Ong Koh Hou v Perbadanan Bandar & Anor [2009] 8 MLJ 616

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HIGH COURT (KUALA LUMPUR)

HARMINDAR SINGH JC

CIVIL SUIT NO S6–22–106 OF 2003

4 June 2009

Case Summary

Contract — Sale and purchase of property — Defective premises — Noise disturbance from water pump located above penthouse — Whether constituted nuisance — Whether developer liable to repair — Whether property manager liable to repair

Land Law — Housing developers — Defective premises — Noise disturbance from water pump located above penthouse — Whether constituted nuisance — Whether developer liable to repair — Whether property manager liable to repair

Tort — Nuisance — Defective premises — Noise disturbance from water pump located above penthouse — Whether real interference with comfort or convenience of living according to standards of average man — Whether nuisance established — Calculation of damages

The plaintiff purchased a penthouse in a condominium. The first defendant was the developer and the second defendant was the property manager appointed by the first defendant to maintain and up keep the said condominium. The plaintiff moved into his penthouse and after occupying the premises for only about two weeks, the plaintiff moved out as he could not stand the noise disturbance or nuisance from a water pump located above the penthouse. The plaintiff therefore commenced this suit claiming damages for loss of use of his penthouse, depreciation in value of the penthouse, loss of rental and other losses.

Held, allowing the plaintiff's claim against the first defendant with costs, dismissing the plaintiff's claim against the second defendant with costs and allowing the second defendant's counterclaim with costs:

(1) The first defendant, being the developer of the condominium, was obliged under section 6.3 of the sale and purchase agreement with the plaintiff to remedy any defect. The water pump problem arose at the [*617]

very onset after the building was completed and the first defendant had installed the water pump. The first defendant was responsible for the defective water pump. It was not a question of lack of maintenance or failure on the part of the second defendant to rectify it. The second defendant was not responsible for creating the nuisance or for continuing it. The plaintiff's claim against the second defendant therefore failed (see paras 6 – 7).

(2) Whether an act constitutes a nuisance cannot be determined by an abstract consideration of the act itself, but by reference to all the circumstance of the particular case; the time and place of its commission, the seriousness of the harm, the manner of committing it, whether it is done maliciously or in the reasonable exercise of rights; and the effect of its commission, that is whether it is continuous; so that it is a question of fact whether or not a nuisance has been committed. To be actionable, there has to be a real interference with the comfort or convenience of living according to the standards of the average man (see paras 11 & 13).

(3) The plaintiff was not being overly sensitive or unreasonable. The defective water15, 17pump was above the penthouse. So it was reasonable to expect that it would be the plaintiff who would be the most affected

or the only one affected by the banging noise. Secondly, to have to put up with a banging noise every half hour was certainly too much to bear for anyone. From a consideration of all the circumstances, the banging noise arising from the defective water pump constituted a nuisance under the law and the first defendant was therefore liable for damages (see para 14).

(4) As for loss of rental, the plaintiff never had any intention of renting out the premises. At best, he could claim for the cost of having to rent other premises since he could not live in the penthouse. However, no evidence was adduced in this regard. As for depreciation, no evidence was adduced. Since the plaintiff was deprived of living in the penthouse, he was therefore entitled to all expenses directly incurred as a result of the nuisance such as maintenance charges for the penthouse until the nuisance ended (see paras 15 & 17).

Plaintif membeli sebuah emper di sebuah kondominium. Defendan pertama merupakan pemaju dan defendan kedua merupakan pengurus harta yang dilantik oleh defendan pertama untuk menyelenggarakan kondominium tersebut. Plaintif berpindah ke empernya dan selepas menduduki premis tersebut selama dua minggu, plaintif telah berpindah keluar kerana dia tidak tahan dengan bunyi bising atau kacau ganggu daripada pam air yang terletak [*618]
atas emper tersebut. Oleh itu plaintif memulakan guaman ini menuntut ganti rugi bagi kehilangan kegunaan emper, susut nilai emper, kehilangan sewaan dan lain-lain kehilangan.

Diputuskan, membenarkan tuntutan plaintif terhadap defendan pertama dengan kos, menolak tuntutan plaintif terhadap defendan kedua dengan kos dan membenarkan tuntutan balas defendan kedua dengan kos:

(1) Defendan pertama, sebagai pemaju kondominium tersebut, berkewajipan di bawah seksyen 6.3 perjanjian jual beli dengan plaintif untuk memperbaiki sebarang kecacatan. Masalah pam air timbul pada mulanya selepas bangunan tersebut disiapkan dan defendan pertama yang memasang pam air tersebut. Defendan pertama bertanggungjawab terhadap kerosakan pam air tersebut. Ini bukanlah persoalan mengenai kekurangan penyelenggaraan atau kegagalan bagi pihak defendan kedua untuk memperbaikinya. Defendan kedua tidak bertanggungjawab menimbulkan kacau ganggu atau meneruskannya. Oleh itu tuntutan plaintif terhadap defendan kedua gagal (lihat perenggan 6 & 7).

