

A MODEL FOR EFFECTIVE AND EFFICIENT DISPUTE RESOLUTION PROCESS FOR STRATA SCHEME DISPUTES IN PENINSULAR MALAYSIA

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Abstract

The current dispute resolution processes for strata scheme disputes in Peninsular Malaysia are built on the centrality of adjudicative approach by the Strata Management Tribunal. Whilst a quasi-judicial adjudicative body like the Tribunal offers simpler, quicker and cheaper dispute resolution processes compared to the courts, its orientation may not produce the quality outcomes desired for strata scheme dispute resolution processes such as parties' satisfaction, improvement in the parties' relationships, changes in behaviour and enhancement of people's well-being. One of the reasons for the potential low quality outcomes is that adjudicative approaches in traditional adversarial legal systems normally limit their attention to a narrow view of the dispute without addressing the underlying issues or problems. As a result, the relationships between the individuals involved may deteriorate further and it may become even more difficult for them to work together effectively. Taking into consideration the current legal framework for resolving disputes in strata schemes in Peninsular Malaysia, this paper posits that dispute resolution approaches for strata scheme disputes should not be limited to addressing the legal rights and interests of individuals. They must also consider other important humanistic factors such as neighbour relationships and a sense of community. More importantly, these approaches must provide support for the concept of self-governance in the strata titles system. This paper proposes a comprehensive, integrated, therapeutic and humanistic dispute resolution model that may become a new dispute resolution model for strata scheme disputes in Peninsular Malaysia.

Keywords: *dispute resolution, strata schemes disputes, adjudicative approach, therapeutic*

1. INTRODUCTION

Living in high-rise residential buildings is different from living in traditional free standing homes. In the traditional neighbourhood, houses are separated with clear physical boundaries and the residents enjoy freedom and privacy within their own property. Residents in strata schemes, however, have to share the common facilities and spaces in the buildings with other residents. The universal concept of common property in strata schemes makes all proprietors as “tenants in common” sharing proportional shares in the common property. The proprietors are jointly responsible for the maintenance and upkeep of their common property.

One of the unique features of the strata title systems is that it imposes upon all unit owners the important task of governing their own strata scheme. For the purpose of governing an individual strata scheme, a statutory management body is created where all unit owners automatically become members. In order to ensure smooth day to day operations and administration of the management body, a council or committee member is elected from among the parcel owners. However, the council is not the sole party responsible for the management and maintenance of the strata development. The mechanism of self-management in strata title system operates on the principles of collective responsibility and liability involving all parcel owners of the strata community.

The concept of self-governance in strata title schemes combining the elements of self-management, self-regulation and self-resolution gives broad powers and authority to the management corporation to manage and maintain the common property, regulate the conduct of owners and occupiers and even make an effort to resolve any disagreement, misunderstanding or disputes involving the unit owners, occupiers or the stakeholders. These broad powers and authority may inevitably cause dissension and disputes among interested parties in strata schemes. Unreasonable rules and procedures, arbitrary decisions, selective enforcement of rules and unruly behaviour of proprietors and occupiers are examples of the challenges confronting the self-governance concept in strata title system.

According to Christensen and Wallace (2006), strata title living by its very nature leads to a higher incidence of neighbour disputes. The physical and legal features of strata living combined with occupational stress and other daily life issues create a situation which is ripe for disagreements, disputes or conflicts involving members in the strata schemes. Since members of the strata scheme may have to go on living side by side, meeting each other every day, improper or negative reaction to the disputes may affect neighbour relations and peaceful enjoyment of the neighbourhood. According to Williamson and Adams (1987), in such situation, residents may take a withdrawal approach or apathy which in the long run will cause problems to the concept of self-management by neglecting their duties and responsibilities as proprietors in the strata schemes.

The Government of Malaysia has recently enacted the Strata Management Act 2013 (Act 757) (SMA). The enactment of the SMA has improved many aspects of governance of strata schemes previously provided by the Strata Titles Act 1985 (STA) and the Building and Common Property (Maintenance and Management) Act 2007 (BCPMMA). One of the important improvements that have been made is the establishment of the Strata Management Tribunal (Tribunal) to adjudicate disputes in strata schemes. While improvements made in the SMA could potentially increase efficiency in the governance of the strata schemes, this paper argues that the scope of dispute resolution processes under the SMA is still limited to enforcement and short-term adjudication solutions. Despite providing a dispute resolution mechanism that is simpler, faster and more flexible than court processes, adjudication that is based solely on the facts of the case, statutory provisions and case precedents may potentially produce adverse effects on disputing parties. Furthermore,

the underlying issues of the legal problem will continue to be unresolved, affecting inter-personal relationships, people's well-being and the concept of self-governance in the strata schemes. This paper argues that, instead of having adjudication as the single-gateway in resolving the strata scheme disputes, the Government of Malaysia should adopt a dispute resolution model that is comprehensive, integrated, therapeutic and humanistic.

2. LITERATURE REVIEW

There has been significant growth in academic interest in the development of high-rise buildings and strata communities particularly in common law jurisdictions such as in Australia, the United States, Canada and even Malaysia. However, the volume of academic research in this area is relatively small resulting in significant gaps in the regulatory framework, for example on dispute resolution mechanisms in strata schemes.

