LEE GUAT CHEOW & CO SDN BHD v. WONG SOO HA

HIGH COURT MALAYA, TAIPING
MOHAMED ZAINI MAZLAN JC
[CIVIL SUIT NO: S-22NCVC-12-04-2013]
13 JULY 2015

LAND LAW: *Ownership – Dispute – Discovery of occupier on plot of land during land survey – Allegation that there was agreement between land owner and occupier – Agreement allowed occupier to build house on plot of land – Land owner commenced action for vacant possession – Occupier claimed for specific performance to compel land owner to transfer plot of land – Whether ownership of plot of land vested on land owner or occupier – Civil Law Act 1956, s. 28(2)*

The plaintiff carried on the business of planting and harvesting oil palm trees for palm oil on 78.3 acres of land ('the land'). The defendant, an unwanted occupier, resided in a property located on a small plot of the land. According to the defendant, there was an agreement between him and the plaintiff allowing the former to build a dwelling house on the land. The plaintiff claimed that it did not have any records of the defendant's occupation and had only discovered the defendant's occupation of its land when it conducted a survey of the land. This prompted the plaintiff to commence the present suit, seeking for, *inter alia*, vacant possession or in the alternative for the defendant to pay rental and damages. The defendant counterclaimed and sought for an order of specific performance against the plaintiff to compel the plaintiff to transfer to him the plot where his house sat on and for damages for breach of contract or in equity. The primary issue that arose for the court's determination was the right of ownership over the land where the defendant's house was built on.

Held (order accordingly):

(1) The terms of the agreement were too vague and uncertain, bearing in mind that it was for the conveyance of land. There were some uncertainties in respect of the agreement for an order for specific performance to be made. It would not be just to allow the defendant's claim for specific performance. However, equity should come to the defendant's aid. The defendant had built and resided in the house interrupted for more than 20 years. His presence was only discovered when the new director of the plaintiff decided to stock the plaintiff's property. The plaintiff had acquiesced to the defendant's presence on its land. (paras 37 & 38)

(2) Section 28(2) of Civil Law Act 1956 ('CLA') clearly provide for a situation that the defendant was caught in. This section states that a person that had erected a building in a *bona fide* belief that he had the right to do so, when faced with eviction by a person with a better title,

A is entitled to have the value of the building purchased by the person with the better title. It would be just for the plaintiff to re-claim back its land where the defendant's house was situated. It would also be just that the defendant be compensated for the value of his house. (para 47)

B **(3)** The defendant was ordered to give vacant possession of the house and the land it was situated on to the plaintiff. The house was to be valued by a registered valuer and the plaintiff was to pay the defendant the value of the house as ascertained by the valuer or in the alternative to appointing a valuer, any amount that both the plaintiff and the defendant could agree on. (para 49)

C **Case(s) referred to:**
Archbold v. Scully 9 HL Cases 371 ***(refd)***
Inwards v. Baker [1965] 1 All ER 446 ***(refd)***
Mok Deng Chee v. Yap See Hoi & Ors [1981] CLJ 124B; [1981] CLJ (Rep) 69 FC ***(refd)***
Sungei Way Leasing Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor [1989] 1 CLJ 996; [1989] 2 CLJ (Rep) 519 HC ***(refd)***
D *Yong Nyee Fan & Sons Sdn Bhd v. Kim Guan & Co Sdn Bhd [1978] 1 LNS 244 FC* ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 28(2), (3)

E *For the plaintiff - KL Choy; M/s KL Choy & Co*
For the defendant - Joshua Ding; M/s Joshua Ding & Partners

Reported by Najib Tamby

JUDGMENT

F **Mohamed Zaini Mazlan JC:**

Introduction

[1] The plaintiff owns 78.3 acres of land in Hulu Perak, Mukim Terulung, Perak, which is described as Geran 22443, Lot 4559 (also known as Lot G 4823) ('the land'). It carries on the business of planting and harvesting oil palm trees for palm oil on the land.

[2] The defendant is an individual that resides in a single storey detached house that is located on a small plot on the land, measuring around 3,000 square feet.

H

[3] The problem lies with the fact that the defendant is an unwanted occupier. The plaintiff takes issue with his occupation, and deems the defendant to be a trespasser. With this suit, the plaintiff is among others seeking for vacant possession, or in the alternative for the defendant to pay rental and damages.

I

[4] The defendant maintains his rights to occupation and ownership pursuant to a written agreement between him and the plaintiff, and in his counterclaim, seeks for an order of specific performance against the plaintiff.

He seeks to compel the plaintiff to transfer to him a 50x60 square feet plot where his house sits on, and is also in addition seeking for damages for breach of contract or in equity.

