DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM NEGERI WILAYAH PERSEKUTUAN KUALA LUMPUR
(BAHAGIAN SIVIL)
[RAYUAN SIVIL NO: WA-12BNCVC-140-12/2018]

ANTARA

TOYS BOX MARKETING (M) SDN. BHD.
... PERAYU

DAN

PENN-MART TOYS (M) SDN. BHD ... RESPONDEN

GROUNDS OF DECISION
(Enclosure 1)

Introduction

[1] The parties are referred to as they were before the Kuala Lumpur Sessions Court in Guaman No. WA-B52NVCV-321-06/2018.

[2] This is an appeal by the Defendant (Toys Box) against the decision of the Sessions Court dated 13.12.2018 in Guaman No. WA-B52NVCV-321-06/2018, in allowing the claim by the Plaintiff (Penn-Mart Toys) for vacant possession of the Plaintiff's property and in ordering damages to the Plaintiff for the Defendant's failure to hand over vacant possession of the same by/on 26.3.2018. The property is located at No. 338, Ground Floor & Mezzanine Floor, Jalan Raja Laut, 50350 Kuala Lumpur.

Decision of this Court on Appeal

[3] On appeal, after having appraised the Records of Appeal, the Grounds of Judgment of the learned Sessions Judge and having considered the submissions by the learned counsels for both the parties, I allowed the Defendant's appeal herein. The Defendant's appeal was allowed on the following grounds.

Factual Background and Chronology of Events

The Plaintiff's Case

[4] The Plaintiff's case in brief is as narrated at pages 34 to 37 of the Record of Appeal. In essence, the Plaintiff's case is as follow:

(i) Raya Realty Sdn. Bhd. (Raya Realty) is the previous owner of a property located at Lot 1623, Seksyen 46, Bandar Kuala Lumpur Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur (the property);

(ii) *Vide* a Tenancy Agreement dated 26.07.2010, Raya Realty rented out the property to the Defendant for a tenure of 3 years ie, from 01.08.2010 until 31.07.2013 *(Exhibit "PB" - 'Rekod Rayuan' pages 136-151 referred* to);

(iii) 31.07.2013 - When the Tenancy Agreement expired on 31.07.2013, no fresh tenancy agreement was entered into between the parties. Thereafter, the tenancy was for a month to month basis;

(iv) 20.02.2018 - *Vide* letter dated 20.02.2018, Raya Realty informed the Defendant that they had sold the property (to the Plaintiff) and thereby gave the Defendant a *"one (1) month notice to quit and deliver vacant possession on or*

before 31.03.2018" (the first Notice to Quit) *('Rekod Rayuan' pages 160 referred to).* The Defendant did not dispute the service of the said Notice.

(v) 26.03.2018 - Raya Realty finalised the sale of the property to the Plaintiff *vide* a Sales and Purchase Agreement dated 26.03.2018. It was agreed that the sale was without vacant possession and the Plaintiff acknowledged that the property was then still tenanted to the Defendant on a month to month basis *(Exhibit "P1' - 'Rekod Rayuan' pages 162-178 referred to);*

(vi) 31.03.2018 - The Defendant did not hand over vacant possession to Raya Realty by/on the 31.03.2018 and continued to pay rental to Raya Realty for the subsequent months of March, April and May;

(vii) 04.05.2018 - *Vide* their solicitor's letter dated 04.05.2018 the Plaintiff served a Notice to Quit (the second Notice to Quit) on the Defendant, demanding that the Defendant hand over vacant possession by/on 15.05.2018 *('Rekod Rayuan' page 179 referred to);*

(viii) 15.05.2018 - Yet again, come 15.05.2018, the Defendant failed to comply and continued to remain on the property;

(ix) 31.05.2018 - The Plaintiff only became the registered owner of the property commencing from 31.05.2018;

(x) 07.06.2018 - *Vide* letter dated 07.06.2018, Raya Realty informed Defendant of its intention to pay the deposit paid by the Defendant under the Tenancy Agreement to the new owners (Plaintiff) for the purpose of paying the Defendant's

rental of the property *("Rekod Rayuan" page 197 referred to).*

[5] Hence, premised on the above facts, on 11.06.2018 the Plaintiff commenced Guaman No. WA-B52NCVC-321-06/2018 in the Sessions Court against the Defendant claiming *inter alia*, for vacant possession. It is the Plaintiff's case that the Defendant having failed to hand over vacant possession by 15.05.201 is a trespasser on the property effective 16.05.2018.