Nor Asiah and Azlinor (2013) for example analyse various alternative dispute resolution (ADR) processes that would be appropriate for settlement of dispute in strata schemes in Peninsular Malaysia compared to litigation in court. They also analyse the recent establishment of a Tribunal by the Strata Management Act 2013 (SMA). According to Nor Asiah and Azlinor (2013), the decision to introduce a Strata Management Tribunal by the government must be applauded since the objective of dispute resolution in strata schemes is to create peace and harmony among the residents.

In Australia, Leshinsky et al. (2012) have carried out a research project on disputes in owners corporations (OC) in the State of Victoria. The research reveals that disputes in OCs basically relate to breach of internal rules, behavior in common areas, issues regarding amount and collection of fees and contractual terms with the managers and developers. On dispute resolution, the research finds that in most cases, the OC committees prefer to adopt informal conflict engagement and in some cases dispute avoidance.

In another article related to the same research above, Douglas and Leshinsky (2012) argue that the Owners Corporation Act 2006 (Vic) provides many options for disputes in owners corporation to be resolved earlier without the parties going to litigation in the Tribunal. According to Douglas and Leshinsky (2012), the three-tier dispute resolution system in the Act consists of an internal dispute resolution scheme which may include mediation and conciliation process (first tier), formal process involving mediation or conciliation processes provided by the Consumer Affairs employee (second tier) and adjudication process by the Victorian Civil and Administrative Tribunal (VCAT) (third tier). Research by Leshinsky et al. (2012); Douglas and Leshinsky (2012) are important as they inform the importance of early disputes resolution processes to be conducted internally.

In the State of Queensland, Australia, Toohey (2011) have been pioneering ways of encouraging the application of therapeutic jurisprudence in dispute resolution processes in high-rise developments such as community titles or strata titles schemes. According to Toohey (2009), therapeutic jurisprudence can be applied in community titles dispute resolution processes in order to promote positive behavioural change for example investigation process carried out by adjudicator in adjudication process under the Body corporate and Community Management Act (Qld) 1997.

Through investigation process, the adjudicator may identify the root cause for the problems which may not appear in the documents filed. Furthermore, through this process, the adjudicator may also have the opportunity to let the parties assess the effects of the whole episode on their well-being. The work done by Toohey (2009) is important because it establishes the needs for dispute resolution process in community titles schemes to facilitate behavioural change amongst the

disputants. Promoting necessary behavioural change using a therapeutic jurisprudence approach would contribute significantly to the overall quality of dispute resolution in high-rise schemes.

Adams and Williamson (1986) have carried out empirical research on dispute resolution in condominiums in the State of Florida, United States. The main objective of their study was to explore the various mechanisms through which condominium-related disputes could be resolved. One of their key findings is that there is great potential for the Alternative Dispute Resolution (ADR) mechanisms to be implemented to resolve conflict within the condominium system. The findings from research in Australia and the United States mentioned above are significant to support the argument of this paper that non-adversarial processes such as mediation and conciliation have the potential to be included in the dispute resolution model for strata scheme disputes in Peninsular Malaysia (Williamson and Adams, R. J., 1987).

3. METHODOLOGY

The methodology employed in this paper is largely doctrinal and theoretical. Empirical research from Malaysia, Australia and the United States has been used to support the arguments in this paper on the concept of good neighbor relations, a sense of community and nature and effects of disputes in strata schemes. The ideas and proposals presented particularly on the linkages between the principles of therapeutic jurisprudence and the principles of self-governance in strata scheme are original and have yet to be tested empirically in the Malaysian alternative dispute resolution field.

4. DISPUTE RESOLUTION MODEL FOR STRATA SCHEMES IN PENINSULAR MALAYSIA

This paper proposes a five-component dispute resolution model for strata schemes disputes in Peninsular Malaysia to support the existing adjudicative approach provided by the Tribunal. The objectives of this model are not only to achieve effectiveness and efficiency in dispute resolution for strata scheme disputes, but most importantly, to address the stressful nature of neighbourhood disputes and place a primary emphasis on the well-being of the disputing parties and the members of the strata schemes. The first component of this model consists of an internal dispute resolution process for strata scheme disputes. This is followed by the second component of the model which provides for a conciliation process by a government agency or body, preferably the Commissioner of Buildings (COB). The third component of the model involves an adjudication process by the Tribunal. The fourth component deals with court litigation while the final component of this model involves a post-dispute resolution process. This model has two distinctive characteristics. First, the model proposes creative solutions in strata scheme disputes that not only address the legal issues of the disputing parties but extend to other human functions such as values, morals, needs, relationships and parties' interests. Secondly, this model seeks to optimise the outcomes of dispute resolution for strata schemes to human well-being such as emotions, psychological functioning and relationships.

The objectives of the model can be summarised as follows:

- i. To produce therapeutic outcomes by encouraging positive communication between individuals in a strata community;
- ii. To prevent legal risks and future disputes through the educative function of the processes;
- iii. To promote positive interpersonal and individual change;
- iv. To preserve neighbour relations in the strata community;

- v. To optimise people's psychological and emotional well-being;
- vi. To establish process efficiency.

The details of the components of this model is examined in the next section.

