Octville Golf Properties Sdn Bhd v Uniwheels Sdn Bhd (appointed receiver and manager)

HIGH COURT (JOHOR BAHRU) — NO 23NCVC-152 OF 2011
VERNON ONG J
5 DECEMBER 2012

Evidence — Admissibility — Tenancy agreement — Validity and enforceability of — Whether execution of tenancy agreement established — Whether tenancy agreement was not tendered or proved through its maker and was therefore, inadmissible — Evidence Act 1950 s 73A

Evidence — Burden of proof — Tenancy agreement — Validity and enforceability of — Whether prima facie case made out of existence of tenancy agreement and of its performance — Whether established — Evidence Act 1950 ss 101(1) & 102

Landlord and Tenant — Tenancy — Agreement — Validity and enforceability of — Execution of — Whether an agreement duly executed by parties — Whether established — Whether agreement aimed at obstructing or frustrating work of receiver and manager in realising charged assets of defendant under a debenture — Whether sham and thus, not genuine document — Whether agreement invalid and unenforceable for want of debenture holders prior written consent

Revenue Law — Stamp duty — Ad valorem stamp duty — Tenancy agreement — Instruments chargeable — Agreement not duly stamped instrument — Whether prevents use of agreement in this proceeding — Tenancy agreement impounded — Plaintiff subsequently paid ad valorem stamp duty and penalty on agreement — Tenancy agreement after being duly stamped was admitted in evidence — Stamp Act 1949 ss 4, 36, 40, 41, 43, 47A, 51 &52

The defendant was the registered owner of a piece of land on which was erected three warehouses known as Blocks A, B and C ('the warehouses'). A receiver and manager ('R&M') was appointed by Kuwait Finance House Bhd ('KFH') over the charged assets of the defendant under a debenture. Blocks A and B were tenanted by Padiberas Nasional Bhd ('Bernas') while Block C was unoccupied and in the possession of the R&M. The plaintiff alleged that vide a tenancy agreement dated 29 September 2010, they had leased the warehouses from the defendant prior to the defendant being placed under receivership. Hence, they contended that the tenancy agreement was binding on the R&M

who had knowledge of the tenancy. Consequently, the plaintiff sought, inter alia, specific performance of the tenancy agreement and an order that the R&M be at liberty to sell the property subject to the plaintiff's rights under the tenancy agreement. The defence was mounted on three main planks: (a) the tenancy agreement was inadmissible under s 73A of the Evidence Act 1950 ('EA') and/or under s 52 of the Stamp Act 1949 ('SA'); (b) the tenancy agreement was a sham and thus, not a genuine document; and (c) the tenancy agreement was invalid for want of KFH's consent. The principal issue for determination was related to the validity and enforceability of the tenancy agreement.

Held, dismissing the plaintiff's claim with costs:

(1) The tenancy agreement was an agreement which had been executed by the plaintiff and the defendant. PW1 was a director of the plaintiff company and he had affirmed to that fact which was further corroborated by PW2, a co-signatory of the tenancy agreement. For the foregoing, the court finds that the defendant's contention was without merit that the tenancy agreement was not admissible under s 73A of the EA (see para 22).

(2) Section 41 of the SA is unequivocal insofar as it categorically stipulates that all instruments chargeable with duty shall be stamped before or at the time of execution. Therefore, the ad valorem stamp duty must be paid in accordance with the SA. Failure to pay the duty or the penalty prevents the use of the tenancy agreement in this proceeding. As the tenancy agreement was not a duly stamped instrument, it was the duty of this court under s 51 to impound the tenancy agreement. Accordingly, the tenancy agreement was impounded. The plaintiff subsequently paid the ad valorem stamp duty and penalty on the tenancy agreement. As the tenancy agreement had been validly stamped, the question (a) above raised by the defence must be answered in the negative (see paras 28–29).

(3) The tenancy agreement after being duly stamped was admitted in evidence and marked as exh P1. However, the fact that the tenancy agreement was marked as an exhibit does not of itself mean that it was a genuine tenancy agreement. It only relates to the fact that the tenancy agreement exists; the question of whether it is a sham or not was for the court to determine on the facts as presented in the evidence (see para 33).

(4) The tenancy agreement was a sham. It was a scheme between associated companies. It was created with the ulterior motive to deceive the R&M into letting Blocks A, B and C to the plaintiff thereby obstructing or frustrating the work of the R&M in realising the charged assets of the defendant under the debenture (see para 40).

(5) As the requirement for KFH's prior written consent was an express

stipulation under the debenture, it was incumbent upon the parties to produce the necessary written consent in support of their assertion. The charged assets under the debenture which includes the land and the warehouses have been secured in favour of KFH as security for the loan facilities granted to the defendant. Unless and until the prior written consent of KFH was obtained, the defendant had neither the legal capacity nor power to enter into any tenancy agreement for the land. Since there was no prior written consent for the tenancy agreement, it must follow that the tenancy agreement was invalid and unenforceable (see para 44).