[5] The issue that requires determination is the right of ownership over the land where the defendant's house is built on.

Pertinent Facts

[6] The plaintiff was incorporated on the 10 April 1952, and used to be known as Lee Guat Cheow & Company Limited. It changed to its present name 14 years later on 15 April 1966.

[7] The plaintiff had purchased the land in September 1961 from an entity named Kota Lima Estates (1952) Limited. It is not disputed that the plaintiff is the registered owner of the land.

[8] The defendant on the other hand, premised on what he claims to be an agreement between him and the plaintiff, built a single storey house on a small plot on the land, measuring around 3,000 square feet sometime in the late 1980s. His family and him had since lived in that house.

[9] The agreement that the defendant is relying on is basically a building plan of his house that contained some written terms in one of the columns in the plan ('the agreement'). The defendant claimed that a Lee Eng Eow ('Lee') had signed on behalf of the plaintiff.

[10] These terms in the agreement were in Mandarin. The translated terms as produced during trial were as follows:

> APPROVED (PLAN A)
>
> Upon the request of Mr. Wong Soo Ha, the said Garden Manager allowed Mr. Wong Soo Ha to built (sic) a dwelling house in the garden near to Lot 3546, Kampung Baru, Kota Tampan, as stated in the plan. Land Area measurement of 90 (width) by 90 (length). Before the title is divided, he has to pay RM8/- as yearly land tax to our garden. After the title is divided, our garden will sell the land to Mr. Wong Soo Ha at the market price of RM4,000/- as per the measurement of the land area 90 x 90 stated in the plan.

[11] The land area measurement in the agreement was actually stated as 50 feet x 60 feet, and not 90 feet x 90 feet as stated in the translation. The defendant had admitted this during his cross-examination.

[12] The terms in essence stipulate the following:

(a) that the defendant would be allowed to build a dwelling house measuring 50 feet x 60 feet on the land, near to Lot 3546; and

(b) that the plaintiff will sell the land to the defendant at RM4,000 once the land is sub-divided, and that the defendant would in the interim pay RM8 yearly land tax.

[13] The plaintiff claimed that it had only discovered the defendant's occupation of its land when it conducted a survey of the land in 2011. They also claimed that they do not have any records of the defendant's occupation, let alone any evidence to suggest that they had consented to his occupation. The plaintiff's initial approach was soft. It offered the defendant to pay rental for his occupation, which the defendant flatly refused. This led the plaintiff to commence this suit.

The Trial

PW1's Testimony

[14] At trial, only one witness gave evidence for the plaintiff. He was Lee Ming Tat, one of the plaintiff's directors ('PW1'). As for the defendant, two witnesses testified, the defendant himself ('DW1') and Lum Peng Seng, who formerly worked as an estate conductor in the Kota Lima Estate, Lenggong, Perak ('DW2').

[15] PW1 claimed that the plaintiff had no records of any transaction with the defendant, including the agreement. He was adamant, in spite of being repeatedly challenged by the defendant's counsel during cross-examination. PW1 however, admitted that he had only been appointed as a director in 2010, and would not have any knowledge on past transactions done by the company, save where there are records.

[16] As for the alleged agreement, PW1 casted some doubts. He doubted that the agreement was genuine, as there was no resolution passed by the plaintiff produced in respect of the agreement. He also noted that the signatory that had allegedly signed on behalf of the plaintiff had used the stamp mark of Kota Lima Estate, and contended that the land had always been under the plaintiff's name ever since it was purchased. PW1 also asserted that he could not find any evidence of the defendant having paid rental.

[17] According to PW1, when the plaintiff discovered the defendant's occupation on its land, its solicitors were instructed to write to the defendant. In that letter dated 28 December 2011, the plaintiff's solicitors asserted that the defendant's occupation of its land was unauthorised, but had nevertheless offered the defendant to enter into a tenancy agreement, for a 2-year period at RM250 per month, and for the defendant to pay arrears of rental for the past six years.

[18] The defendant's solicitors responded through a letter dated 14 May 2012. The contents of this letter were quite telling, in particular the following paragraph, which is set out verbatim:

2. We refer to the tele-conversation on 10/5/2012 between your Mr. Hoe and our Mr. Manjit Singh Bhatt wherein our Mr. Manjit Singh Bhatt informed that the above said tenancy agreement which was given to our client for our client's execution is not in order as our client at all material times is a ground tenant and the premises erected on the subject property has been constructed by our client at his own expense.

