



SHORT-TERM RESIDENTIAL ACCOMMODATION IN STRATA PREMISES: A LEGAL AND TECHNICAL PERSPECTIVE

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Abstract

The perception of life changes towards quality living also plays a role in the demand for strata property, namely to live in a modern lifestyle by owning not just a house but a home with extensive housing conveniences and services such as security, privacy, covered parking space, gymnasium, swimming pool, landscaped garden and etc. In respect of short-term residential accommodation demand in strata units high rise buildings, notably, it is the current trend that the growth of high-rise buildings has dominated the real estate market. As a result, it produced rapid development in high-rise residential scheme. However, many residents are concern about privacy of the premise when the premise is overcrowded with STRA guests. The residents are concern that their privilege as residents will be affected with the presence of many STRA guests using the facilities in the apartments, which sometimes lead to nuisance in the premise. i.e. issues of parking, noise pollution and traffic congestion. In order to determine the legality of short-term residential accommodation in strata properties in Malaysia, comparative study with the position in New South Wales is made.

Keywords: short-term residential accommodation, strata properties, by-laws, joint management, body corporate

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INTRODUCTION

The use of 'strata' as a legal term was introduced in Malaysia with the Strata Title Act 1985. It sets out the definition of strata property as a single property within a larger integrated development that shares common facilities. Basically, that is a condo in a larger complex, an apartment in a big development, and even some landed properties where the land is part of a shared development with communal infrastructure. It means that the property itself forms an individual unit within a larger parcel of land that boasts shared areas. In Malaysia, strata properties is now popular with the emerging concept of home sharing where short-term residential accommodation (STRA) is offered to guests. Hence, this article explores the legal perspective on the operation of STRA in strata properties due to the objections raised by other residents in the strata properties. A comparative study with the current legal position of New South Wales (NSW) is made due to its recent advancement in the development of STRA.

LITERATURE REVIEW

The Edge Court Judgments Report on 24 July 2020 reported that the court in the case of *Verve Suites Mont' Kiara Management Corporation v Innab Salil* (Guaman No. WA-22NCVC-461-09/2017) confirmed the fact that the resolution (House Rule 3) at an Extraordinary General Meeting (EGM) where majority of residents' resolution to prohibit the use of residential units in the strata building as short-term accommodation is binding. In this case, the court overruled the judgement of the Strata Title Tribunal which confirmed the non-validity of the prohibition of the short-term accommodation on the grounds that it violated section 70(5) of the SMA 2013 as it restricts the individual proprietor's rights. In a judgment of a court reported case by the Guardian on the October 2016, the court ruled that temporary occupation of an entire property by an Airbnb guest is not consistent with the definition of the property as "a private residence". Foreign writings are also confined to newspaper reports. The New York Times on 18 July 2018 reported that in New York, hosts of the short-term accommodation are required to inform the Office of Special Enforcement every month, whether the rent is for room only or house. In Japan-Guide.com, it is reported that in Japan, under the new legislation, which came into effect on 15 June 2018, anyone wanting to list their property on Airbnb will need to register their accommodation with the local government, who will conduct fire and safety checks. The new regulations will also limit rentals to 180 days per year - with fines of up to ¥1 million (£6,821) for anyone who breaches the rules. In Sweden, it was reported in The Local, on the 8 February 2016 that under the new law, all hosts' income from rentals mediated by an intermediary similar to Airbnb is deemed taxable revenue when amount exceed SEK 50,000 and some of sexual crime occur in listed places.

On 25 October 2023, the Malay Mail reported that Airbnb has recommended that STRA be allowed by default in all strata buildings under the national STRA guidelines. The STRA platform suggested that residents in stratified buildings should be able to collectively decide with a 75 per cent vote via their joint management body (JMB) or management corporation on any conditions or permissions regarding the STRA. The guidelines on STRA in strata buildings is yet to be introduced in Malaysia and the Malay Mail reported that if approved, these guidelines are set to be the first of its kind in South-east Asia, demonstrating Malaysia's dynamism in embracing technology and innovation in tourism. Despite the above literature, there is lack of comprehensive coverage on the legal aspects of STRA and this led to the need for a comprehensive discussion governing the operation of STRA in strata properties in Malaysia, which covers the legality of the business and the way forward (Talha & Leong, 2006).

