IN THE HIGH COURT OF MALAYA AT IPOH

IN THE STATE OF PERAK DARUL RIDZUAN

CIVIL SUIT NO.: AA-22NCvC-28-04/2019

BETWEEN

1. **HJ ABDUL MANNAN ROMEL**
2. **SHAYAN GOLDEN HOUSE (M) SDN BHD**

…PLAINTIFFS

AND

1. **NOH BIN AHMAD**
2. **MOHAMAD BIN CHE GHANI**
3. **ROSLI BIN ABD RAHMAN**

…DEFENDANTS

CONSOLIDATED AND HEARD TOGETHER

IN THE HIGH COURT OF MALAYA AT IPOH

IN THE STATE OF PERAK DARUL RIDZUAN

CIVIL SUIT NO.: AA-22NCvC-20-02/2020

BETWEEN

1. **NOH BIN AHMAD**
2. **MOHAMAD BIN CHE GHANI**
3. **ROSLI BIN ABD RAHMAN**

…PLAINTIFFS

AND

1. **NOOR HISSHAM BIN ABD AZIZ**
2. **HJ ABDUL MANNAN ROMEL**

…DEFENDANTS

GROUNDS OF JUDGMENT

INTRODUCTION

[1] The Plaintiffs filed this suit against the Defendants for unlawful termination of the Tenancy Agreement dated 1.4.2016.

BACKGROUND FACTS

[2] The 1st Plaintiff is a Bangladesh citizen with a Bangladesh passport and is also a holder of the Malaysian Residence Pass which enables him to work, study and/or conduct business in Malaysia. The 1st Plaintiff was also the owner and the director of the 2nd Plaintiff.

[3] The 1st to 3rd Defendants are the PAS trustees for Lumut for land held under Geran Mukim 1903, Lot No. 8853, Mukim Sitiawan, Daerah Manjung, Neger Perak ("the Land") with an area of approximately 2.75 acres.

[4] The Defendants had entered into a Tenancy Agreement dated 1.4.2016 with Noor Hisham bin Abd Aziz i.e. the 1st Defendant in Civil Suit No.: AA-22NCvC-20-02/2020 ("Noor Hisham") whereby the Defendants had agreed to lease 1.25 acres of the Land with a monthly rental rate of

RM5,000.00 for the period of 3 years beginning 1.4.2016 until 31.3.2019 with a further option to renew for another 2 years.

[5] Sometime in October 2016, the Defendants had through their agent/representative, Encik Shukri bin Ali (SD2) and Osman bin Uyob, went to the Land to meet Noor Hisham but was only able to meet the 1st Plaintiff. Upon discovery that the 1st Plaintiff was occupying the Land instead of Noor Hisham, the Defendants had requested the 1st Plaintiff to vacate the Land.

[6] Following a discussion between the parties, the Defendants had issued a Notice dated 24.11.2016 ("1st Notice"), duly signed by the 1st Plaintiff, whereby the Defendants had allowed the 1st Plaintiff to occupy the Land until end of January, 2017 and that the 1st Plaintiff was required to demolish the temporary construction on the Land by 31st January 2017.

[7] The Plaintiffs had however failed to comply with the 1st Notice which led to the Defendants issuing another Notice dated 24.5.2017 (2nd Notice") compelling the Plaintiffs to vacate the Land by 30.6.2017.

[8] The Plaintiffs had however failed, refused and/or neglected from complying with the 2nd Notice. On 6.9.2017, the Defendants had proceeded to demolish the temporary construction and clear the Land.

[9] The Plaintiffs continued to occupy the Land and had reconstruct temporary construction on the Land. The Defendants had thus issued another notice dated 21.9.2017 ("the 3rd Notice") requesting the Plaintiffs to vacate the Land.

[10] Dissatisfied with the Defendants' action, the Plaintiffs had filed a suit against the Defendants seeking for, inter alia, damages against the Defendants. The Plaintiffs had continued to occupy the Land to this date.

[11] The Defendants had on the other hand filed an action against Noor Hisham and the 1st Plaintiff seeking for vacant possession of the Land on the ground that the tenancy period had expired.

ISSUES TO BE DETERMINED

[12] In my view, issues arose for the determination of this court as follows:-

(i) Whether the Plaintiffs were entitled to remedy under the Tenancy Agreement;

(ii) The validity of termination of the Tenancy Agreement; and

(iii) Whether the Plaintiffs were entitled to damages claimed.