[Bahasa Malaysia summary

Defendan merupakan pemilik berdaftar sebidang tanah di mana tiga buah gudang telah didirikan, dikenali sebagai Blok A, B dan C ('gudang-gudang'). Seorang penerima dan pengurus ('P&P') telah dilantik oleh Kuwait Finance House Bhd ('KFH') terhadap aset-aset defendan yang telah digadaikan di bawah satu debentur. Blok A dan B telah disewa oleh Padiberas Nasional Bhd ('Bernas') manakala Blok C tidak didiami dan dalam milikan P&P. Plaintif mendakwa bahawa melalui perjanjian sewa bertarikh 29 September 2010, mereka telah menyewakan gudang-gudang daripada defendan sebelum defendan diletakkan di bawah penerimaan. Oleh itu, mereka menghujah bahawa perjanjian sewa mengikat P&P yang tahu mengenai sewa tersebut. Sehubungan dengan itu, plaintif menuntut, antara lainnya, pelaksanaan spesifik perjanjian sewa dan satu perintah bahawa P&P bebas untuk menjual hartanah tertakluk kepada hak-hak plaintif di bawah perjanjian sewa. Pembelaan dibuat berdasarkan tiga asas utama: (a) perjanjian sewa tidak boleh diterima di bawah s 73A Akta Keterangan 1950 ('AK') dan/atau di bawah s 52 Akta Setem 1949 ('AS'); (b) perjanjian sewa merupakan satu penipuan dan oleh itu, bukan merupakan dokumen tulen; dan (c) perjanjian sewa adalah tidak sah kerana ketiadaan kebenaran KFH. Isu utama untuk ditentukan adalah berhubung kepada kesahan dan penguatkuasaan perjanjian sewa.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Perjanjian sewa merupakan satu perjanjian yang telah dimeterai oleh plaintif dan defendan. PW1 merupakan seorang pengarah syarikat plaintif dan beliau mengesahkan fakta tersebut yang kemudiannya disokong oleh PW2, penandatangan bersama perjanjian sewa. Berhubung perkara di atas, mahkamah mendapati bahawa hujahan defendan adalah tanpa merit bahawa perjanjian sewa tidak boleh diterima di bawah s 73A AK (lihat perenggan 22).

(2) Seksyen 41 AS adalah jelas setakat ini memandangkan ia telah menyatakan secara kategori bahawa semua instrumen yang dikenakan duti perlu disetem sebelum atau pada masa dimeterai. Oleh itu, duti setem ad valorem stamp perlu dibayar mengikut AS. Kegagalan untuk

membayar duti atau penalti menghalang penggunaan perjanjian sewa dalam prosiding ini. Memandangkan perjanjian sewa bukan merupakan satu instrumen yang disetem sewajarnya, mahkamah ini berkewajipan di bawah s 51 untuk mengimpaun perjanjian sewa. Dengan ini, perjanjian sewa diimpaun. Plaintif seterusnya membayar duti setem ad valorem dan penalti yang dikenakan ke atas perjanjian sewa. Memandangkan perjanjian sewa telah sah disetem, persoalan (a) di atas yang dikemukakan oleh pihak pembelaan dijawab secara negatif (lihat perenggan 28–29).

(3) Perjanjian sewa selepas disetem sewajarnya telah diterima sebagai keterangan dan ditandakan sebagai eksh P1. Walau bagaimanapun, fakta bahawa perjanjian sewa telah ditandakan sebagai satu eskhibit bukan dengan sendirinya bermaksud bahawa ia merupakan satu perjanjian sewa yang tulen. Ia hanya berhubung dengan fakta bahawa perjanjian sewa wujud; persoalan sama ada ia merupakan penipuan atau tidak adalah untuk ditentukan oleh mahkamah berdasarkan fakta-fakta yang dikemukakan dalam keterangan (lihat perenggan 33).

(4) Perjanjian sewa merupakan satu penipuan. Ia merupakan satu skim di antara syarikat-syarikat berkaitan. Ia dicipta dengan motif tersembunyi untuk menipu P & P untuk menyewakan Blok A, B dan C kepada plaintif yang dengan ini menghalang atau menggagalkan kerja P & P dalam penghasilan aset-aset yang digadai defendan di bawah debentur (lihat perenggan 40).

(5) Memandangkan keperluan untuk kebenaran bertulis terlebih dahulu daripada KFH dinyatakan secara tersurat di bawah debentur, adalah penting bagi pihak-pihak untuk mengemukakan kebenaran bertulis yang diperlukan bagi menyokong dakwaan mereka. Aset-aset yang digadai di bawah debentur adalah termasuk hartanah dan gudang-gudang yang telah dicagar bagi pihak KFH sebagai jaminan untuk kemudahan pinjaman yang diberikan kepada defendan. Melainkan dan sehinggalah kebenaran bertulis terlebih dahulu oleh KFH didapatkan, defendan tidak mempunyai kapasiti di sisi undang-undang atau kuasa untuk memeterai sebarang perjanjian sewa untuk hartanah tersebut. Memandangkan tiada kebenaran bertulis terlebih dahulu untuk perjanjian sewa, didapati bahawa perjanjian sewa tersebut adalah tidak sah dan tidak boleh dikuatkuasakan (lihat perenggan 44).]

Notes

For a case on agreement, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) para 1248.