RESEARCH METHODOLOGY

The article examines the Malaysian Strata Management Act 2013 (Act 757) and makes a comparative study with the current legal position of the New South Wales (NSW) Strata Schemes Management Act 2015 and the NSW STRA Code of Conduct. The leading case in both jurisdictions concerning STRA i.e. the Malaysian case, *Innab Salil & Ors v Verve Suites Mont Kiara Management Corp* [2020] 12 MLJ 16 (Federal Court) and NSW case, *Estens v Owners Corporation SP 11825* [2017] NSWCATCD 52 are analysed. The stand taken by the Malaysian Strata Title Tribunal and NSW Civil and Administrative Tribunal pertaining to the permissibility of STRA operation in strata properties in both countries are compared.

ANALYSIS AND DISCUSSION

Management of Strata Properties

To regulate the upkeep and administration of stratified residential projects, including condominiums, apartments, townhouses, and landed properties in a shared development, Malaysia passed the Act 757 in 2013. In order to guarantee appropriate, effective, and continuous administration of these properties, this legislation seeks to combine the rights and obligations of inhabitants, landowners, and developers. To put it simply, that means enacting laws to make sure everyone does their part to preserve a better place to live (Thean Siew, 2006).

Under the Act 757, management bodies called the Joint Management Body (JMB) or Management Corporation (MC) are in charge of managing buildings.

These organizations, which are mandated by Act 757, are meant to give a centralized entity with the authority and responsibility to plan, direct, and supervise site management. The developer and the people who buy building parcels make up the JMB. The JMC is a committee that consists of three or more

members and oversees managing daily operations and making necessary repairs for progress. The moment the developer successfully completes the building's subdivision and issues individual owners with the appropriate strata titles, the MC is created.

The JMB or MC is responsible for among others:

- (a) Maintain and manage common shared areas
- (b) Determine, bill, and enforce collection of management fees
- (c) Ensure the property is appropriately insured and protected
- (d) Comply with building regulations and notices enforced by local authorities
- (e) Maintain an appropriate register of all owners
- (f) Ensure financial transparency of maintenance accounts
- (g) Enforce relevant by-laws or rules

Restriction of Dealings

Section 150 of the Act 757 states that under the Act, section 70 (5), no additional by-law shall be capable of operating—

- a) to prohibit or restrict the transfer, lease or charge of, or any other dealing with any parcel of a subdivided building or land; and
- b) to destroy or modify any easement expressly or impliedly created by or under the Strata Titles Act 1985.

“by-laws” means the by-laws which are in operation in respect of the building or land intended for subdivision into parcels or the subdivided building or land, and the common property as—

- a) prescribed by the regulations made under section 150 for regulating the control, management, administration, use and enjoyment of the building or land intended for subdivision into parcels or the subdivided building or land, and the common property; or
- b) provided for in any additional by-laws made under section 32, 70 or 71;

Under section 32(3) of the Act 757, a JMB may, by a special resolution, make additional by-laws or make amendments to such additional by-laws, not inconsistent with the by-laws prescribed by regulations made under section 150, for regulating the control, management, administration, use and enjoyment of the building or land intended for subdivision into parcels and the common property, including all or any of the following matters:

- a) safety and security measures,

- b) details of any common property of which the use is restricted;
- c) the keeping of pets;
- d) parking;
- e) floor coverings;
- f) refuse control;
- g) behaviour;
- h) architectural and landscaping guidelines to be observed by all parcel owners; and
- i) imposition of a fine not exceeding two hundred ringgits against any parcel owner, occupant or invitee who is in breach of any of the by-laws.

Similarly in New South Wales (NSW), Section 139 of the Strata Schemes Management Act 2015 provides that by-laws cannot be unjust or 'harsh, unconscionable or oppressive'. Further section 150 provides that any such by-law may be invalidated by the NSW Civil and Administrative Tribunal. Section 2 defines by-laws as the by-laws in force for a strata scheme.

Hence, it appears that under the Act 757 and the New South Wales Strata Schemes Management Act 2015, the Joint Management (Malaysia) or body corporate (New South Wales) must be mindful of the provisions above in deciding on the rules of dealings in the strata building.

In Malaysia, debates on the permissibility of strata buildings used for STRA are raised in the case of *Innab Salil & Ors v Verve Suites Mont Kiara Management Corp* [2020] 12 MLJ 16 (Federal Court). The plaintiff in this case is a Management Corporation (MC), which oversees managing and maintaining the "Verve Suites" residential development in Kuala Lumpur. The first defendant owns and controls a firm (the second defendant) that was incorporated in Malaysia. The first defendant also rents a unit at the Verve Suites. The business is handled by the corporation and runs a short-term rental operation in Verve Suites. The business leased out the units at the Verve Suites for both short- and long-term rentals after renting multiple units from parcel owners.