(2) Sama ada tindakan tersebut merupakan kacau ganggu tidak dapat ditentukan oleh pertimbangan abstrak tindakan tersebut, tetapi dengan merujuk kepada seluruh keadaan kes tersebut; masa dan tempat berlaku, keseriusan kerosakan, cara melakukannya, sama ada ia dilakukan secara niat jahat atau dalam melaksanakan hak-hak yang munasabah; dan kesan melakukannya, bahawa sama ada ianya berterusan; bahawa ia merupakan persoalan fakta sama ada kacau ganggu telah berlaku. Tindakan boleh diambil jika terdapat gangguan sebenar terhadap keselesaan dan kemudahan hidup seorang biasa (lihat perenggan 11 & 13).

(3) Plaintif bukanlah seseorang yang terlampau sensitif atau tidak munasabah. Pam air yang rosak tersebut terletak di atas emper. Oleh itu adalah munasabah untuk menjangkakan bahawa plaintif yang paling atau satu-satunya pihak yang terjejas dengan bunyi bising dentuman tersebut. Keduanya, sesiapapun tidak dapat bersabar dengan bunyi dentuman setiap setengah jam. Daripada pertimbangan keseluruhan keadaan, bunyi bising dentuman yang timbul daripada pam air yang rosak merupakan kacau ganggu dibawah undang-undang dan oleh itu defendan pertama bertanggungan untuk ganti rugi (lihat perenggan 14).

(4) Bagi kehilangan sewaan, plaintif tidak pernah mempunyai niat untuk menyewakan premis tersebut. Sebaik-baiknya, dia menuntut kos yang diperlukan untuk menyewa premis lain memandangkan dia tidak dapat tinggal di emper tersebut. Walau bagaimanapun, tiada keterangan yang [*619]

dikemukakan mengenainya. Bagi susut nilai, tiada keterangan yang dikemukakan. Memandangkan plaintif tidak dapat tinggal di emper tersebut, oleh itu dia berhak untuk segala perbelanjaan yang secara terus disebabkan oleh kacau ganggu contohnya bayaran penyelenggaraan untuk emper sehingga kacau ganggu tersebut berakhir (lihat perenggan 15 & 17).

Notes

For cases on sale and purchase of property, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4949–5014.

For cases on housing developers, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2830–2894.

For cases on nuinsance, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1543–1587.

Cases referred to

British Transport Commission v Gourley [1956] AC 185, HL

HW West & Son Ltd v Shephard [1963] 2 All ER 625

Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324

Sedleigh-Denfield v O'Callaghan & Ors [1940] AC 880, HL

Sheikh Amin bin Salleh v Chop Hup Seng [1974] 2 MLJ 125

St Helens Smelting Co v Tipping (1865) II HLC 642

Stone v Bolton & Ors [1949] 1 All ER 237, KBD

Poh Ban Chuan (Ikhwan bin Ilias with him)(TC Chong & Partners) for the plaintiff.
Juanita Johari (Shaikh Harun & Co) for the first defendant.
Wong Kam Leong (Wong Kam Leong & Partners) for the second defendant.

Harmindar Singh JC

[1]On 19 October 1993, the plaintiff purchased a penthouse at the Angkasa Impian Condominium. The purchase price was RM849,904. The first defendant was the developer of the condominium whilst the second defendant was the property manager or management agent appointed by the first defendant to maintain, up keep and administer the said condominium in a reasonably good state of repair and maintenance for the enjoyment of use by the residents.

[2]After vacant possession was handed over and the renovations completed, the plaintiff moved into his penthouse around the end of 1997. After occupying the premises for only about two weeks, the plaintiff moved out. He said that he could not stand the noise disturbance or nuisance from a water pump located above the penthouse and other contributing problems. [*620]
These were all listed out in a letter dated 1 June 1998. The plaintiff is now claiming damages for loss of use of his penthouse, depreciation in value of the penthouse, loss of rental and other losses.