The Defendant's Case

[6] In its Statement of Defence, the Defendant pleads the following:

(i) the Defendant rented the property from Raya Realty for 3 years from 01.08.2010 until 31.07.2013 as per Tenancy Agreement dated 26.07.2010 *(Exhibit "PB");*

(ii) when the Tenancy Agreement expired on 31.07.2013, no fresh tenancy agreement was entered into between the parties;

(iii) thereafter, Defendant continued to rent on a monthly basis until 2018. According to the Defendant, it intended to purchase the property. So, along the way, there were negotiations towards that. However, in the end, the plan did not materialised;

(iv) then, by letter dated 20.02.2018, Raya Realty informed the Defendant that they had sold the property to the Plaintiff and thereby gave the Defendant one (1) month notice to quit and to deliver vacant possession on or before 31.03.2018;

(v) the Defendant however, continued to stay on and continued to pay rent to Raya Realty for the subsequent months of February 2018 to May 2018, of which Raya Realty, willingly accepted the payments made;

(vi) by letter dated 04.05.2018 the Plaintiff served another Notice to Quit on the Defendant to hand over vacant possession by/on 15.05.2018. The Defendant disputed the said Notice and therefore did not move out from the property by/on the date as fixed;

(vii) instead, by letter dated 07.06.2018, Raya Realty notified the Defendant they forwarded the rental and utility deposits paid by the Defendant under the Tenancy Agreement dated 26.07.2010 *(Exhibit 'PB)* to the new owner (Plaintiff) as payment for the Defendant's rental of the property. The Plaintiff also, willingly accepted the payments channelled to them;

(viii) Raya Realty did not refund the deposits to the Defendant.

[7] At the closed of the Plaintiffs case, the learned counsel for the Defendant opted not to call any witness and chose to submit no case to answer based on the pleadings of the parties and the evidence adduced by the Plaintiff. In essence, the Defendant submitted that the Plaintiff has failed to proof their case for the Defendant to answer.

[8] In a nutshell, the Defendant claimed that they are still the lawful tenant and did not trespass on to the said property as alleged by the Plaintiff.

The Findings and Decision of the Sessions Court

[9] The learned Sessions Judge allowed the Plaintiff's claim. The detailed reasonings of the Sessions Judge in allowing the Plaintiff's

claim are as per her 'Grounds of Judgment' *('Rekod Rayuan Tambahan' pages 12-34 referred to)*. Briefly, the Sessions Judge made the following findings:

(i) that the Plaintiff is the owner of the said property after having purchased it from the previous owner, Raya Realty;

(ii) that the purchase was subjected to the Tenancy Agreement between Raya Realty and the Defendant;

(iii) that the Plaintiff had never intended to let out the property;

(iv) that the Notice to Quit was duly served on the Defendant;

(v) that the Notice to Quit was valid and enforceable;

(vi) that the first Notice to Quit was a special notification given by the landlord (Raya Realty) to the Defendant to deliver vacant possession to the Plaintiff;

(vii) that the Defendant failed to hand over vacant possession as requested by the Plaintiff, making the Defendant a trespasser on the said property;

(viii) that the rent for the months of February, March, April and May 2018 were paid to the previous owner (Raya Realty) and not to the Plaintiff;

(ix) that the Defendant failed to show waiver by the Plaintiff of the Notice to Quit;

(x) that the transfer of the rent collected by Raya Realty to the Plaintiff does not amount to an attornment:

(xi) that the Defendant did no plead waiver and/or attornment in its Statement of Defence;

Issues for determination on Appeal

[10] The parties listed down the following issues for determination as per at pages 38 and 39 of the 'Rekod Rayuan'. For this Appeal, the main issues to be determined are:

(i) Whether the Notices to Quit issued and served onto the Defendant are valid and effective?;

(ii) Whether there was waiver of the Notice to Quit?;

(iii) Whether there was attornment?

(iv) Whether the Notice to Quit is reasonable/adequate?

(v) Whether the Defendant is a trespasser?

(vi) Whether the Plaintiff is entitled to damages?

(vii) Whether the Sessions Judge was correct in rejecting the Defendant's submission of no case to answer?

Submissions on Appeal

The Defendant/Appellant's Submission

[11] On the Defendant's submission of no case to answer, learned counsel for the Defendant submitted that the learned Sessions Judge had erred in failing to thoroughly consider the Defendant's submission of no case to answer. Learned counsel submitted that, the Plaintiff's case is so unsatisfactory and that the Plaintiff had failed to discharge its burden of proof. Therefore, the Sessions Judge should have considered and accepted the Defendant's submission of no case to answer.

[12] On the issue relating to the Notice to Quit, learned counsel submitted that the first Notice to Quit dated 20.02.2018 had been waived by the Plaintiff and that the second Notice to Quit dated 04.05.2018 is ineffective and bad in law.

[13] Learned counsel submitted that the Sessions Judge had also erred in finding that the first Notice to Quit is a special notification to deliver vacant possession.

[14] Learned counsel submitted that the Sessions Judge had erred in refusing to consider the Defendant's defence on waiver and attornment on the ground that they were not pleaded.

[15] Learned counsel further submit that the Sessions Judge had also erred in finding that the Plaintiff never intended to rent out the property to the Defendant and that the Defendant is a trespasser.

The Plaintiff/Respondent's Submission

[16] Converse to the Defendant's submission, the Plaintiff's counsel submitted that the Sessions Judge made the correct findings both on the facts and the law. Counsel submitted that the Defendant failed to show that the Sessions Judge had erred in rejecting the Defendant's submission of no case to answer.