5. FIVE COMPONENTS OF DISPUTE RESOLUTION MODEL FOR STRATA SCHEMES

5.1 First Component- Internal Dispute Resolution Processes

Strata living has been described as an intensified and highly regulated form of living that may become antecedent to disputes and disagreements. Disputes in strata schemes may arise for various reasons including: dissatisfaction with a neighbour's behaviour, restrictive by-laws, unprofessional conduct of the management staff and council members and deteriorating quality of life in the strata schemes. Disputes in strata schemes that are not resolved speedily and allowed to escalate into bigger conflicts may lead to stress, apathy, disunity and a lower sense of community among members of strata schemes. A dispute between neighbours in strata schemes may also have the potential to "lead to a feeling of disengagement and separation from the community as a whole" (Douglas, Kathy, Goodman and Leshinsky, 2008). The negative effects of disputes in strata schemes may affect relationships and the concept of self-governance in the long run. In order to address the anticipated outcome of strata scheme disputes, this paper argues that it is imperative for early intervention by way of internal dispute resolution processes be introduced in the strata schemes.

There are a number of benefits of early intervention in resolving strata scheme disputes. First, early intervention limits hostility and emotional damage to the parties, particularly neighbours who are living in close proximity in the same strata scheme. Secondly, internal processes can prevent minor disputes from escalating into bigger conflicts. According to Mollen and Scott, E. (1999), if disputes in strata schemes are not resolved earlier, there is strong possibility that such disputes will escalate as follows:

The hostility may spiral even higher as the adversaries encounter each other in their five foot by five foot elevator, in their hallways, in the lobby of the building, in their parking lots or at their common area recreational facilities. An occupancy conflict, like an infectious disease, may spread through the condo and co-op as factions evolve. Members of the community will often rush to support their neighbours and friends (Mollen, 1999).

Since many incidents of disputes in strata schemes are due to the behavioural conduct of the parties in common or private areas, it is argued that the disputing parties should first take the step to talk to each other about the issues in dispute in a friendly and polite manner. Furthermore, Marler and Gregory (2013) argues that the need for parties in dispute to engage with each other positively and express their emotions freely are important because, "in many cases, people just want to be heard and to have their thoughts and feelings validated by others ." Early intervention provides the disputing parties with a chance to communicate and discuss their disputes or misunderstandings informally and in a less hostile manner.

Thirdly, internal processes potentially prevent both the underlying cause of dispute and the direct cause of the dispute from having negative effects on individuals and community through educational approach. According to Beasley and Amy (2007), disputes involving parcel owners, committee members and building managers normally revolve around breaches of the rules and regulations while disputes between occupiers are more about behavioural and

lack of understanding on the concept of communal living in strata schemes. The opportunity to engage with each other during the internal dispute resolution processes may also educate the parties regarding the rules and regulations of the strata scheme and the concept of community living in the strata development environment.

Fourthly, internal dispute resolution processes are an important aspect of self-governance where the parcel proprietors and the management body are expected to self-resolve disputes occurring in strata schemes to avoid such disputes from being referred to formal adjudicative body for resolution. Self-resolution supports the principle of self-determination which is an important value in mediation systems. According to Cooper, Donna and Field (2008), self-determination allows the parties to actively and directly participate in the communication and negotiation process, choose and control the norms that guide their decision making, create their own options for settlement and have input in the final decision. Self-resolution that subscribes to the philosophy of self-determination may also ensure parties' satisfaction, a high degree of compliance and prevent future disputes from occurring.

There are many benefits that have been identified for self-resolution by way of internal process in strata scheme disputes. The outcomes from these benefits are related to positive communication, educational effect, preservation of relationship, positive personal transformation and psychological well-being. Internal dispute resolution processes have become so important that many common law jurisdictions have now sanctioned internal dispute resolution processes as necessary or even mandatory before any formal dispute resolution process takes place. In the State of Queensland, Australia for example, the internal process is made mandatory under the Body Corporate and Community Management Act 1997 (BCCMA).

In Peninsular Malaysia, the statutes are silent with regard to internal dispute resolution processes in strata schemes. However, the Rukun Tetangga Act 2012 (Act 751) (Neighbourhood Watch Act) does provide for a mediation process in resolving any dispute or difference amongst the members of the community. However, the process is voluntary and is applicable to the wider community or neighbourhood. The Government of Malaysia has also enacted a Mediation Act 2012 (Act 749) to promote and encourage mediation as a method of alternative dispute resolution that facilitate fair, speedy and cost-effective settlement of disputes. Since there are positive developments in community mediation in Malaysia at the moment, this paper argues that the mediation process can become the mechanism in resolving strata scheme disputes internally. Since internal dispute resolution through mediation can be carried out informally, there is no need for any new institution or body to be established to carry out the process. It also does not require the services of legal professionals which in turn makes it cheaper in costs.

Based on the advantages offered by mediation in the context of internal dispute resolution process in strata schemes, this paper argues that the building manager and the committee member may play an important role in the internal process and become the first contact point if there is a dispute between the parcel proprietors or occupiers or even between a parcel proprietor and the management corporation. In order to implement this idea, it is imperative for the strata managers and the committee members to have advanced skills in mediation, negotiation and creative problem-solving to facilitate internal dispute resolution. Perhaps, the government may impose a condition that the strata manager must attend professional training on various dispute resolution techniques prior to appointment and such requirement can also be extended to committee members upon election to the committee of the management corporation.

