DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
[RAYUAN SIVIL NO: W-01fNCvCMW)-57-01/2021]

ANTARA

1. RANJAN PARAMALINGAM

2. JUDE MICORY LOBIJIN ... PERAYU-PERAYU

DAN

PERSATUAN PENDUDUK TAMAN BANGSAR KUALA LUMPUR
(NO. PENDAFTARAN: PPM-002-14-04081971) ... RESPONDEN

(DISAMAN MELALUI PRESIDENNYA NITESH MALANI)
(Dalam Perkara Mengenai Mahkamah Tinggi Malaya di Kuala Lumpur
Guaman Sivil No: 22NCVC-152-03/2017

Antara

1. Ranjan Paramalingam

2. Jude Micory Lobijin ... Plaintif-Plaintif

Dan

Persatuan Penduduk Taman Bangsar, Kuala Lumpur
(No. Pendaftaran: PPM-002-14-04081971)
(Disaman Melalui Presidennya Nitesh Malani) ... Defendan

Dan

1. Dewan Bandaraya Kuala Lumpur

2. Datuk Bandar Kuala Lumpur … Pihak Ketiga)

CORAM: HAS ZANAH MEHAT, JCA
CHE MOHD RUZIMA GHAZALI, JCA
SEE MEE CHUN, JCA

JUDGMENT

Introduction

[1] This appeal emanated from the decision of the learned High Court Judge (LHCJ) at Kuala Lumpur High Court dismissing the appellants'/the plaintiffs' claim against the respondent/the defendant premised on the tort of nuisance, both public and private, and for breach of personal data law. The relief sought by the appellants/the plaintiffs are inter alia for declarations, injunctions, specific orders and damages.

[2] For ease of reference, parties will be identified as in the trial court, the plaintiffs and the defendant.

Brief Background Facts

[3] The first plaintiff is a registered proprietor of a house at No 73 Jalan Limau Manis, Bangsar Park, Kuala Lumpur (the said Property). The second plaintiff is the tenant of the said Property. The defendant is a Resident Association registered under Society Act 1966 who manage the Guarded Neighbourhood (GN) scheme and represents the residents of Bangsar Park. The defendant then brought in Dewan Bandaraya and Datuk Bandar Kuala Lumpur as the third party.

[4] On or about 2.1.2017, the defendant had set up the GN scheme which comprises of a security posts and automatic gates on Lorong Limau Manis 1 and manual barriers on Jalan Limau Lipis, Jalan Limau Kasturi, Lorong Limau Kasturi and Lorong Limau Manis 2 located in Bangsar Park which was implemented to improve public safety and security for all residents. The defendant's GN scheme was duly approved by the third party upon the defendant's application. Following that, the third party granted the defendant's GN scheme an extension subject to the

defendant meeting certain requirements. The defendant's GN scheme was renewed from 1.10.2016 to 10.3.2020.

[5] In managing and maintaining the GN scheme, the defendant has collected monthly fees from the residents to foot the bill for security and maintenance charges and to provide windshield stickers for residents' vehicles for easy identification and access to the GN area. The defendant's GN scheme consists of a guard house and boom gate with a closed circuit television camera (CCTV) at the main entrances and an unmanned barrier placed at certain road sides or back lanes for the effectiveness of security in the GN area.

[6] Disagreeing with the implementation of the GN scheme, the plaintiffs filed suit against the defendant claiming that the whole or any part of the defendant's GN scheme is illegal and amounts to an unwarranted intrusion into their private lives and the lives of members of the public who enter or reside within the GN area.

The LHCJ's Decision

[7] The principal issue to be decided is whether the defendant's GN scheme which comprises of the guard house and the boom gates were constructed with the approval of the relevant local authority, namely the third party. It was not disputed that the third party had given their approval to the defendant to implement and operate the GN scheme. The approval was renewed on a three-month basis in the beginning and on a yearly basis thereafter from 1.10.2016 to 10.3.2020 based on the guidelines issued by the Ministry of Housing and Local Government. Thus, the third party's approval makes it legal and lawful for the defendant to execute and operate the GN scheme within the area specified.

[8] As to the private or public nuisance, the plaintiffs failed to prove that the defendant had committed any act of nuisance by maintaining the boom gates and the guard house on the only road at the entrance to the

GN area. Living in a robust society where safety and security are the prime concerns one has to balance individuals' inconveniences against the communities' interests so long as such interference does not go beyond discomfort or inconvenience that exceeds reasonable limits. The presence of the guard house and boom gates in the GN area has no discernible impact on the average person's comfort or convenience of living. Thus, there is no nuisance caused by the defendant to the plaintiff or the public with respect to the enjoyment of their property in the GN area.

[9] As to the breach of the Personal Data Protection Act (PDPA), the purpose of the defendant's requirement of getting the personal information prior to entering the GN area was necessary for the purpose of preventing or detecting a crime, which is for safety and security reasons. In the absence of evidence to shows that the data collected was meant to be misused by the defendant, the LHCJ found that there was no breach on the part of the defendant.

[10] Therefore, on the balance of probabilities, the plaintiffs have failed to prove their claim against the defendant. The plaintiffs' claim was dismissed with costs. On the same premise, the defendant's claim against the third party was also dismissed with costs.

The Appeal

[11] The plaintiffs had listed 57 grounds of appeal in their Memorandum of Appeal. However, learned counsel for the plaintiffs' submission before us argued mainly on two main issues that revolve around the same issues as decided by the LHCJ. First, it was argued that the LHCJ erred in facts and law when made a finding that the defendant was given approval by the third party to operate the GN scheme, and even if the defendant got approval from the third party, it was unlawful and without legal basis. Second, it was said that the LHCJ erred in facts and law, and committed serious misdirection in her conclusion that the plaintiffs failed to prove that the defendant had committed private and

public nuisance, and breached the personal data law by operating and implementing the GN scheme. Besides that, the plaintiffs also raised the issue of two written judgments given by the LHCJ. First dated 26.1.2021 upon delivering of the decision after the matter had been reserved for decision for a considerable period, and second, a written judgment dated 18.3.2021. Learned counsel for the plaintiffs argued that the propriety of furnishing such grounds of decision is questionable and therefore the second judgment should be disregarded.

