

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO. B-01(A)-426-06/2022**

ANTARA

LIM KENG JIT (NO. K/P:670322-10-5415)

~~CHOW HAU MUN (NO. K/P: 631007-10-5317)~~

[Membawa tindakan ini dalam kapasitinya sebagai ahli yang diberikuasa di bawah seksyen 9(c) Akta Pertubuhan 1966 bagi dan untuk Persatuan Penduduk Parkville Jalan PJU 3/32-3/37 Sunway Damansara, Petaling Jaya, Selangor] ... PERAYU

DAN

MAJLIS BANDARAYA PETALING JAYA

... RESPONDEN

**[Dalam Perkara Mengenai Mahkamah Tinggi Malaya Di Shah Alam
Permohonan Semakan Kehakiman No. BA-25-24-04/2021**

Dalam Perkara Keputusan Majlis Perbandaran Petaling Jaya Bertarikh 30 Mac 2021 Dalam Menolak Permohonan Persatuan Penduduk Parkville Jalan PJU 3/32-3/37 Sunway Damansara, Petaling Jaya, Selangor Untuk Melaksanakan Peraturan "Penduduk Yang Tidak Membayar Caj Keselamatan Perlu Membuka Penghalang "Boomgate" Itu Sendiri Tanpa Pertolongan Pegawai Keselamatan"

Dan

Dalam Perkara Seksyen 25(2) Dan/Atau Jadual, Akta Mahkamah Kehakiman 1964
Dan

Dalam Perkara Aturan 15, Kaedah 12(1) Dan 16, Dan Aturan 53, Kaedah-Kaedah Mahkamah 2012 Dan/Atau Bidang Kuasa Sedia Ada Mahkamah Berkenaan Proklamasi Darurat Yang Dikeluarkan



Pada 11 Januari 2021 Vide P.U. (A) 7/2021
Bertarikh 12 Januari 2021

Dan

Dalam Perkara Seksyen 8, 9 Dan/Atau
101(V) Akta Kerajaan Tempatan 1976

Dan

Dalam Perkara Seksyen 70 Akta Jalan,
Parit Dan Bangunan 1974

Dan

Dalam Perkara Seksyen 9(C), Akta
Pertubuhan 1966

Dan

Dalam Perkara Seksyen 41 Dan 42, Akta
Relif Spesifik 1950

Antara

Chow Hau Mun (No. K/P: 631007-10-5317)

[Membawa Tindakan Ini Dalam Kapasitinya Sebagai Ahli Yang
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Untuk Persatuan Penduduk Parkville Jalan PJU 3/32-3/37 Sunway
Damansara, Petaling Jaya, Selangor] ... Pemohon

Dan

Majlis Bandaraya Petaling Jaya

... Responden]

CORAM

HAS ZANAH BINTI MEHAT, JCA

CHE MOHD RUZIMA BIN GHAZALI, JCA

SEE MEE CHUN, JCA



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JUDGMENT OF THE COURT

Introduction

[1] The boom gate-boon or bane? This is indeed a question which has confronted residents and residents' associations in guarded communities and local authorities and at times, the Courts, when the matter escalates into a dispute. This appeal is one such example.

[2] The Appellant as the Applicant is an authorized officer of the Residents Association of Parkville Sunway Damansara (RA and Residential Area). The Respondent is the Majlis Bandaraya Petaling Jaya (MBPJ), the relevant local council under the Local Government Act 1976 (LGA).

[3] The Appellant had sought to challenge by way of judicial review (JR) the decision of the Respondent dated 30-3-2021 (the Decision) essentially rejecting the Appellant's application to impose a rule that non-paying owners and residents or non-residential members of the RA have to operate the boom gates by themselves without the assistance of security guards (the Condition).

[4] The JR challenge was unsuccessful in the High Court. On appeal before us, we had allowed the application for the reasons as below.

Background facts

[5] The RA was 1st registered as a society on 20-8-2007. On 12-12-2017, it had applied to MBPJ for the RA to be a Guarded Community. Then, 90.23% of the residents in the Residential Area had consented to



it. The application was approved for 2 years from 1-11-2018 until 31-10-2020 (the 2018 Approval). The condition in paragraph 2(iii) is that no driver of any vehicle could be ordered to alight from his car to open the boom gate by himself to enable his vehicle to use the access road to the Residential Area.