[17] Counsel submitted that the Sessions Judge was correct in finding that the Notice to Quit was proper and valid. Consequently, the Sessions Judge was not wrong in ruling that the Defendant is a trespasser.

[18] On the issue of waiver and attornment, learned counsel submitted that the Sessions Judge was correct in rejecting the defence of waiver and attornment as it was not pleaded and due to the absence of evidence of intention to waive. Counsel relied on the Federal Court

case of *Muniandy a/l Themba Kaunder & Anor v. Development & Commercial Bank Bhd & Anor* [1996] 2 CLJ 586 where it was held that there can be no waiver in the absence of an intention to waive.

The Findings and Decision of this Court on Appeal

[19] The principle of law in respect of appeal from the lower Court is trite. An appellate Court would not disturb the findings of facts of the trial Court unless there is error in the finding on the material facts and law. The burden/onus to prove error is on the appellant. An appeal is by way of rehearing (the case of *Government of Malaysia v. Zainal bin Hashim* [1997] 2 MLJ 254 F.C, amongst others referred to).

[20] After having considered the submissions by the learned counsels for both sides, I am in agreement with the Defendant/Appellant's counsel that the learned Sessions Court Judge has materially erred in her decision and findings in allowing the Plaintiff's claim. I find that the Defendant/Appellant has succeeded in showing to this Court that the learned Sessions Judge has fallen into error in her . findings and decision.

[21] I agreed with the submission of the counsel for the Defendant based on the following undisputed facts:

(i) that the tenancy is on a month to month basis;

(ii) that there are 2 Notices to Quit dated 20.02.2018 and 04.05.2018 respectively;

(iii) that the Defendant did not hand over vacant possession and continued to pay rent for the subsequent months;

(iv) that the landlord (Raya Realty) continued to accept the rents paid by the Defendant;

(v) that the new landlord (the Plaintiff) willingly accepted as payment of rental the deposit paid by the Defendant under the Tenancy Agreement dated 26.07.2010 through the previous landlord (Raya Realty);

(vi) that the Plaintiff's claim for vacant possession and for damages for tresspass is premised on the second Notice to Quit.

Issues on the validity of the Notices to Quit. on waiver of the Notice to Quit and on attornment

[22] All the three (3) issues abovementioned are interrelated and intertwined, based on the same set of undisputed/agreed facts.

Issues on the validity of the Notice to Quit

[23] As regard to this issue, at the outset, it is pertinent to note that it is the case for the Defendant that the Notices to Quit (the first and the second Notice to Quit) are ineffective and invalid. The Defendant claimed that, even if assuming that the Notices to Quit were properly/regularly issued, the Notices to Quit are ineffective.

The first Notice to Quit - whether there was waiver?

[24] The learned Sessions Judge held that the Notice to Quit was duly served on the Defendant and that the Notice to Quit was valid and enforceable.

[25] The Sessions Judge also ruled that the first Notice to Quit was a special notification given by the landlord (Raya Realty) to the Defendant to deliver vacant possession to the Plaintiff. I am unable to agree with the Sessions Judge's finding aforesaid.

[26] It is not disputed that there are two (2) Notices to Quit served on the Defendant. The first one is dated 20.02.2018 *('Rekod Rayuan' page 160)* and the second dated 04.05.2018 *('Rekod Rayuan' page 179).* Both the Notices were duly served on the Defendant. The first Notice was issued by the previous/original landlord (Raya Realty) and the second, by the Plaintiff. The Defendant did not deny receiving the two (2) Notices.

[27] In respect of the first Notice to Quit, it was not issued by the Plaintiff but by Raya Realty, the previous owner of the property. Under the said Notice, the deadline given to the quit is by/on 31.3.2018. I find that the learned Sessions Judge in ruling that the first Notice to be valid and enforceable, failed to consider these unchallenged facts/evidence subsequent to the said first Notice to Quit:

(i) the Defendant continued to pay rent to the landlord (Raya Realty) beyond the deadline set and the landlord continued to accept the rent paid;

(ii) the Defendant continued to stay on the property and the landlord did not take any legal action to execute/enforce the first Notice;

(iii) the landlord then issued the second Notice to Quit dated 04.05.2018.

[28] Eventhough, Raya Realty issued a Notice to Quit dated 20.02.2018, the Defendant continued to stay oh and continue paying rent up until June 2018, which were accepted by the Raya Realty being the then landlord.

[29] In my view, the above unchallenged facts all pointed to the fact that the landlord did not intend to enforce the said first Notice. I find

that the conduct of the parties especially the landlord speak volume of their intention and based on those facts it can only be concluded that the first Notice to Quit has been abandoned by the landlord.