[12] On the other hand, learned counsel for the defendant submitted that since the plaintiffs only appeal against part of the LHCJ's decision, that is in respect of the defendant and not the third party, therefore, any finding of facts and laws made in the said decision, in respect of the third party, must not be disturbed. Thus, the learned counsel for plaintiffs' argument about the legality of the third party's approvals given to the defendant to operate the GN scheme should collapse. As to the plaintiffs' appeal against the LHCJ's finding on the defendant's GN scheme, it turns out that the LHCJ had made a correct finding of facts and law. The LHCJ did not err or misdirect herself in making the decision, particularly, when her Ladyship herself has visited the neighbourhood in Bangsar Park and had the advantages of first-hand examination and evaluation of the evidence and witnesses.

Our Analysis and Decision

[13] First and foremost, we have to emphasize that parties are bound by their pleadings. The law on pleadings is well settled. Generally, parties are bound by their pleadings and the court should not decide on the issue that was not pleaded. Federal Court in the case of *Anjalai Ammal & Anor v. Abdul Kareem* [1969] 1 MLJ 22 had made the following observation and had opined that:

> There is considerable authority in regard to the purpose and effect of particulars filed pursuant to O. 19, r. 7A of the Rules of the Supreme Court. At p. 31 of Halsbury (3rd Edn.) Vol. 3, the learned

commentator has this to say:-

> A party is bound by his pleadings unless he is allowed to amend them, and he is therefore bound by his particulars, which are, in effect, part of the pleadings under which they are delivered.

In *Thomson v. Birkley* (1883) 47 LTR p. 700 Watkin Williams J says:-

> The object of particulars is to prevent surprise, and to limit and particularise events in order that both parties should come to trial fully prepared for the issues.

In *Spedding v. Fitzpatrick* (1888) 38 Ch. D 410 at 413 Cotton LJ says:-

> The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise.

In *Thorp v. Holdsworth* (1876) Ch. 637 at 639 Jessel Mr. says:-

> The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules of R XIX was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.

Finally, in *Yorkshire Provident Life Assurance Co. v. Gilbert & Rivington* [1895] 2 QB 114 at 152 Lindley LJ says:-

> What is the effect of these particulars? I take it the effect of these particulars is this, that the issues to be tried are limited by these particulars in the first instance. I do not mean to say that leave cannot be obtained to add to the particulars - of course it can; but the moment these particulars are delivered, and until some further order is obtained for the delivery of further particulars, the effect of delivering the particulars is to cut down the matters in question in the action to the particulars.

Therefore, in my opinion, the learned trial Judge, in the instant case, had departed from the strict rules of procedure, in deciding the case on an issue not raised in the pleadings and on the assumption of a fact which the appellants were not obliged to call evidence to rebut. ...

On the same principle of law related to the rule of pleadings, this court in the case of *Pern binaan SPK Sdn Bhd v. Jalinan Waja Sdn Bhd* [2014] 2 MLJ 322 has made the following observation:

> [23] In such a situation, a return to the basic governing principles and rules of pleadings in our system of civil litigation will be timely and appropriate. This was also the route adopted by the learned judicial commissioner, but, with the utmost respect, his conclusions resulted from a misapplication of these basic principles. The law reports are replete with exhortations and reminders by judges on the need for decisions to be grounded on the pleaded case of the litigants, whether plaintiff or defendant. The need to comply with the rules on pleading are generally to be strictly enforced to avoid surprises at the trial and to narrow and define the issues of the parties so that each will know the opposing party's case, to prepare to meet it in advance and to marshal the necessary evidence at trial to establish its claim and answer the defence of the opposing party. The underlying rationale is not only to prevent surprises as seemed to be the reasoning of the High

Court, but is much more than just that.

[24] That classic, authoritative text on the rules of pleadings - Sir Jack Jacob & Ian S Goldrein, *Pleadings: Principles and Practice* - provides four 'objects' Pleadings - their dual object in summary. Pleadings serve a two-fold purpose:

(a) first To inform each party what is the case of the opposite party which he will have to meet before and at the trial; and

(b) secondly concurrently to appraise the court what are the issues. The identity of the issues is crucial, not only for the purposes of trial, but also for the purposes of all the pre-trial interlocutory proceedings.

The object of pleadings - in detail

(a) first To define with clarity and precision the issues or questions which are in dispute between the parties and fall to be determined by the court...

(b) secondly To require each party to give fair and proper notice to his opponent of the case he has to meet to enable him to frame and prepare his own case for trial...

(c) thirdly To inform the court what are the precise matters in issue between the parties which alone the Court may determine, since they set the limits of the action which may not be extended without due amendment properly made ...

... in *Blay v. Pollard and Morn's* Scrutton LJ said:

> Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself

without amending the pleadings, and in my opinion he was not entitiled to take such a course ...

(d) Fourthly To provide a brief summary of the case of each party, which is readily available for reference, and from which the nature of the claim and defence may be easily apprehended, and to constitute a permanent record of the issues and questions raised in the action and decided thereon so as to prevent future litigation upon matters already adjudicated upon between the litigants or those privy to them ... (at pp 3-4 of the text (1990 Ed).

[14] Then, corresponding to the principle of pleadings, the plaintiffs are bound by the scope of appeal to the appellate court as mentioned in the Notice of Appeal and the reasons listed in the Memorandum of Appeal can be construed as the pleadings at the appellate stage. In relation to scope of appeal, sub-rules 5(1) & (4) of the Rules of The Court of Appeal 1994 (RCOA) provide as follows:

5. Appeal to be by re-hearing on notice.

(1) Appeals to the Court shall be by way of re-hearing and shall be brought by giving notice of appeal.

…

(4) Any appellant may appeal from the whole or part of a judgment or order and the notice of appeal shall state whether the whole or part only, and what part, of the judgment or order is complained of.

In respect of the Memorandum of Appeal, sub-rules 18(1) & (2) of the RCOA provide that:

18. Memorandum of appeal.

(1) The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or

narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided; such grounds to be numbered consecutively.

(2) The appellant shall not without the leave of the Court put forward any other ground of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

[15] In respect of the plaintiffs' pleadings at the High Court, it is pertinent to note that the plaintiffs had filed amended statements of claim (ASOC) as can be seen in Enclosure 13 at pages 101 to 116 in National language and the translation at pages 118 to 130.

