

Laws on Formation and Management: Guarded Neighbourhood in Malaysia Being Neglected?

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Abstract: Urban lifestyle in a gated and guarded community became a trend in the modern era. This trend is driven by various factors such as safety, security, privacy, facilities and amenities. Appropriate legal framework is necessary for the formation and management of the gated and guarded community in order to achieve better quality of life. Prior to 2007, there was no clear demarcation between the terms and concepts of 'gated community' and 'guarded neighbourhood' in Malaysia. The scope of strata laws including formation and management was extended from parcels in a building to land parcels via Strata Titles (Amendment) Act 2007. However, not all landed parcels nor all parcels in a building come within the ambit of strata laws. Strata properties are basically categorised as 'gated community' and the issues on formation and management of the strata properties (including the common property) are now governed by the Strata Management Act 2013. There are no comprehensive laws governing the formation and management of 'guarded neighbourhood' in non-stratified properties. This paper intends to examine the lacuna on the existing strata laws on the aspects formation and management and also to explore the laws on formation and management of guarded neighbourhood in Malaysia.

1 INTRODUCTION

There is a rapid growth in the urban population in Malaysia over the last decade where 67% is urban population in Peninsular Malaysia (Tenth Malaysian Plan, 2010, p.248) and over 70% of Malaysia's population will be urban by the year 2020 (Tenth Malaysian Plan, 2010, p.249). The government has drawn up various strategies under the Tenth Malaysian Plan (2011-2015) to build a vibrant and attractive living environment and community that is safer. The approach is in line with paragraph 11 of the New Urban Agenda 2016 ('NUA') which "share a vision of cities for all is, inter alia, to promote inclusivity and ensure that all inhabitants, ... are able to inhabit and produce just, safe ... and sustainable cities and human settlements, to foster prosperity and quality of life for all" (Habitat III 2017, p.5).

Modern lifestyle in urban and city focuses on safety, security, privacy, facilities and amenities (Mohammed Osman, Rabe & Bachok, 2011). However, Numbeo reports (a world database of

users contributed data about cities and countries worldwide) indicate that crime index in urban areas in Malaysia is alarming with Kuala Lumpur registering a high Crime Index of 66.95 as at June 2018 (Numbeo, 2018a). The Numbeo website provides current and timely information on world living conditions including cost of living, housing indicators, health care, traffic, crime and pollution (Numbeo, 2018b) and the indexes are based on perceptions of visitors of the website in the past 3 years. Local newspapers also report that rampant crimes such as house breaking and murder happened in the gated and guarded communities (Daily Express, 2015; Malaymail Online, 2017). Thus, housing developments that focuses on the security and safety aspects of daily life in urban areas are in urgent demand (Tahir & Hussin, 2012) to ensure that Malaysia is a preferred place to live, work and play (Tenth Malaysian Plan, 2010, p. 250). Also this may safeguard not only the economy but also to help to ensure unity and social well-being of Malaysians (Mustaffa, 2007).

It is stated that the demand of gated and guarded communities is increased due to lifestyle changes among Malaysians (Shamsudin, et.al., 2017). Living in a gated and guarded community is preferred in urban areas as it provides better level of safety and security features (Shamsudin, Ying & Omar, 2016). Gated and guarded communities may have, among others, the following characteristics: security (such as guard service, intercom system), privacy (controlled by physical barrier, privatisation of public space and private roads), facilities and amenities (common facilities such as recreational park, swimming pool, spa, gymnasium and golf course, which are maintained by a management corporation) (Adnan, et.al., 2015; Shamsudin & Ying, 2016 at p.579).

1.1 Strata Laws

Prior to 2007, there was no clear demarcation between the terms and concepts of 'gated community' and 'guarded neighbourhood' in Malaysia (Xavier, 2008). The terms "gated community", "guarded community" and "gated and guarded community" were used interchangeably (Xavier, 2008) to refer to parcels in a building issued with strata titles are basically equipped with the gates and/or guard services. These parcels in a building basically fall within the scope of the strata laws i.e. Strata Titles Act 1985 (Act 318) ('STA 1985') on the aspect of formation and management. The law requires the formation of a management corporation to manage and maintain the building and the common properties.

