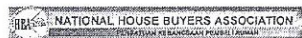


Kesan Pelaksanaan Akta 663

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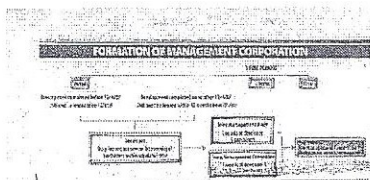
Contents

- Why Act 663
- Aim of Act 663
- Effects of Act 663
- Conclusion

Why have Act 663

- Act came into force on 12.4.2007.
- Provides for the maintenance and management of buildings & common property (strata property) before strata titles for the parcels are issued.
- How is this done? Joint Management Body (JMB) is formed. Developer and parcel owners jointly manage and maintain the building until strata titles for the parcels are issued.

Why have Act 663



Aim of Act 663

- Act 663 seeks to empower parcel owners. More power and control given to owners.
- Why empower? "Interim" can range between 5 to 15 years.
- Avoid badly managed stratified properties by the developer during the "interim".

Aim of Act 663

- Owners jointly manage the property with developer via the JMB until 1st AGM of the management corporation (MC).
- JMB collects maintenance charges and maintains the common property.

Aim of Act 663



Effects of Act 663

- Voting rights.
- COB's power.
- Enforcement.
- Managing agents.
- JMC.
- Transition.
- Power of attorney.
- House rules.
- Maintenance charges.
- Writ of seizure & sale.

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Voting Rights

Voting rights in 1st JMB Meeting & AGM / EGM

(a) 1st JMB meeting:

- Vote is by show of hands. s 6(4)
- Joint owners vote by jointly appointed proxy. s 6(5). Proxy votes by show of hand.
- Question: Can single owner appoint a proxy? No. LPHS Guidelines 1/2009 dated 3.2.2009

Voting Rights

- If yes, must proxy be an owner? How many proxies can owner hold? Can he/she hold 30 proxies?
- Problematic. Eg. Owner (with vested interest) holds proxies to get voted into JMC. Against spirit of Act 663.
- HBA's interpretation : Proxies not allowed. Agree with LPHS.

Voting Rights

(b) AGM or EGM:

- How do owners vote at meetings i.e. AGM or EGM? By show of hands only? Is poll allowed? Act 663 is silent.
- Act 663 s 2 defines allocated share units as "share units to be assigned to each parcel by the developer". "To be allocated" may mean share units need not be immediately allocated when JMB is formed.

Voting Rights

- S 8(2)(a) & 23(1)(2) refer to collection and apportionment of maintenance charges according to allocated share units. No reference on share unit is made to voting. Does the silence mean there is no voting by poll?
- Effect on owners : Confusion at meetings.
- Effect on COB : Different views and procedures.

Effects of Act 663

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COB's Power

- Act 663 gives wide ranging duties and powers to the COB. COB is expected to wear many hats: be a legal officer, law enforcer, presiding officer at residents' meetings, mediator, defects investigator, forensic accountant and debt collector.
- Many duties for COB? Is there capacity or ability?
- Owners will be expected to give COB time to carry out their duties. How long will they need to wait?

COB's Power

- Effect on owner : Frustration, disrespect and arrogance towards COB.
- Effect on COB : Work overload?
- Effect on developer: Disrespect and arrogance towards COB.

Effects of Act 663

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Enforcement

- Act 663 provides for penalties against breaches of the Act. E.g. penalties against errant developers.
- Delay in forming JMB. **Penalty:** Fine not exceeding RM20,000 or to imprisonment not exceeding 3 months or to both. S 5(5).
- Fail to keep proper accounts. **Penalty:** Fine of not less than RM10,000 and not more than RM100,000 and a fine not exceeding RM100 for each day the offences continues after conviction. S 17(7).

Enforcement

- Fail to file a copy of the audited statement of accounts (BMA) with the COB. **Penalty:** Fine of not less than RM10,000 and not more than RM100,000 and a fine not exceeding RM100 for each day the offences continues after conviction. S 17(7).

Enforcement

- Insure the completed building against any loss of the building, fire and other risks until JMB is formed. S 17(4). **Penalty:** Fine of not less than RM10,000 and not more than RM100,000 and a further fine not exceeding RM100 for each day the offences continues after conviction. S 17(7).
- Deposit the cash or bank guarantee with Commissioner a sum prescribed by State Authority for the repair of defects in the common property after its completion and upon handing over of vacant possession. S 31(1). **Penalty:** Fine of not exceeding RM5,000 and a further fine not exceeding RM50 for each day the offences continues after conviction. S 31(2).

Enforcement

- Have errant developers been prosecuted? What is the success rate?
- Slow or non-prosecution of errant developers allows breaches of Act to go unchecked.
- Is there a mechanism for COB to penalise errant developers? Act is silent.
- COB has power to compound offences *vis a vis* person reasonably suspected of having committed the offence. S 40. How often has this power been used?