[16] In their ASOC, the plaintiffs had pleaded the facts that, inter alia, the defendant had wrongfully set up permanent locked and unmanned barriers on various public streets in Bangsar Park so as to form an illegal gated and guarded area. In addition, there is a checkpoint complete with a shed on the footway and the boom gate across the main street to the neighbourhood, which is well-guarded by the defendant's security guard and also equipped with the CCTV. The security guard was given the right and discretion to stop, inspect, interrogate and ask for personal information about any individual who wanted to pass the checkpoint. Then, it was said that the defendant issued stickers and electronic passes to be used by those persons who subscribe to the defendant's illegal business and on top of it, the defendant had tried to collect fees from the first plaintiff for a so called 'hassle-free' driving in and out of the neighbourhood which according to the plaintiffs amounted to an act of extortion and an attempt to impose unlawful toll charges. See paragraphs 8 to 18 of the ASOC.

[17] The plaintiffs then listed 18 consequences of the defendant's unlawful activities in paragraph 19 of the ASOC as follows:

19.1 has, by its members, officials and agents, committed various

criminal offences;

19.2 has obstructed the Plaintiffs and members of their respective families from visiting their relations and/or friends residing within the illegal security area;

19.3 has obstructed and disrupted the flow and distribution of vehicular and pedestrian traffic within Bangsar Park and adjoining areas, with some streets outside the illegal security area becoming far more congested with traffic than before;

19.4 has purported to exclude many members of the public from public streets and public places within the illegal security area;

19.5 has fail to promote law abiding behaviour amongst its members and residents of the illegal security area;

19.6 under the pretext of fighting crime, has purported to divert criminal activity from the illegal security area to neighbouring areas;

19.7 has acted under the mistaken belief that residents within the illegal security area are free of criminal and anti-social tendencies but that others should be kept out because of the possibility that some of the others would commit crimes or act in an anti-social manner within the illegal security area;

19.8 has selfishly reserved on public streets within the illegal security area parking space for motor vehicles exclusively for residents of the illegal security area and those who have subscribed to its illegal security business and their nominated friends and visitors;

19.9 has caused vehicles which had been excluded from the Illegal security area to be parked, including illegally, and even double-parked, on streets outside the illegal security area,

including the street on which the said property is situated, and on nearby streets, with residents there suffering difficulty in driving in or out of the driveways of their homes, including during busy times such as festive occasions and during social gatherings in the neighbourhood;

19.10 has caused, from time to time, the 2nd Plaintiff "to borrow" parking space for his motor vehicles in front of and on the properties of his neighbours;

19.11 has caused delay and inconvenience to the Plaintiffs and visitors to the said property because pedestrian and vehicular traffic heading from or towards the said property had been diverted by the obstructions;

19.12 has caused air, water and noise pollution, increased traffic, obstruction of traffic, and excessive or illegal parking, including double-parking of vehicles in the vicinity of the said property, thereby increasing the incidence of parking and road age, increasing the risk of traffic accidents in that area, including during busy times such as festive occasions and during social gatherings in the neighbourhood;

19.13 has caused breaches of the peace;

19.14 has harmed the quality of life along the street fronting and streets near the said property and harmed the value of the said property;

19.15 has committed various acts of harassment against the Plaintiffs and caused annoyance and inconvenience to the Plaintiffs in regard to their use and enjoyment of the said property, and therefore also a nuisance;

19.16 has caused an obstruction of the Plaintiffs' right of access from the said property to public streets within the illegal

security area and vice versa;

19.17 has threatened to obstruct the 1st Plaintiff in the discharge of his duties as an advocate and solicitor in that he would not be able to deliver business letters to and serve legal documents such as writs of summons, orders of the courts, and witness subpoenas on residents within the illegal security area, in particular those who instruct the security guard) to obstruct those who intend to deliver such letters to or to serve such documents on them, thereby committing contempt of court in some instances; and

19.18 has unlawfully provided sanctuary to those within the illegal security area who sought to escape the process, including civil process, of the law.

The plaintiffs alleged that the defendant's unlawful activities are going against 10 laws as listed in paragraph 21 of the ASOC.

[18] At paragraph 24 of the ASOC, the plaintiffs describe the defendant's activities as an illegal security business and in the course of the said business, defendant has acquired the personal data of various people in contravention of the PDPA. Thus, increase the risk of identity theft, the unlawful sale of personal data to various businesses, and the abuse for criminal purposes of the personal data that was unlawfully acquired.

[19] Then, the plaintiffs prayed the following orders at the end of the ASOC;

a) a declaration that the Defendant had operated an illegal security business within the illegal security area;

b) a declaration that the Plaintiffs are entitled to travel on any public street in or within any public part of Bangsar Park without obstruction on the part of the Defendant;

c) a perpetual injunction restraining the Defendant and its officials, servants and agents from operating the illegal security business and, in regard to the illegal security area, from permanently or temporarily obstructing public streets or roads, from operating roadblocks or security checkpoints on public streets or roads, from undertaking interrogation of and body searches of people who enter or leave the illegal security area, from inspecting and making copies of identification documents of such people, from conducting surveillance of such people whether by camera or otherwise, from making photographs or making video images of such people and the vehicles on or in which they travel or the animals that they travel on or with, from inspecting and searching motor vehicles, and luggage carried in them, and from inspecting letters, documents and articles carried by any person;

d) a perpetual injunction restraining the Defendant and its servants and agents from harassing the Plaintiffs when they approach, enter or remain within the illegal security area, and from harassing the invitees, licensees and other lawful visitors who intend to enter upon the said property;

e) an order that the Defendant do abate the nuisance within such time as is allowed by the Court;

f) an order for an inquiry by a proper officer of the Court as regards the personal data relating to the Plaintiffs that has been acquired by the Defendant, for an account by the Defendant to the Plaintiffs as regards such data, and for such consequential relief as the Court may deem fit;

g) damages, including as aggravated;

h) interest on the damages;

i) costs; and

j) such further or other relief as the Court deems fit.

[20] From the ASOC, it is clear that the main prayer sought by the plaintiffs is for the Court to declare that the defendant operated an illegal security business within the illegal security area. Then, plaintiffs asked for a declaration that they are entitled to travel on any public street in or within any public part of Bangsar Park without obstruction from the defendant followed by the prayer for a perpetual injunction restraining the defendant from operating the illegal security business. Next, the plaintiffs prayed for a perpetual injunction to restrain the defendant from harassing the plaintiffs, invitees, licensees or other lawful visitors when they approach, enter or remain within the illegal security area. Following the declarations and perpetual injunction orders sought, only the plaintiff seek an order that the defendant abate the nuisance as well as an order for an inquiry into the personal data acquired or collected from the plaintiffs.