For a case on ad valorem stamp duty, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) para 2796.

Cases referred to

Abrath v The North Eastern Railway Co (1883) 11 QBD 440, CA (refd)
Arab-Malaysian Merchant Bank Bhd v Chong On Foh Medical Hall & Liquor Dealers [1997] 4 MLJ 532, HC (refd)
Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance Co Sdn Bhd [1999] 1 MLJ 303, CA (refd)
Chong Khee Sang v Pang Ah Chee [1984] 1 MLJ 377 (refd)
Chop Tiong Kok Hang v Hock Cheng & Co [1934] 1 MLJ 74 (refd)
Joseph Thambirajah v Bank Buruh (M) Bhd (now known as BSN Commercial Bank (M) Bhd) [2008] 2 MLJ 773, CA (distd)
Kubota Agricultural Machinery Sdn Bhd v Sharizan Sdn Bhd & Anor [2001] MLJU 71; [2001] 6 CLJ 104, HC (refd)
Lee Pooi Chun v Lee Kah Gee [1971] 2 MLJ 67, FC (refd)
Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors [1982] 1 MLJ 198, FC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Seascope Sdn Bhd v Syed Izhar bin Syed Syed Salleh [2006] 3 MLJ 756, HC (refd)
Selvaduray v Chinniah [1939] 1 MLJ 253, CA (refd)
Tempil Perkakas Sdn Bhd v Foo Sex Hong (t/a Agrodrive Engineering) [1996] 5 MLJ 542, HC (distd)
Tetrix Sdn Bhd & Ors v Malayan Banking Bhd (formerly known as Mayban Finance Bhd) [2008] 3 MLJ 838, HC (refd)
Yeo Ah Gian (P) and Anor v Wan Mohd Zaidi bin Wan Nawang and others [2009] MLJU 174; [2009] 9 CLJ 599, HC (refd)

Legislation referred to

Companies Act 1965
Contracts Act 1950 s 24(b)
Evidence Act 1950 ss 73A, 73(A)(2), 90A, 101(1), 102
National Land Code s 316
Stamp Act 1949 ss 4, First Schedule Item 49, 36, 40, 41, 43, 47A, 51, 52(1), (1)(a)

Mathews George (Thilaga Ramaloo with him) (Mathews George & Co) for the plaintiff.
Lau Kee Sern (Samuel Tan with him) (Shook Lin & Bok) for the defendant.

Vernon Ong J:

[1] The plaintiff is seeking to enforce an agreement entered with the defendant for the tenancy of three warehouses.

A BRIEF ACCOUNT OF THE FACTS

[2] The defendant is the registered owner of a piece of land held under HAS(D) 444056 PTD 194763 Mukim Plentong Dareah Johor Bahru ('the land') upon which is erected three warehouses known as Blocks A, B and C ('the warehouses').

[3] On 9 December 2010, a receiver and manager ('R&M') was appointed by Kuwait Finance House Bhd ('KFH') over the charged assets of the defendant under a debenture.

[4] Blocks A and B is tenanted by Padiberas Nasional Bhd ('Bernas'). Block C is unoccupied and is in the possession of the R&M.

D THE PLAINTIFF'S CASE

[5] The plaintiff's case is that a tenancy agreement dated 29 September 2010 ('the tenancy agreement') for the lease of the warehouses made with the defendant prior to the defendant being placed under receivership is binding on the R&M who had knowledge of the tenancy, and that KFH did consent to the defendant letting the warehouses to third parties.

[6] The R&M did not honour the tenancy agreement. Consequently, the plaintiff is seeking (a) a decree of specific performance of the tenancy agreement; and (b) an order that the R&M be at liberty to sell the property on condition that the sale is subject to the plaintiff's rights under the tenancy agreement.

G THE DEFENDANT'S DEFENCE

[7] The defence is mounted on three main planks:

H (a) the tenancy agreement is inadmissible under s 73A of the Evidence Act 1950 ('EA 1950') and/or under s 52 of the Stamp Act 1949 ('SA 1949');

(b) the tenancy agreement is a sham and is not a genuine document; and

(c) the tenancy agreement is invalid for want of KFH's consent.

I SUMMARY OF EVIDENCE INTRODUCED AT THE TRIAL

[8] Two witnesses testified for the plaintiff and one witness for the defendant.

[9] Mr Rudy Soeprapto Samiyonon Wardana ('PW1') a director of the plaintiff company produced a copy of the tenancy agreement dated 29 September 2010 (exh P1). The tenancy agreement was signed by one Lee Siak Meng on behalf of the plaintiff whilst one Tjio Siang Min signed on behalf of the defendant. The salient terms of the tenancy agreement are as follows:

(a) term of tenancy — three years;

(b) commencement of tenancy — 1 February 2011;

(c) monthly rental — RM318,813.60;

(d) rental deposit of RM500,000 and utilities deposit of RM50,000; and

(e) option to renew for two years at market rental rate.

PW1 also produced copies of the plaintiff and defendant's respective board of directors' resolutions (exhs P2 and P3) empowering the parties to enter into the tenancy agreement.