Enforcement

- Effect on owner : Owners at mercy of errant developer.
- Effect on COB : COB becomes "a toothless tiger".
- Effect on developer : A loophole to breach the Act and get away with it.
- Enforcing the Act is necessary.

Effects of Act 663

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Managing Agents

- ❖ Must managing agent be registered? Act is silent.
- ❖ Act 663 s 25:
... the Commissioner may appoint, by a written notification, one or more persons to act as managing agent to maintain and manage the building for a period to be specified by the Commissioner.
- ❖ There is no reference to Valuers, Appraisers & Estate Agents Act 1981 (Act 242) in Act 663.

Managing Agents

- ❖ VAEA Act 242 s 16(1)(aa):
(1) No person shall unless he is a registered valuer or appraiser and has been issued with an authority to practise under section 16-
...
(aa) act as a property manager;

Managing Agents

- ❖ VAEA Act 242 s 2:
"Property management" means the management and control of any land, building and any interest therein, excluding the management of property-based businesses, on behalf of the owner for a fee, and includes but is not limited to the following responsibilities:
(a) monitoring outgoings for the property and making payments out of the income from the property;
(b) preparing budgets and maintaining the financial records for the property;

Managing Agents

- (c) enforcing the terms of leases and other agreements pertaining to the property;
- (d) advising on sale and purchase decisions;
- (e) advising on insurance matters;
- (f) advising on the opportunities for the realisation of development or investment potential of the property; and
- (g) advising on the necessity for upgrading the property or for the merging of interests.

Managing Agents

- ❖ VAEA (Act 242) s 2:
"property manager" means a person, a firm or a company who, on behalf of the owner of any land, building and any interest therein, manages and controls such land, building and interest to maintain or increase the investment in, or physical worth of, such property.
- ❖ Rule of law that laws are to be read together. Thus, Act 663 and Act 242 are to be read together.

Managing Agents

- ❖ Managing agent (Act 663) would fall within the meaning of "property manager" (Act 242).
- ❖ Managing agents have duties and obligations. They, like lawyers, need to go through a formal course of studies to be professionally qualified.

Managing Agents

- Managing agents are to be independent. S 26.
- This may imply agents are to be registered because independent means acting as a professional.
- Act 663 s 26:
(1) A person shall not be appointed as a managing agent if the person has a professional or pecuniary interest in any building or land intended for subdivision into parcels.

Managing Agents

(2) A person is regarded as having a professional or pecuniary interest in any building or land if-

(a) he has been responsible for the design or construction of the building;

(b) he or any of his nominees, officers or employees has any material interest in the building or land or any part of the building or land;

Managing Agents

(c) he is a partner or is in the employment of a person who has any material interest in the building or land or any part of the building or land; or

(d) he or his family holds any interest in the building or land or part of the building or land whether directly, as a trustee or otherwise.

Managing Agents

- Effect on managing agent : Doubts on professional standards & integrity. Does registered agent lodged a bond with COB in addition to getting professional indemnity insurance with BOV? S 27. Who regulates non-registered agents? Grant amnesty to competent but unregistered agents to encourage them to register?
- Effect on owner : Risk on maintenance & management of building & mishandling of maintenance charges & sinking fund.
- HBA's interpretation: Managing agents should be registered with Board of Valuers.

Managing Agents

Highlights of the amendments:

1. The amendments provide for the appointment of a managing agent for a building or land intended for subdivision into parcels.

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Apartment owners trapped in a limbo

Apartment owners are trapped in a limbo as the managing agent has not been appointed.

The managing agent has not been appointed and the apartment owners are trapped in a limbo.

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Managing Agents

PERTUBUHAN JURUKUKUR MALAYSIA
THE INSTITUTION OF SURVEYORS MALAYSIA

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Managing Agents



Regulation the way to go

NET 11 - A Project, Housing

The National Housing Board (HBA) has issued a notice to the public to inform the government and a group of property developers on regulation of residential management.



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JMC

- In AGM, committee members (JMC) are changed or re-elected.
- Act 663 s 11(2): The JMC shall hold office for a period not exceeding three years or until the dissolution of the Body, whichever is earlier.
- Does JMC hold office for 1 year or 3 years?
- HBA's interpretation: JMC holds office for 1 year because AGM is to be held every year.

JMC

- Effect on owner : Heated arguments at AGM. Power struggle between owners.
- Effect on COB : Deadlock meetings.
- When is JMB formed? See *Debir Desa Development Sdn Bhd v Pesuruhjaya Bangunan, Kuala Lumpur & Ors* [2009] 5 CLJ 563

JMC



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Transition

- What are the things to do for a smooth handover from developer to JMB?
- Act 663 is silent.
- Things needed for handover: Account records; Plans & permits; Service contracts; Warranties & guarantees; House rules; Correspondence; Contacts of contractor, sub-contractors and suppliers.
- Regulations can list the things to do.