[21] Before this court, learned counsel for the plaintiffs submitted that the plaintiffs sued the defendant for nuisance and breach of personal data laws which arose as a result of the illegal GN scheme. The nuisance complained of was obstructing access to public streets and public spaces by erecting boom gates and permanently locked metal barriers, resulting in vehicular traffic being diverted, and parking in front of the plaintiffs' house and along the road fronting and surrounding the house, causing increased traffic congestion, noise and air pollution and etcetera as pleaded and adduced in evidence.

[22] Ironically, we cannot find a single paragraph in the ASOC that the plaintiffs define with clarity and precision the tort of nuisance, either private or public, allegedly committed by the defendant which was supposedly the main point or issue in dispute between the parties and fall to be determined by the Court. Even though the plaintiffs had pleaded that the defendant's act of obstruction by setting up permanent locked and unmanned barriers on various public streets within the Bangsar Park,

harassment while going through security check by the security guard hired by the defendant, caused delay and inconvenience, pollution, excessive or illegal parking, and etcetera, the plaintiffs finally relate the abovementioned acts by the defendant to 'an illegal security business' as claimed in the main prayer of the ASOC. Alas, the plaintiffs did not mount any claim on the tort of nuisance.

[23] After all, paragraph 19 of the ASOC listed the unlawful activities of the defendant and not the particulars of nuisance committed by the defendant to conform with the basic rule of pleading. In other words, the plaintiffs pleaded facts on the tort of nuisance allegedly committed by the defendant are not clear at all in the ASOC. The opposing party and the Court had to read or interpret between the line of the ASOC to determine whether the plaintiff raised issues on the tort of nuisance. Even for a moment a holistic approach is taken to read and analyse the ASOC as a whole, the court still cannot simply ignore the basic tenets of pleadings and the laws relating to the dispute between the parties. See Federal *Court decision in Munchy Food Industries Sdn Bhd v. Huasin Food Industries Sdn Bhd [2021] 10 CLJ 329 at page 348.*

[24] Therefore, based on the basic rule on pleading, the plaintiffs are required to prove their pleaded case against the defendant, that is, the defendant had engaged in an illegal activity by operating the security business within the illegal security area as clearly mentioned in several paragraphs and finally claimed as the main prayer in the ASOC.

[25] As to the evidence on the plaintiffs' pleaded facts, that is the defendant had engaged in an illegal security business, there is only one paragraph in the witness statement filed by the plaintiffs first witness (PW1) saying that:

> 22. The illegal gated and guarded scheme gives unlawfully business to securities companies. The security licenses are issued to former police and military officers.

See Enclosure 15 at page 681. That was all the evidence tendered before the court in relation to the plaintiffs' allegation. Surprisingly, the plaintiffs' only piece of evidence averred that the defendant's GN scheme gives unlawful business to securities companies and not the defendant. Indeed, the plaintiffs have not had an iota of evidence to prove their pleaded case.

[26] Next, on the issue of the breach of PDPA, the plaintiffs pleaded fact in paragraph 24 of the ASOC is as follows:

> The Defendant in the course of its illegal business has acquired personal data of various people in contravention of the Personal Data Protection Act. There is therefore the increased risk of identity theft, unlawful sale of personal data to various businesses, and abuse for criminal purposes of the personal data acquired unlawfully by the Defendant.

Again, the plaintiffs make reference to "its illegal business" which we can safely infer it as refers to the alleged defendant's 'illegal security business', in which we find that the plaintiffs failed to prove. Based on that reason alone, we are of the opinion that the plaintiffs' claim that stems from the issue of PDPA should also collapse.

[27] Therefore, we are of the considered view that the plaintiffs failed to put up a proper case against the defendant based on the tort of nuisance and the breach of the PDPA. On the issue of the pleading alone, the plaintiffs' claim against the defendant should be dismissed.

[28] Be that as it may, even if the plaintiffs' pleadings are properly pleaded based on the tort of nuisance and breach of the PDPA as submitted by learned counsel for the plaintiffs, we unanimously find that there is also no merit in the plaintiffs' appeal based on the following reasons.

[29] Before the High Court, the defendant brought in the first and second third parties via the Third-Party Proceedings. The defendant's

third-party proceedings were heard and decided together with the plaintiffs' claim by the LHCJ. In her decision, the LHCJ had analysed all submissions forwarded by all parties on the relevant facts and law applicable, including the third party. Then, her Ladyship made a specific substantive finding that the defendant's GN scheme was authorised by the third party based on the guidelines issued by the Ministry of Housing and Local Government, and it was in line with the Street, Drainage and Building Act 1974, the City of Kuala Lumpur Act 1971 and the Federal Capital Act 1960 (Revised 1977). Therefore, the third party's approval makes it legal and lawful for the defendant to execute and operate the GN scheme within the area specified. See paragraphs 21 to 27 of the LHCJ grounds of judgment (GOJ).

[30] However, in the notice of appeal before this court, the plaintiffs choose to limit their appeal only to part of the decision of the LHCJ, that is, the plaintiffs' claim against the defendant be dismissed with costs in the sum of RM50,000.00. Therefore, the LHCJ's decision pertaining to the approval of the GN scheme given to the defendant by the third party and other findings by the LHCJ in relation to the third-party's involvement in the defendant's GN scheme remain unchallenged.

[31] On this point of law and facts, learned counsel for the defendant argued that the plaintiffs' grounds of appeal in relation to the third party in paragraphs 7 to 11, 13 to 19 and 21 of the Memorandum of Appeal does not hold any ground nor can be heard in this appeal. We are in agreement with the defendant's contention. The plaintiffs failed to file an appeal against the whole decision of the LHCJ. We are of the opinion that the defendants' failure to file a proper notice of appeal will disable them from mounting any challenge on the LHCJ's finding pertaining to the third party. We find support in the Federal Court's decision in the case of *Kabushiki Kaisha Ngu v. Leisure Farm Corp Sdn Bhd & Ors* [2016] 5 MLJ 557; [2016] 8 CLJ 149. Federal Court held that:

> [16] We also agree with the Court of Appeal's finding that it had considered the clear provisions under r 5 of the RCA 1994, and

holding that r 5 of the RCA 1994 provided for an appeal to be lodged against the whole or part of any judgment or order of court, and such an appeal in contrast to a cross-appeal is by way of a re-hearing. The word 're-hearing' used clearly anticipated a review or regurgitation before the appeal court of all the points and arguments taken at the court below. Hence, if it was the substantive finding of the court that was intended to be attacked, it behoved upon the party aggrieved to file a proper notice of appeal.