[6] The RA was de-registered on 20-11-2018. It was however re-registered on 26-12-2019. On 19-9-2020, the RA had its first Annual General Meeting (AGM) where it was resolved *inter alia* to submit a renewal application to continue as a Guarded Community and to impose a condition that non-members of the RA would have to operate the boom gate themselves without the assistance of security guards.

[7] On 9-10-2020, the RA submitted its application to renew MBPJ's approval to operate as a Guarded Community.

[8] On 8-12-2020, the renewal was granted for a period from 1-12-2020 until 1-12-2022 (the 2020 Approval) with a stipulation that the RA cannot direct that non-members have to register with the guard house in order to gain entry into the RA.

[9] On the same day too, another letter was sent attaching the *Garis Panduan Komuniti Berpengawal (Guarded Community) Di Kawasan Majlis Bandaraya Petaling Jaya (Penambahbaikan 2017) (the 2017 Guidelines)*. That letter stated that all RAs were to comply with the Guidelines and any breach would result in enforcement action.



[10] On 21-12-2020, the RA wrote to MBPJ stating it will be imposing the Condition based on the decision in **Au Kean Hoe v Persatuan Penduduk D’Villa Equestrian** [2015] 3 CLJ 277.

[11] There were complaints from residents in the RA on the Condition which prompted a visit from MBPJ on 27-1-2021. There followed other letters from the RA maintaining its position and appealing that it be exempted from the requirement in paragraph 4(iii) of the 2020 Approval that drivers of vehicles cannot be required to get out of their vehicles to open any barrier blocking the road leading into the Residential Area.

[12] On 30-3-2021, MBPJ rejected the RA’s request to impose the Condition. The Decision was communicated to the RA by letter dated 7-4-2021.

[13] There were then other correspondences, this time involving the solicitors. Eventually the RA agreed without prejudice to their JR application to allow the residents of the RA who did not participate in the Guarded Community to use the residents’ lane when entering or leaving the Residential Area.

The JR application

[14] In the JR application dated 28-4-2021, the Appellant sought the following reliefs:

“1.1. A direction of the nature of certiorari to quash the decision of the Respondent dated 30.03.2021, which was communicated to the Applicant by way of a letter dated 07.04.2021, in rejecting the application of Persatuan Penduduk Parkville Jalan PJU 3/32-3/37 Sunway Damansara, Petaling Jaya,



Selangor (“RA”) to impose a rule that non-paying owners and residents or non-members of the RA in the townhouses in Jalan PJU 3/32, Jalan PJU 3/33, Jalan PJU 3/34, Jalan PJU 3/35, Jalan PJU 3/36 and Jalan PJU 3/37, Sunway Damansara, Petaling Jaya, Selangor (the “Residential Area”) have to operate the boom gates by themselves with out the assistance of security guards;

1.2. A declaration that the RA is entitled to impose a rule that non-paying owners and residents or non-members of the RA in the Residential Area have to operate the boom gates by themselves without the assistance of security guards;

1.3. A declaration that the Respondent, in approving a Guarded Community application, is not entitled to impose a condition that the RA cannot require non-paying owners and residents or non-members of the RA to operate the boom gate by themselves; and/or”

[15] In paragraph 9 of the affidavit in support (AIS), it was stated as follows:

“9. In the AGM, the following were unanimously resolved:

9.1 A renewal application would be made to the Respondent for the Residential Area to be a Guarded Community.

9.2 An Application would be made to the land office to obtain a temporary operating license to set up a guard house and boom gate.

9.3 A condition would be imposed that non-members of the RA would have to operate the boom gate themselves without the assistance of security guards (the “Condition”). There will be a button for such residents to press themselves to open the boom gate.



Members would be given access cards which would enable the automatic lifting of the boom gate.”

Refer to encl. 4/28 and minutes of AGM, paragraph 3.1, encl. 5/36).

[16] In paragraphs 9.4 to 9.6 of the AIS (encl. 4/28-29), the following too was averred:

- “9.4 The Condition was imposed as it would be unfair and unreasonable for non-paying members to enjoy the benefits of a guarded community without making any contribution. All residents and owners have a collective responsibility to ensure the safety of the Residential Area as well as the upkeep of the gardens within the Residential Area.
- 9.5 The fees collected from members will be used for the following two primary areas:
- a. First, to ensure the security of the area. For this purpose, a guardhouse and boom gate has to be built and manned by security guards.
 - b. Second, to hire gardeners to maintain and upkeep the roads, gardens and plants/trees in the Residential Area. There are a total of six themed gardens in the area that requires upkeep.
- 9.6 In the event, non-members are given similar access through the boom gate, more residents and owners would refuse to be members of the RA. This would ultimately result in the RA being unable to sustain a guarded community and would be to the detriment of the safety of the community and well as the need to upkeep of the gardens within the Residential Area.”