[10] Mr Tjio Siang Min ('PW2') the managing director of the defendant company signed the tenancy agreement on behalf of the defendant company. PW2 also said that the defendant has received payment of the rental and utilities deposit from the plaintiff. PW2 said that the defendant did not deliver vacant possession of the warehouses to the plaintiff on 1 February 2011. PW2 also said that as at the date of the trial, vacant possession had not been delivered because the R&M refused to do so. PW2 appealed to one Mr Koh an executive director of Pricewaterhouse Coopers ('PwC') without any success.

[11] En Abdul Malek Mohamed Said ('DW1') an executive director of PwC have been assisting the R&M in the receivership of the defendant company. DW1 said that on 9 December 2010 Mr Lim San Peen was appointed as the R&M of the charged assets of the defendant by KFH pursuant to a debenture. By numerous letters dated 9 December 2010, the R&M notified all the directors of the defendant of the R&M's appointment.

[12] According to DW1, there is an existing tenancy for Blocks A and B between the defendant and Bernas. DW1 produced a tenancy agreement dated 15 January 2009 relating to Block B for a term expiring on 14 January 2010 with an option of one year renewal. On 15 January 2010, Bernas wrote to the defendant agreeing to extend the Block B tenancy from 15 January 2010–15 January 2011. By a letter dated 3 December 2010 the defendant offered a one year extension of the Block B tenancy from 15 January 2011. On 5 April 2011, the defendant through the R&M wrote to Bernas confirming that the Block B tenancy will be extended until 31 May 2011. The Block B tenancy was then subsequently renewed until 31 December 2011 vide a letter from the defendant to Bernas dated 21 June 2011. The Block B tenancy was also

extended until 30 June 2012; and pursuant to a letter dated 7 August 2012 further extended to 14 January 2013. Similarly, Block A was rented out to Bernas on 20 July 2010 and there is presently a continuing tenancy to Bernas until 14 January 2013.

[13] DW1 also produced a restructuring proposal by PW2 dated 28 July 2011 in respect of the debts of the defendant and two other related companies. The tenancy agreements for Blocks A and B were attached to this restructuring proposal. It is also stated at p 7 of that proposal that the finalisation of the agreement for Block C is pending. On 2 July 2012, PW2 wrote to KFH on the rental of additional space in Block C to Bernas.

[14] DW1 said that the first time the R&M became aware of the tenancy agreement was after they received a letter of 30 May 2011 from Messrs Gan & Lim, the plaintiff's then solicitors; asking for the tenancy agreement to be performed by the defendant. The defendant did not obtain the prior written consent of KFH for the tenancy agreement as required under cll 8.2 and 17(o) of the debenture. DW1 also produced a copy of a tenancy agreement dated 1 June 2010 between the plaintiff and the defendant relating to the warehouses. This agreement appears to have been stamped on 3 March 2011 and signed by one Rosman bin Abd Rahim who is a director of both the plaintiff and the defendant. A copy of this agreement was given to the R&M by Bernas.

FINDINGS OF THE COURT

[15] The principal issue for determination relates to the validity and enforceability of the tenancy agreement.

[16] The document tendered by PW1 is an agreement dated 29 September 2010 entered into between the defendant qua landlord and the plaintiff qua tenant for the tenancy of the warehouses for a term of three years commencing from 1 February 2011 and ending on 31 January 2014 at a monthly rental of RM318,813.60. PW2 the managing director of the defendant company testified that he signed the tenancy agreement; and said that the defendant has received the rental and utilities deposits from the plaintiff. It is not disputed that as at the date of the trial, the plaintiff has not yet taken possession of the warehouses and that the same is being tenanted by Bernas.

BURDEN OF PROOF IN CIVIL PROCEEDINGS

[17] In law, the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s 101(1) of the Evidence Act 1950). The burden of proof is on that party is twofold: (a) the burden of establishing

a case; and (b) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The standard of proof required of the plaintiff is on the balance of probabilities. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this respect it is the plaintiff who must establish its case that there is a tenancy agreement. If the plaintiff fails to do so, it will not do for the plaintiff to say that the defendant has not established its defence (*Selvaduray v Chinniah* [1939] 1 MLJ 253 (CA); s 102 of the Evidence Act 1950). It should also be noted that there must be some preponderance in the plaintiff's favour at the conclusion of the whole case. Even if the plaintiff established a prima facie case, but at the conclusion of the trial the court found that the position was exactly even, then any preponderance in favour of the plaintiff had ceased to exist. If that happens, then the plaintiff has failed to discharge the burden of proof which is upon it, and the plaintiff must necessarily fail (*Abrath v The North Eastern Railway Co* (1883) 11 QBD 440, 452 (CA)).

[18] After considering the evidence introduced by the plaintiff the court is satisfied that the plaintiff has made out a prima facie case that there is a tenancy agreement and that the tenancy agreement has not yet been performed. Accordingly, the burden has shifted upon the defendant to prove its defence. The court will proceed to consider the defence.

(1) Whether the tenancy agreement is inadmissible under s 73A of the Evidence Act 1950 and/or under s 52 of the Stamp Act 1949?

[19] Learned counsel for the defendant argued that the tenancy agreement is inadmissible on two grounds — (a) under s 73A of the Evidence Act 1950 and (b) s 52 of the Stamp Act 1949.