[30] The learned Sessions Judge ruled that there was no waiver of the Notice to Quit by the landlord/Plaintiff. With respect, based on the facts adduced and not in dispute, I find the findings/decision by the Sessions Judge to be in error. I am in agreement with the submission by the learned counsel for the Defendant that the first Notice to Quit has been waived by the landlord/Plaintiff, firstly, by the act/conduct of the landlord in accepting the rental payment for the subsequent months of February, March, April and Mei 2018 subsequent to issuing the First Notice to Quit and secondly, the Plaintiff's issuance of the second Notice to Quit.

[31] In my view, there cannot be two (2) Notices to Quit with two (2) different datelines given for the Defendant to quit and to hand over vacant possession. The conduct of Raya Realty in continuing to accept rent from the Defendant after the dateline in the Notice to Quit and also that of the Plaintiff in accepting the deposits paid under the original Tenancy Agreement, all pin-pointed to waiver of the Notices to Quit by the landlord.

[32] In *Muniandy a/l Themba Kaunder & Anor v. Development & Commercial Bank Bhd & Anor* [*supra*] it was held that there can be no waiver in the absence of an intention to waive. Edgar Joseph Jr FCJ had this to say:

> Held:[6] "There can be no waiver in the absence of an intention to waive. The chargers here were laypersons and unrepresented and obviously knew nothing about their legal rights. In these circumstances, the chargers acceptance of the money could not .be construed as an intention to waive those

rights. In any event, an order which is a nullity is incapable of being waived. The chargers' summons in chambers, therefore, was not barred by waiver".

[33] In the case above mentioned, it was held that there was no waiver since tha chargor being laypersons and unrepresented, knew nothing of their legal rights. However, the facts in our present appeal/case is the opposite. The Plaintiff was represented by solicitors and never once did it reject payments made and there was no proof that the payments were accepted under protest. As we all know, intention of parties can be deciphered and deduced *via* their actions and conduct. I find that the Plaintiff's conduct as a whole showed that the Plaintiff has acknowledged and accepted the presence of the Defendant as lawful tenants to the property.

[34] The learned Sessions Judge did not take these facts into account. The learned Session Judge had erred in failing to appreciate the effect of the acceptance of rental paid by the Defendant to the landlord after the month of January 2018, the rental of which were subsequently accepted by the Plaintiff without objection.

[35] As such, I am in agreement with the learned counsel for the Defendant that the learned Sessions Judge was in error in finding/ruling that the first Notice to Quit is valid and effective and that the first Notice to Quit was a special notice for the Defendant to deliver vacant possession to the Plaintiff. I find that the said first Notice has been waived and overidden by the second Notice to Quit dated 4.5.2018. So, the followed up question is what is the status/legal standing of the second Notice to Quit?

The Second Notice to Quit

[36] The second Notice to Quit dated in fact made reference to the first Notice. The second Notice to Quit was issued by the Plaintiff

through their lawyer on 04.05.2019. Whereas, at that moment, the Plaintiff was still not the registered owner of the property. The Plaintiff only became the legal owner of the property on 06.06.2018 when the sale of the property by the Plaintiff was completed and legal possession was delivered by Raya Realty to the Plaintiff.

[37] According to the SPA, legal possession of the property shall only be delivered to the purchaser (Plaintiff) upon payment of the balance purchase price to the Vendor (Raya Realty) and release of the rental and utilities deposits to the purchaser. In this case, it is not disputed that payment was only made to the purchaser (Plaintiff) on 11.06.2018 *('Rekod Rayuan' page 100 referred to).* The Plaintiff accepted the payment made by Raya Realty.

[38] Thus in my mind, it is incumbent on the Court to look into the factual matrix of the case including the conduct of the parties. Unfortunately, in my view, the learned Sessions Judge has failed to undertake that exercise as she seemed overly engrossed with the submission of no case to answer made by the Defence counsel. The learned Session Judge failed to consider this conduct of the Plaintiff in not rejecting the deposit and instead in accepting the rental payments forwarded by Raya Realty, was consistent with "waiver" of the First Notice to Quit.

[39] Having appraised the evidence and having considered the submissions, I am in agreement with the learned counsel for the Defendant. In respect of the first Notice to Quit I find that it has been waived and taken over by the second Notice to Quit. In respect of the second Notice to Quit, based on my following findings, I find it to be bad in law and thus ineffective.

The Second Notice to Quit - whether it is adequate?

[40] The second Notice to Quit was issued by the Plaintiff through their lawyer on 04.05.2019. The second Notice to Quit dated 04.05.2018 made reference to the first Notice.

[41] *Via* the second Notice, the Plaintiff gave a final Notice to Quit whereby the Defendant was asked to quit in 1O days ie, by 15.05.2018 *('Rekod Rayuan' - page 179 referred to).* The said Notice which is dated 04.05.2018 states the following:

> "TAKE NOTICE that we are hereby giving you final notice that you are required to quit and deliver vacant possession of the said premises .Qy 15.05.2018...." (emphasis added).