In summary, an internal dispute resolution process is a process whereby the disputing parties

need to start communicating directly with each other over a dispute or disagreement. More often than not, the miscommunication or rather lack of communication between the parties exacerbates the dispute (Baum, 2010). In this respect, the internal process allows them to interact with one another more positively. This paper argues that mediation process is the most appropriate and effective process for internal dispute resolution in strata contexts. This paper further argues that leadership in strata schemes including the building manager must encourage disputing parties to resolve disputes at the earliest possible stage to avoid the unnecessary escalation of conflict. If the internal dispute resolution process through mediation fails to resolve the dispute, then the parties should be advised to make another non- adversarial attempt through conciliation process. The conciliation process by the Commissioner of Buildings (COB) is the second component of this proposed model. The next section elaborates on conciliation process by the COB.

5.2 Second Component – Conciliation By The COB

Conciliation is in many ways similar to mediation. From a practical point of view, conciliation processes involve relatively informal discussion and negotiation sessions between the disputing parties. The process is assisted or facilitated by a third party. The role of a conciliator in a dispute is normally to identify the issues in dispute but, similar to a mediator, a conciliator is prevented from determining those issues. However, a conciliator does have a more interventionist role than the mediator. This is because they will provide information and offer options based on their knowledge of the relevant law, and also of how a Tribunal or a Court may decide a particular matter (Sourdin and Tania, 2012).

There are many benefits of conciliation as a dispute resolution mechanism, particularly for strata scheme disputes. As a non-adversarial process, the conciliation reduces the negative psychological effects that are associated with adversarial processes such as the Tribunal or the Courts. Further, unlike the adjudicative process which could be rigid and procedural, a conciliation process is conducted in an informal setting where the parties are encouraged to discuss the dispute honestly and openly and to generate options for potential solutions. More importantly, the discussion and admissions made during the conciliation process are considered confidential and generally cannot be used against the other party in the adjudication processes (Body Corporate Act, 1997).

Similar to internal process, conciliation can be used to resolve disputes quickly as the process is conducted informally and is not subjected to any legal procedures. Normally, a conciliation process can be completed in just three hours (Common Ground, 2011). The quick resolution of disputes can contribute significantly to reducing stress among the disputants and it can also contribute to further supporting the psychological well-being of the parties. More importantly, the parties would then have more opportunities to focus on reconciliation and rebuilding the interpersonal neighbour relationship that have been damaged by the disputes (Shuman and Daniel, 1992). Another advantage or benefits of conciliation is it provides useful information regarding the operations of law and the concept of strata living. While a conciliation process does not and should not amount to formal legal advice to the parties, a conciliator who possesses sound knowledge of the law and procedures can play a significant role in assisting the parties to design workable solutions for the parties within strata legal framework (Stolle, 1997-1998).

A conciliation process that involves positive interactions and exchange of views may promote better understanding of each party's position and allow them to let go their pre-occupation with their own individual concerns. A significant benefit arising from improved communication is the development of good relations between the parties who are neighbours and living together in a strata scheme. Joint problem-solving approaches like mediation or conciliation can improve long-term relations because the parties may attain better understanding of each other and acquire the relevant experience and skills in managing future disputes. Since disputes in strata schemes involve people having ongoing relations, it is argued that conciliation is a process that can reduce the damage to the parties' relationship as well as preserve, maintain, restore or create good interpersonal relationships. Other advantages or benefits of conciliation are high compliance to the settlement agreement that have been entered by the disputing parties due to the fairness of the process, and conciliation generates parties high satisfaction due to the ability of the parties to control the process and to achieve self-determination and self-transcendence.

Despite of the many advantages conciliation process can offer to resolve strata scheme disputes, The State of Queensland in Australia is the only common law jurisdiction which provides comprehensive statutory provisions on conciliation processes and procedures (Faizal, 2011). The conciliation processes in Queensland are conducted by the Office of the Commissioner for Body Corporate and Community Management (Corporate office, 2016). In Malaysia, there is no provision on conciliation in the SMA or in any other statutes related to strata scheme disputes. However, this paper argues that the COB is the most appropriate party to play a role in providing conciliation processes to disputing parties in strata schemes. The enactment of the SMA resulted in the powers and duties of the COB being increased. However, the increased powers and duties of the COB provided in the SMA only relate to enforcement of the law and not resolution of disputes or educative role. Conciliation process that has educational elements regarding rules and regulations in a strata system may help the disputing parties from among the members of the strata schemes to further understand the responsibilities and the liabilities of the management corporation, council members, proprietors and occupiers as well as the principles of strata living. If conciliation process fails to resolve the disputes in strata schemes, the COB should then advise the parties to refer the dispute to the Tribunal for adjudication. An adjudication process by the Tribunal therefore becomes the third component in this proposed model and discussion of the processes is highlighted in the next section.