[3]What is the allegation against the defendants? The complaints of the plaintiff were all set out in a letter dated 1 June 1998. The major complaint of the plaintiff is in relation to a defective water pump. There were other complaints concerning poor TV reception, presence of mosquitoes and lack of cleanliness at the lobby area. I considered these matters too trivial and minor to be worthy of consideration.

[4]What was wrong with the water pump? The problem of the defective water pump is evidenced by documents from the first defendant's consultants. The consultant's view was contained on a letter dated 5 March 1999 of which the relevant parts stated as follows:

1. The booster pumpsets were found to be operating satisfactorily. There was adequate pressure developed for flow into the roof storage tank and no excessive vibration & sound were noted during its operation.
2. However, when the pump stops, a distinct "banging" sound is heard. This, in our opinion, is due to the rapid closure (slamming action) of the check valve installed at the pump discharge.
3. To overcome this problem in an effective way (technically and economically), we recommend that the installed water/flap check valves be replaced with silent, anti-hammer & non-slam type check valves.

[5]According to the plaintiff, this banging sound occurred persistently throughout the day at approximately twice each hour.

[6]Who is responsible for this state of affairs? There was no doubt that the first defendant, being the developer of the condominium, was obliged under section 6.3 of the sale and purchase agreement with the plaintiff to remedy any defect. This water pump problem arose at the very onset after the building was completed. It was the first defendant who installed the water pump. So there cannot be any doubt that they are responsible for the defective water pump.

[7]What about the second defendants? Are they also responsible? They claim that this was a structural or building problem and not a maintenance issue. SD3, the asset manager of the plaintiff, told the court that it was a design fault. As such, it was the developers who had to attend to the problem. The documents produced as evidence appear to suggest that the first defendant accepted this contention. The first defendant appeared to accept [*621] the responsibility to rectify the defective pump. I would think in all the circumstances in this case that the problem with the banging noise from the defective water pump emanated from the first defendant's failure to ensure that a proper water pump was installed in the first place. It was not a question of lack of maintenance or failure on the part of the second defendant to rectify it. The second defendant had no funds to do so anyway. To utilise the funds from the maintenance account would have been grossly unfair to the owners of the condominiums as the problem arose at the inception due to the fault of the developer/first defendant and not through any improper maintenance on the part of the second defendant. For these reasons, the second defendant was not responsible for creating the nuisance or for continuing it. The plaintiff's claim against the second defendant must therefore fail on this account.

[8]So did the banging sound from the water pump amount to nuisance by the first defendant? Nuisance is defined as an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of (a) a right belonging to him as a member of the public, when it is a private nuisance or (b) his ownership or occupation of land or some easement, profit or other right used or enjoyed in connection with the land, when it is a private nuisance (see *Clark & Lindsell on Torts* (18th Ed), at p 973; *Sheikh Amin bin Salleh v Chop Hup Seng* [1974] 2 MLJ 125).

[9]In the instant case, nuisance is relevant when it involves under interference with enjoyment of the land or 'the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves' (see *Clark & Lindsell on Torts*, at p 979; *St Helens Smelting Co v Tipping* (1865) II HLC 642).

[10]A passage in *Clark & Lindsell on Torts*, at p 979 is instructive. It reads as follows:

> It is always a question of degree whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance. The acts complained of as constituting the nuisance, such as voice, smells or vibration, will usually be lawful acts which only become wrongful from the circumstances under which they are performed, such as time, place, extent or the manner of performance. In organised society everyone must put up with a certain amount of discomfort and annoyance caused by the legitimate activities of his neighbours… No precise or universal formula is possible, but a useful test is what is reasonably according to ordinary usages of mankind living in a particular society.
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> (see also *Sedleigh-Denfield v O'Callaghan & Ors* [1940] AC 880).

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[11]It would appear therefore that the primary consideration is the question of reasonableness. In this regard, whether an act constitutes a nuisance cannot be determined by an abstract consideration of the act itself, but by reference to all the circumstance of the particular case; the time and place of its commission, the seriousness of the harm, the manner of committing it, whether it is done maliciously on the reasonable exercise of rights; and the effect of its commission, that is whether it is continuos; so that it is a question of fact whether or not a nuisance has been committed (see *Winfield and Jolowicz on Tort* (15th Ed), at p 497; *Stone v Bolton & Ors* [1949] 1 All ER 237).

[12]In the present case, the plaintiff claimed that the banging noise was unbearable and he was forced to move out within two weeks after spending a lot of money in first purchasing the penthouse and then spending some more on renovation works. The defendants, on the other hand, contended that no one else but the plaintiff complained about the noise.