In 2007, the scope of application of strata laws was further extended to land parcels when the STA 1985 was amended via the Strata Titles (Amendment) Act 2007 (Act A1290) ('STA(A) 2007') in line with the introduction of the Building and Common Property (Maintenance and Management) Act 2007 (Act 663) ('BCPA 2007'). The BCPA 2007 provides for the proper maintenance and management of buildings and common property. This amendment and introduction of new law has allowed subsequent housing development involving landed properties to come within the ambit of strata laws. Thus the landscape is such that the developers of housing estates with landed properties after 2007 may opt for strata titles issued under STA 1985, instead of individual titles issued under National Land Code 1965 ('NLC 1965'). Those areas in this type of housing estate (other than individual designated parcel/land parcel) are known as common properties and will be

managed by the management corporation. Common property means those areas of the lot as is not comprised in any parcel as shown in a certified strata plan (STA 1985, s. 4), which area is used or capable of being used or enjoyed by occupiers of two or more parcels (SMA 2013, s. 2).

A classic example is Desa ParkCity housing development in Kuala Lumpur which comprises various housing development schemes covering 473 acres in area such as vertical development projects (apartments and condominiums) and horizontal development projects (bungalows, terrace/linked houses, and semi-detached houses). According to its website homepage, it is stated that Desa ParkCity is "truly a self-contained township, centred on the ideals of good, wholesome living, where its residents are able to foster family, neighbourhood and community ties." (Desa ParkCity, 2019).

The Department of Town and Country Planning has distinguished the two terms 'gated community' and 'guarded neighbourhood' in its Planning Guidelines on 'Gated Community and Guarded Neighbourhood' dated 2 September 2010 (Planning Guidelines, 2010). According to the 2010 Planning Guidelines, a gated community is referred to as a gated and guarded residential community comprising strata title properties, while a guarded neighbourhood is referred to as a residential community comprising landed properties held under individual land titles) with security services, either with or without a security house (Planning Guidelines, 2010 at p.3). The definition by the Department is for the purpose of application for approval to enclose the housing areas (either gated community or guarded neighbourhood only) for the security scheme. There is no other written law which provides for the meaning for both terms.

Not all landed properties nor all parcels in a building come within the ambit of strata laws. Stratified properties are categorised as 'gated community'. The Strata Management Act 2013 (Act 757) ('SMA 2013') is the current law that governs the issues on formation and management of the stratified properties (including the common property). The SMA 2013 has repealed and replaced the BCPA 2007. Non-stratified properties may be classified as 'guarded neighbourhood' if similar features such as security and safety are provided in the housing estate's "public space".

There are no comprehensive laws governing the formation and management of 'guarded neighbourhood', especially the "public space" within the housing estates. This paper intends to examine the lacunae on the existing strata laws on

the aspects of formation and management of that community and to explore the laws on formation and management of guarded neighbourhood in Malaysia.

2 MATERIALS AND METHODS

2.1 Method

This research study is purely a doctrinal legal research where the data collected are mainly from primary sources such as the relevant statutes and case laws; and secondary sources thesis/dissertation, books/book chapters, articles, conference proceedings, and newspapers.

2.2 Scope of Existing Strata Laws

The application of the STA 1985 and the SMA 2013 is only limited to properties issued with strata titles. Once the building or land is capable of being subdivided into parcels, the original proprietor may apply to the Director of Lands and Mines for the respective State for subdivision (STA 1985, s. 4). The SMA 2013 shall thereafter be operative in the respect of the maintenance and management of building and common property, joint management body ('JMB') and the management corporation. JMB is established under s. 17 of the SMA 2013, after the handing of vacant possession but before the issuance of strata titles, as an interim body before the existence of the management corporation. The membership of JMB comprises the developer and the purchasers (SMA 2013, s. 17(5)) whereas the membership of the management corporation consists of the proprietors of parcels.

All legal responsibilities of the JMB shall be transferred by the developer to the management corporation when strata titles are issued (Master title in Form 3 registered in the name of the management corporation and individual strata title in Form 4 registered in the name of respective registered parcel owners). Once the management corporation is established, JMB shall cease operation. Basically the SMA 2013 has spelt out the duties and powers of the relevant parties. The responsibility of JMB and subsequently the management corporation basically is to maintain the common property and to serve the community living in the stratified properties. These include the establishing of maintenance account (SMA 2013, s. 50), and sinking fund account (SMA 2013, s. 51) in the name of the management corporation, the convening of the annual general meeting, and the dispute resolution mechanism.

There is a proper set of laws and by-laws governing the management on finance risk, safety and security, and dispute actions (Strata Management Regulations 2015, Third Schedule).

