IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

IN THE FEDERAL TERRITORY OF KUALA LUMPUR

CIVIL SUIT NO. 22NCVC-152-03/2017

BETWEEN

1. RANJAN PARAMALINGAM

2. JUDE MICORY LOBIJIN …PLAINTIFFS

AND

BANGSAR PARK RESIDENTS ASSOCIATION

(Registration No PPM-002-14-04081971)
(Sued through its President Nitesh Malani) …DEFENDANT

And

1. Dewan Bandaraya Kuala Lumpur

2. Datuk Bandar Kuala Lumpur …THIRD PARTIES

DECISION

A. Background

[1] This Plaintiffs sued the Defendant in tort of nuisance for both public and private and breach of personal data law. The relief sought by the Plaintiffs are *inter alia* damages, injunction and an order for abetment of the nuisance as at paragraph 31 in the Amended Statement of Claim.

[2] The Defendants claimed indemnity against the 3rd Party for the entire judgement sum and costs of this action as claimed against the Defendant by the Plaintiff.

B. **Parties**

[3] The 1st Plaintiff is a registered proprietor of a house at No 73 Jalan Limau Manis Bangsar Park Kuala Lumpur (the Property). The 2nd Plaintiff is the tenant of the Property.

[4] The Defendant is a registered Resident Association under Society Act 1966 who manage the Guarded Neighbourhood (GN) scheme and represents the residents of Taman Bangsar.

[5] The 3rd Parties are the authorities who approved the GN scheme where the Defendant relied upon in operating the scheme.

C. **Analysis and Finding**

[4] I observed the thrust of the Plaintiff's suit is that the approval given to the Defendant by the 3rd Party to operate the GN is without legal basis and contravenes the law. In that the Plaintiff contended that there is no law relating to the security of the Federation or any part thereof or as regard public order as contemplated by Article 9 of the Federal Constitution by which a private person or private body of persons may operate it. There is no statue to establish and regulate the GN and for this reason the Defendant has committed both private and public nuisance. The Defendant relied on the defence of lawful approval to setup the GN granted by the 3rd Party from 1.10.2016 until 10.3.2020. The GN was established and operates pursuant to legitimate approval which entailed obtaining no objection from various authorities and public service

providers. The purpose of the GN is for the benefit of the Defendant's neighbourhood and with its implementation, the crime rates and social problems have reduced in the said neighbourhood. The Defendant did not breach any statutory laws nor rules of law where the GN was operated and implemented with the 3rd Party's lawful and legal approvals.

[5] The 3rd Party submitted that the approval given to the Defendant is in accordance with the guidelines by the Ministry of Housing and Local Government. IT follows that the 3rd Party have the legal and lawful power to issue the said approvals to the Defendant for the purpose of implementing the GN and not ultra vires to any existing Malaysian laws.

[6] I am of the view the principal issue to be decided in this case is whether the GN which comprises of the guard house and the boom gates were constructed with the approval of the relevant local authority, namely, the 3rd Party. It was not disputed that the 3rd Party had given their approval to the Defendants to implement and operate the GN. The approvals and renewal for the 1st, 2nd,3rd and 4th GN for a yearly period from 1.10.2016 to 10.3.2020 by the 3rd Party are with conditions of operating the same as contained in Lampiran GN.

[7] I am mindful that there is no law or Act of Parliament that specifically deals with GN and this was confirmed by the 3rd Party's witness (TPW1). According to TPW1 the authority of the 3rd Party to issue the guidelines for GN and the approval was given in accordance therewith based on Lampiran GN. I also took note that under Section 133 of Street, Drainage and Building Act 1974 (Act 133) provides that:

The State Authority shall have the power to make by-laws for or in respect of every purpose which is deemed by him necessary for carrying out the provisions of this Act, and for prescribing any matter which is authorised or required under this Act to be prescribed, and in particular and without prejudice to the generality of the foregoing for in respect of all or any of the matters specified hereunder …

[8] By the reading of the said Section, it clear that the 3rd Party is the State Authority in this case that has the rightful authority for the approval of the GN including the guard house and the boom gates. Even under Section 101 (v) of the Local Government Act 1976 (Act 171) contained provision empowering the local authority to do all things necessary for or conducive to the public safety, health and convenience. In this regard it cannot be disputed that guarded communities are schemes implemented to improve public safety and security in the defined residential areas.