[42] It is not in dispute that the premises/property was rented by Defendant for its business outlet. The Plaintiff as the new owner is aware and acknowledged this fact. In the case of *JR Lincks Educational Consultants Sdn Bhd v. Goh & Sons Enterprise Sdn Bhd* [2008] 3 CLJ 808 KN Segara JCA at page 840 said as follows:

> "Any notice to quit business premises must give adequate and sufficient time for the tenant to find new premises to relocate and continue its business from there...In our view. any valid notice to terminate a fixed term tenancy of business premises. in order to be sufficient and reasonable in the absence of any express and unambiguous term in the agreement. should not be less than three month". (emphasis added)

[43] I am aware that the facts in abovementioned case may be distinguished with the facts in our present appeal. The case of *JR Lincks* [*supra*] concerned a fixed term tenancy as compared to our case which is a month to month tenancy. Hence, to require the Plaintiff in our case to give a notice of not less than three (3) months,

in my view, would not be fair on the Plaintiff, but a ten (10) days notice to vacate as the one given by the Plaintiff to the Defendant in our case is, to me, most unreasonable. It is too short a notice. This fact was not taken into consideration by the learned Sessions Judge.

[44] Hence, based on the abovementioned I find the dateline of 31.03.2018 fixed in the first Notice to Quit to be ineffective. A new Notice of Quit ought to have been issued and a new one apparently, was issued as per second the Notice dated 4.5.2018 *(Appeal Record p.179 referred to).* However, based on the reasons given above, I find the second Notice to be unreasonable and thus ineffective. In my view, should the Plaintiff decides to terminate the Tenancy Agreement with the Defendant, then it has to issue a new/fresh Notice of Quit again, in accordance with the law.

Whether the second Notice to Quit is valid and effective?

[45] According to the SPA, legal possession of the property shall only be delivered to the purchaser (Plaintiff) upon payment of the balance purchase price to the Vendor (Raya Realty) and upon the release of the rental and utilities deposits to the purchaser. Clause 10 of the Sales and Purchase Agreement (Exhibit 'P1') provides the following:

> "10. DELIVERY OF LEGAL POSSESSION
>
> (a) The Vendor shall deliver legal possession together with the existing Tenant (if any) of the said Property on an as is where is basis to the Purchaser on the date the Balance Purchase Price together with any late payment interest and apportioned sum are deposited with the Vendor's Solicitors (hereinafter referred to as "the Delivery Date").

(b) For the avoidance of doubt, the legal possession of the said Property is deemed to deliver upon the Purchaser received the followings:

(i) Notice to the tenant within seven (7) days from the date of this Agreement that the said Property has been sold to the Purchaser;

(ii) To issue a letter of termination of tenancy to the existing tenants by giving them one month notice to yield up the said Property to the Vendor within one month from the date of notice;

(iii) The Vendor shall remit both the Rental Deposit, Utility Deposit and the apportioned sum to the Purchaser upon passing of legal possession from the Vendor to the Purchaser if the Tenant still remain effective".

[46] In this case, it is not disputed that payment was only made to the purchaser (Plaintiff) on 11.06.2018 *('Rekod Rayuan' page 100 referred* to) which the Plaintiff readily accepted.

[47] In the case of *Thompson v. McCullough* [1947] KB 447 it was held that where a Notice to Quit issued before the completion of the purchase the property, such a notice is ineffective. In that case it was held:

> "that, in the absence of direct evidence as to the delivery of the deed of conveyance, the fact that on April 1O only part of the purchase price had been paid justified the inference that the deed, if delivered on that date, was delivered as an escrow pending payment of the balance; that the deed. on being made effective on June 21 by payment of the balance, could not

operate retrospectively to validate the plaintiff s notice to quit to the defendant dated April 12; that the plaintiff had no power to give that notice on that date since he was not yet the freeholder and might never have become so" (emphasis added)

[48] Thus it is not in dispute that when the second Notice to Quit was issued by the Plaintiff's solicitor on 04.05.2019, the Plaintiff was still not the registered owner of the property. The Plaintiff only became the legal owner of the property on 06.06.2018. Thus, based on the aforesaid, I find the Notice to Quit to be ineffective.

[49] Even if assuming the above second Notice to Quit was properly/regularly issued, based on my ruling/finding at paragraphs 40 to 44 above mentioned, the ten (10) days grace period given to the Defendant to vacate the property is to my view, unreasonable. Therefore, I find that the second Notice to Quit to be ineffective.

Whether there was attornment?

[50] The learned Sessions Judge dismissed the submission by the Defendant on attornment and made the following findings:

(i) that the transfer of the rent collected by Raya Realty to the Plaintiff does not amount to an attornment.

(ii) that the Defendant did no plead attornment in its Statement of Defence;

[51] Learned counsel submitted that the Sessions Judge made the findings purely on the ground that it was not pleaded. Counsel maintained that from the conduct of the parties, particularly that of the Plaintiff and Raya Realty, there was attornment of the tenancy agreement with the Defendant.

[52] Learned counsel submitted that there is no need to plead attornment as it is a point of law and not of facts. Counsel submitted that since the Defendant had opted not to give evidence and instead to submit no case to answer, whether or not it was pleaded becomes irrelevant. The Court must in the circumstances, consider the point. However, the learned Sessions Judge erroneously, failed to do so.