The MC has notified the residents about the implementation of by-law Rule 3 which provides:

“The unit shall be used only for the purpose of service suites and shall not be used for business or any other purpose (Illegal or otherwise) which may be detrimental to the credibility of Verve Suites Mont Kiara. “

It is not permitted to use any apartment for short-term rentals. Unless demonstrated differently, a short-term rental agreement will be assumed for the purposes of these rules if the following conditions are met:

- (i) Any stay for which a booking was made through services/applications/websites etc such as Airbnb, booking.com, agoda.com, klsuites.com and other similar services;
- (ii) Any stay for which a signed and stamped tenancy agreement has not been filed with the management and tenants registered and issued with access cards;
- (iii) Any unit rented out with a tenancy agreement that permits the tenant from subleasing the property.

Any breach of the above shall attract a penalty of RM 200 for each day the infringement continues.

The Management reserves the rights to deactivate the access cards and barred the unit from facilities booking.”

The motion approved by most parcel owners at the Extraordinary General Meeting is what puts the rule into effect. The plaintiff then fined parcel owners who disregarded the restriction RM 200 per day.

The Defendants, dissatisfied with the ruling, brought the matter before the Strata Management Tribunal on the grounds that the ruling is in violation of section 70(5) of the Act 757.

In the suit between *Innab Salil v. the Verve Suites Mont' Kiara Management* in the Malaysian Strata Title Tribunal, Innab Salil (the owner of a strata lot) in Verve Suites Mont' Kiara sought against the decision of the resolution (House Rule 3) at an Extraordinary General Meeting (EGM) where the majority of residents' resolution to prohibit the use of residential units in the strata building as short-term accommodation. The tribunal ruled that the prohibition of the STRAs on the strata property for the purpose of STRA is void on the grounds that it violated section 70(5) of the Act 757 as it limits the individual proprietor's rights. It means that the tribunal ruled that the STRA owner is entitled to enjoy his proprietary rights over his unit as accorded to other residents.

However, the Court of Appeal in the Malaysian case of *Verve Suites Mont' Kiara Management Corporation v Innab Salil* [2020] 6 MLRA 244 confirmed the fact that the resolution (House Rule 3) at an Extraordinary General Meeting (EGM) where majority of residents' resolution to prohibit the use of residential units in the strata building as short-term accommodation is binding. In this case, the High Court overruled the judgement of the Strata Title Tribunal which confirmed the prohibition of the STRAs on the grounds that it violated section 70(5) of the Act 757 as it limits the individual proprietor's rights. It means that the STRA owner is not entitled to enjoy his proprietary rights over his unit in the providing STRA services.

Like Malaysia, the NSW Civil and Administrative Tribunal has the authority to deem a bylaw illegal if it determines that the Owners Corporation lacked the authority to create the bylaw or if the bylaw is oppressive, harsh, or morally repugnant.

Unlike Malaysia, the NSW body corporates of strata property now find it far more difficult to prevent apartment owners from listing their properties for short-term rentals on Airbnb due to a recent historic court decision, *Estens v Owners Corporation* SP 11825 [2017] NSWCATCD 52. The Owners Corporation's bylaws are subordinate to the strata law principle that they cannot "prohibit or restrict" the functioning of an owner's lot, according to the NSW Civil and Administrative Tribunal.

The NSW case involved Peta Estens, a former rower for Australia, who owned an apartment in a five-apartment block in Woollahra, in Sydney. For 12 months she let the apartment out short-term through Airbnb while she was away on holiday. But the body corporate passed a special by-law against short-term letting after one owner complained about strangers using the common laundry and strange men who she felt were watching her sitting on Ms Estens' deck. Ms Estens argued she was very careful in selecting her Airbnb tenants, they had always left the apartment in immaculate condition, and they did not hold loud parties. She argued that the body corporate did not have the power to ban Airbnb. Ms Estens contended that Airbnb letting is a "lease" within the meaning of section 139 of the Act.

The Tribunal found that under section 150 and section 139 of the Strata Schemes Management Act 2015, the body corporate did not have the power to make the by-law. Section 139 says that by-laws cannot be unjust or "harsh, unconscionable or oppressive". The Tribunal found that Airbnb is a lease within the meaning of the Act, and that the Department of Fair Trading and a parliamentary committee examining short-term letting held a similar view. The Tribunal said it was satisfied that "the manner in which the Airbnb tenancy is devolved by the landlord is sufficient to constitute a tenancy or lease".