5.3 Third Component – Adjudication By The Tribunal

The adjudication process to be implemented by the Tribunal is considered a significant component of this model since the Tribunal has already been established formally by the SMA. Even though this model is proposing a non-adversarial approach in resolving strata scheme disputes, it does not mean that any adversarial adjudicative processes should be excluded from this model. Instead, this paper acknowledges that there are many advantages attached to the Tribunal as a quasi-judicial adjudicative body in resolving strata disputes efficiently. For example, the Tribunal offers a cheaper and quicker dispute resolution compared to litigation in court. Section 117(1) of the SMA provides that the Tribunal shall make a finding within 60 days from the date the first hearing commences. Another advantage of the Tribunal concerns the power it has to conduct proceedings using simplified rules and procedures compared to the rigid procedural formalities that have to be applied by the courts (Strata Management Act, 2013). The simplification of the procedures will also help the Tribunal to assess the application and issue an award on the merits of the matter rather than on technical procedural aspects of court proceedings.

The fact that the SMA does not allow any party to be represented by an Advocate and Solicitor unless it involves complex issues of law minimises the costs for adjudication by the Tribunal (Strata Management Act, 2013).

Despite the advantages of a Tribunal adjudication process compared to court litigation, adjudication by the Tribunal still retains an adversarial approach to resolving disputes. Adjudication by a quasi - judicial body normally provides the same result as litigation in courts where one party is declared a winner and another is the loser. Unlike other non-adversarial processes like the mediation and conciliation, decisions or orders by the Tribunal are imposed upon the parties and have binding effects. Appeal to a higher authority such as the court is not allowed under the SMA unless on points of law or when there is a serious irregularity (Strata Management Act, 2013).

This approach of imposing orders on parties based on the merits of the case and under the guidance of existing legal principles minimises the opportunity for the parties to achieve self-determination in adjudication processes.

Whilst the Tribunal still retains many traditional adversarial elements of adjudicative processes, there are ample opportunities for it to apply therapeutic approaches in resolving strata disputes under the SMA. First, it can adopt a problem-solving approach in strata schemes. Section 112 of the SMA provides that the Tribunal may assist the parties to negotiate an agreed settlement in relation to the matter. Since the SMA is silence on the procedures for negotiation process to take place, this paper argues that the Tribunal may take a creative problem-solving approach to assist the parties in negotiation process. The first creative problem-solving approach that can be applied by the Tribunal is for the Chairman of the Tribunal to engage with the disputant actively. The objective is to obtain more information about the dispute and the background of the disputants. Through this process, the Chairman of the Tribunal may not only understand the contentious issue at hand but is also able to identify the underlying issues that may have become the root cause for the dispute (De Villiers, 2011).

Secondly, this paper proposes that the Tribunal can apply a creative problem-solving approach during the adjudicative process by taking a more inquisitorial role. The Tribunal should be encouraged to seek more information based on the evidence presented by the parties or even to conduct its own investigation. The inquisitorial approach may provide the opportunities for the adjudicator to probe the real issues and to understand the whole situation that leads to the dispute. This paper further argues that the need for the Tribunal to play a more inquisitorial role is justified since the SMA does not allow for legal representation unless the matter in dispute involves complex legal issue and one party may be greatly prejudiced if a legal representative is not allowed to argue the case on his behalf. According to De Villiers (2011), when the parties are self-represented, the Chairman of the Tribunal must adjudicate with empathy and play a creative role in assisting the parties to resolve the disputes themselves rather than simply imposing a decision on them.

Thirdly, the Tribunal must exercise its power beyond strict legal rights, individual rights, duties and liabilities in order to ensure the order given is for the well-being of the parties as well as the strata community. Such approach by the Tribunal would contribute positively towards promoting relationships, moral development and the well-being of the disputants. Such approach is also consistent with the statutory provisions in the SMA. Section 117(4) of the SMA provides that:

In making an order under the subsection (3), the Tribunal shall have regard to:

- (a) The relevant provisions of this Act; or
- (b) The interest of all parcel owners or proprietors in the use and enjoyment of their parcels or the common property or the limited common property.

Finally, the Tribunal may help to educate the disputing parties on the rules and regulations of strata title system as well as the concept of strata living by providing reasons for its decision or award (Strata Management Act, 2013).

There are many benefits for writing reasoned decisions, for example, such an approach gives the parties a sense of fairness because they were made aware of the reasons for their victory or loss. It also gives the opportunity for the adjudicator to explain the law and establish precedents. More importantly, writing reasoned decisions may create therapeutic effects for the disputing parties. According to Toohey (2009), "in writing their reasons for decision, the adjudicator has the opportunity to refer in a respectful way to the parties' allegations and submissions and to avoid unproductive castigation of the parties."

In conclusion, while adjudicative approaches by the Tribunal, as proposed in this model, are still very much influenced by traditional adversarial approaches, the Tribunal may in fact provide better efficiency than court processes in terms of time, procedures and costs. Certain procedures of the Tribunal, as provided in the SMA may also provide opportunities for the Tribunal to apply therapeutic approach for the parties in giving decisions and awards. The therapeutic orientation of the tribunal as proposed in this model will benefit the parties, strata community and the society at large in terms of the psychological functioning of the parties and their future relationships. The next section discusses court litigation and appeal as the fourth component of this model.