The RA took the position that the communities' interest is paramount (paragraph 9.7 of AIS).

Decision of the High Court (HC)

[17] The Grounds of Judgment (GOJ) can be found in encl. 3/87-96.

[18] The HC identified the crux of the JR application as lying in the differing comprehension of **Au Kien Hoe (Au)** with the RA's stand being that **Au** applies such that MBPJ must follow that decision and MBPJ contending otherwise (paragraphs 13 and 14, GOJ).

[19] It was then said in paragraph 15 of the GOJ that **Au** stated that a local authority has power to regulate the guarded community schemes under section 101(v) LGA, Street, Drainage and Building Act 1974 (SDBA) and Town and Country Planning Act 1976 (TCPA).

[20] **Au** was distinguished as there is nothing in that case which relates to conditions imposed by MBPJ and the issue there was whether inconvenience amounts to an actionable nuisance (paragraphs 18 and 22, GOJ).

[21] It was also observed that the RA had not challenged the 2017 Guidelines in the JR application. The condition that is now being challenged was the same condition as the 2018 Approval and the RA had not raised any issue then or in the 2020 Approval until the dispute with non-paying residents occurred (paragraphs 19, 26 and 28 GOJ).

The HC also stated in paragraph 25 as follows:



“[25] Was the imposition of the condition prohibiting the residents’ association from requiring non-paying members of the residents’ association and non-members to operate the boom gate themselves without the assistance of the security guards something necessary for or conducive to the public safety, health and convenience? Is the act of nonpaying members of the residents’ association or non-members of the residents’ association opening the boom gate themselves something necessary for or conducive to the public safety, health and convenience? This court finds this to be in the negative. This court is not satisfied that the act of non-paying members of the residents’ association or nonmembers of the residents’ association opening the boom gate themselves is something necessary for or conducive to the public safety, health and convenience.”

[22] It was also said at paragraph 28 that:

“[28] Why then, is the residents’ association now challenging the condition by MBPJ? The same condition was previously imposed by MBPJ and the residents’ association had accepted this condition. Now, non-paying members and non-members of the residents’ association are expected to open the boom gate themselves. It appears to this court, there is a possibility the proposed condition for non-paying members of the residents’ association and non-members of the residents’ association to open the boom gate themselves may pressure non-paying members of the residents to pay for the security services. It will further encourage nonmembers of the residents’ association to become members of the residents’ association.”

[23] In essence, the HC found that **Au** did not apply; the RA had not raised any issue regarding the condition in the 2018 Approval and had not challenged the 2017 Guidelines; and that the Condition was an attempt to pressure residents into joining the RA. The Decision of MBPJ was thus found to be not illegal, irrational or unreasonable.



Submissions of the RA

[24] The RA submitted that **Au** had determined that the Condition was in the larger interest of the community.

[25] It was the contention of the RA that the HC had erred in distinguishing **Au** as follows:

- i. The fact that the cause of action there was for nuisance is irrelevant. The ratio of the decision as set-out above is that the Condition is necessary for the larger interest of the community. This finding was made in context of section 101(v) LGA;
- ii. The fact that the Federal Court did not delve into the types of conditions that can be imposed by MBPJ is equally irrelevant. The RA does not dispute that MBPJ can regulate such matters. However, the exercise of that power must be in line with section 101(v) LGA; and
- iii. The learned Judge had failed to consider that there was no issue of any of the residents being forced or pressured into joining the RA in this case.

[26] There was also no need to specifically challenge the Guidelines as it was not binding law or regulations. It was the Decision to reject the RA's application to impose the Condition that is binding and now being challenged.



Submissions of MBPJ

[27] MBPJ submitted that the HC had correctly analysed **Au** which dealt with nuisance and had nothing to do with the validity of conditions imposed by MBPJ.

[28] **Au** only decided that guarded community schemes are schemes conducive to public safety in residential areas and that local authorities are empowered under section 101(v) LGA to approve such schemes. It did not say that a condition requiring residents who did not participate in its guarded community scheme to operate boom gate on their own was in line with the aforesaid provision of LGA.