[9] Under Section 3 of the City of Kuala Lumpur Act 1971 (Act 59) the Commissioner or other offices respectively, have and exercise all the rights, duties, powers and privileges formerly appertaining to any such office under the Federal Capital Act 1960 or any other written law and any by-laws. By virtue of Section 13 (1) Of Federal Capital Act 1960 (Revised 1977) (Act 190)

(1) The Minister may from time to time give the Commissioner directions and inconsistent with this Act, on the policy to be followed in the exercise of the powers conferred and the duties imposed on the Commissioner by or under this Act in relation to matters which appear to him to affect the interests of the City, and the Commissioner shall as soon as possible give effect to all such directions.

("Commissioner" means Dato Bandar Kuala Lumpur or, in English, the Commissioner of the City of Kuala Lumpur, appointed under section 4)

[10] Based on the above, it is my finding that the GN scheme was authorised by the 3rd Party based on the Lampiran GN issued by the Ministry Housing and Local Government in line with Act 133, Act 59 and Act 190. Therefore the 3rd Party approval is legal and lawful for the Defendant to execute and operate the GN within the area specified.

[11] The Plaintiffs also contended that the Defendant has committed tort of nuisance both private and public.

[12] **Nuisance**

[a] What is nuisance in law? Clerks & Lindsay on Torts (15th Ed) at p 1140 classified nuisance into two classes: a public nuisance and a private nuisance. As a general rule an act or omission which interferes with or disturbs or annoys a person in the exercise or enjoyment of a right belonging to him as a member of the public is a public nuisance and if the act or omission only affects the person ownership or occupation of land or of some easement or other right used or enjoyed in connection with land, then it is a private nuisance. The learned authors also have defined whether an act is a nuisance or otherwise as follows:

> *Whether such an act does constitute a nuisance must be determined not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case, including, for example, the time of committing it, that is whether it is done wantonly or in the reasonable exercise of rights; and the effect of its commission, that is, whether those effects are transitory or permanent, occasional or continuous so that the question of a nuisance or no nuisance is one of fact.*

[b] It is obvious therefore that whether an act or omission is a nuisance or not is a question of fact.

[13] **Private Nuisance**

[a] The private nuisance as alleged by the Plaintiffs, is that the Defendant has committed various act of harassment and caused annoyance and inconvenience in regard to Plaintiffs' use and enjoyment of the Property. It also has caused an obstruction of the Plaintiffs' right of access from the Property to the public street within the GN and vice versa. The Plaintiffs were annoyed with the request for identity cards and other identification documents and the 'interrogation' carried out by the guards before entering the GN.

[b] The front entrance of the Property is facing the public road whilst the back lane is within the GN area. The Defendant has blocked the side lane with a permanent barrier which blocked access to the back lane serving the rear entrance to the Property. The Plaintiffs in order to get to the rear entrance, they have to drive away from their front street and go some distance to the major public road i.e Lorong Limau Manis 1 on which the Defendant has built a guard house, boom gates and stationed security guards. It follows that to be able to pass through the boom gates, the Plaintiffs will be question by the security guards, identity check, telephone, the name and address of the person they intend to visit before access is granted. In other words, such entry will be allowed only on acceptable grounds and with necessary documentation. The Plaintiffs said that they were denied of the right of peaceful use of the property due to the fact that they need to obtain the Defendant's permission and

produce documents with is in violation of their rights to protection of their personal data.

[c] In this case for the Plaintiff to be successful in a claim for the tort of nuisance as held by the ***Privy Council in Hiap Lee (Cheong Leong & Sons) Brickmakers Ltd v. Weng Lok Mining Co Ltd [1974] 2 MLJ 1****,* the Plaintiffs must prove, on a balance of probabilities, that Defendant "use which he was making of his own land might interfere with the use or enjoyment by his neighbour of his land was something which the Defendant might reasonably have foreseen."

[d] Private nuisance concerns the unreasonable interference with another's use or enjoyment of land. In determining what is reasonable, the court will balance each party's right to use the land as they wish. At this juncture, I adopt the Court of Appeal's case ***Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd [2013] 6 CLJ 958; [2013] 5 MLJ 360, at [124]-[128]*** that has laid down 3 elements; namely

[a] indirect interference with the enjoyment of the land;

[b] that such an interference was unreasonable; and

[c] that the interference had caused damage to the claimant.