5.4 Fourth Component – Court Litigation

In Peninsular Malaysia, the SMA provides specific processes for dispute resolution for strata schemes involving the Tribunal. However, the SMA does not prevent anyone from seeking settlement or remedy from the court of competent jurisdiction in matters involving strata schemes disputes. The SMA even allows a party to Tribunal proceedings to apply to the High Court challenging a decision by the Tribunal on the ground of serious irregularity (Strata Management Act, 2013).

While the strata legislation in Peninsular Malaysia allows any person to bring an action in court to resolve a dispute arising from strata schemes, this paper argues that such action should be an option of last resort or be avoided totally if possible. This is because dispute resolution in traditional adversarial court system only provides temporary solutions in terms of damages, remedy, compensation or injunction. Furthermore, court litigation in an adversarial model normally restricted itself to establishing the facts, weighing the evidence, applying relevant legal principles, selecting legal authorities and making decisions based on the best argument and available evidence (Spiller and Peter, 1999). The end result of this method is not a solution to the whole problem as the issues underlying the legal problems are not resolved, but continue to simmer (Sammons and Kathryn, 2008-2009). According to Lippman (2007), court litigation involving people in relationships such as neighbours serves no-one's interest. Such an approach is achieving very little, making little difference to disputing parties or the community.

Based on the above observation regarding the court litigation and the negative impacts it has in resolving strata scheme disputes, this paper argues that the adversarial court processes for strata should consider a transformative approach to litigation, similar to what has been proposed to the Tribunal in the third component of this model. Instead of just focusing on reducing court dockets, the courts should embrace a creative problem-solving approach that not only addresses the legal issues but also gives attention to the underlying social, psychological or economic problems of the disputing parties. Judges in such cases may, instead of merely being an arbiter, take a collaborative and active role in the proceedings. According to Kaye (2004), "problem-solving courts are courts. They strive to ensure due process, to engage in neutral fact-finding, and to dispense fair and impartial justice." A problem-solving court introduces a new constructive approach to processing cases with the objective of resolving problems rather than adjudicating cases.

According to Sammon (2008), the problem-solving courts have several distinctive features. First, problem-solving courts are outcome based rather than focusing on traditional court approaches such as processes and precedents; secondly, problem-solving courts encourage active interaction between judges and litigants; thirdly, problem-solving courts are not limited to restrictive sanctions prescribed by the law; fourthly, problem-solving courts are creative and innovative in utilising community service and other social services as alternative sanctions and finally, problem-solving courts do not only impose sentencing and sanctions, but are also actively involved in monitoring and ensuring compliance by offenders particularly where community based sanctions are applied. Blagg argues that problem-solving courts do not aim to resolve complex legal issues, but rather are more concerned with complex social problems which cannot be effectively dealt with by the standardised and mechanistic focus of legal norms alone Sammons (2008).

Today, court systems particularly in the United States, United Kingdom and Australia have undergone significant change, shifting their orientations from traditional adversarial approaches to problem-solving approaches, employing a collaborative process that focuses on therapeutic outcome (Blagg, 2008). Instead of viewing themselves as arbiters, judges in problem-solving courts consciously view themselves as therapeutic agents, applying therapeutic functions in their dealings with the disputing parties. According to Judge Lippman (2007), "problem-solving court is about modifying court processes to fit the trends that are driving caseload activity. It is about courts putting the individual front and center, fashioning individualised responses designed to change future behaviour (Daicoff & Susan, 2006)." Whilst problem-solving courts began as specialised criminal courts such as drug treatment courts and domestic violence courts, they have now expanded to include community and housing courts such as the housing court in New York that was created to resolve disputes in condominiums and co-operatives.

For the purpose of this model, a theoretical framework based on the concept and principles of problem-solving courts is proposed for formal court adjudicative dispute resolution for strata schemes. With the objective of creating peaceful and harmonious strata neighbourhoods that will then support the concept of self-governance in strata titles system in Peninsular Malaysia, this paper proposes that judges administering adjudicative processes based on traditional adversarial system should take a transformative approach in resolving disputes by embracing a problem-solving court approach. A problem-solving court approach in the context of resolving strata scheme disputes means the judges should give attention to the underlying social, psychological or economic problems of the disputing parties rather than just determining the disputes based on the existing facts, principles of law and case precedents. Judges in problem-solving court approach could play an active role in the

proceedings with the objective of providing the disputing parties freedom to express their emotions, validate their concerns, achieve self-determination and restore their relationship as neighbours.

In conclusion, problem-solving court approaches promote better outcomes for the disputants in terms of supporting a change in behaviour and enhancing the parties' psychological well-being. Problem-solving court approaches also promote a stronger internal commitment among the disputants to change for the better. In terms of modification of court processes, a problem-solving court approach does not require any fundamental changes in the traditional court structure, processes or procedures. Instead, problem-solving court approaches can enhance procedural justice for the parties within the existing structure by giving litigants greater voice, validation and respect than is currently achieved in the court system. Adjudication by the Tribunal in the third component and litigation by the court in the fourth components are based on adversarial adjudicative approach. No matter how the processes are conducted, the experience and the outcome normally yields unsatisfying results for the disputants and the community. In such situation, a reconciliation process needs to follow. The next section proposes a post-adversarial approach employing transformative mediation as the final component in this model.