[19] Useful reference can also be made to the provision of s. 67(1) of the Courts of Judicature Act 1964 ['the CJA 1964') which provides as follows:

> 67 Jurisdiction to hear and determine civil appeals
>
> (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.
>
> [20] We are of the view that s. 67(1 of the CJA 1964 clearly provides that a litigant has the right of appeal to appeal against 'any judgment or order of any High Court'. It is therefore trite that such an appeal must be filed pursuant to r 5 of the RCA 1994. (emphasis added)

[32] By filing an appeal against only part of the LHCJ's decision, it shows that the plaintiffs accepted the other part of the decision. Therefore, we are of the view that the appeal before us is limited to the issues between the plaintiffs and the defendant only. The plaintiffs are estopped from arguing the issues or points that are contrary to their Notice of Appeal.

[33] However, we did acknowledge that the plaintiffs consistently described the defendant's GN scheme as an illegal security area. It means that the plaintiffs are questioning the legality of the defendant's GN scheme. Even in the PLAINTIFFS' ISSUE TO BE TRIED, the plaintiffs' first issue is "Whether the gated and guarded scheme has been and is being operated by the Defendant in accordance with law". So as in the ISSUES TO BE TRIED (DEFENDANT'S VERSION), the first two issues stated that, "Whether the DBKL's approval on the gated and guarded scheme was made in accordance with law" and "Whether the gated, and guarded scheme has been and is being operated by the Defendant in accordance with the DBKL's approvals" respectively. Therefore, there is a need for us to decide on the issue of the legality of the defendant's GN scheme as it is a live issue between plaintiffs and the defendant before the High Court.

[34] In addressing the issue, the LHCJ found that the defendant's GN scheme which comprises of the guard house and the boom gates were constructed and operated with the approval of the local authority. The approval and renewal are from 1.10.2016 and for certain period up to 10.3.2020 We have no issues to the abovementioned finding. In fact, the plaintiffs agreed in their STATEMENT OF AGREED FACTS at paragraph 8, 9 and 10 that the defendant had obtained approval from the local authority to operate the GN scheme. The approval for renewal to operate the defendant's GN scheme halted pending the plaintiffs suit against the defendant as stated in the witness statement of the third party's first witness, (TPW1). See Enclosure 15 at page 766.

[35] In the GOJ, the LHCJ is mindful that there is no law or Act of Parliament that specifically deals with GN scheme as confirmed by the TPW1. The question is, can the local authority give approval to a GN scheme since there is no law that governs the scheme? In answering Question 7 of his witness statement, TPW1 referred to "Pekeliling Ketua Setiausaha Kementerian Perumahan dan Kerajaan Tempatan Bilangan 1 Tahun 2010" titled "Garis Panduan Perancangan Gated Community and

Guarded Neighbourhood" (Pekeliling KSU KPKT) dated 20.10.2010 and marked as an exhibit TP80, and it was referred to in the proceedings as "Lampiran GN". See Enclosure 16 at pages 1054 to 1056. According to TPW1, the local authority referred to the consent and authorization in the Pekeliling KSU KPKT to approve the defendant's GN scheme.

[36] It is pertinent to note that the issuance of the Pekeliling KSU KPKT is intended to provide explanations and guidance to state authority and the local authority in relation to the implementation of the Gated Community (GC) and GN. Pekeliling KSU KPKT specifically referred to the "Garis Panduan Perancangan Gated Community and Guarded Neighbourhood" (the Guidelines) annex as "Lampiran 1". Unfortunately, the Guidelines which was annex as "Lampiran 1 " was not included as part of the Appeal Records before us. However, we find that the Guidelines can be found on the Town and Country Planning Department's website at *https://www.planmalaysia. gov.my.* We had viewed the Guidelines and it is essential for us to produce the notification at the beginning of the document which stated as follows:

Pemberitahuan

Garis panduan ini telah diluluskan oleh Jemaah Menteri pada 28 Julai 2010 dan Mesyuarat Majlis Negara Bagi Kerajaan Tempatan (MNKT) Ke-63 pada 2 September 2010.

Garis panduan ini hendaklah dibaca bersama dengan peruntukan undang-undang sedia ada, khususnya Kanun Tanah Negara 1965 (Akta 56), Akta Hakmilik Strata 1985 (Akta 318), Akta Bangunan dan Harta Bersama (Penyelenggaraan dan Pengurusan) 2007 (Akta 663), Akta Perancangan Bandar dan Desa 1976 (Akta 172), Akta Jalan, Paritdan Bangunan 1974 (Akta 133), Akta Pengangkutan Jalan 1985 (Akta 333) dan Undang-Undang Kecil Bangunan Seragam 1984.

Pelaksanaan dan penguatkuasaan kepada garis panduan umum dan garis panduan khusus yang terkandung di dalam garis panduan ini perlu

diselaras dengan rancangan pemajuan (khususnya rancangan tempatan dan rancangan kawasan khas) yang sedang berkuatkuasa di sesebuah kawasan pihak berkuasa perancang tempatan. la juga perlu merujuk kepada dasar-dasar, pekeliling, arahan dan piawaian-piawaian yang digubal dan dikuatkuasakan oleh pihak- pihak berkuasa berpandukan kepada skop kuasa yang diperuntukkan oleh undang-undang, serta garis panduan-garis panduan perancangan lain yang digubal oleh Jabatan Perancangan Bandar dan Desa Semenanjung Malaysia.

2 September 2010

[37] From the notification, it is clear that the Guidelines had been approved by the Cabinet on 28.7.2010 and then, it was approved in the Meeting of the National Council for Local Government on 2.9.2010. It is important to note that the National Council for Local Government is a council that was establish under Article 95A of the Federal Constitution (FC). For easy reference, we produced the whole Article as follows:

National Council for Local Government

95A. (1) There shall be a National Council for Local Government consisting of a Minister as Chairman, one representative from each of the States, who shall be appointed by the Ruler or Yang di-Pertua Negeri, and such number of representatives of the Federal Government as that Government may appoint but, subject to Clause (5) of Article 95e, the number of representatives of the Federal Government shall not exceed ten.

(2) The Chairman may vote on any question before the National Council for Local Government and shall have a casting vote.

(3) The National Council for Local Government shall be summoned to meet by the Chairman as often as he considers necessary but there shall be at least one meeting in every year.

(4) If the Chairman or a representative of a State or of the

Federal Government is unable to attend a meeting, the authority by whom he was appointed may appoint another person to take his place at that meeting.