(i) The Plaintiffs' occupation status on the Land

[13] It was the Defendants submission that the contracting parties under the Tenancy Agreement are the Defendants and Noor Hisham. The Plaintiffs were not referred to anywhere in the Tenancy Agreement and as such the Plaintiffs have no right to enforce the Tenancy Agreement.

[14] Evidence was however led to show, from the very beginning, that all rental invoices and receipts in respect of the Tenancy Agreement were issued by the Kompleks Pendidikan At-Taalim Sdn Bhd to the 2nd Plaintiff. This clearly shows that the Defendants were at all material time aware of the Plaintiffs occupying the Land.

[15] Furthermore, based on the subject matter of the 1st Notice issued by the Defendants to the 1st Plaintiff, which reads "*Per: Penyewaan Tanah GM 1903, Lot 8853 Mukim Sitiawan, Daerah Manjung*", this was in direct reference to the tenancy of the Land under the Tenancy Agreement. The

1st Notice further went on to state "*Sila maklum bahawa Tuan telah gagal dan abai membayar sewaan tanah sepertimana yang telah dipersetujui. Kami dapati jumlah sewaan yang dibayar dan dimasukkan ke dalam akaun adalah kurang daripada jumlah yang telah dipersetujui dan Perjanjian Penyewaan telah terbatal Berdasarkan kepada keingkaran Tuan sebagai Penyewa*". It is evident that the Defendants had acknowledged the 1st Plaintiff as the tenant of the Land.

[16] The principal fact or '*factum probandum'* may be proved indirectly by means of certain inferences drawn from '*factum probans'* i.e. the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue, but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together, they form a chain of circumstances from which the existence of the principal act can be legally inferred or presumed" (**Woodroffe and Amir Ali supra vol. 2 at p. 2236**).

[17] Application of the balance of probabilities comes down to whether it is more likely than not that an event had taken place (see **Re S-B Children [2010] 1 AC 678; Davies v. Taylor [1974] 1 AC 207**).

[18] Bearing in mind the principles as alluded above and in view of the overwhelming evidences adduced before me particularly the invoices and receipts issued in the name of the 2nd Plaintiff, this court is convinced that the Defendants had knowledge of the Plaintiffs' status as the rightful tenant of the Land. Noor Hisham in entering into the Tenancy Agreement with the Defendants had clearly acted in his capacity as an agent and/or representative of the Plaintiffs.

[19] In view of the chain of circumstances of the present case and guided by the above authorities, it is in my considered view that the Plaintiffs are the rightful tenant to the Land as acknowledged by the Defendants. The Plaintiffs are therefore entitled to claim for remedy under the Tenancy Agreement. Having said that, the court is therefore of the view that the Defendants cannot now come to court and object the Plaintiffs' claim under the Tenancy Agreement unless they could show that they had not acquiesced in the Plaintiffs' act of occupying the Land.

(ii) <u>Whether the Plaintiff was entitled to remedy under the Tenancy Agreement</u>

[20] Notwithstanding my findings above, the question of whether the Plaintiffs are entitled to remedies and/or damages sought are heavily

dependant on the next question in issue i.e. the validity of termination of the Tenancy Agreement.

(iii) <u>Validity of the termination of the Tenancy Agreement</u>

[21] It was the Plaintiffs' main case that the Tenancy Agreement entered into was for the period of 3 years beginning 1.4.2016. The Defendants had however issued the 1st Notice dated 24.11.2016 terminating the Tenancy Agreement on the ground of the Plaintiffs' failure to pay rental as per the terms of the Tenancy Agreement.

[22] It was the Plaintiffs' contention that the Defendants had orally agreed with the Plaintiffs and/or their agent or representative that the Land leased to the Plaintiffs was 2.75 acres in size as was leased to Sermaini Binti Mohammad Tarmidi (SP5).

[23] The Plaintiffs contended that the Defendants had breached the said oral agreement in taking about 1 ½ acres of the land from the leased land. The Plaintiffs claimed that, consequent to the said action by the Defendants, it was agreed between parties that the Plaintiffs will pay a monthly rent of less than RM5,000.00.

[24] The Defendants had opposed the above claim on the ground that the size of the Land leased under the Tenancy Agreement was expressly stated as follows:-

> "*MUKADIMAH*
>
> *…*
>
> *DAN BAHAWASANYA Pihak Pertama telah bersetuju memberi sewaan dan Pihak Kedua telah bersetuju menyewa sebahagian daripada Tanah tersebut sepertimana yang dilorekkan warna kuning di atas pelan yang dilampirkan di Lampiran C dengan tertakluk kepada terma-terma dan syarat-syarat yang terkandung kemudian daripada ini.*"

[25] Based on "*Lampiran C*" of the Tenancy Agreement, the area shaded in yellow is clearly stated to have an area of 5712 square meters only.

