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House Rule Prohibiting Airbnb Is Valid

In the recent years, the trend for tourists and holidaymakers to trawl online marketplaces for the best offer on short-term lodging and vacation rentals have grown increasingly popular. This saw numerous websites and mobile apps like Airbnb, Trivago, Agoda and Booking.com to spring up like mushrooms in keeping up with and capitalising on this change in consumer behaviour.

In the recent case of *Innab Salil & Ors. v Verve Suites Mont' Kiara Management Corporation* [2020] 10 CLJ 285, the Federal Court ruled that a house rule to prohibit short-term rental activities passed by management corporations is not *ultra vires* the Strata Management Act 2013 (SMA) or the National Land Code 1965 (NLC).

The Federal Court also held that private home occupancies via online booking sites are nothing more than mere licenses and by its nature, does not tantamount to a tenancy. This alert discusses the Federal Court's decision.

Facts

The appellants had used their apartment units at the Verve Suites for commercial purposes by letting them out for short-term rentals. As a result of frequent entry and exits by non-residents, numerous incidents arose where house guests had misused the Verve Suites' common facilities and caused nuisance to the residents to the extent that the security of the residential building was compromised.

As a measure to curb the incidents, the respondent passed at an extraordinary general meeting 'House Rule No 3' to prohibit all forms of short-term rental activities involving Verve Suites' residential premises. The appellants having repeatedly breached House Rule No 3 post its implementation were imposed with fines by the respondent.

Aggrieved by such administrative action, the appellants sought to nullify House Rule No 3 as being *ultra vires* the SMA and by extension, the NLC.

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The High Court's Decision

The respondent (plaintiff in the High Court) sought to injunct the appellants (defendants in the High Court) from continuing to breach House Rule No 3 and to enforce the same. The appellants' primary defence was that their right to rent out their premises short-term constitutes '*tenancies exempt from registration*' and is therefore a '*dealing*' within the ambit of '*any other dealing*' permitted under Section 70(5) of the SMA. In the absence of a definition of '*dealing*' in the SMA, the High Court turned to the NLC for guidance. The High Court dismissed the appellants' defence and ruled that:

- (a) The relationship between the house guests and the appellants as hosts is like that of hotel guests, one of licensee and licensor.
- (b) The SMA constitutes social legislation. Thus, the interest of the community in the strata body prevailed over the individual commercial interests.

The Court Of Appeal's Decision

The Court of Appeal held that in determining the nature of the occupancy, one must assess the nature of the stay regardless of the label ascribed by parties to the transactions. The Court of Appeal upheld the High Court's decision and agreed that the relationship between the appellants and the short-term renters is one of licensor and licensee.

The Court of Appeal dismissed the appellants' appeal.

The Federal Court's Decision

The appellants obtained leave for the apex court to decide on the following questions of law:

- (a) Question 1 – Whether the respondent as a management corporation can pass house rules to prohibit suite owners from using their suites for commercial purposes (i.e. short-term rental) which is

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consistent with the land's express condition of "Commercial Building" which the suites are built upon.

- (b) Question 2 – Whether the enforcement of such house rule is in violation of Section 70(5) of the SMA.

Question 1

There appears to be a conflict between House Rule No 3 and the express condition of the land use. By extension, this leads to a conflict between Section 70 of the SMA (enabling provision for a management corporation to pass by-laws) and Section 120 of the NLC (enabling provision for State Authority to impose express conditions on land use).

In resolving the conflict, the Federal Court opined that Section 70 of the SMA and Section 120 of the NLC must be read harmoniously such that they do not diametrically contradict each other. The effect of the harmonious reading of the conflicting provisions is, that the grant of powers or rights by one particular provision in a law does not mean that such rights may not at the same time be restricted by other provisions of the law. In other words, management corporations like the respondent are not precluded from promulgating by-laws which circumscribe the conditions and restrictions of use of the land.

Question 2

The appellants contended that the short-term rental arrangements tantamount to '*tenancies exempt from registration*' and hence constitute as '*dealings*' permitted under the SMA and the NLC.

In answering this question, the Federal Court devoted a great portion of its judgment to pioneer the ascertainment of whether short-term rentals in the likes of Airbnb, is a tenancy or a license. In full recognition that the NLC is taken as a complete legislation, the Federal Court relied on foreign authorities in attempting to explain the difference between the law on contractual licenses and tenancies.

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The English case of *Street v Mountford* [1985] AC 809 is instructive – where it is proved or conceded that the tenant enjoys exclusive possession of the premises, that in itself is sufficient to conclude the existence of a tenancy.

The Supreme Court of Victoria, Australia in *Swan v Uecker* [2016] VSC 313 delved into the manner in which house guests could be evicted should they overstay their welcome in determining for certain whether short-term rental is mere license or a tenancy. Typical to a license, a clause in an Airbnb agreement allows homeowners to immediately evict guests who refuse to vacate the premises upon expiry of the occupancy period. This is unlike a lease/tenancy where an order for possession is a prerequisite to eviction.

The Federal Court in *Innab Salil* viewed that the analysis in *Swan* is consistent with hotel operations and how hotels would proceed to evict overstaying guests beyond checking out hour. A closer observation on Clause 8.2.1 of Airbnb terms of service demonstrates the similarity of its operation with that of hotels where the host retains the right to re-enter the premises and remove the occupant in the event the occupant fails to vacate on time.

It is crucial to note that the Airbnb clause which retains the right to re-entry is inconsistent with tenancy rights in that if a tenant holds over, he cannot be removed except in accordance with an order of possession which, among others, require the issuance of a notice to quit.

Further, Clause 8.1.3 of the Airbnb agreement regulates the number of additional guests that the short-term renters can allow into the premises. This indicates that short-term renters do not, in fact, have an exclusive possession over the premises, unlike in the manner tenants would.

On this point, the Federal Court held that short-term rental arrangements made via virtual platforms such as Airbnb, klsuites.com or any other booking site are nothing more than mere licenses and not tenancies amounting to a '*dealing*'. As such, House Rule No 3 was enacted for legitimate purposes which is not *ultra vires* the SMA.

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Commentary

In the face of fast-changing trends in consumer behaviours and online marketplaces, our courts are quick to adopt and remain adept in interpreting laws which are relevant to the prevailing societal context. The Federal Court in *Innab Salil* demonstrated exactly just that. The court proved that where existing laws fall short of providing exact answers to novel questions of law, cross-border legal interpretation could be espoused for creative application in local scenes.

This also proves that the law, or the application of it, must be flexible to befit the constantly evolving societal and economic circumstances. The judgment in *Innab Salil* is a refreshing decision which successfully shed some guiding light on the *rather* uncharted territory that is transient lodging.

Authored by Dayana Najwa Jainon, an associate with the firm's Dispute Resolution practice.

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