

M A L A Y S I A
IN THE HIGH COURT OF SABAH AND SARAWAK
AT KOTA KINABALU
JUDICIAL REVIEW NO. BKI-13NCvC-32/12-2015

BETWEEN

PADUAN HEBAT SDN BHD ... APPLICANT

AND

**THE MAYOR OF THE CITY
OF KOTA KINABALU ... 1ST RESPONDENT**

PADUAN HEBAT (S) SDN BHD ... 2ND DEFENDANT

RULING

The Applicant has sold several units in its development project known as
Harbour City to the 2nd Respondent pursuant to a Sales & Purchase
Agreement dated 14th November 2006. These disputed properties were
subsequently converted to a hotel. Whilst the Applicant is agreeable in
principle to this conversion it was proposed that the Applicant and the 2nd

Respondent would enter into a supplementary agreement as among other things as some of the common corridors which were said to be not part of the properties sold to the 2nd Respondent would form part of the hotel. This would involved some additional charges and or consideration said the Applicant.

Despite several attempts no supplementary agreement was conducted. Meanwhile the 2nd Respondent was already occupying the disputed or impugned areas and running them for hotel business known as Zara Hotel.

As there was no response from the 2nd Respondent, the Applicant terminated the Agreement vide a letter 18.2.2015 from Messrs Chung & Associates. By a letter dated 1.7.2015 the 2nd Respondent was told to stop the hotel operation till the Occupation Certificate (O.C) was issued.

The Affidavit of Goh Yit Yean affirmed on 7.6.2016 filed in opposition to the Judicial Review together enclosures i.e. pleadings and affidavit of Tay Chee Ling affirmed on 15.7.2015 sets out the ongoing dispute between the parties and the events occurring subsequent to the alleged termination.

Central to the ongoing dispute was the absence/lack of the occupation certificate and that usually, it will be the developer or owner who should
3 be the one who should apply to the relevant authority to obtain for one.

The Applicant is also complaining about the 1st Respondent exercise of its statutory power and duties and was in breach thereof.

6 The first question to address is whether the Applicant has the necessary standing to apply for Judicial Review to challenge the issuance of the decision of the Mayor of the City of Kota Kinabalu to issue an occupation
9 certificate dated the 21st September 2015 to Paduan Hebat (S) Sdn Bhd the 2nd Respondent herein in respect of Blocks D 1-2 (levels 1 – 6) & Lots 3-11 (level 3-5) Harbour City, Jalan Pantai Baru, Sembulan, Kota
12 Kinabalu.

All 3 parties have cited the relevant case laws and authorities. The Applicant argued that **the Malaysian Trade Union Congress & Others**
15 **v. Menteri Tenaga Air dan Komunikasi & Anor [2014] 3 MLJ 145** set the standard that one only need to show that it has a real and genuine interest in the subject matter.

18 The Applicant say that they are the developers of Harbour City and they have terminated the Sales & Purchase Agreement with the 2nd

Respondent. They have a genuine and real interest in the matter over the issuance of the O.C. It is not necessary to establish infringement of a private right or suffering of special damage.

The Respondents on the other hand argued that the Applicants' argument is misconceived that MTUC case was on public interest litigation unlike in our present case. Both Respondents argued that by Order 53 Rule 2(4) the Applicant must show that he was adversely affected by the decision of the Mayor to issue the O.C.

Given the facts of this case and mindful of the fact that there is an ongoing litigation in Suit BKI-22NCvC-62/6-2015 between Paduan Hebat (S) Sdn Bhd (the 2nd Respondent in our Judicial Review case) as Plaintiff against Paduan Hebat Sdn Bhd (the Applicant in our present Judicial Review case) and one other and having read the pleadings in the above suit and the affidavits filed in this Judicial Review proceedings, I am of the view this present Judicial Review application is a collateral attempt by the Applicant to improve or to enhance their chances of succeeding in their Defence and Counterclaim in the Suit. I agree this application for judicial review is in furtherance to the Applicants' commercial or financial interests against the 2nd Respondent.

In view of my finding as above, I am mindful of the Indian decision of **Malik Brothers v. Narendra Dadhich AIR 199 SC 3211** (adopted by the COA
3 in **QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164**
where it says:-

*“But if the Court finds that in the garb of a public interest litigation
6 actually an individual’s interest is sought to be carried out or
protected, it would be bounden duty of the court not to entertain
such petition as otherwise the very purpose of innovation of
9 public interest litigation will be frustrated.”*

I agree

I am also aware that the Applicant say that theirs is not on the basis of a
12 public interest litigation but on the 1st Respondent exercise of its statutory
powers. As I have said earlier given the background of this case I
disagree. I am aware from affidavit evidence of the many attempts made
15 by the Applicant to hinder and disrupt the hotel business of the 2nd
Respondent. I hold the view that this Judicial Review application is an
oblique attempt designed also to disrupt the business. I note that the 2nd
18 Respondent had sought the protection of the High Court by way of an
injunction to stop the Applicant from further disrupting the hotel business.