[53] Under the Tenancy Agreement (Exhibit 'P3') the Defendant paid RM48,000-00 to the landlord (Raya Realty) equivalent to three (3) months rental *('Rekod Rayuan' - Second Schedule item 6 at page 149 referred to).*

[54] It is undisputed that the Plaintiff as landlord upon obtaining legal possession/title to the said property did not at any time forfeit the deposits paid by the Defendant under the said Agreement. Instead, the deposit was accepted by the Plaintiff. For clarity, Clause 2(a) of the Tenancy Agreement (Exhibit 'P3') states the following:

> 2. THE TENANT HEREBY COVENANT WITH THE LANDLORD as follows:
>
> "(a) To pay Landlord upon the execution of this Agreement a deposit in the manner stipulated in Section 6 of the Second Schedule hereto (hereinafter referred to as "the Deposit") (the receipt whereof the Landlord hereby acknowledges) as security for the due observance and performance by the Tenant of the stipulations, terms and conditions of this Agreement. The said Deposit shall be maintained at this figure during the term of this Agreement and shall not be deemed or treated as payment of rental unless the Landlord chooses to do so and the same shall be returned to the Tenant without interest on the determination of this Agreement".

[55] In my view, the fact that the deposit was never at any time forteited by either Raya Realty or the Plaintiff, coupled with the acceptance of the rental payment made by the Defendant even after the expiration of the Tenancy Agreement, all pinpointed to attornment of the said monthly tenancy agreement between Raya Realty and Defendant.

[56] It is not in dispute that the Plaintiff is not privy to the said tenancy agreement and therefore not bound to follow it. Even if the Plaintiff is to fall back on the monthly tenancy which it inherited from Raya Realty, the Plaintiff could have follow through with its right and determined the said agreement by refusing to accept rental payment from the Defendant, but instead the Plaintiff chose to accept the rental payment made by the Defendant.

[57] Based on the facts especially the conduct of the Plaintiff aforesaid, I find that the Plaintiff has attorned to the Defendant by accepting him as his tenant. In the Federal Court case of *Cheak Lek San v. Yong Kam Chin* [1970] 2 MLJ. 179 at page 180 Suffian L.P said the following:

> "The law has been conveniently summarised by *Spenser-Bower and Turner* on *Estoppel by Misrepresentation, 2nd Edition,* page 173, as follows:
>
> "Where a tenant, with full knowledge of the facts, ... attorns tenant to a person other than his original landlord... he is ordinarily estopped from questioning the title of the person to whom he has attorned. But here, too, it is open to the party sought to be estopped to explain away the attornment, and so escape the estoppel to which he would otherwise be subject, by proof that when he so attorned, he was labouring under mistake or ignorance as to material facts affecting the title of the person to whom he attorned ..."

[58] Based on the terms of the SPA between the Plaintiff and Raya Realty, the Plaintiff clearly agreed to purchase the property together with the incumbrances attached to it, namely, the Defendant as monthly tenant of the property. Thus, based on their conduct, I find as submitted by the Defendant's counsel, the Plaintiff is estopped by attornment from claiming the Defendant as trespasser on the property.

Whether the Defendant is a trespasser

[59] The learned Sessions Judge ruled that the Notices to Quit were valid and effective and that the Defendant failed to hand over vacant possession by the dateline set. The learned Session Judge ruled that the Plaintiff never intended to rent out the property to the Defendant and that the Plaintiff purchased the property for its own use.

[60] At the risk of me repeating what I have said and ruled in earlier paragraphs, the Defendant never defaulted in paying the monthly rental for the month subsequent to the "termination" of the Tenancy Agreement. The payments were accepted and never rejected by Raya Realty. Neither were the payments received under protest by them. In the case of *Monashofian bin Zulkarnain Putra v. KLCC Urusharta Sdn Bhd & Anor* [2003] 1 LNS 86 Vincent Ng J states as follows:

> "....On this point, I would restate the trite law, a tenant who continues in occupation after the expiry of the tenancy period in the agreement, does so only as a monthly tenant or as a trepasser. He becomes a trepasser if he is in continued occupation without consent of the landlord and a monthly tenant if that is implied-through acceptance of rental or express consent...." (emphasis added).

[61] Based on the whole evidence adduced by the Plaintiff, I have to disagree with the Session Judge's findings/ruling. In my view, the

conduct and action of the parties especially of Raya Realty in continuing to accept/collect the rental for the subsequent months and more significantly the Plaintiff's conduct of accepting the rental and utility deposits, nullified the findings of the Sessions Judge. I find that, there was no evidence to support the Sessions Judge's finding/ruling.

[62] The Plaintiff also alleged that since no permission was given to the Defendant to remain on the property post the dateline, the Defendant became a trespasser on the Plaintiff's property. However, oddly enough the Plaintiff did not claim for double rerital for the period the Defendant was alleged to have trespassed.