5.5 Fifth Component – Post-Dispute Resolution Process

The main issues in strata living are not about individual legal rights and interests but rather how neighbours and stakeholders with different values and interests can work through their differences and still live together in a harmonious and peaceful strata neighbourhood. Dispute resolution among neighbours particularly through adjudication by the Tribunal or court litigation may not necessarily resolve the whole episode of the conflict. In many situations, adversarial approach by traditional court systems may only lead to the "settlement of disputes" and not the "resolution of relationships." As a result, hostility between the parties may continue and there is still a possibility that the wound will never heal, the trust will never be recovered and the enmity will silently continue. Where this is the case, the negative effects or outcomes of the dispute resolution process for strata scheme disputes may contribute to creating a community with entrenched conflict and deteriorating personal relationships thus undermining the concept of self-governance.

Research by Miencke et. al. (1990) has shown that good neighbour relations contribute significantly to a higher sense of community and these two important social constructs may contribute positively to the strata neighbourhood and the concept of self-governance in strata titles system. While the previous four components of this model propose various problem-solving approaches in resolving strata scheme disputes, this model is not complete without a post-dispute resolution process between the parties in continuing relationships to further heal the wounds, mend the fences and renew the relationship. The objective of a post-dispute resolution process is to allow any underlying issues involving behavioural, emotional or relationship factors that were not publicly highlighted and addressed during the informal and formal process of resolving disputes to be further deliberated and discussed in a private reconciliation process.

An important question that can be asked about the final component is how a post-dispute resolution can be implemented? What will be the main driver that pushes the parties to undertake reconciliation process? Taking into consideration the objectives of this model which are to promote positive communication and an educational experience during dispute

resolution processes, this paper proposes for the Tribunal and the Courts to encourage the disputing parties during the adjudicative processes to participate in post-adversarial mediation as part of reconciliation process. The Chairman of the Tribunal or a judge in such cases may provide information to the parties about the tangible and intangible benefits of reconciliation mediation on future relationships, psychological well-being and economic incentives.

The management corporation and the building manager can also play an important role in encouraging disputing parties to resolve any underlying issues post-adjudication. Due to the destructive conflict interactions normally occur during adjudication, the parties may not be able to communicate with each other positively or constructively post-adjudication. According to Folger (2008), conflict tends to lessen parties ability to accurately understand and assess their situations. As a result, their relations as neighbours may further deteriorate and this will affect the stability of strata neighbourhoods in the long term. In order to maintain peace and promote good neighbour relations among members of strata community, the management corporation or the building manager is encouraged to facilitate “transformation” in the parties’ interaction by applying transformative mediation framework for example.

6. CONCLUSION

Strata title systems create a unique form of communal living based on the principle of self-governance. The success of this concept relies strongly on good neighbour relations and a strong sense of community. These are the keys to strata schemes functioning well and form the basis for a good neighbourhood. A good strata neighbourhood is one where neighbours have mutual respect for each other, a strong sense of belonging, actively participate in the community and demonstrate in-group solidarity and unity. All these elements of a good strata neighbourhood contribute significantly to people’s health and psychological well-being when living in a strata environment.

Disputes in strata scheme may occur in relation to a variety of issues and can be damaging to harmonious strata living. According to Leshinsky et al (2012), “conflict between neighbours can be some of the most bitter and protracted types of disputes in our communities.” Traditional adversarial adjudicative approaches to dispute resolution have been shown to be ineffective in resolving disputes involving relationships, particularly in terms of neighbour relations in strata schemes (Fuller and Lon, 1978). In order to address the inadequacies in the current dispute resolution model for strata scheme disputes in Peninsular Malaysia, this paper proposes a model that is comprehensive, dynamic and responsive.

This model is proposed not only to achieve effectiveness and efficiency, but most importantly, to produce some form of therapeutic outcome for people experiencing disputes in strata title contexts through the preservation of neighbour relations and optimisation of community’s well-being. This model consists of five components. The first component is centred on a mediation process in an internal dispute resolution setting. The second component builds on the centrality of conciliation, which is a non-adversarial dispute resolution process involving the COB. The third component identifies therapeutic opportunities in an adjudicative process offered by the Tribunal, while the fourth component suggests a problem-solving approach for the courts system in resolving strata scheme disputes. The fifth and final component proposes a post-dispute resolution reconciliation process. These five components of dispute resolution processes need to be read and understood as an integrated whole in order to construct a new dispute resolution model for strata scheme disputes in Peninsular Malaysia.

BIBLIOGRAPHY

Australian Property Law Journal. 14, 90 -111.

Baum, C. (2010) 'The Benefits of Alternative Dispute Resolution in Common Interest Development Disputes' 2010. *St John's Law Review* 84, 907-948.

Beasley & A. (2007-2008). The Road Not Often Taken: Alternative Dispute Resolution for Common Interest Communities in North Carolina. *Campbell Law Review*. 30, 315-337.

Blagg, H. Harry (2008). Problem-Oriented Courts. Law Reform Commission of Western Australia. 1-30.

Body Corporate and Community Management Office, Queensland [Online]. From: www.justice.qld.gov.au [Accessed on 6 March 2016].

Body Corporate and Community Management Act 1997 (QLD), s 238(1).

Body Corporate and Community Management Act 1997 (QLD), s 252E(5).