DW1's Testimony

[19] The contents of the defendant's solicitors' letter suggested that the defendant had held himself out as a tenant. There was no mention or assertion of his claim for ownership. DW1's solicitors did write another letter dated 5 July 2012 to the plaintiff's solicitors. In this letter, DW1's solicitors forwarded a copy of the agreement with a translation of the terms as set out in the preceding paragraph. Again, there was no mention or assertion made by DW1 on the right of ownership. DW1 however when crossed on these two letters, stated that "The lawyer don't understand what I want to say". He also said that he could not read English. It was perhaps, a case of lost in translation, as DW1 did not seem to be a highly educated person.

[20] DW1 claims that he had already paid RM6,000 to Lee, and that the receipt will only be issued once the balance of RM4,000 is paid. As for the RM8 ground rental, DW1 had during cross, stated that he had never paid them as no one came to collect it. At one point in time, DW1 worked in Japan for ten years, and that his mother had lived in the house. DW1 had obviously proceeded to build the house and had over the years made improvements and renovations to it. He also had electricity and water connected to the house, and has been paying assessment to the local council. It was to him and his family, their home.

[21] DW1 in his witness statement, claimed that he is able and willing to fulfil the agreement by paying RM4,000. However, he asserts that the plaintiff has not performed its part of the agreement. He did not seem to be aware that the plaintiff had already subdivided the land.

DW2's Testimony

[22] DW2 worked as an estate conductor in Kota Lima Estate in Lenggong, Perak back in 1987. He stated that Lee was the managing director at that time, and that the latter had requested him to sign the agreement as a witness. He was aware of the terms of the agreement, and confirmed its terms. DW2 did not appear to be an interested party.

Issues

[23] The pertinent issue here is whether the agreement supports the defendant's claim. There is no issue as to the authenticity of this agreement, as the original copy of the agreement was produced. Furthermore, it was also

verified by both DW1 and DW2 who were signatories to it. The question that requires an answer, is whether Lee had executed the agreement on behalf of the plaintiff.

[24] As mentioned earlier, the stamp mark at Lee's signature was Kota Lima Estate. The question now is whether Kota Lima Estate and the plaintiff are one and the same.

Analysis

[25] Other than his witness statement, DW1's counsel had posed additional questions during the examination-in-chief. This was what was asked of him:

Q: Who is the owner according to you who is the owner? Who is the owner of the estate?

A: That owner of Kota Lima Estate.

[26] The plaintiff's counsel too had crossed DW1 on this issue, which were as follows:

Q: Okay now I put it to you the owner is Lee Guat Cheow & Company not Kota Lima Estate. Agree or disagree? The owner of the land where you are sitting on the owner is not Kota Lima Estate. Lee Guat Cheow & Company?

A: Yes I agree the land belongs to Lee Guat Cheow & Company.

Q: The owner of the land is Lee Guat Cheow estate. Lee Guat Cheow & Company, agree or disagree?

A: Yes agree.

[27] DW1 in re-examination said as follows:

Q: By landowner who do you mean, it is Lee Guat Cheow & Company?

A: Kota Lima Estate.

[28] DW2 in cross-examination also agreed that the land belongs to the plaintiff.

[29] As stated earlier, the plaintiff had purchased the land in September 1961 from Kota Lima Estates (1952) Limited. This is evident from the memorandum of transfer dated 30 September 1961, which was attested by Peh Swee Chin (then an Advocate & Solicitor and later FCJ). The previous owner of the land was clearly Kota Lima Estates (1952) Limited, and that the plaintiff became the registered owner back in 1961, which was way before the agreement was signed. PW1 had emphatically testified that the plaintiff is not related to Kota Lima Estate.

[30] However, there is evidence to suggest that the plaintiff could have back in those days used the name Kota Lima Estate as its trade name. DW2 had described his occupation back in 1987 as an estate conductor for the Kota Lima Estate. DW2 described Lee as his "former boss" and that Lee was the son of Guat Cheow, the name that the plaintiff's company presumably had taken on. It is not in dispute that Lee was the former managing director of the plaintiff. Lee incidentally was PW1's uncle.

[31] PW1 had in his witness statement acknowledged that the plaintiff's business was known as Kota Lima Estate during pre-war times. In re-examination, PW1 had also stated that there are three companies in the area under Kota Lima Estate, namely Hock Guan Estate, Yong Hock Estate and the plaintiff.

[32] Furthermore, there is also documentary evidence to suggest that the plaintiff had used the name Kota Lima Estate. The corporate information of the plaintiff by the Companies Commission of Malaysia shows that the business address of the plaintiff is denoted as "Kota Lima Estate, Lenggong, Perak". There was also a letter from the Land and District Office of Lenggong dated 13 November 1984 addressed to Kota Lima Estate. This letter pertained to the plaintiff's request to sub-divide Lot 3546 and Lot 3547. It is noted that Lot 3546 had since been subdivided into Lots 4559 to 4562, which included the land. What is material is the fact that this letter was addressed to the plaintiff, but in the name of Kota Lima Estate.