In NSW, the new Section 137A of the Strata Schemes Management Act 2015 (NSW) was commenced on 10 April 2020. Section 137A states that:

"By-law made by a special resolution of Owners Corporation may prohibit a lot being used for the purposes of a STRA arrangement if the lot is not the principal place of residence of the person who is the owner or occupier of the lot; and

By-law has no force or effect to the extent to which it purports to prevent a lot being used for the purposes of a STRA arrangement if the lot is the principal place of residence of the person who is the owner or occupier of the lot."

As a result of the new provision, by-laws that currently forbid STRA will no longer be enforceable against owners or tenants who occupy their property for more than 180 days out of the year as of April 10, 2020. Accordingly, property owners and occupants who live there for 180 days a year could:

- (a) rent out a spare room in their property on a short-term letting platform while they are present; or
- (b) rent out their entire property whilst on holiday,

and these arrangements could not be prohibited by an Owners Corporation.

Code of Conduct as Control Tool

The creation of the STRA Code of Conduct is seen in New South Wales as a crucial instrument for guaranteeing that STRA is run in a morally just and rational manner. Such a code of conduct helps to protect other residents' rights and guarantee the comfort of visitors throughout their stay. Restrictions can be outlined in such a code of conduct, such as prohibiting behaviour that violates the bylaws that govern the property. For example, according to the Code of Conduct, guests are not permitted to make noise during the occupancy period that could disturb, harm, or unfairly disturb the peace and comfort of their neighbours, use the property in a way that interferes with their ability to use or enjoy the common areas with their neighbours or other tenants in a stratum or community scheme, or purposefully, carelessly, or negligently damage their neighbours' or other occupants' personal property.

Under the Code of Conduct, a person, who would include an Owners Corporation, could lodge a complaint to the Commissioner if a host or guest contravenes the Draft Code. If the Commissioner is satisfied that the Draft Code has been breached, it can take disciplinary action. Such action could include:

- a) the issuing of a “strike notice”. If a guest or host receives two “strike notices”, then they will be included on an exclusion registrar which will be maintained by the Commissioner; or
- b) the issuing of a written direction requiring the host to stop acting in a particular manner. This direction can include a direction applying to common property or association property, e.g. a direction preventing the host from making a common property facility available to his/her guests.

Although this initially appeared to be a course of action that an Owners Corporation could take in the event that they had a problematic host, the NSW Code of Conduct stipulates that the Strata Commissioner may only accept a complaint based on a by-law violation of a community scheme or stratum scheme if the NSW Civil and Administrative Tribunal (NCAT) has already issued orders for a monetary penalty for the by-law violation.

Hence, this is an example of Code of Conduct that can be adopted in strata properties that have STRA operators.

CONCLUSION

Apart from the issue of legality of STRA in strata properties, there is also insurance consequences on strata property owners who use websites in carrying out STRA business, be it the entire house or giving up bedrooms to guests. The contents within the insurance coverage and policies which is meant for standard home may not cover the STRA business and its *modus operandi*. As a result, the STRA business owners will lose the right to make any claim in any incident related to STRAs which are not covered by the insurance policy.

Under the Malaysian Minor Offences Act 1955 (Revised - 1987) (Act 336), section 13, an action can be taken against an occupier of a premise for extreme noise created in the premise. Upon conviction, he shall be liable to a fine not exceeding RM100. Acting on the complaint of a house holder that the noise for any good and sufficient reason is harmful, any police officer not below the rank of Inspector, may enter upon the premises. After warning to stop the noise, the officer may remove the noise in some other appropriate way. However, this law is already outdated, and the punishments imposed were suitable at the time they were drafted decades ago. (The Star, 17 December 2017)

In addition, any police officer may arrest without warrant any person offending in his sight against any of the provisions of this Act, or reasonably suspected of committing any offence against this Act (section 31 of the Act 336) unless such person cooperates and satisfies such officer that he will act and respond accordingly upon any summons or other proceeding that may be taken against him.

Under the common law, if the STRA service led to the uneasy environment which interrupts other residents' quiet enjoyment and general welfare of the residents, the issue that can be raised is whether the interference was unreasonable for it to constitute a nuisance. From a legal perspective, one must not only prove that the purported unreasonable act had to be more than annoying before it is said to be a nuisance. It must also cause damage or impede with someone's enjoyment of their property.

The source or creator who creates the interference, i.e. the owner of the residence, whether, or not he occupies the premise from which the intrusion derives, will be liable for the nuisance. If the owner of the premise let out the premise to a tenant and the tenant sub-let the premise to STRA customers, the owner will be liable even though it is the tenant or sub-tenant who caused the nuisance. As owner of the premise, it is his duty to ensure that the tenant comply with all the bylaws, rules whatsoever.

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