[20] On the first ground, it is contended that PW1 is not the maker nor does he have any direct or personal knowledge of the tenancy agreement. PW1's testimony on the tenancy agreement is nothing but hearsay evidence which is not admissible in law. In 2010 when the tenancy agreement was allegedly executed, PW1 was only 22 years of age and a student studying in KL and not in Johor Bahru. PW1 is not one of the signatories to the tenancy agreement. The tenancy agreement was allegedly prepared by the plaintiff's company secetary but PW1 is not sure when it was prepared. PW1 did not witness the signing of the tenancy agreement purportedly by one Lee Siak Meng, and if so when. PW1 had no dealings with the defendant and was not involved in the negotiations with the defendant on the alleged tenancy and the terms of the tenancy agreement. Lee Siak Meng was allegedly the sole person who dealt with the defendant and was the key person who managed the plaintiff at the material

time. PW1 was told that the tenancy agreement was signed by Lee Siak Meng. PWTs knowledge about the tenancy agreement is derived solely from Lee Siak Meng. In the circumstances, Lee Siak Meng is a material witness and the plaintiff did not give any reasonable or acceptable explanation to account for his failure to attend court. Further, the company secretary who purportedly prepared the tenancy agreement and the witness who allegedly attested to Lee Siak Meng's signature were not called as witnesses. Therefore, learned counsel for the defendant argued that the tenancy agreement was not tendered or proved through its maker and is inadmissible under s 73A of the EA 1950 (*Tempil Perkakas Sdn Bhd v Foo Sex Hong (t/a Agrodrive Engineering)* [1996] 5 MLJ 542; *Joseph Thambirajah v Bank Buruh (M) Bhd (now known as BSN Commercial Bank (M) Bhd)* [2008] 2 MLJ 773).

[21] In reply, learned counsel for the plaintiff argued that the tenancy agreement was a part of the company documents. The plaintiff had authorised Lee Siak Meng their director to execute the tenancy agreement. Lee Siak Meng could not attend court as he had an urgent meeting to attend in Vietnam. PW1 a director had testified on behalf of the plaintiff. As a director, PW1 may testify in court in respect of the affairs of the company when the subject matter is within their knowledge. In any event, PW2 being the co-signatory of the tenancy agreement had identified the signature as that of Lee Siak Meng. In this case, the tenancy agreement is admissible under subsection of s 73A of the EA 1950 if the court is satisfied that undue delay or expense would be caused in order to call the maker to give evidence (*Kubota Agricultural Machinery Sdn Bhd v Sharizan Sdn Bhd & Anor* [2001] MLJU 71; [2001] 6 CLJ 104).

[22] In *Tempil Perkakas Sdn Bhd*, the plaintiff witness was not competent to testify upon the invoices and delivery orders as he had no personal knowledge of them. The persons who prepared and had custody of the same were not available to testify in court. In *Joseph Thambirajah*, a letter of demand which could not be admitted in evidence as it was not tendered by any witness of the respondent, it was only an identification document ('ID') in the non-agreed bundle and was never converted into a court exhibit. In this case, the tenancy agreement is an agreement which had been executed by the plaintiff and the defendant. PW1 is a director of the plaintiff company and he has affirmed to that fact. PW1's affirmation is corroborated by PW2 the managing director of the defendant company; PW2 is equally the maker of the document as the defendant is a party to the tenancy agreement. In both the authorities cited by defence counsel the documents in question are not in the nature of an agreement; instead, they are documents emanating from one party such as invoices, DOs and a letter of demand. In those circumstances, the maker of those documents ought to be called in order for them to be admitted in evidence. The cases cited by learned counsel for the defendant are therefore distinguishable on the facts and are inapplicable to the issue in hand. For the

foregoing reasons, the court finds that the defendant's contention that the tenancy agreement is not admissible under s 73A of the EA 1950 is without merit.

[23] The second objection to the admissibility is more substantive. It relates to the fact that the tenancy agreement is not a duly stamped instrument as ad valorem duty was not paid. Under s 52(1) of the SA 1949 no instrument chargeable with duty shall be admitted in evidence unless such instrument is duly stamped. The tenancy agreement merely carries a 'supposed stamp duty chop for RM10.00' (*Chop Tiong Kok Hang v Hock Cheng & Co* [1934] 1 MLJ 74; *Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors* [1982] 1 MLJ 198 (FC)).

[24] Learned counsel for the plaintiff argued that cl 8 of the tenancy agreement provides for a deferment of payment of stamp duty until possession is given. Clause 8 provides that the tenancy agreement shall be stamped as a contract to create a tenancy on 1 February 2011 and full ad valorem duty shall be paid after possession of the warehouses had been delivered to the plaintiff on 1 February 2011. In any event, the court has the power to impound the tenancy agreement and order it to be admitted on payment of the appropriate penalty (*Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd*).

[25] A tenancy agreement is an instrument falling under s 4 of the SA 1949. It is an instrument chargeable with duty. It is provided under Item No 49 of the First Schedule (s 4) under the description 'Lease or Agreement for Lease that a tenancy agreement attracts payment of ad valorem stamp duty'. What this means is that in order for a tenancy agreement to be validly stamped, ad valorem stamp duty at the rate as prescribed under Item No 49 must be paid.