It was also the Defendants' contention that the Tenancy Agreement was validly terminated on the ground of the Plaintiffs' failure to make rental payment as agreed under the Tenancy Agreement. The agreed monthly

rental under the Tenancy Agreement was for the total sum of RM5000.00 per month. However, the Plaintiffs had since the commencement of tenancy of the Land paid the Defendants a reduced monthly rental as follows:-

Month	Rental sum paid	Rental sum owed
April 2016	RM4,000.00	RM1,000.00
May 2016	RM4,000.00	RM1,000.00
June 2016	RM4,000.00	RM1,000.00
July 2016	RM4,000.00	RM1,000.00
August 2016	RM2,500.00	RM2,500.00
September 2016	RM2,500.00	RM2,500.00
October 2016	RM2,000.00	RM3,000.00
November 2016	RM2,000.00	RM3,000.00
December 2016	RM2,000.00	RM3,000.00
January 2017	RM1,500.00	RM3,500.00
February 2017	RM1,500.00	RM3,500.00
March 2017	RM1,500.00	RM3,500.00
April 2017	RM1,500.00	RM3,500.00
May 2017	RM1,500.00	RM3,500.00
June 2017	RM1,500.00	RM3,500.00

July 2017	RM1,500.00	RM3,500.00
August 2017	RM1,500.00	RM3,500.00

[26] Having carefully scrutinised all evidence as adduced before this court, I find a total lack of evidence in support the Plaintiffs' contention that an oral agreement exists between the parties in respect of the size of the Land leased to the Plaintiffs. He who asserts must bear the burden of proving and of discharging that burden of proof on the balance of probabilities (See section 101 of the Evidence Act 1950). Reference was made to the Federal Court case of **Perbadanan Kemajuan Negeri Selangor v. Selangor Country Club Sdn Bhd [2016] 8 CLJ 211** where it was held as follows:

> "*[34] Accordingly, when a court is called upon to interpret a document, it looks at the language. If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning; for the duty of the court is not to delve into intricacies of the human mind to disclose one's undisclosed intention, but only to take the*

meaning of the words used by him, that is to say his expressed intentions." (emphasis added)

[27] A clear reading of the Tenancy Agreement shows that the Land leased to the Plaintiffs was only 5712 square meters in size. The Plaintiffs had failed to adduce sufficient evidence to show the existence of an oral agreement between parties as claimed.

[28] Going through the factual matrix of the matter herein and for the foregoing reasons above, it is my finding that there was material breach by the Plaintiffs in failing to pay monthly rental as agreed. It is thus in my considered view that the Defendants were justified to terminate the Tenancy Agreement as of right.

[29] Needless to say that in view of the Plaintiffs' breach of agreement, the answer for issue (ii) above is also in the negative i.e. that the Plaintiffs are not entitled to under the Tenancy Agreement.

(iv) Whether the Plaintiffs were entitled to expenses incurred

[30] Irrespective of the legality of termination, the Plaintiffs are entitled to claim damages and/or expenses incurred as a result of the Defendants'

wrongful action. In the case of **New Kok Ann Realty Sdn. Bhd v. Development & Commercial Bank Ltd; New Hebrides (In Liquidation) [1986] 1 LNS 30; [1987] 2 MLJ**, the Federal Court held that:-

> "*Counsel also referred to the following passages in the judgment of Lord Wright in Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Limited.*
>
> *It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi- contract or restitution.*"

[31] It is trite law that the burden of proof incumbent on a party claiming damages is to place before the court sufficient evidence of the loss it has suffered as result of the breach committed by the contract breaker. In

order for the Respondent to be able to claim for damages, the Respondent must prove the damage and it is not enough to merely write down the particulars and rely on the same. McGregor on Damages (Sweet & Maxwell, 18th edn. 2009) provides succinctly for this requirement at para. 8-001:

> "*A claimant claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court both as to the fact of damage and as to its amount. If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where a right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages; this situation is illustrated by Dixon v. Deveridge and Twyman v. Knowles.*"

[32] In the Federal Court case of **Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15**, it was held as follows:

"*Before we embark upon a detailed consideration of the specific issues which arise for decision, there are three preliminary matter which, at the outset, require emphasis. Firstly, that part of the judgment of the judge which provides that the Vendor shall pay to the purchaser damages to be assessed for wrongful termination of the Agreement with costs and that Tan Sri Khoo and the Vendor shall pay to the purchaser damages to be assessed for breaches of the undertakings, even though affirmed on appeal, can in no way relieve the purchaser of satisfying the fundamental requirement of having to prove its loss (if any) arising from those breaches. To hold otherwise would amount to dispensing with proof of quantum altogether, and that cannot be the law. In so saying, we are reminded of the words of Lord Goddard in Bonham-Carter v. Hyde Park Hotel Ltd. 64, TLR 177, 178:*

> *... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head*

of the Court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

This dictum was referred to and applied by our Court of Appeal in **John v. Dharmaratnam [1961] 1 LNS 35; [1962] MLJ 187**.

[33] **Popular Industries Limited v. Eastern Garment Manufacturing Sdn. Bhd. [1990] 2 CLJ Rep 635; [1989] 3 MLJ 360**, the Court had occasion to say this (at p.367):

It is axiomatic that a plaintiff seeking substantial damages has the, burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see Marzetti v. Willian). And, where damage is

shown but its amount is not proved sufficiently or at all, the Court will usually decree nominal damages. See. For example Dixon v. Deveridge and Twyman v. Knowles.

[34] The Plaintiffs had purchased the 8 container cabin, 2 shared-accommodation, a building with 1 restaurant and 1 grocer on the land from the previous tenant i.e. Marvellous Gold Touch Enterprise as admitted by SP5 herself. The Plaintiffs had, in support thereof, adduced before this court the cheque payments made by the 2nd Plaintiff to Marvellous Gold Touch Enterprise for the total sum of RM130,000.00.

[35] The Defendants had however proceeded to sell the 8 container cabin and demolished the 2 shared-accommodation located on the Land to which the Plaintiffs sought damages.

[36] Reference was made to the case of **Punca Klasik Sdn Bhd v. All Persons in Occupation of The Wooden House Erected On a Portion of Land Held Under Grant No 26977 For Lot 4271 In The Township of Johor Bahru, Johor and Another Action (No. 2) [1996] 5 MLJ 92** where Abdul Malik Ishak J (as he then was) had held as follows:-

"*(5) the houses built on those parts or portions of the land were permanently fastened to the earth. These houses are part of the land and the ownership thereof vests with the owner of the land (see p 115E); Holland v. Hodgson [1872] LR 7 CP 328; Shell Company of the Federation of Malaya Ltd. v. Comissioner of the Federal Capital of Kuala Lumpur [1964] 30 MLJ 302; and MBf Finance Berhad v. Global Pacific Textile Industries Sdn. Bhd. (in receivership) & Anor. [1994] 2 AMR 21: 1084 followed. As such the Plaintiffs have the right to demolish the houses and the defendants are not entitled to damages (see p102E).*

(6) On equity, it is now trite that our land laws are governed by the NLC which does not allow the law to be tempered with equity (see p 117D); Verama v. Amarugam & Anor. [1982] 1 MLJ 107 followed. On the facts even the principle of equitable estoppel does not apply because there was no evidence of any inducement or encouragement by the plaintiffs or any expectation held out by them to both the

defendants on the strength of which they had expended money on those parts or portions of the land. Further, there was no landlord-tenant relationship between the parties and, consequently, the principle of equitable estoppel has no application here (see p 117E); Khew Ah Bah v. Hong Ah Mye[1971] 2 MLJ 86; Ooi Ho Cheng v. Grace Joseph & Ors. [1975] 1 MLJ 168; Lim Hock Kim v. Sim Seng Quee [1982] 2 MLJ 210; Ooi Ah Seng v. Chan Lin Lam [1973] 2 MLJ 20 and Tan Khien Toong & Ors. v. Hoong Bee & Co. [1987] 1 MLJ 387 followed."

…

"*There is, however, one last point that deserves consideration. On the question of damages, this must be read with my earlier findings that the houses that were built on those parts of the land as reflected in the photographs annexed to the affidavits were fixtures and were part of the land. As such those houses rightly belonged to the plaintiffs and the plaintiffs have the right to demolish those houses as they were interested in developing the land. The arguments that quit rents were paid and the Majlis*