[29] The HC was also correct to observe that there had been no challenge on the 2018 Approval nor the 2017 Guidelines and to hold that the Condition was not necessary for reasons of public safety, health or convenience.

[30] The Decision was entirely consistent with the provisions in clauses 2(f) and 4(d) of the 2017 Guidelines. The provisions prohibit any person administering a guarded community scheme from requiring any person from alighting his vehicle to open a barrier blocking a road. The Decision is also consistent with condition 2(iii) in the 2018 Approval and condition 4(iii) in the 2020 Approval.

[31] In the light of **Au**, MBPJ's earlier 2011 Guidelines had been amended by the 2017 Guidelines to forbid any discrimination against residents who do not participate in a guarded gate community.



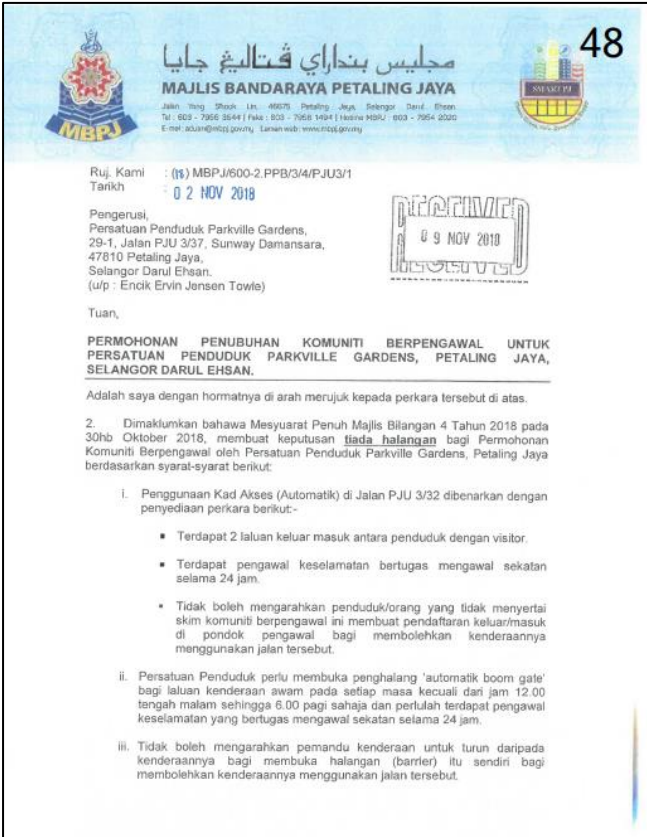

[32] The 2017 Guidelines were intended to take into account and balance the rights of those who participated in and did not participate in guarded community schemes.

[33] It was the RA that had incorrectly analysed the findings in **Au** and the HC was correct in not applying the case to the present JR application.

Our decision

2018 Approval

[34] The starting point is to look at the 2018 Approval dated 2-11-2018 (encl. 5/29-30) as below:

