel.

Different parcels may have different share units allocated to them, depending on the size and character of the parcel, he said.

According to the Grounds for Judgment, prepared by Judge Datuk Vernon Ong Lam Kiat, both the JMB and the car park owners acted beyond their power under the Strata Management Act 2013, rendering their decision for the different rates null and void.

It also noted that the JMB and its executive arm, the joint management committee, comprised of four members, three of whom are

shareholders/directors of the second defendant car park company Denflow Sdn Bhd and they had "conveniently" given themselves a lower rate of maintenance at RM1.68 per share unit.

Although the weightage factor for the whole floor car parking facilities were lower compared to the residential portion, because of the size of parking facilities, the car park owners have more share units in total, resulting in more voting rights.

Other than the imposition of a "flat" rate on different components of mixed-use development, MIPFM, HBA, PEPS and RISM were also of the view that JMBs should have the same power as management committees (MCs) to determine rates of maintenance charges because JMBs perform "the same functions of the MCs."

To simplify the legal jargon in real estate management, immediately after owners take delivery of their properties, the developer is to maintain and manage the property and its public areas, usually over a period of 12 months until a JMB - comprising both developer and unit owners - is set up.

The developer is required to hand over the money in the maintenance and sinking fund account to the JMB in which both developer and unit owners manage and maintain the development and its public areas jointly.

After the unit owners have been issued with their strata titles, an MC is formed comprising solely unit owners. The duties and functions of the JMB is, therefore, transitory but its functions are similar, the four contented.

Judge Ong said the JMB does not have "the inherent power" and nor can it lay claim to such powers as to fix and impose different rates.



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SUMMARIES

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