(see also ***Syarikat Perniagaan Selangor Sdn Bhd v. Fahro Rozi Mohdi & Ors [1981] 1 LNS 70; [1981] 2 MLJ 16***

[e] As to the element of interference, it must be a result of a continuing state of affairs rather than a one-off incident. It is the duty of the Plaintiffs to prove that the Defendant has caused an interference with the Plaintiffs' use or enjoyment of the property. In regard to the element of unreasonableness, the Plaintiffs' enjoyment of the property constitutes nuisance if it can be considered unreasonable in that it 'goes beyond the normal bounds of acceptable behaviour'. As to the element of damage, it envisages a situation where the interference must have caused damage to the Plaintiffs'

[f] Therefore, whether the interference amounts to a nuisance is always a question of degree – the 'acts complained as constituting the nuisance will usually be lawful acts which only become wrongful from the circumstances under which they are performed. For an interference to amount to nuisance, while it may or may not be lawful or authorized and done on one's own land or property, that act must interfere with the neighbour's reasonable enjoyment of the neighbour's land. The test of what is "reasonable" would "perhaps be what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society ", as opined by **Lord Wright in Sedleigh-Denfield v. O'Callaghan [1940] AC 880, 903**.

[g] This principle of reasonableness or reasonable user recognizes and subscribes to the "principle of give and take as between neighbouring occupiers of land, under which '...those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action " - as per Lord Goff of **Chieveley in Cambridge Water Company v. Western Counties Leather plc [1994] 2 AC 264, 299.** Consequently, whether a

particular activity is or is not a nuisance, often involves an assessment of the locality in which the activity concerned is carried out.

[h] It is also a question of degree, when an act which is an interference must be tolerated or forebear, or is said to exceed or breach limits of reasonableness. The case of **Stone v. Bolton [1949] 1 All ER 337** illustrates this:

> *"Private nuisance occurs when there is an act or omission which interferes with disturbs or annoys a person in the exercise or enjoyment of his ownership or occupation of land or some other right or interest used or enjoyed in connection with the land. Whether the interference complained of amounts to a nuisance is a question of degree. It is necessary to bear in mind that in organized society, one is expected to put up with a certain amount of discomfort and annoyance caused by the legitimate activities of one's neighbours. Therefore, whether an action constitutes a nuisance must be determined by reference to all the surrounding circumstances of the case. The surrounding circumstances would include the time and place of its commission, the seriousness of the harm, the manner of committing it, whether it is done maliciously or in the exercise of rights and the effect of its commission.*

[i] Reasonableness, therefore, is not assessed subjectively but, objectively - see **Coventry and Others v. Lawrence And Another (No. 2) [2014] UKSC 46.**

[j] According to the Plaintiffs it is troublesome to access the property's back lane because they have to go through the guard house and the boom gate since the back lane of the property lies in the GN. I have visited the site and observed that the property is situated outside the GN opposite the security post and there is no issue of nuisance raised in relation of access to the front property. Having assessed the site, I am of the view that the Plaintiff can also access the back lane by going through the Property from the front or going through the guard house to the back lane which is few meters away. There is no evidence as to when and number of times the Plaintiffs were denied access by the guards from entering the GN to have access to the back lane. When the Plaintiffs chose to have access to the back land via the guard house, the Plaintiffs are required to furnish their particulars for the purpose safety and security reasons. On the contrary, PW3 testified that she had no trouble accessing the back lane of the property when she chooses to go through the guard house.

[k] In this case having to walk a few meters away through the guard post and furnished some particulars, it can be inconvenience to the Plaintiffs but there were no evidence that they were obstructed from going to the back lane of the property via the guard house. Thus, being inconvenienced and being obstructed are entirely two different circumstances and scenarios. 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.'"

[l] As said by the Federal Court in **See Au Kean Hoe v Persatuan Penduduk D"Villa Equestrian [2015] 3 CLJ 277)** that an unreasonable interference is one that 'goes beyond the normal bounds of acceptable behaviour' – to establish an action in private nuisance, it would be necessary to prove that the interference must go beyond discomfort or inconvenience alone that it ought to exceed 'all reasonable limits'. The Federal Court held that at paragraphs 24 and 27:

"[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.

[27] It is our judgment that both the High Court and the Court of Appeal had correctly concluded that the appellant's inconvenience was not an actionable nuisance by the presence of the guard house and the boom gates."

[m] In my view, living in this robust society, where safety and security are the prime concern that one has to balance between individuals' inconvenience against the communities' interest so long as such interference did not go beyond discomfort or inconvenience that it exceed 'all reasonable limits'. If not, every little discomfort or inconvenience will be brought on to the category of actionable nuisance. According to ***Au Kean Hoe (supra)*** 'actionable private nuisance is not available for inconvenience' and that what amounts to actionable private nuisance 'is a matter of degree at all times and the conduct has to be unreasonable conduct in the circumstances of the case to be actionable'.

[n] In the finality, I am of the view that there are no real interferences with the comfort or convenience of living according to the standards of the average man by having the guard house and the boom gates. It is my finding that there is no private nuisance caused by the Defendant as to the Plaintiff's use and enjoyment of the property and in particular to access to the property back lane through the guard house.