 <p>48</p> <p>MAJLIS BANDARAYA PETALING JAYA Jalan Yang Shook Lin, 46675 Petaling Jaya, Selangor Darul Ehsan. Tel: 952 - 7956 8641 Faks: 953 - 7956 1484 Website MBPJ: 953 - 7954 2020 E-mail: majlis@mbpj.gov.my, Laman web: www.mbpj.gov.my</p> <p>Ruj. Kami : (f) MBPJ/600-2,PPB/3/4/PJU/3/1 Tarikh : 02 NOV 2018</p> <p>Pengerusi, Persatuan Penduduk Parkville Gardens, 29-1, Jalan PJU 3/37, Sunway Damansara, 47810 Petaling Jaya, Selangor Darul Ehsan. (u/p : Enck Ervin Jensen Towle)</p> <p>Tuan,</p> <p>PERMOHONAN PENUBUHAN KOMUNITI BERPEGAWAL UNTUK PERSATUAN PENDUDUK PARKVILLE GARDENS, PETALING JAYA, SELANGOR DARUL EHSAN.</p> <p>Adalah saya dengan hormatnya di arah merujuk kepada perkara tersebut di atas.</p> <p>2. Dimaklumkan bahawa Mesyuarat Penuh Majlis Bilangan 4 Tahun 2018 pada 30hb Oktober 2018, membuat keputusan <u>tiada halangan</u> bagi Permohonan Komuniti Berpengawal oleh Persatuan Penduduk Parkville Gardens, Petaling Jaya berdasarkan syarat-syarat berikut:</p> <ol style="list-style-type: none">Penggunaan Kad Akses (Automatik) di Jalan PJU 3/32 dibenarkan dengan penyediaan perkara berikut:-<ul style="list-style-type: none">Terdapat 2 laluan keluar masuk antara penduduk dengan visitor.Terdapat pengawal keselamatan bertugas mengawal sekatan selama 24 jam.Tidak boleh mengarahkan penduduk/orang yang tidak menyertai skim komuniti berpengawal ini membuat pendaftaran keluar/masuk di pondok pengawal bagi membolehkan kenderaannya menggunakan jalan tersebut.Persatuan Penduduk perlu membuka penghalang 'automatik boom gate' bagi laluan kenderaan awam pada setiap masa kecuali dari jam 12.00 tengah malam sehingga 6.00 pagi sahaja dan perlulah terdapat pengawal keselamatan yang bertugas mengawal sekatan selama 24 jam.Tidak boleh mengarahkan pemandu kenderaan untuk turun daripada kenderaannya bagi membuka halangan (barrier) itu sendiri bagi membolehkan kenderaannya menggunakan jalan tersebut.	<p>3. Pihak tuan perlulah mematuhi segala syarat-syarat Garispanduan Komuniti Berpengawal (<i>Guarded Community</i>) di kawasan Majlis Bandaraya Petaling Jaya. Sekiranya didapati pihak tuan gagal mematuhi syarat kelulusan tersebut, pihak Majlis akan mengambil tindakan penguatkuasaan dengan serta merta.</p> <p>4. Kelulusan ini adalah untuk TEMPOH 2 TAHUN SAHAJA bermula 1/11/2018 sehingga 31/10/2020 dan pihak tuan perlu mengemukakan permohonan memperbaharui kelulusan selewat-lewatnya 3 bulan sebelum tarikh tamat tempoh. Sekiranya pihak tuan didapati gagal membuat demikian, Majlis berhak untuk membatalkan kelulusan penubuhan komuniti berpengawal yang telah diberikan.</p> <p>Sekian, terima kasih.</p> <p>"MEMBANGUN BANGSA MEMAKMUR NEGERI" "BERKHIDMAT UNTUK NEGARA"</p> <p>Saya yang menjalankan amanah,</p>  <p>(TP. SHARIPAH MARHAINI BINTI SYED ALI) Pengarah, Jabatan Perancangan Pembangunan, b.p: Datuk Bandar, Majlis Bandaraya Petaling Jaya.</p>
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[35] As noted earlier, the approval was for a period of 2 years from 1-11-2018 until 31-10-2020 and the relevant condition is paragraph 2(iii) where no driver of any vehicle could be ordered to alight from his car to open the boom gate by himself to enable his vehicle to use the access road to the Residential Area.

2017 Guidelines

[36] The 2017 Guidelines was sent by another letter and condition 4(d) (encl. 5/89) is especially relevant, namely:

“4. ...

- d. *Tidak boleh mengarahkan pemandu kenderaan untuk turun daripada kenderaannya bagi membuka halangan (barrier) itu sendiri bagi membolehkan kenderaannya menggunakan jalan tersebut.”*

2020 Approval

[37] Next comes the 2020 Approval dated 8-12-2020 (encl. 5/92-93) as follows:

“2. *Dimaklumkan bahawa Mesyuarat Penuh Majlis Bilangan 11 Tahun 2020 pada 30 November 2020, membuat keputusan tiada halangan bagi permohonan ini untuk melanjutkan tempoh kelulusan untuk tempoh 2 tahun sahaja bermula 1 Disember 2020 sehingga 1 Disember 2022.*

...