[13]In this regard, it is trite that the law does not take into account abnormal sensitivity in either persons or property. To be actionable, there has to be a real interference with the comfort or convenience of living according to the standards of the average man (see *Clark and Lindsell on Torts*, at p 979).

[14]So was the plaintiff being overly sensitive or unreasonable as the defendants would like us to believe? I do not think so. In the first place, there may be a simple explanation as to why no one else complained. The defective water pump was above the penthouse. So it was reasonable to expect that it would be the plaintiff who would be most affected or the only one affected by the banging noise. Secondly, to have to put up with a banging noise every half hour would certainly be too much to bear for anyone. And it was for these reasons that the defendants decided to take action to resolve this problem. From a consideration of all the circumstances in this case, I am satisfied that the banging noise arising from the defective water pump constituted a nuisance under the law and the first defendant is therefore liable for damages.

[15]So what are the damages that the plaintiff is entitled to? Firstly, the plaintiff is claiming for loss of rentals at the rate of RM8,000 per month. I do not see how the plaintiff could be entitled to this. He never had any intention to renting out the premises. At best, he could claim for the cost of having to rent other premises since he could not live in the penthouse. However, no evidence was adduced in this regard. The reason for this is probably because the plaintiff went back to live in the premises above his business as he was doing prior to his purchase of the penthouse.

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[16]Secondly, the plaintiff is claiming for depreciation in value of the penthouse. Again no evidence was adduced. SD3, the witness for the second defendant, however stated that the penthouse has in fact appreciated in value. This claim must therefore fail.

[17]So what measure of damages is the plaintiff entitled to? It should be reiterated that the basic function and purpose of an award of damages is compensation. Damages are not meant to be punitive and much less a reward. They are simply compensation that will give reparation for the wrongful act and for all the natural and direct consequences of the wrongful act, so far as money can compensate (see *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324; *British Transport Commission v Gourley* [1956] AC 185 and *HW West & Son Ltd v Shephard* [1963] 2 All ER 625). In the instant case, since the plaintiff was deprived of living in the penthouse, he is entitled to all expenses directly incurred as a result of the nuisance. To my mind, the expenses he would be entitled to are the maintenance charges that he had to pay for the maintenance of the penthouse. It could be argued that he would have had to pay this whether he stayed in the premises or not. However, if his intention had been not to stay but to rent out the penthouse, he would have been able to secure rental which would have far in excess of the maintenance charges that he would have to pay. In any event, it was clear that his intention was to live in the penthouse, I think it is fair compensation that the first defendant be liable for the maintenance charges until the nuisance had ended.

[18]So the question now is when did the banging sound stop? From the documentary evidence, it could be gathered that the banging sound was not resolved until 30 September 1999. There was a letter dated 30 September 1999 sent by the consultant to the first defendant. The letter confirmed that new silent anti-hammer and non-slam check valves were installed in the water pump with the result that 'the system was satisfactorily operating with no hammering, vibration and noise problems'. Although there appears to be some dispute in that the banging sound was only resolved later, it is significant to note that this letter appears as an agreed document. Upon a consideration of the other correspondences between the parties, it could well have been the case that the problem may have recurred or more likely that the hammering problem may have been resolved to some extent but not in its entirety. However, I considered that what was crucial was to determine when the banging sound stopped or was reduced to such an extent that it became untenable for the plaintiff to contend that he could not live there. In this case, I came to the view that the nuisance abated on 30 September 1999 which was some 22 months from the time the plaintiff moved out. Since the maintenance charges was at RM598.92 per month, I would allow damages to the plaintiff in the sum of RM13,169.64 against the first defendant.

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[19]But that is not quite the end of the matter. There is a counterclaim by the second defendant for the failure of the plaintiff to pay the maintenance charges. Documentary evidence was adduced to show that the amount due was RM88,778 as at 30 August 2006. There is no serious dispute on this issue. In fact, at the outset of the trial, the plaintiff had agreed to pay the maintenance charges that are outstanding. The second defendant is therefore entitled to the amount claimed.

[20]In the result, the plaintiff is entitled to judgment against the first defendant for the sum of RM13,169.64 together with interest at 8%pa from the date of filing of the summons till realisation and costs. The plaintiff's claim against the second defendant is dismissed with costs. The second defendant is entitled to their counterclaim against the

plaintiff for the sum of RM88,778 together with interest at 8%pa on the principal sum of RM71,140.88 from 30 August 2006 until realisation and costs.

Plaintiff's claim against the first defendant allowed with costs. Plaintiff's claim against the second defendant dismissed with costs. Second defendant's counterclaim allowed with costs.

Reported by Kanesh Sundrum