(5) It shall be the duty of the National Council for Local Government to formulate from time to time in consultation with the Federal Government and the State Governments a national policy for the promotion, development and control of local government throughout the Federation and for the administration of any laws relating thereto; and the Federal and State Governments shall follow the policy so formulated.

(6) It shall also be the duty of the Federal Government and the Government of any State to consult the National Council for Local Government in respect of any proposed legislation dealing with local government, and it shall be the duty of the National Council for Local Government to advise those Governments on any such matter.

(7) The Federal Government or the Government of any State may consult the National Council for Local Government in respect of any other matter relating to local government, and it shall be the duty of the National Council for Local Government to advise that Government on any such matter.

[38] Sub article 95A (4), of the FC clearly provide that it is the duty of the National Council for Local Government to formulate from time-to-time national policy for the promotion, development and control of local government throughout the Federation in consultation with the Federal Government and the State Government, and it is mandatory for the Federal Government and the State Governments to follow the policy so formulated. The fact that the Guidelines was approved by the National Council for Local Government shows that the matters on GC and GN had been discuss, deliberated and agreed to be implemented as a matter of national policy.

[39] As to the need of a guidelines to monitor GC and GN scheme, the Guidelines clearly spelt out its aim as mention in its 'Background' as follows;

> Memandangkan pertumbuhan skim 'gated community' dan 'guarded neighbourhood' terus berleluasa, maka penggubalan satu garis panduan perancangan adalah perlu. Langkah ini akan membantu proses pertimbangan permohonan skim GC dan penguatkuasaan skim GN oleh PBT.

For the implementation of GN scheme, the Guidelines provides as follows:

> **7. GARIS PANDUAN SKIM 'GUARDED NEIGHBOURHOOD*'**
>
> Penubuhan skim GN adalah tidak tertakluk kepada mana-mana peruntukan undang-undang. Bagi tujuan pemantauan dan pengawalseliaan oleh pihak berkuasa, khususnya Kementerian Dalam Negeri, PBT, PejabatTanah Daerah dan PDRM, terdapat beberapa syarat dan kawalan yang perlu dipatuhi oleh persatuan penduduk kejiranan sedia ada atau kejiranan baru di dalam menubuh dan menjalankan operasi GN.
>
> **7.1 Kawalan Am Perancangan**
>
> - Skim GN hanya dibenarkan di kawasan bandar (di dalam kawasan operasi PBT), khususnya di kawasan yang kurang selamat (mempunyai kadar jenayah yang tinggi berdasarkan rekod pihak polis). PBT dicadangkan mendapat pandangan daripada pihak PDRM dalam meneliti sebarang cadangan penubuhan GN oleh persatuan penduduk.
> - GN tidak dibenarkan jika di dalam kawasan kejiranan terdapat komponen-komponen kemudahan awam utama seperti sekolah, masjid, dewan orang ramai dan sebagainya serta jika merupakan kawasan laluan pengangkutan bas

awam.

- PBT boleh menentukan bilangan unit rumah (minimum dan maksimum) dalam sesuatu skim GN bagi memastikan ianya dapat dikawal dan diurus dengan berkesan.

7.2 Syarat Asas Penubuhan

- Cadangan menubuhkan GN perlu dimaklumkan kepada PBT yang berkenaan melalui persatuan penduduk (RA) yang berdaftar dengan Jabatan Pendaftaran Pertubuhan (RoS). Semua premis kediaman yang hendak dijadikan sebagai GN mestilah telah mendapat Perakuan Kelayakan Menduduki (CFO) atau Perakuan Siap dan Pematuhan (CCC).

- Cadangan untuk mewujudkan GN perlu mendapat persetujuan majoriti penduduk (ketua isi rumah), tertakluk kepada tiada sebarang paksaan dan tekanan kepada penduduk yang tidak bersetuju.

- Pihak persatuan penduduk perlu mengemukakan dokumen berkenaan dengan persetujuan penduduk dan Iain-lain maklumat yang diperlukan kepada PBT dan pihak-pihak berkuasa yang berkenaan

7.3 Pembinaan Pondok Pengawal

- Saiz pondok pengawal hendaklah tidak melebihi 1.8 meter X 2.4 meter.

- Pondok pengawal hanya dibenarkan disedia atau dibina di kawasan bahu jalan (road shoulder) dan perlu dipastikan tidak menghalang lalulintas. Amalan pembinaan pondok pengawal di atas atau di kawasan tengah jalan adalah tidak dibenarkan.

- Jika cadangan binaan pondok pengawal di kawasan bahu

jalan adalah berstruktur kekal (permanent structure), pemohon (persatuan penduduk) perlu memohon kelulusan Lesen Pendudukan Sementara (Temporary Occupation Licence-TOL) daripada PejabatTanah Daerah (PTD) yang berkenaan. Peraturan ini adalah selaras dengan peruntukan seksyen 65, Kanun Tanah Negara, 1965 (Akta 56).

- Cadangan lokasi pondok pengawal perlu ditanda di dalam pelan yang sesuai dan perlu dikemukakan kepada PTD semasa mengemukakan permohonan TOL dan kepada PBT bagi permohonan kebenaran merancang sementara dan permohonan permit atau kelulusan pembinaan sementara.Cadangan rekabentuk pondok pengawal perlu dikemukakan kepada PBT (Bahagian Bangunan) untuk mendapat permit atau kelulusan pembinaan sementara bagi pembinaan bangunan pondok pengawal. Pondok pengawal hanya boleh dibina setelah mendapat permit atau kelulusan pembinaan sementara daripada PBT.

- Rekabentuk bumbung dan fasad bangunan perlulah berharmoni dengan pembangunan sekitar dan perlu dibina secara kemas serta tidak mencacatkan pemandangan.

- Halangan dalam bentuk sekatan fizikal secara sementara seperti 'manual boom gate’, kon dan papan tanda keselamatan boleh diberi pertimbangan untuk dipasang atau diletak di lokasi yang sesuai di jalan masuk berhadapan dengan pondok pengawal dengan syarat terdapat pengawal keselamatan bertugas mengawal sekatan tersebut selama 24 jam.

7.4 Pembinaan Pagar

- Pembinaan pagar (perimeter fencing) mengelilingi kawasan sempadan skim kejiranan adalah tidak dibenarkan.

7.5 Pengawal Keselamatan

- Syarikat pengawal keselamatan yang dilantik perlu berdaftar dengan Kementerian Dalam Negeri. Syarat-syarat bagi pengambilan pekerja dan pengawal keselamatan adalah sebagaimana di Lampiran 1.