Christensen, S. & Wallace, A. (2006). Links Between Physical and Legal Structures of Community Title Schemes and Dispute.

Common Ground, Issue 7, November 2011 [Online]. From: www.justice.qld.gov.au [Accessed on 6 March 2016].

Cooper, Donna, & Field, R. (2008). The Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Notion of an 'Independent' Practitioner. *QUT Law Journal*. 8, 158 -175.

Daicoff & Susan S. (2006). Law as a Healing Profession: The Comprehensive Law Movement. *Pepperdine Dispute Resolution Law Journal*. 6:1-62.

Dispute Resolution in Condominiums: An Exploratory Study of Condominium Owners in the State of Florida. [Online]. From: http://dc.cifge.org/fl_publications/37. [Accessed on 17 July 2011].

Douglas, K., Goodman, R. & Leshinsky, R. (2008). Models of Mediation: Dispute Resolution Design under the Owners Corporation Act 2006 (Vic). *Australasian Dispute Resolution Journal*. 19: 95-103.

Douglas, K., Goodman, R. & Leshinsky, R. (2008). Models of Mediation: Dispute Resolution Design under the Owners Corporation Act 2006 (Vic). *Australasian Dispute Resolution Journal*. 19, 95-103.

Douglas, K.N & Leshinsky, R. (2012). Pre-action Dispute Resolution under the Owners Corporation Act 2006 (Vic): Teaching Conflict Resolution Strategies. *Australian Property Law Journal*. 20, 225

Faizal Kamarudin (2011). The Commissioner of Buildings (COB): A Brief Comparison of the Malaysian, Singaporean and Australian (Queensland) Legislation. *Malayan Law Journal*. 4:cvii-cxxxvi.

- Folger & J. P. (2008), 'Harmony and Transformative Mediation Practice: Sustaining Ideological Differences in Purpose and Practice' *84 North Dakota Law Review*. 84: 823-860.
- Fuller, L. L. (1978). The Forms and Limits of Adjudication. *Harvard Law Review*. 92:353-409.
- Kaye, Judith S. (2004). Delivering Justice Today: A Problem-Solving Approach. *Yale Law and Policy Review*. 22:125 -151.
- Leshinsky, R., Condliffe, P., Taylor, E., & Goodman R., (2012). What Are They Fighting About? Research into Disputes in Victorian Owners Corporations. *Australasian Dispute Resolution Journal*. 23:112-119.
- Lippman J. (2007). Achieving Better Outcomes for Litigants in New York State Courts. *Fordham Urban Law Journal*. 34:813-831.
- Marler & Gregory, W. (2013). Strategies and Legal Tools to Diffuse Difficult People. Community Update. [Online]. From: www.becker-poliakoff.com [Accessed on 17th September 2013].
- Minencke, W.H.Weenig, Taco & Cees J.H Midden (1990). Social Dimensions of Neighbourhoods and the Effectiveness of Information Programs. *Environment and Behaviour*. 22(1):27-54.
- Mollen & Scott, E. (1999). Alternative Dispute Resolution of Condominium and Cooperative Conflicts. *St. John's Law Review*. 73, 75-100.
- Ng Eng Hee v Mamata Kapildev [2009] 3 SLR (R) 109.
- Nor Asiah Mohamad & Azlinor Sufian. Development on Management of strata Disputes in Peninsular Malaysia: The Way Forward. 4th International Conference on Business and Economic Research, 2013 Bandung, Indonesia, 4-5 March 2013.
- Practice Direction11: Representation and Attendance at Conciliation Session. Body Corporate and Community Management Office, Queensland.[Online]. From: www.justice.qld.gov.au [Accessed on 6 March 2016].
- Sammons, Kathryn C. (2008). Therapeutic Jurisprudence: An Examination of Problem-solving Justice in New York. *St John's Journal of Legal Commentary*. 23:923 -960.
- Shuman & D. W. (1992). Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care. *Southern Methodist University Law Review*. 46:409-430.
- Sourdin & T. (2012), Alternative Dispute Resolution. 4th Edition, Australia: Lawbook Co.
- Spiller & P., (ed.) (1999). Dispute Resolution in New Zealand. Victoria: Oxford University Press.
- Stolle, D. P., D.B Wexler, D.B, Winick B.J & Dauer E.A (1997-1998). Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering. *California Western Law Review*. 34:15-51.

Strata Management Act 2013, s 114(1).

Strata Management Act 2013, s 110(1).

Strata Management Act 2013, s 118, 120, 121.

Strata Management Act 2013, s 118, 120, 121.

Toohey, L. & Toohey, D. (2011). Achieving Quality Outcomes in Community Titles Disputes: A Therapeutic Jurisprudence Approach. *Monash University Law Review*. 298-303.

Villiers, B. (2011), Strata Titles, Mediation and Restorative Justice Making Our Lives Livable. Strata and Community Title in Australia for the 21st Century Conference 2011, Gold Coast, Queensland, Australia, 7-9 September 2011.

Williamson, S. A. & Adams, R. J. (1987). Dispute Resolution in Condominiums: An Exploratory Study of Condominium Owners in the State of Florida. [Online]. From: http://dc.clfge.org/fl_publications/37. [Accessed on 17 July 2011].