DIFFERENT RATES FOR MAINTENANCE CHARGES IN STRATIFIED MIXED DEVELOPMENT: YES OR NO?

by Ho Ai Ting & Preveena Ravindra Kumar

The Strata Management Act 2013 ("**SMA**") is the key legislation in Malaysia governing the maintenance and management of stratified properties. One of the topical issues that arises in the maintenance and management of stratified mixed developments is whether the SMA allows the imposition of different rates for maintenance charges and contribution to the sinking fund in stratified mixed developments comprising parcels for different purposes, i.e., residential and commercial.

The above question was addressed by the Court of Appeal in *Aikbee Timbers*[1], where it was held, among others, that different rates for maintenance charges and contribution to the sinking fund may be imposed by the property developer during the preliminary management period, and by the management corporation during their management period, in a mixed development that comprises parcels serving significantly different purposes.

Salient Facts

Aikbee Timbers Sdn Bhd ("the **Developer**") is the owner and developer of an integrated development project known as Pearl Suria – Menara Pearl Point 2 ("the **Development**"). The Development includes a mixed development consisting of Pearl Suria Residence, Pearl Suria Shopping Mall owned by the Developer, and a car park block owned by Sit Seng & Sons Realty Sdn Bhd ("**Car Park Owner**").

During the preliminary management period, the Developer had imposed different rates per share unit for the residential and commercial parcels. It was later resolved at the first annual general meeting of the management corporation of Pearl Suria ("**MC**") that the rates for maintenance charges for the residential parcels would be increased, whereas the rates for the commercial parcels would remain unchanged. Yii Sing Chiu, a parcel proprietor in Pearl Suria Residence, who had objected against the resolution but was outvoted, filed an Originating Summons ("**OS**") seeking a court determination on '*whether it was lawful of Aikbee, previously, and the management corporation of Pearl Suria, to require residential parcel owners in the building to pay higher maintenance charges and contributions to the sinking fund than the commercial parcel owners*'.

The High Court, in allowing the OS, ruled that the '*rates must be the same whether it was an apartment parcel or commercial parcel*'. The High Court also ruled that '*on the true*

[1] *Aikbee Timbers Sdn Bhd & Anor v Yii Sing Chiu & Anor and another appeal* [2024] 1 MLJ 948. This Court of Appeal's decision is final as a parcel owner's application for leave to appeal to Federal Court was dismissed on 19.3.2024.

construction of the relevant provisions of the SMA, the Strata Titles Act 1985, the Housing Development (Control and Licensing) Act 1966, the Housing Development (Control and Licensing) Regulations 1989, the imposition of different rates for maintenance charges and contribution to the sinking fund imposed by Aikbee was therefore unlawful, null and void'. Dissatisfied with the said decision, the Developer, the MC, and the Car Park Owner pursued their respective appeal to the Court of Appeal.

Section 60(3) of the SMA & "Significantly Different Purposes" Test

There were two main issues on appeal:

(a) '*Whether the developer could impose different rates of charges for residential parcels as opposed to the commercial parcels for the payments of the maintenance charges and contribution to the sinking fund during the preliminary management period?*'

(b) '*Whether the MC is entitled under the law to fix different rates of maintenance charges and contribution to the sinking fund for parcels which are different in nature or purpose?*'

This article focuses on the second question, which examines the application and parameters of Section 60(3) of the SMA and the "significantly different purposes" test.

The MC is a body corporate with perpetual succession and a common seal[2]. It is settled law that a body corporate created by statute may only exercise the powers conferred on it by statute[3]. The SMA provides a clear framework for the apportionment of maintenance charges and sinking fund contributions in a stratified development.

Sections 50, 52, 60, 61, and 62 of the SMA confer statutory power on the developer or the MC, as the case may be, to impose charges for maintenance and contributions to the sinking fund. In a similar vein, Sections 58(c) and 59(b) of the SMA empower the MC to decide whether to confirm or vary any amount determined as maintenance charges, and to determine and impose such charges.