Perbandaran Johor Bahru have given them postal numbers and addresses cannot in law give them (Lim and Ng) ownerships of those parts of the land. The time has how come for the Majlis Perbandaran Johor Bahru to be more selective and cautious before proceeding to allot house numbers and addresses to illegal squatters in Johor Bahru. It must be stressed that 'squatters have no right either in law or in equity' (per Raja Azlan Shah CJ Malaya (as HRH then was) in Sidek bin Haji Muhamad & Ors v The Government of the State of Perak & Ors (supra)) and I venture to say that squatters will impede development and progress in the country; their very presence will stifle the image of Malaysia as a developing country. Be that as it may, both Lim and Ng are not entitled to damages and this court would make an order to that effect. However, if the plaintiffs are willing to give Lim and Ng ex gratia compensations, that would be entirely their prerogatives. For the reasons adumbrated above, with regard to Originating Summons No 24-655 of 1994, I granted prayers (a), (b) and (c) of encl 3. I too granted prayers (a), (b) and

(c) of encl 4 of Originating Summons No 24-872 of 1994."

[37] SP5 not being the owner of the Land was under an obligation to demolish any construction and/or building on the Land at the end of her Tenancy Agreement. Her failure to do so had rendered all building and/or construction on the Land to belong to the Defendants. SP5 was not in a position to sell the property to the Plaintiffs in the first place.

[38] The Plaintiffs had been instructed by the Defendants to remove and/or demolish any construction and/or building on the Land on several occasions but had failed, refused and/or neglected to comply with the Defendants' instruction. The Plaintiff had, in blatant disregard to the Defendants' instruction, carried out reconstruction work on the Land subsequent to the occurrence on 6.9.2017.

[39] In the circumstance, it is my considered view that. The Plaintiffs cannot be placed in a position to take advantage of their own wrong. No order will therefore be made by this court for amount expended by the Plaintiffs for the purchase of properties on the Land and/or construction work done on the Land.

THE DEFENDANTS' COUNTERCLAIM

[40] The Defendant had in the present case counterclaimed as follows:-

(a) Vacant possession of the Land;

(b) Loss of income from April 2016 until August 2017 for the total sum of RM46,000.00 for monies due and owing by the Plaintiffs under the Tenancy Agreement;

(c) Loss of income for the monthly sum of RM5,000.00 from September 2017 until the date of delivery of vacant possession;

(d) Demolition costs for the sum RM5,000.00;

(e) Interest at 5% per annum from the date of judgment until full settlement;

(f) General damages;

(g) Costs of this action; and

(h) Any further and other reliefs this court deems fit and proper to grant.

[41] In view of my finding in respect of the Plaintiffs' breach of the Tenancy Agreement, and considering the 1st Plaintiff's admission to the reduced rental sum paid by the Plaintiffs commencing April 2016 until

August 2017. The Defendants are thus entitled to monies due and owing by the Plaintiffs under the Tenancy Agreement for the total sum of RM46,000.00.

[42] Based on the foregoing reasons above in respect of the validity of the termination of the Tenancy Agreement. The Plaintiffs are required to vacate the Land and return vacant possession of the Land upon termination of the Tenancy Agreement to which the Plaintiffs had failed to adhere. The Plaintiffs had continued to occupy the Land to this date. As such, I am of the considered opinion that the Plaintiffs ought to pay the monthly rental of RM5,000.00 to the Defendants from September 2017 until vacant possession is duly delivered to the Defendants.

[43] It was the Defendants' submission that the property left on the Land by the previous tenant belonged to the Defendants and not the Plaintiffs. The Defendants ought not be allowed to approbate and reprobate. As such the costs of demolition of construction existing on the Land is for the Defendants to bear.

CONCLUSION

[44] For the reasons adumbrated above and in considering the totality of evidence before me, I hereby dismiss the Plaintiffs' claim and on the counterclaim by the Defendants, with the findings of this court as above, I hereby allow the Defendant's counterclaim as follows:-

(a) Vacant possession of the Land;

(b) Loss of income from April 2016 until August 2017 for the total sum of RM46,000.00 for monies due and owing by the Plaintiffs under the Tenancy Agreement;

(c) Loss of income for the monthly sum of RM5,000.00 from September 2017 until the date of delivery of vacant possession;

(d) Interest on judgment sum at 5% per annum from the date of judgment until full settlement; and

(e) Costs of this action in the sum of RM10,000.00

Dated: 11.10.2022

-signed-

(ABDUL WAHAB BIN MOHAMED)
JUDGE
HIGH COURT OF MALAYA
IPOH, PERAK

Peguamcara Perayu

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Peguamcara Responden dan /atau Plaintiff-Plaintiff dalam AA-22NCVC-20-02/2020

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Peguamcara bagi kes : AA-22NCVC-20-02/2020

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Peguamcara: Encik Esmael Shah bin Shahrudin / Puan Norlida binti Ishak

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