[33] It is plausible that DW1 and even DW2, who are not highly educated, could not appreciate the legal dichotomy between the plaintiff and Kota Lima Estate. In all probability, they had associated plaintiff with the name Kota Lima Estate. As I had mentioned earlier, even PW1 admitted that the plaintiff's business was known as Kota Lima Estate in the past. In my considered opinion, the plaintiff had represented or described itself as Kota Lima Estate.

[34] However, the agreement by itself could not support the defendant's claim. The fact that this agreement was entered into many years ago, meant that evidence that could have been produced to support the defendant's claim would not have been available due to effluxion of time. The defendant admitted that he had not kept his part of the bargain, as he had not been paying the yearly land tax of RM8. He has also not paid the RM4,000 as agreed, but this would have probably been due to the fact that no one had pushed for this to be done, as he was only due to pay after the land is subdivided. As I had mentioned earlier, he did not seem to be aware of the fact, that the land had already been subdivided.

[35] Nevertheless, this court takes cognisance of the fact that the defendant had in reliance of the agreement, proceeded to construct the house on the land. Although the defendant could not produce documentary evidence that

A he had paid RM6,000, it is probable that this was done, as he would not have otherwise been allowed to build the house. I also noted that when being crossed with the fact that there was no receipt for the RM6,000 that he had paid, the defendant sadly lamented that there was nothing that he could do if the plaintiff wanted to cheat him. I do not think that this was the case. The
B fact that Lee got DW2, who was the plaintiff's estate conductor to witness the agreement, meant that the agreement was *bona fide*. Furthermore, the defendant had been residing there for more than 20 years since 1987, and that his presence was only discovered by PW1 sometime in 2011.

Findings

C

[36] From the photos shown of the defendant's house in the valuation Report produced by the defendant, it adds credence to the defendant's contention that he and his family had lived there. I am inclined to believe that the defendant's occupation was based on his *bona fide* belief that he had been given the right to construct and occupy the house that he had built.

D

[37] I am however disinclined to make an order for specific performance in respect of the agreement. The terms of the agreement are too vague and uncertain, bearing in mind that it was for the conveyance of land. There are some uncertainties in respect of the agreement for an order for specific
E performance to be made. I am of the view, that it would not be just to allow the defendant's claim for specific performance.

[38] In this instance however, equity should come to the defendant's aid. It is a fact that the defendant had built and resided in the house uninterrupted for more than 20 years. His presence was only discovered when PW1, who
F had recently assumed duties as a director, decided to take stock of the plaintiff's property. I would further add that the plaintiff had acquiesced to the defendant's presence on its land.

[39] The House of Lords in *Archbold v. Scully* 9 HL Cases 371 defined acquiescence as follows:

G

> If a party could object, lies by and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce; (p 383)

[40] *Archbold v. Scully (supra)* was cited with approval by the Federal Court
H in *Yong Nyee Fan & Sons Sdn Bhd v. Kim Guan & Co Sdn Bhd* [1978] 1 LNS 244; [1979] 1 MLJ 182. The Federal Court in that case also had this so to say on the applicability of an equitable relief:

> To sum up, there can be no hard and fast rule about equity. The application of the doctrine of laches or acquiescence must depend on the
I facts and circumstances of each case. In the ultimate analysis therefore the determination of these questions must largely depend on the court which

has to decide whether the balance of justice or injustice is in favour of granting the remedy or withholding it. Equity would primarily look at the conduct of parties, sacrificing certainty and inconsistency in order to do justice according to the type of relief and circumstances. (I, 189)

[41] The equitable relief comes in a statutory form. Section 28(2) and (3) of the Civil Law Act 1956 ('CLA 1956') states as follows:

(2) If any person erects any building or makes an improvement upon any land held by him in the *bona fide* belief that he had an estate in fee simple or other absolute estate, and that person, his executor or assign, or his under-tenant is evicted from the land by any person having a better title, the person who erected the building or made the improvement, his executor or assign shall be entitled either to have the value of the building or improvement so erected or made while the land was held by him and in that belief estimated and paid or secured to him or at the option of the person causing the eviction to purchase the interest of that person in the land at the value thereof but not taking onto account the value of the building or improvement.

(3) The amount to be paid or secured in respect of the building or improvement shall be the estimated value of the same at the time of the eviction.