The presence of the management corporation is necessary to collectively maintain and manage the building and common property to reach a sustainable and equitable communal living environment. A common challenge in communal living is the insufficient fund (non-payment of Charges by some parcel proprietors) to upkeep the surrounding shared facilities, common areas which may trigger consequential issues of safety and security. Eventually the property price may also be affected.

All aspects of the stratified properties are regulated to ensure that the moneys (Charges paid into the maintenance account and contribution to the sinking fund) paid by the parcel proprietors and held by the developer, JMB or management corporation are properly accounted and audited. The Commissioner of Buildings appointed by the State Authority as the public authority to administer and carry out the provisions of the SMA 2013 (SMA, s 4). Non-compliance and breach of any of the provisions of the STA 1985 or SMA 2013 by the relevant parties, be it developer, JMB, management corporation or the parcel proprietors, may attract civil and/or criminal sanctions. Parties are not prohibited to contract out of the provisions of the SMA 2013 (SMA 2013, s 149). Besides, disputes may be referred to Strata Management Tribunal instead of courts. (SMA 2013, Part IX).

However, these extensive set of strata laws only cover those purchasers who are ultimately registered parcel proprietors (having registered title), and not those registered lessees (having registered interest). This is one lacunae where the developer and/or original proprietor may rely upon to escape legal responsibilities and sanctions imposed by the strata laws.

2.3 Guarded Neighbourhood

In contrast, there is no specific single law governing the guarded neighbourhood (non-stratified properties) in the aspect of maintenance and management. The non-stratified properties are basically properties which are issued or to be issued with individual title or under a master title. It can be categorised broadly into two: (a) existing housing estate; and (b) new housing development projects, where the developers often tag the projects under gated or guarded community as attractive selling point.

This is due to the fact that the proprietors (registered or not yet registered) in the housing development area to be responsible for 'public space' outside their respective house boundary. Thus there is no legal responsibility imposed on them to maintain the surrounding environment such as public road, drainage, and public garden.

Nevertheless, the management of the guarded neighbourhood in some areas exist on an 'ad-hoc' voluntary basis based on the private agreement among the residents in the housing estate by establishing residents' association. In the new housing estate, the developer may require the purchasers to execute deed of mutual covenants (in addition to the standard sale and purchase agreement) to set up a residents' association to maintain and manage the housing community.

The Common property concept does not apply in guarded neighbourhood, thus the residents' association must obtain prior approval from the relevant authority (state government and local authority) if it intends to privately restrict or regulate public spaces such as to close, barricade or restrict the access of a public road, drain or space within the housing estate. Various laws are involved such as: s. 46(1) of the Street Drainage and Building Act 1974 (Act 133) which prohibits a person to build, erect, maintain or issue permit to maintain any wall or fencing in a public place; s. 80 of the Road Transport Act 1987 (Act 333), and s. 62 and s. 136 of the NLC 1965 which prohibit obstruction to any public road; and Town and Country Planning Act 1976 (Act 172). It requires a minimum of 51% of residents to agree to establish a residents' association under the Societies Act 1966 (Act 335). Basically the residents' association can only enforce against the registered members for non-payment of the charges in arrears based on contractual relationship. In contrast, the management corporation is empowered under s. 77(3) of SMA 2013 to take legal action against proprietor of the parcel in strata properties in a court of competent jurisdiction or before the Strata Management Tribunal.

As not all residents in the guarded neighbourhood are registered members of the residents' association, the residents' association may have financial restraint to manage and maintain the guarded neighbourhood.

3 RESULTS AND DISCUSSION

The discussion on the lacuna in laws is divided into two aspects: (a) gated community; and (b) guarded neighbourhood.

3.1 Gated Community

The STA 1985 and the SMA 2013 only intend to either cover those "proprietors" of the parcels or land parcels only. The word 'proprietor' is defined (STA 1985, s. 4; SMA 2013, s. 2) and basically refers to those purchasers of the parcels or land parcels who shall ultimately obtain the title ownership over the strata titles via a valid instrument of transfer of title in Form 14A (NLC 1965, s. 214(1)(a)). Only these proprietors are subject to the statutory rights provided under the SMA 2013, such as right to establish the management corporation, right to attend the general meeting of the management corporation and right to vote, together with the obligation to pay sinking fund and Charges (SMA 2013, ss. 34-38).