[63] The Plaintiff claimed that the Defendant is a trespasser as per paragraph 9 of the Plaintiff's Statement of Claim. If indeed the Defendant is one as claimed, why then Plaintiff did not claim double rental for the period/duration of the alleged trespass eventhough it is allowed under the law to claim as such? As can be seen the Plaintiff's Statment of Claim at paragraph 11 (d) the Plaintiff did not claim for double rental eventhough **section 28(4) (a) of the Civil Law Act, 1956** clearly allowed so. Section 28 (4) provides the following:

> Section 28 (4)
>
> (a) "Every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of his rent until possession is given up by him or with double rental the value during the period of detention of the land or premises so detained, whether notis to that effect has been given or not"

[64] Based on the abovementioned, I find that the claim by the Plaintiff that the Plaintiff is a trespasser is an afterthought and that the Plaintiff had failed to prove it. Therefore I find that the learned

Sessions Judge has erred her finding that the Defendant was a trespasser and consequently allowing the Plaintiff's claim for damages.

[65] I find that the learned Sessions Judge also erred in accepting as true the Plaintiff's version that the Plaintiff never intended to rent out the property to the Defendant and that the Defendant is a trespasser. The Sessions Judge failed to consider the conduct of the landlord subsequent to the issuance of the notices as mentioned in the above paragraph.

Issue on submission of no case to answer

[66] As to the option taken up by the Defendant to submit no case and not to call witnesses learned counsel for the Plaintiff referred to the cases of *lb Builders Sdn Bhd v. Kheng Bee Company Sdn Bhd & Anor Civil Appeal* [2015] MLJU 17, *M & A Securities Sdn Bhd v. Ng Chi Kwong* [2011] 1 LNS 469 and *Yew Lin Lai v. Teo Meng Hai & Anor* [2013] 8 MLJ 787 where it was held by the Courts that once a defendant in a civil proceeding elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true. Counsel for the Plaintiff submitted that the learned Sessions Judge was correct in rejecting the Defendant's submission of no case to answer since the evidence/testimonies of the Plaintiff's witnesses are assumed to be true.

[67] On the other hand, counsel for the Defendant relied on the cases of *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Nairn* [2015] 2 CLJ 1037 and *Lembaga Penggalakan Pelancongan Malaysia v. Ong Big Option Sdn Bhd* [2017] 1 LNS 1566.

[68] It is the contention of the learned counsel for the Defendant that the evidence of the Plaintiff's witnesses failed to withstand the cross examination by the Defence and that factually and evidentially, the evidence is so unsatisfactory that the Plaintiff had failed to discharge its burden of proof. Counsel submitted that based on the decision in the cases abovementioned, the learned Sessions Judge was in error.

[69] After having considered the points raised by both the counsel, based on the facts of this case and the status of the law as decided in the cases referred to, I am in agreement with the Defendant's counsel. I find that as can be gauged from the Grounds of Judgment, the learned Session Judge did not seem to give much scrutiny on the submission of no case to answer of the Defendant's counsel. The submission was glossed through and mentioned in one brief four (4) line short paragraph in her Grounds of Judgment *(paragraph 24 of the Alasan Penghakiman Rekod Rayuan Tambahan at page 20 referred to).*

[70] In · the case *Lembaga Penggalakan Pelancongan Malaysia* [*supra*] the Court of Appeal held that:

> "..... even though the Defendant had elected to a "no case to answer" the trial court is not absolved of its duty to look at the entire evidence of the Plaintiff and his witnesses, which also includes the answers given under cross- examination in order to determine whether the Plaintiff had adequately discharge his burden. The trial court must evaluate the evidence of the Plaintiff in its entirety''.

[71] In the case of *Syarikat Kemajuan Timbermine Sdn Bhd* [*supra*], the Federal Court held that

> "..... despite the fact the defendant did no call any witness and that even if the plaintiffs evidence is unopposed (and therefore

presumed to .be true), this does not automatically equate to that evidence satisfying the burden of proving the existence of the settlement agreement borne by the plaintiff, or mean that the burden of proving on the balance of probabilities no longer applies, or that a case to answer is automatically made out. The evidence adduced by the plaintiff must still be sufficient to prove the existence of the settlement agreement"

[72] The learned Sessions Judge in her Grounds of Judgement did not even touch on the two (2) cases abovementioned especially the later which was decided by our apex Court. From the decision in two cases abovementioned, it is thus clear inmy view that a submission of no case to answer is not a passport exempting the Plaintiff from proving its case. The duty/burden to prove its claim on a balance of probability still remain.

[73] Therefore in my view, it is the duty of the Court to scrutinize more deeply into the evidence adduced. The Court cannot just assumed the evidence adduced by the Plaintiff to be true. In our case, to be fair to the learned Sessions Judge, at paragraph 27 of her Grounds of Judge, she did say that she had considered the evidence of the Plaintiff. However, I find that her findings seems to go against the undisputed evidence adduced, especially concerning waiver and attornment.