[14] **Public Nuisance**

[a] The acts which constitute public nuisances are all of them unlawful acts. Public nuisance arises when an act materially affects the reasonable comfort & convenience the life of a class of the society" as in the case **Attorney-General (on the relation of Glamorgan County Council and Pontardawe Rural District Council) v. PYA Quarries Ltd [1957] 1 All ER 894** ***(see also Majlis Perbandaran Pulau Pinang v Boey Siew Than & Ors [1977] 1 LNS 68 HC)***

[b] The Plaintiffs in this have to prove that they have suffered damages and injury over & above the ordinary convenience suffered by the public at large. The following factors may be used as a guidance to determine the existence of special particular damage:

[i] the type or extent of damage is more serious, The Plaintiffs must suffer more than what is suffered by other persons who are exposed to the same interference.

[ii] the damage must be a direct consequence and is substantial. If no special damage suffered by any particular individuals, Section 8(1) of Government Proceeding Act 1956 provides that the Attorney General, or two or more persons who have obtained written permission from the Attorney General, may institute a suit in public nuisance for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case. In ***Koperasi Pasaraya Malaysia Bhd v Uda Holdings Sdn Bhd &Ors [2002] 8 CLJ 582*** it was held that in action for public nuisance, consent must be first obtained from the Attorney General (see also ***South Johore Omnibus Sdn Bhd v. Damai Express [1982] 1 LNS 87)***

[c] The Plaintiff alleged with the existence of GN, the Defendant has taken control of the public road in the area by putting up boom gates and barrier which denied the Plaintiffs and the public to have a legal right to unimpeded access save in accordance with the law. The Defendant has blocked other roads, side lanes and back lanes with permanent unmanned barrier with the intention to have only one entry/exit point at the guardhouse. The GN has caused obstructions to access to the public road, sides and back lanes and has created illegal parking along the side roads and excessive traffic which resulted to air and noise pollution and also the depreciation in value of the Property.

[d] The blockade of back lane would also cause obstruction to fire engines, rescue vehicle, ambulances and police vehicle when there is a need for emergency. This scenario would also cause grave danger and "death traps" to the residents. Since, the 1st Plaintiff has rented out the Property to the 2nd Plaintiff, he owes a duty of care to the occupants of the Property and is not willing to risk of acting in breach such duty.

[e] As decided earlier, the GN is a legal scheme authorised and approved by the 3rd Party in accordance with the conditions and requirements. I noted that that the 3rd Party renewed the GN for three (3) consecutive times despite of some non-compliance of conditions but were rectified by the Defendant and this were confirmed by TPW1 and TPW2 after they performed a site visit for each time of renewal.

[f] As to the illegal parking along the public road as complained by the Plaintiffs, it is unreasonable to blame the Defendants for such state of affair which cause inconvenience to the Plaintiff. To my mind, the illegal parking would occur with or without the existence of GN. Further, it is beyond the control and authority of the Defendant to address on the illegal parking. It is within the jurisdiction and authority concerned i.e in this case the 3rd Party, to take action accordingly or if there is any complaint been made. According to TPW2, after her investigation, she confirmed that there were no issues of parking, traffic congestion nor any pollution as alleged by the Plaintiffs.

[g] As to the alleged of “death traps” where the fire engines, rescue vehicle, or ambulances could not get to the back of the Defendant’s barrier, to my mind that these impediments would have been deliberated, considered and decided by the relevant authorities based on the guided procedure (Lampiran GN) before granting the approval to implement the GN. In fact, the implementation of the GN had obtained the consent of 80% of the resident, a percentage required by the 3rd Party prior the approval since it implemented to improve public safety and security of all residents. On the facts, the GN was implemented for those residents who opted to participate in the security scheme. There was no evidence before me that the Plaintiffs or the rest of 20% residents had complained that they or their family was prohibited from access at all or that the boom gates was a barricade against them or their family. Therefore, the Plaintiffs complaint was a complaint of inconvenience and not of obstruction. As decided in ***Au Kean Hoe, (supra)*** “the guarded communities were schemes implemented to improve public safety and security in defined residential areas. A regulated access to a defined area was not an obstruction in law especially if it was for security purposes.