The strata laws have neglected the scenario whereby the parcels or land parcels are leased to the purchasers by the original proprietor via Form 15A (NLC 1965, s. 221(3)(a) & (4)). In this case, the original proprietor shall remain as the registered proprietor on the strata title and not the purchaser (being a registered lessee). The lessee technically does not fall within the scope of 'proprietor' as he shall only obtain an interest and not proprietorship on the strata title if registered (NLC 1965, s. 227). This can be seen in an unreported High Court decision whereby the judge held that the registered original proprietor could not form a management corporation for the development project in Marina Bay Condominium, Penang that consist of condominium units, leased to the purchasers (*Hunza Parade Development v Lai Ah Han*, 2011). The Court acknowledged that the STA 1985 does not provide for the situation where the original proprietor only leased the land concerned to the purchasers for 99-year lease where only the original proprietor appears as the registered proprietor on all strata titles issued and the purchasers are only registered as lessees. Similar view is also highlighted by Tay, Kuek & Kung (2015) that the strata legislations need to be ironed out immediately on this aspect.

It is awkward that during the interim period of the strata management before the existence of the management corporation, the purchaser, being member in the JMB has the right to attend the first

annual general meeting of the JMB (SMA 2013, s. 19) and exercises his rights empowered thereof, including consider the annual budget, voting, and etcetera. The term ‘purchaser’ means either ‘a purchaser of a parcel which includes any person who has acquired an interest or registered as a parcel owner’ (SMA 2013, s. 4). However, immediately, when the management corporation is established, only the proprietor (registered) (SMA 2013, s. 4) assumes those rights and obligations, but not those acquiring interest like lessee.

Perhaps it could be a genuine omission by the legislature that not all purchasers will eventually become registered owner of the respective parcel or land parcel. No one foresees that the original proprietor may want to retain ownership and lease his parcel or land parcel to the purchaser for a maximum of 99 years. This is especially so that there would be some developers or original proprietors who may be interested only to lease the parcel or land parcel and at the same time remain as registered proprietors. Possibly this could be a reason for the developer to avoid the over-regulated strata laws which are full with criminal sanctions since the SMA 2013 prohibits the parties to contract out of the provisions.

3.2 Guarded Neighbourhood

There is a lacuna in laws on formation and management of guarded neighbourhood in Malaysia. Currently it remains a private arrangement/agreement among the residents within the housing estate to form a residents’ association to manage and safeguard the safety and security of the housing estate. The legality of the residents’ association to fence the public road (entrance to the housing estate) was tested in *Au Kean Hoe v Persatuan Penduduk D’villa Equestrian* (2015). The Federal Court dismissed the plaintiff (resident)’s action for nuisance caused by the presence of guard house and boom gates on access road into the housing estate. The court ruled that the use of boom gates across public roads and guardhouses in the housing estate was legal on two grounds. Firstly, local authority has approved the erection of the structures; and secondly, such complaint of obstruction was only inconvenience (not nuisance) to the plaintiff who had earlier defaulted in maintenance and security charges payment to the residents’ association. The research output by Haji Mohamad, Tan & Ahmad (2009) showed that the letter of law clearly prohibits any form of blocking of public spaces except if permitted by the local

authority via guidelines. There was an attempt to propose a Gated and Guarded Community Bill in 2009 by the residents of Tropicana but was not accepted by the Ministry (Tan, 2009). Instead, the 2010 Planning Guidelines issued by the Department of Town and Country Planning (now under the Ministry of Urban Wellbeing, Housing and Local Authority) serves as guidelines for the gated community and guarded neighbourhood in the security scheme. The 2010 Planning Guidelines cover these aspects, among others, the minimum and maximum land area for gated community, requisite Social Impact Assessment, maximum number of houses, internal road systems, height restriction of fence and masonry wall, entry and exit access, location and size of the guard house and formation of a residents’ association.

The formation and management of the guarded neighbourhood will depend very much on the collective decision of the residents in each housing estate. In fact, the guarded neighbourhood could adopt a similar model of the gated community (on their choice) but there is no legal compulsion to do that. In both situations (lessees in strata properties and residents in guarded neighbourhood), the existing possible solution is through deed of mutual covenants among the residents as there is no uniform law governing both situations.

4 CONCLUSION

In conclusion, the strata laws may require some amendments to include the registered lessee within the definition of “proprietor” in order for the mechanism of the statutory rights and obligations similar to those registered owners under the strata titles.

A comprehensive legal framework to manage and maintain the guarded communities is required to achieve a better quality of life within the guarded neighbourhood in Malaysia. Meanwhile, the guarded neighbourhood may refer to the strata laws as a guide only in formation and management of the respective areas. However, there are other areas that need to be addressed for landed properties.

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