7.6 Pelepasan Status

- Cadangan pelepasan atau pembubaran status GN kepada status asal (tidak berpengawal) oleh persatuan penduduk perlu dimaklumkan kepada PBT.

[40] Back to the question of whether the local authority has the power to approve the GN scheme, we are of the opinion that the implementation of GN scheme has been recognized as a national policy, and the local authority can rely on the Guidelines to approve the GN scheme provided that the approval is consistent with all relevant laws and regulations mentioned in the Guidelines.

[41] Even though there is no specific legislation on the GN scheme, the local authority can still rely on the general powers given to the local authority under Part XII of the Local Government Act 1976 (LGA 1976) titled "FURTHER POWERS OF LOCAL AUTHORITY" especially the powers under paragraph 101 *(v)* of the LGA 1976 which provides as follows:

> **Further powers of local authority**
>
> 101. 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;

According to the first defendant's witness (DW1) who is also the

President of the defendant, the main purpose of the defendants' GN scheme is to improve public safety and security in the neighbourhood. Therefore, we are of the opinion that the local authority has the necessary residual power to approve the defendant's GN scheme based on the general power conferred to the local authority under the LGA 1976.

[42] As to the approval and renewal of the defendant's GN scheme prior to the plaintiffs' suit, TPWTs evidence in Court which was supported by the contemporaneous exhibited documents, shows that the local authority was satisfied that the defendant has met the requirements stated in the Guidelines to get approval to set up and operate the GN scheme. Furthermore, according to the third party second witness (TPW2) who had visited and made a site inspection at the neighbourhood confirmed that the defendant had fulfilled all requirements before being given approval or renewal of the GN scheme. As for the approval of the renewal of the defendant's GN scheme, evidence shows that the defendant cannot expect an automatic approval from the local authority. That is why there were certain gaps or lapses in time between the defendant's GN scheme renewal approvals that appeared to be admitted as undisputed facts by the parties and also from TPW2's evidence.

[43] Once the defendant's GN scheme obtains approval from the local authority, it erases all the issues raised by the plaintiffs as regard to the implementation of the GN scheme especially on the issue of obstruction by the boom gate set up by the defendant to control the unnecessary ingress of unwanted person into the neighbourhood. On the issue of obstruction, we refer to Federal Court's finding in *Au Kean Hoe v. Persatuan Penduduk D' villa Equestrian* [2015] 4 MLJ 204 *(Au Kean Hoe's* case) which stated as follows at page 213 and 214:

> [15] The appellant relies on s. 46(1)(a) of the SDBA to contend that the boom gates are illegal as they constitute an obstruction over a public road. With respect, we do not agree with such a contention. On the scope of application of s. 46(1)(a) of the SDBA, it has been held by the Federal Court in *UDA Holdings Bhd v. Koperasi*

Pasaraya (M) Bhd and other appeals [2009] 1 MLJ 737; [2009] 1 CLJ 329 that s. 46(1)*(a)* of the SDBA has no application where the local authority has given approval for the so-called obstruction complained of. Section 46(1)*(a)* of the SDBA must be read with s. 46(3) of the SDBA that empowers the local authority to remove an obstruction. Abdul Aziz Mohamad FCJ on this point held, inter alia, as follows:

> The erection of the building was with the approval of DBKL. As far as concerns s. 46, the case is no different from that of a person who obtained a TOL in respect of some other State land in Kuala Lumpur and built on it a temporary shop with the approval of DBKL. It is ludicrous to suggest that he thereby built or erected an obstruction in a public place and committed an offence under para (a) of sub-s (1) of s. 46 and that DBKL, who approved the construction of the building, had a duty under sub-s. (3*)(a)* to remove it. The situation is simply not of the kind intended by s. 46.

Even though the said finding of the Federal Court is on a GC scheme, we are of the opinion that the same principle of law should apply to the GN scheme. In our case, it is not disputed that the defendant's GN scheme had been approved by the local authority. Thus, with the approval, the issue on the construction of the alleged illegal obstruction by the defendant in operating the GN scheme, could no longer exist.

[44] Therefore, we answer the question related to the validity of the defendant's GN scheme, in the positive. We are of the considered view that the local authority has the necessary residual powers under the law to give such approval to the defendant.

[45] Next, on the issue of nuisance. The plaintiffs argued that they had proven their case on the tort of nuisance, both on private and public nuisance against the defendant. The plaintiffs' main complaint is that the defendant's conduct has obstructed and disrupted the flow and

distribution of traffic within the Bangsar Park and adjoining area by having the boom gate and the unmanned barrier. The plaintiffs also raised an issue with the security guards employed by the defendant, who are allegedly said to have interrogated the residents and visitors who enter the neighbourhood.

[46] For private nuisance, the LHCJ refers to the definition as stated in Clerks & Lindsay on Torts (15th Ed) in her GOJ 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.

After considering the elements of interference as had been decided by this court in *Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 6 CLJ 958; [2013] 5 MLJ 360; the principle of reasonableness as opined by Lord Wright in *Sedleigh-Denfield* v. *O'Callaghan* [1940] AC 880 at page 903 and also Lord Goff in *Chieveley in Cambridge Water Company v. Western Counties Leather pic* [1994] 2 AC 264 at page 299; the question of the degree of an interference in *Stone v. Bolton* [1949) 1 All ER 337; the test for reasonableness must be objectively tested in *Coventry and Others v. Lawrence And Another (No. 2)* [2014] UKSC 46; the difference of being inconvenience and being obstructed as decided by the High Court in India in *George Philip & Ors v. Subbammal & Ors* AIR 1957 Tra-Co 281; the principle of an unreasonable interference that must 'goes beyond the normal bounds of acceptable behaviour' in *Au Kean Hoe's* case, and after taking into consideration of her own visit and observation at the neighbourhood in the defendant's GN scheme, her Ladyship had opined and made the following findings:

[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.