[26] In this instance, a RM10 'HASIL' adhesive stamp has been stuck on the top right hand corner of the first page of the tenancy agreement. The 'HASIL' stamp appears to have been cancelled by the Pontian Stamp Duty office on 12 October 2010. Ad valorem duty has not been paid on the tenancy agreement.

[27] All instruments chargeable with duty must be stamped before or at the time of its execution as provided under s 41 failing which it will not be admitted under s 52(1) of the SA 1949. The prohibition against admissibility of an instrument for being not duly stamped is, however, not an absolute prohibition (proviso (a) to s 52(1)). It is conditional upon payment of a duty or a penalty, if any, under ss 43 and 47A. In this case, the tenancy agreement is an instrument that should have been brought to the collector of stamp duties for

adjudication of stamp duty under s 36. After the duty had been assessed by the collector, the tenancy agreement must be stamped within 14 days pursuant to s 40.

[28] In this case, cl 8 of the tenancy agreement is an attempt to circumvent and contract outside the provisions of the SA 1949; as such the object of cl 8 is unlawful and is to that extent void (see s 24(b) of the Contracts Act 1950). Section 41 of the SA 1949 is unequivocal insofar as it categorically stipulates that all instruments chargeable with duty shall be stamped before or at the time of execution. Therefore, the ad valorem stamp duty must be paid in accordance with the SA 1949 in the manner described above. Failure to pay the duty or the penalty prevents the use of the tenancy agreement in this proceedings. As the tenancy agreement is not a duly stamped instrument, it is the duty of this court under s 51 to impound the tenancy agreement.

[29] Accordingly, the tenancy agreement (ex P1) was impounded. The plaintiff subsequently paid the ad valorem stamp duty and penalty on the tenancy agreement. As the tenancy agreement had been validly stamped, the question must be answered in the negative. The court will now proceed to make a determination on the remaining two issues.

(2) Whether the tenancy agreement is a sham and is not a genuine document?

[30] Learned counsel for the defendant submitted that the tenancy agreement is a sham and therefore not enforceable (*Lee Pooi Chun v Lee Kah Gee* [1971] 2 MLJ 67, at p 70; (FC); *Seascope Sdn Bhd v Syed Izhar bin Syed Syed Salleh* [2006] 3 MLJ 756). Learned counsel also submitted that there is no proof that the tenancy agreement was actually signed by Lee Siak Meng for and on behalf of the plaintiff (*Munusamy v Public Prosecutor* [1987] 1 MLJ 492; *Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 MLJ 303, at pp 308–309; *Tetrix Sdn Bhd & Ors v Malayan Banking Bhd (formerly known as Mayban Finance Bhd)* [2008] 3 MLJ 838, at p 844; *Yeo Ah Gian (P) and Anor v Wan Mohd Zaidi bin Wan Nawang and others* [2009] MLJU 174; [2009] 9 CLJ 599, at p 606). Secondly, the tenancy agreement could not possibly co-exist with the tenancy agreement made between the defendant and Bernas for the same period of time. Thirdly, the tenancy agreement was never brought to the R&M's attention until 2 June 2011. Fourthly, the dubious circumstances surrounding the creation of the tenancy agreement casts doubt on the genuineness of the tenancy agreement. Fifthly, there was another agreement allegedly made in June 2010 that was deliberately stamped on 3 March 2011. Six, there is no proof that there was any payment of the RM550,000 as deposit to the defendant under the tenancy agreement. The purported official receipt is a computer generated document and it was not tendered through its maker

(s 90A of the Evidence Act 1950; *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377, at pp 380–383; *Tetrix Sdn Bhd,*). Lastly, the plaintiff failed to contact the R&M and register its alleged interest in the Land; there is no evidence to suggest that the plaintiff applied for or registered any endorsement of its claim on the register document of title to the land (s 316 of the National Land Code).

[31] In reply, learned counsel for the plaintiff submitted that the tenancy agreement is a part of the company documents. Lee Siak Meng is a director of the plaintiff company. The plaintiff has authorised Lee to execute the tenancy agreement. Lee was unable to attend court as he had an urgent meeting to attend in Vietnam. PW1 give evidence on behalf of the plaintiff. PW2, the managing director of the defendant company and a co-signatory of the tenancy agreement identified the signature as that of Lee. The tenancy agreement is admissible as there would be undue delay and expense in order to call Lee to give evidence (s 73(A)(2) of the Evidence Act 1950; *Kubota Agricultural Machinery Sdn Bhd v Sharizan Sdn Bhd & Anor* [2001] MLJU 71; [2001] 6 CLJ 104; *Arab Malaysian Merchant Bank Bhd v Chong On Foh Medical Hall & Liquor Dealers* [1997] 4 MLJ 532). PW1 testified that the R&M had knowledge of the existence of the tenancy agreement from Bernas prior to the commencement of this action. PW2 also acknowledged that RM550,000 was received by the defendant.