4. Pemohon juga dikehendaki mematuhi segala syarat-syarat kelulusan Majlis seperti berikut:-

i. Penggunaan kad Akses (Automatik) di Jalan PJU 3/32 dibenarkan dengan penyediaan perkara berikut:-

- Terdapat 2 laluan keluar masuk antara penduduk dengan 'visitor'.
- Terdapat pengawal keselamatan bertugas mengawal sekatan selama 24 jam.
- Tidak boleh mengarahkan penduduk/orang yang tidak menyertai skim komuniti berpengawal ini membuat pendaftaran keluar/masuk di pondok pengawal bagi membolehkan kenderaannya menggunakan jalan tersebut.

ii. Persatuan Penduduk perlu membuka penghalang 'automatik boom gate' bagi laluan kenderaan awam pada setiap masa kecuali dari jam 12.00 tengah malam sehingga 6.00 pagi sahaja dan perlulah terdapat pengawal keselamatan yang bertugas mengawal sekatan selama 24 jam.

iii. Tidak boleh mengarahkan pemandu kenderaan untuk turun daripada kenderaannya bagi membuka halangan (barrier) itu sendiri bagi membolehkan kenderaannya menggunakan jalan tersebut.

...”

[38] The approval was for a further period of 2 years from 1-12-2020 until 1-12-2022.



Requirement that no driver to alight from vehicle to open boom gate

[39] It is not disputed that the condition in paragraph 4(iii) is identical to that of the condition in paragraph 2(iii) of the 2018 Approval. In fact, all the conditions in the 2020 Approval are identical to the 2018 Approval.

The Condition and request for exemption

[40] It was only by letter dated 21-12-2020 (encl. 5/103-104) that the RA wrote to MBPJ that it will be imposing the Condition that non-paying owners and residents or non-residential members of the RA have to operate the boom gates by themselves without the assistance of security guards.

[41] This was followed by a further similar letter dated 29-1-2021 (encl. 5/107-109). It concluded as follows:

“Oleh yang demikian, kami berharap pihak Majlis dapat memberikan kecualian syarat 4 (iii) tersebut bagi pihak kami melaksanakan peraturan bahawa mereka yang tidak membayar caj keselamatan menolong diri dalam membuka palang ('boomgate') tanpa pertolongan pengawal keselamatan.”

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Muka Surat 2

PERMOHONAN PERSATUAN PENDUDUK PARKVILLE JALAN PJU 3/32-3/37 SUNWAY DAMANSARA UNTUK MELAKSANAKAN PERATURAN "PENDUDUK YANG TIDAK MEMBAYAR CAJ KESELAMATAN PERLU MEMBUKA PENGHALANG 'BOOMGATE' ITU SENDIRI TANPA PERTOLONGAN PENGAWAL KESELAMATAN".

5. Susulan daripada keputusan tersebut, MBPJ telah menyediakan Garis Panduan Komuniti Berpengawal (Penambahbaikan 2017) yang telah diluluskan oleh Mesyuarat Penuh Majlis Bil. 3/2017 pada 29.3.2017 setelah mengambilkira segala keperluan dan kehendak pelaksanaan skim komuniti berpengawal di kawasan kejiranan serta hak-hak penduduk / orang awam yang tidak menyertai skim dan terkesan daripada pelaksanaan tersebut. Secara keseluruhannya, Garis Panduan ini telah mengambilkira keseimbangan di antara keperluan keselamatan penduduk, integrasi sosial penduduk setempat serta kebebasan pergerakan / lalulintas penduduk setempat dan orang awam.

Sekian, terima kasih.

**"SELANGOR MAJU BERSAMA"
"BERKHIDMAT UNTUK NEGARA"**

Saya yang menjalankan amanah,



(TPr. SHARIPAH MARHAINI BINTI SYED ALI)

Pengarah,
Jabatan Perancangan Pembangunan,
b.p: Datuk Bandar,
Majlis Bandaraya Petaling Jaya.



[43] By this Decision, MBPJ rejected the RA's application to impose the Condition and the RA was required to comply with all conditions of the 2020 Approval.

Analysis of Au Kien Hoe

[44] In **Au**, the appellant was the purchaser of a unit in a housing area. The respondent had decided that residents who did not pay the monthly fee for security and maintenance charges would have to open the boom gates themselves without the assistance of the security guard on duty. The appellant sued the respondent for nuisance in obstruction. The questions of law at the Federal Court were as follows:

“(a) whether the erecting of a guard house and a boom gate across a public road in a residential area amounts to an obstruction within the meaning of s 46(1)(a) of the Street, Drainage and Building Act 1974 ('SDBA');

and

(b) whether a local government is empowered to authorise or otherwise approve an obstruction within the meaning of s 46(1)(a) of the SDBA.”

[45] The first question was answered in the negative. The second question was not answered as it was not necessary to answer for being too general and not based on specific factual circumstances.