[h] I took cognizance that Section 8 of the Government Proceeding Act 1956 provides the right to sue for public nuisance where such nuisance had caused the person harm over and above what the general public has suffered who has the same experience and to prove special damages. Public nuisance is a crime and it is dealt with by the Attorney-General's Chambers through prosecution under the criminal law. However, in some cases where the parties who have suffered as a result of a public nuisance may commence a suit in tort. In this present case, the Plaintiffs contended that the harm over and above what the general public has suffered is shown by the danger caused by having the front entrance being blocked by other peoples’ car and

the rear entrance being within the GN with no excess to it for the Plaintiffs and other emergencies vehicles. I am satisfied that the Plaintiffs were not in any way prevented or obstructed from leaving or entering the property except that the Plaintiffs has to go through the guard house if they want to access the back lanes likewise any other residents who have religiously paid their security and maintenance charges of GN. The Plaintiffs did not produce any evidence that they were being obstructed or prevented from entering or leaving the GN after accessing the property back lanes through the guard house. In other words, the access to the property and to the outside world were never at any time being jeopardised. The same applies to the freedom of traffic flow for emergencies vehicle where there is no shred of evidence before me to conclude that the GN or specifically the guard house and the boom gates had caused the "death trap". There was also no evidence to support the Plaintiffs contention that the existence of GN had cause the property or other properties within the area have been devalued or depreciated particularly due to traffic congestion, noise and air pollution and parking problem. PW3 testimony is not much of help for her failure to produce valuation report of the property or other properties in the surroundings area. TPW2 even testified that there was no issue of pollution, CCTV, double parking, traffic congestion as complained by the Plaintiffs during her site visit investigation. The Plaintiffs also failed to prove special damages suffered by them.

[i] As pointed by the Court Appeal in ***Randhir Singh Bhajnik Singh v. Sunildave Singh Parmar [2019] 6 CLJ 771; [2018] 1 LNS 1374 at p 9:***

> "(a) It is trite that legal burden is on the plaintiff and the evidential burden and/or opposing evidence to rebut the plaintiff's claim on the balance of probability lies

on the defendant. In Pan Malaysian Pools Sdn Bhd v. Kwan Tat Thai & Anor and other appeals [2018] 4 CLJ 323, the Court of Appeal observed:

> "[7] It is well-established as a general rule that „burden of proof' in a civil case is on the plaintiff but the burden will shift when the plaintiff has adduced sufficient evidence of probative value which requires the defendant to rebut the plaintiff's evidence.....". [See Selvaduray v. Chinniah [1939] 1 LNS 107; [1939] 1 MLJ 253]."

[j] Thus, it is my finding that Plaintiff has failed to prove that the Defendant has committed any act of public nuisance by maintaining the boom gates and the guard house on the only road at the entrance to the GN.

[15] The Plaintiffs also contended that the was a breach of the Personal Data Protection Act 2010 [Act 709] when they were “interrogated” by the security guards and the surveillance through the cameras installed at the guard post. During the “interrogation” personal identification document such as identification card, driving license or passport were asked by the guard before they were allowed to enter the GN. These information are obtained and retained by the Defendant or third parties.

[16] DW1 admitted such requirement of getting the personal information occurred intended to prevent people that are unwanted coming into the GN and aimed to ensure that all entries are rightful and for an acceptable purpose. However, such practice was put to stop in February 2017 approximately 4 months after the 1st approval of GN (1.10.2016). The 3rd Party continuously renewed the Defendant ‘s application for approvals even increased the approval period from 3 months to one (1) year. The 3rd party also conduct an investigation which reveal that the Defendant did not breach any

of the terms and conditions as reflected in the 4th approval letter. (Common Bundle Page 48).

[17] In my view, the purpose of the Defendant requirement of getting the personal information prior entering the GN was for the purpose of preventing or detecting a crime; safety and security. In the absence of evidence before me, I am satisfied that the data collected was not meant to be misused by the Defendant. As said earlier the 3rd party had observed such personal information requirement and such practice was already put to stop by the Defendant even though PW3 testified that the practice was still continuing October 2019, but offers no evidence to support her contention. As there was no evidence of misused of personal data, I find that there was no breach on part of the Defendant since the collection of such of personal data was necessary for the purpose of preventing or detecting a crime in the GN in pursuant to Section 130 (2) (a) (i) Act 709.

[18] In the totality of the evidence before me and by reason aforesaid, I therefore on balance of probabilities find that the Plaintiff has failed to prove its claim against the Defendant, therefore the Plaintiff's claim is dismissed with cost.

[19] On the same premise I also find that the Defendants' claim against the 3rd Party is dismissed with costs.

[20] [a] Cost to be paid by the Plaintiff to the Defendant is RM50,000.00.

[b] Cost to be paid by the Defendant to the Third Party is RM20,000.00.

-Sgd-

(DATO' ROZANA BINTI ALI YUSOFF)

HIGH COURT JUDGE

KUALA LUMPUR

Dated: 26th January 2021