The answer to the second question lies in Section 60(3) of the SMA, particularly subsection (b), which reads:

> *"60 Maintenance account of the management corporation*
> *(1) ...*
> *(2) ...*
> *(3) Subject to Section 52, for the purpose of establishing and maintaining the maintenance account, the management corporation* ***may at a general meeting****:*
>
> *(a) determine from time to time the amount to be raised for the purposes mentioned in* subsection 50(3)*;*
>
> *(b)* ***raise the amounts so determined by imposing Charges on the proprietors in proportion to the share units or provisional share units*** *of their respective parcels or provisional blocks, and the management corporation* ***may determine different rates of Charges to be paid in respect of parcels which are used for significantly different purposes and in respect of the provisional blocks****; and*

[2] Section 39(2), Strata Titles Act 1985
[3] *Sungei Wang Plaza Management Corp v Leong Soo Nyean* [2019] MLJU 158

(c) *determine the amount of interest payable by a proprietor in respect of late payments which shall not exceed the rate of ten per cent per annum …"* (emphasis added)

A plain reading of Section 60(3)(b) of the SMA suggests that the MC has the power to determine and impose different rates of maintenance charges for parcels used for significantly different purposes. However, the provision does not explicitly specify the nature or type of "purposes" for consideration thereunder, and it does not explain what satisfies the '***significantly different***' threshold.

The interpretation of Section 60(3) of the SMA was considered by the High Court in *Sodalite Sdn Bhd v 1 Mont' Kiara*[4]. The High Court held at Paragraph [10]:

> "*Based on the plain reading of Section 60(3) of the Strata Management Act 2013, I am of the view that the said provision indicate that the MC has powers to differentiate the different type of charges to be imposed on proprietors subject to the condition that the said power must not exceed the two limitations above. The said charges must be proportional to the share units of each parcel and if any different rates are to be applied it must be shown that these parcels are used for significantly different purposes*."

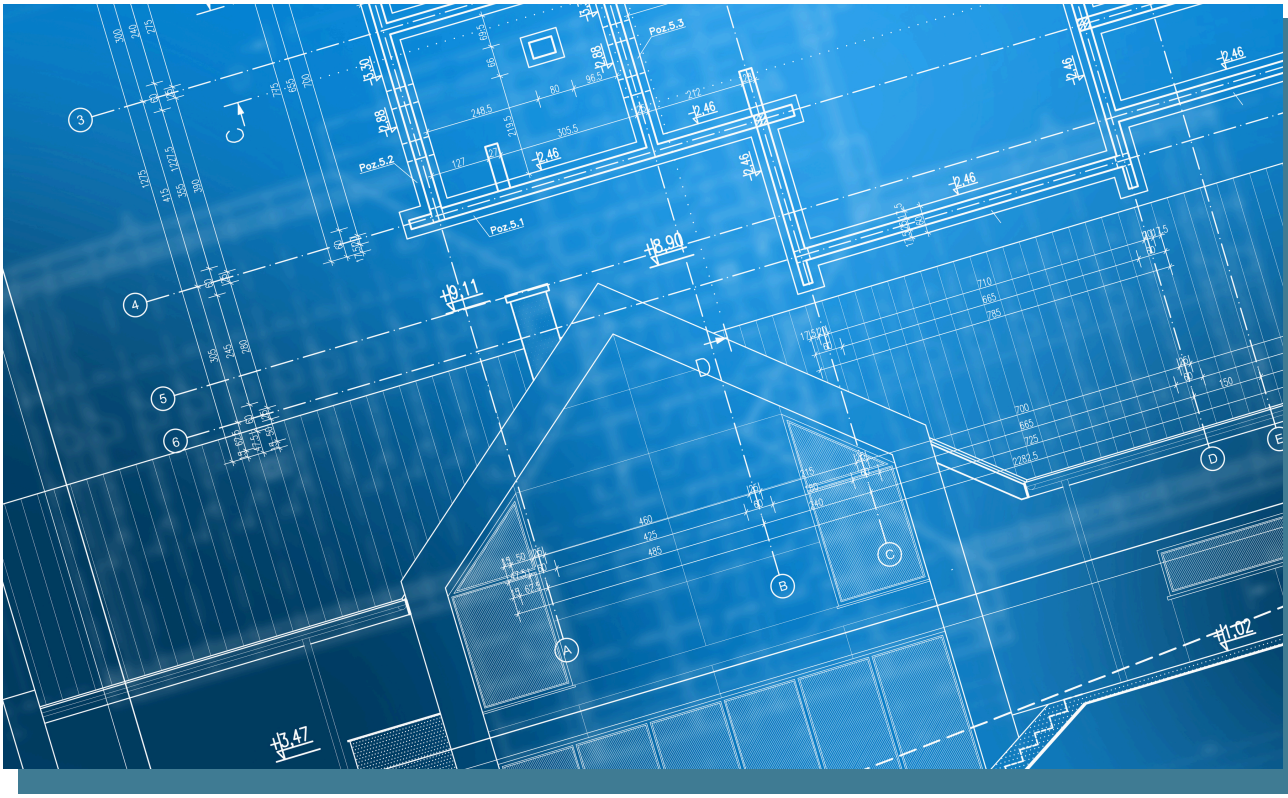
Also, in SCP Assets v Perbadanan Pengurusan PD2[5], the High Court, at Paragraph [66], examined the phrase "*parcels which are used for significantly different purpose*" in Section 60(3) of the SMA and provided several interpretations, including:

(a) *"the use for different purpose can mean different category of land use, such as "commercial", "industrial", "residential"*

(b) *the use for different purpose can mean a change in the use of the parcel subsequent to the original use when the parcel was completed and originally used;*

(c) *the different purposes for the use of parcels in a mixed development according to the original intent and purposes of the design in the development, although there is no change in the purpose of use by the parcel owners subsequent to the completion of the development project;*

(d) *the "significantly different purposes" can be interpreted to mean the other parcels being used for significantly different purpose as compared with the provisional block."*



[4] *Sodalite Sdn Bhd & Ors v 1 Mont' Kiara and Kiara 2 Management Corp & Ors* [2021] 12 MLJ 116
[5] *SCP Assets Sdn Bhd v Perbadanan Pengurusan PD2* [2021] MLJU 623

Key Findings by the Court of Appeal

The Court of Appeal answered the second question in the affirmative. The Court acknowledged the specific powers granted to the MC by the SMA, which include the ability to impose varying maintenance charge rates for different types of parcels.

The Court of Appeal made the following key findings:

(a) Where a building is subdivided into parcels with separate strata titles, and the parcels are used for more than one type of purposes (i.e., parcels for residential purpose and parcels for commercial purpose within a single development), the management corporation is permitted by law to charge different rates for parcels that are used for significantly different purposes.[6] The Court recognised the use of the parcels for residential purpose is significantly different from those used for commercial purposes (mall and car park).[7]

(b) The interpretation by the High Court that the purpose of the parcel concerned must go through a significant change from its original purposes before the MC can impose different rates was erroneous. The SMA makes no mention of the prerequisite for a change in the original purpose.[8]

(c) Different rates are allowed to be imposed for parcels in relation to a subdivided building that are used for significantly different purposes.[9] This is consistent with Section 65 of the SMA 2013, read together with Section 17A of the Strata Titles Act 1985, which anticipates that different chargeable rates can be imposed[10].

(d) The test for determining chargeable rates, or different chargeable rates, as the case may be, is 'just and reasonable'[11]

Our Thoughts

Aikbee Timbers gives certainty that a property developer, during the preliminary management period, and later a management corporation, may impose different rates for maintenance charges in a single stratified mixed development that comprises parcels serving significantly different purposes, as long as the differentiation is "just and reasonable". In our view, this approach is sensible and promotes harmonious strata living as it ensures fair and proportionate allocation of maintenance costs among different types of parcel owners having regard to its understandable varying usage, benefits, and enjoyment.

For completeness, it is worth noting that, with regard to the power of a joint management body, the Court of Appeal's decision in *Muhamad Nazri bin Muhamad v JMB Menara Rajawali*[12] remains good law to-date, that the joint management body, as an interim body, can only determine 'one uniform maintenance charge' applicable to all parcel types based on the relevant provisions of the SMA.

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[6] Para [67]
[7] Para [79]
[8] Para [76]
[9] Para [65]
[10] Para [80]
[11] Para [84]
[12] *Muhamad Nazri bin Muhamad v JMB Menara Rajawali & Anor* [2019] 10 CLJ 547