[46] It is readily apparent that **Au** is a case on nuisance in obstruction where it was held that the complaint was one of inconvenience and not obstruction. We also agree that the type of condition that can be imposed by MBPJ was also not an issue. But that does not end the matter.



[47] We find that in answering the first question that a boom gate is not an obstruction and there was only inconvenience, the Federal Court had construed that the larger interest of the community must be considered when reading section 101(v) LGA and section 46(1)(a) SDBA.

[48] We note firstly what the Court of Appeal said in **Au** [2014] 10 CLJ 1 at page 17 as follows:

“[41] For the above reasons, we agree with the conclusion and finding of the learned judge in this case, that is neither unreasonable to direct the guards not to assist residents who had not paid the security charges especially when all residents (except the plaintiff) had agreed to adhere to the notice of self-service entrance and had paid for the fees upon receipt of the notice nor there is a real interference with the comfort or convenience of living according to the standard of average man by having the guard house and the boom gates at the housing estate. We are of the view that the defendant have not committed any act of nuisance by maintaining the boom gates and the guard house on the only road at the entrance to the housing estate in the circumstances.”

[49] The Court of Appeal decision was affirmed by the Federal Court.

[50] We would now need to refer in *extenso* to the relevant passages of **Au**.

[51] It is not disputed that the Federal Court had held that MBPJ is the rightful authority for the approval of guard house and boom gate as “buildings” under the SDBA (paragraph 19). It was next said in paragraphs 20 and 21 as follows:



“[20] In the context of the present case useful reference can be made to another statute, the Local Government Act 1976 (‘LGA’) which contained provision empowering the local authority to do all things necessary for or conducive to the public safety, health and convenience (see s 101(v)). In this regard it cannot be disputed that guarded communities are schemes implemented to improve public safety and security in defined residential areas.

[21] It is our judgment that the guard house and boom gates are duly authorised structures under the relevant statutes namely the TCPA, the SDBA and the LGA and cannot therefore in law be an obstruction under s 46(1)(a) of the SDBA as posed by the first question in this appeal.”

[52] It then went on to say at paragraph 23 that regulated access is not an obstruction and also had occasion to refer to the earlier Guidelines:

“[23] We shall now deal with the issue of nuisance. It is noted that the two questions posed in this appeal are premised on the assumption that operating a security gate system in a residential area is an actionable obstruction in law. In our view this is clearly wrong. A regulated access to a defined area is not an obstruction in law especially if it is for security purposes. It is so only if one is denied access to a public place. It is not a barricade that is placed across a public road that denies access altogether to all who wish to enter. The MBPJ guidelines, on which the January 2012 approval was given, addresses this issue. The guidelines in relation to a guarded community deal with the rights of those residents who opt not to participate in the security scheme. It says in para 2(f) of the guidelines as follows:

Penghuni yang tidak menyertai skim ini tidak boleh dihalang sama sekali memasuki kediaman mereka pada bila-bila masa”

[53] It is relevant to note that then such a Condition being imposed by the RA was not prohibited.



[54] Finally, the Court said at paragraphs 24 and 26:

“[24] It is noted in the present case that the appellant does not complain that he or his family are prohibited from access at all or that the boom gates are a barricade against him or his family. His complaint is that he is inconvenienced because he has to engage in self-service to lift the gate. In short, the appellant’s complaint in reality is a complaint of inconvenience and not of obstruction.

...

[26] We are of the view the underlying rule is a recognition that individuals live within a community and it is always the balancing of the individuals’ inconvenience against the communities’ interest that is of paramount concern. On this point in *George Philip & Ors v Subbammal & Ors* AIR 1957 Tra-Co 281, the High Court in India observed as follows:

Every little discomfort or inconvenience cannot be brought on to the category of actionable nuisance. Consistent with the circumstances under which a person is living, he may have to put up with a certain amount of inevitable annoyance or inconvenience. But if such inconvenience or annoyance exceeds all reasonable limits, then the same would amount to actionable nuisance. The question as to what would be a reasonable limit in a given case will have to be determined on a consideration as to whether there has been a material interference with the ordinary comfort and convenience of life under normal circumstances.”

Application of Au to this appeal

[55] The Federal Court thus found that the condition in **Au** that residents who did not pay the monthly fee for security and maintenance charges would have to open the boom gates themselves without the assistance of



the security guard on duty was not a nuisance in the interest of the community.