Transition

- Effect on owner : Blind leading the blind.
- Effect on COB : More meetings to attend.
- Effect on developer: A loophole to delay or avoid handover of relevant documents.
- Effect on managing agent : Obstacle to proper maintenance & management of the building.

Transition



Transition



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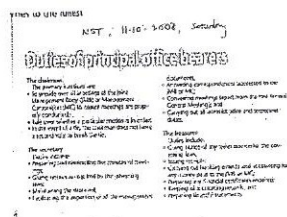
Power of Attorney

- Can owner (a JMC) appoint 3rd party as attorney to sit in JMC meetings? Act is silent.
- Legally, power of attorney is recognised. It give lawful authority to the appointed attorney. Powers of Attorney Act 1949
- Practically, appointing an attorney defeats the JMB's aims. Better for the relevant owner to step down and allow others to be in the committee if owner is unable to attend.

Power of Attorney

- Effect on JMB : 3rd parties (staying in another place) make management decisions for the building.
- Is this a mismatch?
- Keep the spirit of Act 663 – owners living in the building know better the problems within the building. Let these owner manage the building.

Power of Attorney



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House Rules

- House rules are necessary to regulate the JMB's affairs.
- Egs. JMC spending; Collection of maintenance charges; Water cut; Security cards; Inspection of accounts.
- Act 663 fails to provide for a complete set of house rules. In fact, no house rules are provided.
- Developer's house rules are normally adopted. Such rules to be tabled and endorsed by JMB. S 14(2).

House Rules

- Effect on owner: Power struggle between Camp A and Camp B; little Napoleans managing the building.
- Effect on COB: More problems to solve.

House Rules



Effects of Act 663

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Maintenance Charges

- Outstanding maintenance charges before JMB formed. Who owns them?
- Developer's view: Charges belong to developer. Charges incurred when developer was managing the building.
- JMB's view: Charges belong to JMB. Defaulting owners must pay charges to JMB for the owners to vote at meetings. Alternatively, JMB to collect them from developer.

Maintenance Charges

- Legal issues: Can a party have the cake and eat it?
- If previous charges belong to JMB, does developer or JMB pay the debts (owed to contractors, sub-contractor & suppliers) incurred before JMB?
- If previous charges belong to developer, is JMB expected to pay TNB or Syabas for developer's utilities debts?

Maintenance Charges

- Legally, JMB may claim the debts from the developer.
- But JMB must fund for the legal costs.
- Did Act 663 intend for this?
- Act is silent.

Maintenance Charges

- Effect on owner: Owners fail to pay maintenance charges before JMB because contra against late damages. Account books show owners didn't pay the charges. Can owners vote at AGM or EGM or sit in JMC?
- Effect on developer: Passing over of deficit to JMB. Is that fair? Is deficit due to bad management by developer or default in payment by owners?
- Regulations need to state what to do in these cases.

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Writ of Seizure & Sale

- COB may issue a warrant of attachment to defaulting owner to claim maintenance charges in arrears of 6 months. S 33(1)
- Warrant of attachment results in owner's moveable property in the parcel or elsewhere within the local authority area being seized and sold by public auction.
- Is there an efficient mechanism in place for this remedy? How long will the recovery process take? Can JMC get enough funds from other owners while waiting for the proceeds from the recovery?

Writ of Seizure & Sale

- Effect on JMB : Difficulty in collecting maintenance charges. Effectiveness of remedy is doubted.
- Effect on COB : Slow process.
- Effect on errant owners : Arrogance against JMB & COB.

Contents

- Why Act 663
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Conclusion

- Ambiguity in the Act.
- Need regulations to deal with ambiguity.
- Act intended to have regulations. S 42.
- s 42(1): The Minister may, with the concurrence of the State Authority, make such regulations as may be expedient or necessary for the better carrying out of the provisions of this Act.

Conclusion

- s 42(2):
(2) Regulations may be made for all or any of the following purposes:
 - (a) prescribing any matter which is required under this Act to be prescribed;
 - (b) providing for proper standards of maintenance and management in respect of buildings and common property;

Conclusion

- (c) providing for the payment of deposit by any person erecting or constructing a building to ensure its proper maintenance and management and for the forfeiture of the deposit;
- (d) providing for collection charges by the Commissioner;
- (e) prescribing offences which may be compounded and the forms to be used in and the method and the procedure for compounding such offences;
- (f) providing generally for the performance of the functions, the exercise of the powers and the discharge of the duties of the Body under the provisions of this Act.

Conclusion

s 42(2):

(3) Regulations under this section-

(a) may provide for different provisions for different types of buildings and common property; or

(b) may provide for any other matter which is expedient or necessary for the purposes of this Act.

● Act without regulations is a mismatch.



TERIMA KASIH

THANK YOU