[74] I am in agreement with the learned counsel for the Defendant. In my view had the learned Sessions Judge properly evaluated and took into account the evidence of the conduct of the Plaintiff and Raya Realty relating to their acceptance of rental from the Defendant for the months of February, March, April and May 2018, she would have no choice but to find that the first Notice to Quit has been waived by the Plaintiff and Raya Realty.

[75] Hence, I find that the learned Sessions Judge was in error. I find that the Defendant had succeded in showing that is no case to answer.

Issue on entitlement of damages

[76] The Plaintiff claimed for damages can be seen at paragraph 11(d) of its Statement of Claim. As I see it, the Plaintiff's claim for damages is predicated on the first Notice to Quit issued by the landlord (Raya Realty), as can be discerned through prayer 11(d) wherein, the Plaintiff claims:

> "(d) Gantirugi yang ditaksir oleh Mahkamah .... bagi kerugian yang ditanggung akibat dari kegagalan Defendant menyerahkan milikan kosong kepada Plaintif dari 26.03.2018 hingga tarikh penyerahan milikan kosong;"

[77] The date mentioned above ie, 26.03.2018 was not the deadline given to the Defendant to hand over the said property in the first Notice to Quit. The first Notice gave the Defendant up until 31.03.2018. So, why did the Plaintiff then claimed for damages effective from 26.03.2018?. The Plaintiff's justification is "Exhibit P1" ie, the Sales and Purchase Agreement which the Plaintiff had entered with the then landlord (Raya Realty) on 26.03.2018 *(Appeal Record pages 161-178).* According to the Plaintiff, effective from 26.03.2018 it has become the owner of the property and since the Defendant failed to hand over vacant possession despite the first Notice to Quit being reguarly and legally served, the Defendant became a trespasser on the property effective 26.03.2018. Hence, they are liable for damages claimed by the Plaintiff. The learned Session Judge agreed with the Plaintiff.

[78] With respect, I find that the Sessions Judge also had erred on this point. I find the facts and evidence adduced showed that the first

Notice to Quit had been waived. My finding on this is based also on the letter from the landlord (Raya Realty) through their lawyer Tetuan Helen Lim & Co to the Defendant dated 07.06.2018, informing the Defendant of the sale the property by Raya Property to the Plaintiff and for "payment of all future rental" to be paid to the Plaintiff as the purchaser of the property *(Appeal Record p.197 referred to)*. 'Future rental' would necessarily connote any rental post the month of June 2018 being the month the letter/notice was dated. This goes to show that the Plaintiff has impliedly agreed to extend the month to month tenancy beyond June 2018.

[79] Based on the abovementioned, I find that the Plaintiff's claim for damages on the ground that the Plaintiff is a trespasser is an afterthought and that the Plaintiff had failed to prove it. Therefore I find that the learned Sessions Judge has erred her finding that the Defendant was a trespasser and in consequently allowing the Plaintiff's claim for damages.

Conclusion

[80] Based on the grounds and findings mentioned above, I find that the Defendant/Appellant had succeeded in showing to the Court that the learned Session Judge had erred in her rulings and findings in coming to her decision in allowing the Plaintiff's claim. The learned Sessions Judge has erred in failing to find that the the defence of no case to answer has been successfully proved by the Defendant. Therefore the Defendant's Appeal is allowed and it was ordered that the Sessions Court decision dated 13.12.2018 be overruled.

Dated: 30 APRIL 2020

(AHMAD ZAIDI IBRAHIM)
Judge
High Court Malaya
Kuala Lumpur

COUNSEL:

For the plaintiff/respondent - Celena Chay Woon Wei; M/s Lim Soh & Goonting

For the defendant/appellant - Michael Chow; M/s Michael Chow

Case(s) referred to:

Cheak Lek San v. Yong Kam Chin [1970] 2 MLJ 180

Government of Malaysia v. Zainal Bin Hashim [1997] 2 MLJ 254 F.C

JR Lincks Educational Consultants Sdn Bhd v. Goh & Sons Enterprise Sdn Bhd [2008] 3 CLJ 808 CA

Lembaga Penggalakan Pelancungan Malaysia v. Ong Big Option Sdn Bhd [2017] 1 LNS 1566

M & A Securities Sdn Bhd v. Ng Chi Kwong [2011] 1 LNS 469

Monashofian bin Zulkarnain Putra v. KLCC Urusharta Sdn Bhd [2003] 1 LNS 86

Muniandy all Themba Kaunder & Anor v. Development & Commercial Bank Bhd & Anor [1996] 2 CLJ 586

Ramayee Gengan & Ors v. Tan Yik Kok & Anor [1983] CLJ (Rep) 828

Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Nairn [2015] 2 CLJ 1037

Thompson v. McCallogh [1947] KB 447

Yew Lin Lai v. Teo Meng Hai & Anor [2013] 8 MLJ 787

lb Builders Sdn Bhd v. Kheng Bee Company Sdn Bhd & Anor Civil Appeal [2015] MLJU 17

Legislation referred to:

Civil Law Act 1956, s. 28(4) (a)