Further I am unable to understand how the decision of the Mayor to issue the O.C could adversely affect the Applicant whose legal rights are yet to be determined in the Suit, and that the O.C relates only to the fitness to occupy the buildings and do not in any manner or form confer ownership rights.

In the circumstances I do not think the Applicant has standing to apply for a Judicial Review.

Even if I am wrong on this, I will still dismiss this application on merits for the following grounds.

Was the issuance of the O.C in respect of the properties now occupied and use as a hotel illegal?

Applicant said that it is so and that the O.C should not have been issued to the 2nd Respondent in the first place because:-

(i) 2nd Respondent is not the owner of the said property.

15

(ii) Applicant did not give consent to the 2nd Respondent to apply.

- 3 (iii) Non-compliance by 1st Respondent with the Guidelines for
Submission of Plans for Approval, Procedure and System on
Processing of O.C and Handing Over of Services to Mayor.
- 6 (iv) 1st Respondent did not conduct any inspection of premise
before issuance of O.C.
- 9 (v) Structural plans did not contain level 5.
- 12 (vi) Failure to furnish Applicant who had requested for minutes of
the meeting pertaining to the decision to issue O.C and the
relevant documents and plans.
- 15 (vii) Other conditions (not specific) not fulfilled.
- (viii) Applicant not afforded opportunity to be heard.

18 In response to the above, Counsel for the 1st Respondent argued that by
Section 37 of the Building By Laws 1951 any qualified person which
includes any architect, draughtsman or engineer can apply for the O.C
provided that they accept full responsibility for those portions which they
21 respectively concerned with.

The 2nd Respondent had engaged their own firm of Architects i.e. Arkitek Tressie Yap to submit an application to the 1st Respondent for the
3 issuance of the O.C. This was in response after the Applicant had
terminated the Sales & Purchase Agreement and had instructed its
Engineer and Architects not to proceed with the application for the O.C
6 issuance.

I agree with Counsel's argument that the issue of an occupation certificate
relates only to the fitness of a building to be occupied. It does not convey
9 ownership.

I am also in agreement that Section 37 do allow Arkitek Tressie Yap to
properly make such an application. The issuance of the O.C by the 1st
12 Respondent to the 2nd Respondent therefore is not irregular or invalid.

I accept that the O.C as exhibited in T-20/GCY-32 carried an endorsement
of having visually inspected the building and confirming that the building
15 and infrastructure works were indeed completed in accordance with the
endorsed/approval plans.

On the issue of level 5, the 1st Respondent say that the registered
18 structured plan, reference S.09/06.06/U/493(A)(IV) and referred to in the

O.C and shown in Exhibit 'T-25' to Affidavit Verifying Facts relied on in Enclosure 1 clearly showed the structural plans for level 5.

3 I am therefore not persuaded by the Applicants' arguments that the plans submitted to the 1st Respondent did not contain level 5.

I shall not address issues raised and canvassed by Applicant after they
6 had obtained leave. Issues to be litigated are confirmed to those for which leave had been granted.

After reading the 1st Respondent's Affidavit in Opposition I am not
9 persuaded on affidavit evidence to come to a conclusion that there was a wrongful exercise of the 1st Respondent's statutory duties.

On merits I dismiss the application for judicial review with costs of
12 RM10,000.00 to the 1st Respondent and RM7,500.00 to the 2nd Respondent. Allocator fee is 4%.

15 Dated this day the 11th day of May 2017

18 **- SIGNED-**
DATUK DOUGLAS CRISTO PRIMUS SIKAYUN
High Court Judge
High Court at Kota Kinabalu

21

- Counsel for Applicant : Chung Jiun Dau
Of Messrs Chung & Associates
Kota Kinabalu, Sabah
- Counsel for the 1st
Respondent : Elffie Johnny and
Allyssa Mojilip (Chambering student)
Of Messrs Chin Jingulam & Associates
Kota Kinabalu, Sabah
- Counsel for the 2nd
Respondent : Alvin Leong with Janice Wong
Of Messrs Leong & Wong
Kota Kinabalu, Sabah