DECISION

[32] The word 'sham' is defined as 'something which is not what it seems to be and is intended to deceive people' (*Cambridge Advanced Learner's Dictionary* (2nd Ed)). Going by this definition, the defendant's contention is that the tenancy agreement is not actually a genuine tenancy agreement. It is a fictitious agreement which was created in order to deceive the R&M. Whether the tenancy agreement is a genuine or sham agreement is a question of fact to be determined by an evaluation of all the surrounding circumstances of this case.

[33] In this instance, the tenancy agreement after being duly stamped was admitted in evidence and marked as exh P1. However, the fact that the tenancy agreement is marked as an exhibit does not of itself mean that it is a genuine tenancy agreement. It only relates to the fact that the tenancy agreement exists; the question of whether it is a sham or not is for the court to determine on the facts as presented in the evidence.

[34] Lee is a director of the plaintiff company having been appointed on 6 July 2007. According to PW1, Lee signed the tenancy agreement in his capacity as a director of the plaintiff company. In support of his assertion, PW1 tendered the plaintiff's directors' resolution dated 29 September 2010

authorising the plaintiff to enter into the tenancy agreement. As the sole signatory to the tenancy agreement on behalf of the plaintiff company, Lee is clearly an important and material witness in this case. However, Lee was not called to give evidence at the trial. PW1 informed the court at the trial that Lee was unavailable as he had an urgent meeting to attend in Vietnam. The court also notes that the payment of the rental and utilities deposit appears to be supported by the defendant's official receipt (exh P3) and the defendant's statement of accounts showing a record of RM550,000 in the defendant's accounts.

[35] Be that as it may, the evidence suggests that the circumstances surrounding the tenancy agreement are not entirely straight forward. Firstly, when the R&M was appointed on 9 December 2010, Blocks A and B had already been rented out to and were occupied by Bernas; the tenancy over these properties were then still subsisting and valid. Prior to the R&M's appointment, the defendant had on 3 December 2010 written a letter (72B) to Bernas offering to renew the tenancy of Block B at the monthly rental of RM0.98 psf for a period of one year from 15 January 2011 with an option of renewal for another year. The tenancy agreement (dated 29 September 2010) is for Blocks A, B and C and it purports to grant a lease for a period of three years commencing from 1 February 2011. It is obvious that the period of the lease under the tenancy agreement would overlap with that of the existing tenancy granted to Bernas. In such circumstances, it is quite inconceivable that the defendant would have entered into a tenancy agreement with the plaintiff for the warehouses, which tenure overlaps with the existing tenancies to Bernas of Blocks A and B. Clearly, the tenancy agreement would not be feasible as it would have led to a conflict between the rights and interest of Bernas qua existing tenant and the plaintiff as the purported tenant under the tenancy agreement.

[36] Secondly, it is also inconceivable that the R&M had any prior knowledge of the tenancy agreement before 2 June 2011. The fact that the R&M had no prior knowledge of the tenancy agreement was accepted by PW1 under cross-examination. The R&M only came to know about the tenancy agreement on 2 June 2011 when he received the letter of demand (77–78B) from the plaintiff's solicitors. This was about six months after the R&M's appointment. Notwithstanding his appointment as R&M, the R&M were denied access to the defendant's office premises including the company records and documents since 9 December 2010. During the six month period, the R&M had written numerous letters addressed to (a) the defendant's board of directors, (b) Tjio Siang Min (PW2), (c) Rosman bin Abd Rahim, (d) Wong Kong Weng and (e) Alina bt Mohd Tahir (26–35B) asking for, inter alia, a list of all 'purchases/sales contracts, hire purchase agreements *or other agreements whether verbal or written entered into by the Company*'. (Emphasis added.) The

R&M did not receive any response to those letters. It is significant to note that under cross-examination, PW2 conceded that most of the company documents and records were and are still under his possession and control. Despite the fact that PW2 had several meetings with representatives of the R&M, PW2 never mentioned about the tenancy agreement or gave a copy of the tenancy agreement to the R&M. It is equally significant that subsequent to a meeting with the R&M on 18 March 2011, PW2 wrote to the R&M on the subject of the warehouses, but he did not make any reference to the tenancy agreement or to the plaintiff's interest under the tenancy agreement. As PW1 and the plaintiff knew of the R&M's appointment since January 2011, neither PW1 nor the plaintiff notified the R&M of the tenancy agreement or at all. No reasons were proffered by PW1 and PW2 for the withholding or for the non-disclosure of the tenancy agreement to the R&M during the six month period.