[56] Therefore, the ratio underlying **Au**, where the appellant had been inconvenienced is the recognition that individuals live in a community and there has to be a balancing between the rights of the individual or what is termed as inconvenience as opposed to the interest of the community at large.

[57] It is in this context that we say that the Condition imposed by the RA was in the larger interest of the community.

[58] In this particular instance, the 2017 Guidelines in paragraph 2(b) (encl. 5/88) required the consent of 75% of residents to agree to a guarded community and 77.7% of residents had consented. This is evident from the application for the 2020 Approval (encl. 5/85).

[59] We had referred earlier to paragraph 9.4 of the AIS and it bears reiterating that the Condition was imposed as it would be unfair and unreasonable for non-paying members to enjoy the benefits of a guarded community without making any contribution. With this Condition, the non-paying members would merely suffer the convenience, as in **Au**, in having to having to operate the boom gate without the assistance of security guards. There must be a sense of collective responsibility towards the greater good to ensure the safety and security of the Residential Area.



[60] It was averred in paragraph 9.8 of the AIS (encl 4/29):

“9.8 Further, at that material time, there were a number of thefts and attempted thefts in the Residential Area. There was a break-in accident where a resident lost valuable items valued at around RM100,000.00. There were a few break-in attempts which were foiled by the residents and security guards. All these incidents happened in a period of one year.”

This shows there was a security and safety issue.

[61] The fees collected go towards the security and upkeep of the Residential Area. This has been explained in paragraph 9.5 of the AIS referred to earlier (encl. 4/28-29).

[62] Section 101(v) LGA provides that MBPJ as a local authority has the power:

“In addition to any other powers conferred upon it by this Act or by any other written law a local authority shall have power to do all or any of the following things, namely -

...

(v) to do all things necessary for or conducive to the public safety, health and convenience;”

[63] There is therefore no doubt that MBPJ has those aforesaid powers. **Au** had recognized that MBPJ is the rightful authority for the approval of boom gates. This power has however to be exercised in the light of the decision in **Au**, to balance the rights of the individuals against that of the community.



[64] Given the factual matrix of the case, the refusal to exempt the RA from the condition where no driver of any vehicle could be ordered to alight from his car to open the boom gate by himself to enable his vehicle to use the access road to the Residential Area, is not reasonable. Effectively this renders the Decision not to allow the imposition of the Condition as unreasonable. We reiterate that the larger interest of the community has to prevail over the rights of individuals, where the issues of public safety and security has to prevail over matters of inconvenience. The Condition is necessary to ensure the proper functioning of a security system for the Residential Area.

[65] It is further unreasonable for non-paying individuals to enjoy the benefits of a guarded community without making any contribution and not having to fork out a single cent. It cannot be construed to be an attempt to force residents into joining the RA. The relevant paragraphs in the AIS referred to by us, dispels that notion.

[66] It is only reasonable that the RA is entitled to impose the Condition it sought and as a consequence the Decision is quashed.

No challenge to 2017 Guidelines

[67] It is further not disputed that the RA did not challenge the 2017 Guidelines. It is also not disputed that the RA had not raised any issue on the 2018 Approval then and that when submitting its application for the 2020 Approval, the RA did not ask MBPJ to review any of the conditions that applied to the 2018 Approval.



[68] In this regard, we note that the RA had been de-registered on 21-11-2018 after its application for the 2018 Approval on 12-12-2017. During the period of de-registration, the RA could really do nothing. It was only after its re-registration on 26-12-2019 and the AGM on 19-9-2020, that the RA could really pursue the Condition. Soon after the 2020 Approval it had addressed the issue with MBPJ. We find that nothing really turns on the RA not having raised the issue of the Condition in the 2018 Approval.

[69] There was also no necessity to challenge the 2017 Guidelines. What is being correctly challenged is the Decision to reject the RA's application to impose the Condition, which was binding on the RA. O. 53 r.2(4) of Rules of Court 2012 stipulates that any person who is adversely affected by the decision in relation to the exercise of the public duty or function is entitled to make a JR application. The RA was indeed adversely affected by the Decision.

Conclusion

[70] For the above reasons, we allowed the appeal and set aside the decision of the HC. Consequently, we allow paragraph 1.1 and 1.2 of the JR application. We award costs of RM8,000.00 here and below to the Appellant, subject to allocatur.



(SEE MEE CHUN)

Judge

Court of Appeal Malaysia

Dated: 10-7-2023



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