[42] The applicability of s. 28(2) CLA 1956 was demonstrated in the case of *Sungei Way Leasing Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor* [1989] 1 CLJ 996; [1989] 2 CLJ (Rep) 519. In that case, the plaintiff had installed and leased central air-conditioning equipment in the first defendant's premises, known as KL Plaza. The land that the plaza was situated on was charged to the interveners, namely, Bank Bumiputra Malaysia Berhad and Bank Bumiputra Merchant Bankers Berhad ('the bankers'). Acting on the first defendant's default on the lease, the plaintiff attempted to reposess the air-conditioning equipment by filing an application for summary judgment, which was resisted by the first defendant. The bankers intervened, and claimed an interest on the air-conditioning equipment. Although the first defendant had not defaulted with the bankers, the latter maintains that they have prior equity over the equipment by virtue of the charge.

[43] Mahadev Shankar J (as he then was), held that s. 28(2) CLA 1956 provides an equitable relief to a person who had made a *bona fide* improvement to land, without intending that to gratuitously benefit a third party, and that the person would be entitled to have the value of that improvement restored to him. His Lordship was of the view that the plaintiff's rights over the air-conditioning equipment prevails over that of the plaintiff and the bankers, but recognises the fact that it would make the plaza useless and cause damage to its structure, if the plaintiff was allowed to remove the air-conditioning equipment. In his wisdom, His Lordship ordered that judgment be entered for the plaintiff against the bankers for the

market value of the air-conditioning equipment, and that a quantity surveyor determine its value. His Lordship further ordered that the bankers should be entitled to recover the amount paid by the first defendant to the plaintiff, from the proceeds of sale of the land and building, in the event of a foreclosure and sale.

[44] A similar situation to this case arose in the case of *Mok Deng Chee v. Yap See Hoi & Ors* [1981] CLJ 124B; [1981] CLJ (Rep) 69 (FC). In this case, the respondent had sued the appellant for the delivery of possession of their land together with a house that was erected on it. The appellant had bought over the house from a ground tenant of the previous owner of the land. The respondent subsequently bought over the land, and had increased the ground rent. The appellant then demolished the house and built on the same site a completely new house. The Federal Court approved of Lord Denning's *dicta* in the case of *Inwards v. Baker* [1965] 1 All ER 446. In that case Lord Denning held:

> It is quite plain from these authorities, that if the owner of a land requests another, or indeed allows another, to expend money on the land under an expectation created, or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with equity … So in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with some encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable to do so (F-I, 448; A, 449)

[45] His Lordship Salleh Abas FJ (later CJ) held:

> The principle is also known as equitable estoppel, because the landowner whose conduct has raised an expectation of his tenant of being allowed to stay on and thereby inducing him to spend money in respect of the tenancy is prevented from taking any action contrary to that expectation. (G, 323)

[46] It was held by the Federal Court in that case, that when the house was built by the previous owner, it was assumed that the house must have been built with encouragement and approval or at least without any objection by the previous landowner. The expenditure for the construction of the house by the previous tenant, raised in favour of him an equity, making him a tenant with an equitable estoppel, and that this equitable rights devolved to the appellant when he bought the house.

[47] In my opinion, s. 28(2) CLA 1956 clearly provides for a situation that the defendant is caught in, for this section states quite clearly that a person that had erected a building in a *bona fide* belief that he had the rights to do so, when faced with eviction by a person with a better title, is entitled to have the value of the building purchased by the person with the better title. It would be just for the plaintiff to reclaim back its land where the defendant's house is situated. It would also be just that the defendant be compensated for the value of his house.

[48] The defendant has produced a valuation report of the house by IPC Island Property Consultants Sdn Bhd dated 24 April 2015. The house itself has been valued at RM130,000. However, the valuer who had prepared the report, was not called to give evidence. The contents of the valuation report had therefore not been proven.

[49] I therefore make the following order:

(a) That the defendant gives vacant possession of the house described as No. 1, A1 Kampung Baru, Kota Tapan, 33400 Lenggong, Perak ('the house'), and the land that it is situated on, to the plaintiff within 100 days from today;

(b) The house is to be valued by a registered valuer to be appointed within two weeks from today, and paid jointly by the plaintiff and the defendant in equal shares, failing which, parties are at liberty to make an application, for this court to appoint a valuer;

(c) The appointed valuer is to provide a valuation of the house within 30 days from the date of appointment;

(d) The plaintiff is to pay the defendant the value of the house as ascertained by the valuer, or in the alternative to appoint a registered valuer, any amount that both plaintiff and defendant can mutually agree, within 100 days from today; and

(e) Each party is to bear their own costs.