[37] Thirdly, PW2 does not appear to be a credible and reliable witness. PW2 is a director of the defendant company who has defaulted in repayment of the facilities granted by KFH prior to the R&M's appointment on 9 December 2010. PW2 failed to disclose the tenancy agreement to the R&M; no explanation was forthcoming for this glaring omission. Immediately prior to the R&M's appointment, PW2 had in fact written a letter dated 3 December 2010 (72B) to Bernas to renew the tenancy for Block B from 15 January 2011; which act and conduct is inconsistent with the contemporaneous documents — in particular, with his own restructuring proposal dated 28 July 2011 (Tab C of B1) showing that Bernas's tenancy of Blocks A and B had been extended and is still subsisting. It is equally pertinent to note that PW2 has continued to collect rental payments on behalf of the defendant from Bernas until March 2011 for Blocks A and B. There is also a close relationship between the plaintiff and the defendant. PW2 is a director and shareholder of the defendant company. Lee is a director of the plaintiff company and one Cemexstar Sdn Bhd. Cemexstar is a common shareholder of both the plaintiff and the defendant. PW1 is a director of the plaintiff and Cemexstar. Both the plaintiff and Cemexstar share the same registered address No 24A, Jalan Bendahara 12, Taman Ungku Tun Aminah, Skudai, Johor Bahru, Johor and the same business address at Lot 88, Jalan Penaga, Kawasan Perindustrian Kota Putri, Masai, Johor. The company secretary of both companies are Alina bt Mohd Tahir. Both the plaintiff and the defendant also share a common director in Rosman bin Abd Rahim. Even though the plaintiff and the defendant are not related companies as defined under the Companies Act 1965, the fact that the companies share a common director and shareholder suggest that they are associated in some way. By reason of the above, PW2 is not an entirely reliable and unbiased witness; in fact under cross-examination, PW2 accused the R&M of wanting to dissipate the defendant's assets cheaply to the defendant's detriment. For the foregoing reasons, PW2's evidence in support of the plaintiff's case must be treated with caution.

[38] It is also significant to note that there was another tenancy agreement (June agreement) for Blocks A, B and C made between the plaintiff and the defendant on 1 June 2010 (63–69B); under which the tenancy would commence immediately after the expiry of the existing tenancy between Bernas and the defendant. The June agreement was signed by Rosman bin Abd Rahim, a common director of the plaintiff and defendant who resigned on 1 March 2011. However, the June agreement was only stamped on 3 March 2011 after the tenancy agreement was purportedly executed. PW1 and PW2's evidence that the plaintiff who is seeking to enforce the tenancy agreement had insisted that the June agreement be stamped; which evidence is wholly implausible and devoid of any logic. Further, the June agreement was then apparently abandoned by the parties.

[39] Lastly, the court also noted that there was also no explanation from the plaintiff to account for their failure to reply to the defendant's solicitor's letter dated 30 May 2011 (79–81B) refuting the plaintiff's claims on the tenancy agreement.

[40] In the abovementioned circumstances described, the court is driven to the conclusion that the tenancy agreement is a sham. It was a scheme between associated companies. It was created with the ulterior motive to deceive the R&M into letting Blocks A, B and C to the plaintiff thereby obstructing or frustrating the work of the R&M in realising the charged assets of the defendant under the debenture.

(3) Whether the tenancy agreement is invalid for want of KFH's consent?

[41] Learned counsel for the defendant submitted that the land is charged under the debenture. This fact is not challenged by the plaintiff or PW2. It is also not disputed that under the debenture the defendant must obtain KFH's prior written consent for the creation of any lease over the land.

[42] Learned counsel for the plaintiff argued that it is bad faith for the R&M to rent Blocks A and B to Bernas without any written consent being granted by KFH whilst raising objections to the plaintiff's tenancy under the tenancy agreement. The R&M is unconscionable and ought to be estopped from raising the issue of consent.

[43] According to PW2, he attended a meeting in Kuala Lumpur with the representatives of KFH in March 2010. At that material time, Blocks A and B were rented out to Bernas. Subsequently, on 3 December 2010, PW2 renewed Bernas's tenancy for Block B for another year from 15 January 2011 with an option for renewal of another year. Thus, KFH was then aware of that fact and had consented to the existing tenancy with Bernas. KFH had since 2010

consented to the tenancy with Bernas and has been receiving rental payments from the R&M. Be that as it may, the fact that KFH may have acquiesced to the tenancy with Bernas does not necessarily operate as a waiver of that requirement for the tenancy agreement. Accordingly, the court is not persuaded that the conduct of the R&M is unconscionable or that the R&M is estopped from raising the issue of consent.

[44] As the requirement for KFH's prior written consent is an express stipulation under the debenture, it is incumbent upon the parties to produce the necessary written consent in support of their assertion. The charged assets under the debenture which includes the land and the warehouses have been secured in favour of KFH as security for the loan facilities granted to the defendant. Unless and until the prior written consent of KFH is obtained, the defendant has neither the legal capacity or power to enter into any tenancy agreement for land. Since there was no prior written consent for the tenancy agreement, it must follow that the tenancy agreement is invalid and unenforceable. The question is therefore answered in the affirmative.

CONCLUSION

[45] Notwithstanding that the tenancy agreement was admitted in evidence, on the totality of the evidence, the court is satisfied that the tenancy agreement is in fact a sham. It was created for an ulterior purpose by the parties. Even if the tenancy agreement is not a sham, it is invalid and unenforceable as KFH's prior written consent was not obtained. This finding is fortified by the fact that the warehouses erected upon the land has been charged to KFH under a debenture; and any dealings of such charged assets may only be undertaken and sanctioned by the obtaining of KFH's prior written consent. For the foregoing reasons, the plaintiff's claim is hereby dismissed with fixed costs of RM35,000.

Plaintiff's claim dismissed with costs.

Reported by Ashgar Ali Ali Mohamed