[47] As to the tort of public nuisance, we will only refer to the LHCJ's finding and learned counsel for the defendant argument based on subsection 8(1) of the Government Proceedings Ordinance, 1956 (GPO 1956). From the pleadings and the undisputed facts, it is clear that the plaintiffs did not fulfil the requirements of the law under the GPO 1956 to mount a claim on the tort of public nuisance against the defendant. On this point of law, we refer to the decision of Raja Azlan Shah, CJ Malaya (as His Royal Highness then) in *Majlis Perbandaran Pulau Pinang v. Boey Slew Than & Ors* [1979] 2 MLJ 127 at pages 128 and 129 where His Lordship had this to say:

> It is common ground that the cause of action is founded on public nuisance and that the action of the respondents constitutes non-compliance with the law and has to be restrained. The forefront of the argument below and before us is whether the appellants can

institute proceedings seeking an injunction to restrain a public nuisance without the relation of the Attorney-General because section 8(1) of the Government Proceedings Ordinance, 1956, it is argued, directs that only the Attorney-General, or two or more persons having obtained his written consent, may institute such proceedings. Section 8(1) is in these terms:

> "In the case of a public nuisance the Attorney-General, or two or more persons having obtained the consent in writing of the Attorney-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case."

We all know the reason behind the salutary provisions of the section which is nothing more than a restatement of the English common law that when anyone complains of a public nuisance he must obtain the fiat of the Attorney-General for proceedings by way of information, unless he can show that the nuisance which he complains is the cause of special damage to himself, and so a ground for action: see *Tottenham Urban District Council v. Williamson & Sons Ltd* [1896] 2 QB 353 354. It is sufficient to say that the principle was laid down to avoid multiplicity of actions or the institution of actions which may well be of no proper concern for the weighty consideration of the courts of law. The argument was put in this way as long ago as in 1535 in a case in the Year Books which was translated by C.H.S. Fifoot in History and Sources of the Criminal Law (1949), page 98 as follows:

> "If one of those injured were allowed to sue, a thousand might do so;"

and that was considered intolerable. *Blackstone* in his Commentaries (17 ed. Book IV page 166) said:

> "... It would be unreasonable to multiply suits by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow- subjects."

On this point of law alone, we find that the plaintiffs' claim on tort of public nuisance against the defendant should fall.

[48] Therefore, we are of the considered view that the LHCJ had made a correct finding of facts and applied the correct principles of law in her finding in relation to the plaintiffs' claim on the tort of nuisance, either private or public, against the defendant.

[49] Then, we move to the issue on the PDPA. The long title of the PDPA clearly stated as follows:

> An Act to regulate the processing of personal data in commercial transactions and to provide for matters connected therewith and incidental thereto.

As to the application of the PDPA, subsection 2(1) provides as follows:

> **Application**
>
> 2. (1) This Act applies to -
>
> (a) any person who processes; and
>
> (b) any person who has control over or authorizes the processing of,
>
> any personal data in respect of commercial transactions.

The word "processing" is defined under s. 4 of the PDPA as follows:

> "processing", in relation to personal data, means collecting, recording, holding or storing the personal data or carrying out any operation or set of operations on the personal data, including -
>
> *(a)* the organization, adaptation or alteration of personal

data;

(b) the retrieval, consultation or use of personal data;

(c) the disclosure of personal data by transmission, transfer, dissemination or otherwise making available; or

(d) the alignment, combination, correction, erasure or destruction of personal data;

[50] From the long title and the applicability of the PDPA, it is crystal clear that the legislature's intention in enacting the PDPA is to regulate the processing of personal data with respect to only commercial transactions. Thus, the plaintiffs have to prove that the defendant is a person who processes, has control over or authorizes the processing of any personal data in respect of a commercial transactions.

[51] Back to the plaintiffs' appeal before us, we find that there is no single piece of evidence that can show or establish that the defendant through its security guards while taking or recording personal information of persons who are non-member of the defendant and the visitors who are visiting the neighbourhood, had done any of the acts as stated in paragraph *(a)* to *(d)* of the definition of the word "processing". On the contrary, the evidence shows that the security guards only take or record personal information for the purpose of keeping records for the safety reason only. There is also no evidence coming from the plaintiffs' witnesses to say that they knew for a fact that the defendant or the security guards misused or sold any of the personal information that they kept, to other business entity as alleged in the plaintiffs' ASOC.

[52] Moreover, even if the plaintiffs' allegations against the defendant on the issue of the PDPA is true and can be substantiated with relevant facts, we still find that the plaintiffs claim on this issue is not amenable under the law. The reason is, the act of unlawful collecting and misuse of personal data is an offence under the PDPA which provides for the

provision of punishment as provided under subsection 130(7) of the PDPA, that is, a person who commits an offence under s. 130 of the PDPA shall, upon conviction, be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both.

[53] What the plaintiffs should do is, lodge a report or a complaint in writing to the Commissioner as provided under s. 104 of the PDPA. Then, the Commissioner who is appointed under s. 47 of the PDPA or the authorize officer appointed under s. 50 and 51 of the PDPA will investigate the complaint and take the necessary action. Thus, the non-compliance of the PDPA cannot and should not be a cause of action in a civil suit. The plaintiffs' claim based on PDPA is not sustainable either on fact or law.

[54] Finally, the issue of two written judgments given by the LHCJ, first dated 26.1.2021 upon delivering the decision and second, a written judgment dated 18.3.2021. We have read both the decision and the judgment of the LHCJ as can be seen in the plaintiffs' core bundle in Enclosure 61 beginning from page 5 to page 23 for the decision dated 26.1.2021 and from page 24 to page 48 for the written judgment dated 18.3.2021 Learned counsel for the plaintiffs argued that the propriety of furnishing such grounds of decision is questionable and therefore the second judgment should be disregarded.

[55] With due respect, we could not agree with the submission. Upon reading both the decision and the judgment by the LHCJ, the decision dated 26.1.2021 akin to a broad grounds of decision delivered on the decision day. While the judgment dated 18.3.2021 is the full GOJ prepared by the LHCJ after the decision. We find that the contents of the GOJ is only an elaboration to the decision given on 26.1.2021. The GOJ was prepared purely based on the same issues of facts and law that had been argued before the LHCJ by the parties. Learned counsel for the plaintiffs did not point out a single new issue of facts or law considered by the LHCJ in the GOJ that can cause prejudice to the plaintiffs.

Therefore, we are of the opinion that the LHCJ was not wrong in preparing the GOJ where her Ladyship had elaborated on the same issue of facts and law raised before her.

Conclusion

[56] For all the reasons adumbrated above, we find that there is no merit in the plaintiffs' appeal to warrant our appellate intervention. Accordingly, we are unanimous in dismissing this appeal with cost. The plaintiffs are hereby ordered to pay cost of RM10,000.00 to the defendant subject to allocator.

Dated: 10 JANUARY 2023

(CHE MOHD RUZIMA GHAZALI)
Judge
Court of Appeal Malaysia

Counsel:

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