PENANG AMUSEMENT COM SDN BHD v ABDUL GAFFOR BIN KALANDAR MASTAN

CaseAnalysis
| **[2011] MLJU 111**

PENANG AMUSEMENT COM SDN BHD v ABDUL GAFFOR BIN KALANDAR MASTAN [2011] MLJU 111

Malayan Law Journal Unreported

HIGH COURT (PENANG)

CHEW SOO HO, JC

CIVIL SUIT NO 22-645-2008 (22-449-2007)

26 January 2011

See Liang Teik & Lim chiah Shiang (See Ramsun &Tan),

RSN Rayer (R Nethaji Rayer & Co.)

CHEW SOO HO, JC

DecisionBrief Facts

Plaintiff is the registered owner of land bearing Lot No. 126, Section 14, Georgetown, Penang under Grant No. 35 & 46 ("the said land") together with a building erected thereon known as Kompleks Penang Bowl.

Plaintiff averred that Defendant is occupying a portion of the said land used as car park ("the car park") without any payment of rental to the Plaintiff i.e. a tenant at will. Vide a letter dated 31.7.2007, Plaintiff had through their solicitors given notice to the Defendant to quit and deliver vacant possession of the car park to the Plaintiff not later than 15.8.2007 to which the Defendant did not comply and refused to quit and deliver vacant possession. Hence, the Plaintiff sued.

The Issues

1 Whether SP1 who testified as a witness for and on behalf of the Plaintiff must produce a copy of written authorization from the Plaintiff before her evidence can be considered by the Court.

2 Whether Defendant's occupation of the portion of land used as a car park, is a tenancy between landlord and tenant pertaining to payment of rental or whether it is tenancy at will.

3 Is the Defendant entitled in law to continue occupation of the car park?

1st Issue

Plaintiff is in fact present in Court with a representative.

SP1 who is an employee of the Plaintiff has been working for the Plaintiff as office supervisor for 31 years. Even evidence of Defendant also suggested that the Defendant dealt with 'Christine' referring to SP1 in respect of the car park. SP1 was also not challenged that she is not so employed by the Plaintiff. I have no doubt upon a finding of fact that SP1 is an employee of the Plaintiff.

The challenge raised in submission of the Defendant is that SP1 testified without the authorization of the Plaintiff when she testified for and on behalf of the Plaintiff citing*Chew Hock San & Ors v. Connaught Housing Development Sdn. Bhd.* [1985] 1 MLJ 350 SC and *Sarawak Building Supplies Sdn. Bhd. v. Director of Forests & Ors* [1991] 1

MLJ 211. Learned counsel for the Plaintiff in opposing Defendant's submission submitted the cases of *Syarikat Ying Mui Sdn. Bhd. v. Muthusamy Sellapan* [1999] 4 CLJ 651 and *Lee Chin Ho & Anor v. Syed Hussein Salim Alattas & Anor* [2000] 6 CLJ 123.

SP1 had indeed testified as a witness for the Plaintiff in whatever capacity she may be. As a witness, the paramount consideration is whether she is competent. So long as she is a competent witness, there is no reason for her evidence to be rejected by the Court outright. Section 118 Evidence Act 1950 is explicit when it states that "All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind." I find no such infirmities under section 118 in the case of SP1 which would disqualify her from being a competent witness. SP1 who has been working for Plaintiff for 31 years as office supervisor since 1979 has full and personal knowledge of the matters in this case and she was able to give cogent evidence of all relevant facts vide her Witness Statement which she endorsed and signed in open Court, her cross-examination and re-examination. She is a material witness of facts with full knowledge of the facts in this case and she is still the employee of the Plaintiff. Apart from mere cross-examination which she withstood, there is also no contradictory evidence from the Defendant to suggest that she is incapable of giving evidence as a witness of facts for the Plaintiff. Evidence of Defendant even suggested that he had dealt with SP1 all along. I accept SP1's evidence that she was authorized by her boss to testify in Court for the Plaintiff. The case of Chew Hock San (supra) cited by learned counsel for the Defendant is distinguishable as it relates inter alia to the authorization by the employer to its clerk for the receipt of any booking fee from purchasers for the purchase of the shophouses and the issuance of receipts thereof before the official booking was commenced; it does not relate to the capacity of a witness to testify. The 2nd case of Sarawak Building Supplies Sdn. Bhd. (supra) pertains to the authority of solicitors to institute the suit for and on behalf of the Plaintiff company and is thus not relevant herein. I agree with the observation by His Lordship Clement Skinner JC (now JCA) in Syarikat Yin Mui Sdn. Bhd. (supra) submitted by learned counsel for the Plaintiff that "At trial, evidence will normally be introduced through the oral testimony of a witness but there is no requirement that before a person testifies, he must be authorized to do so by the party who calls him." There is no necessity to prove SP1's authority to testify as a witness for the Plaintiff as long as she is a competent witness. If every witness testifying for a party which is a company is required to have such written authorization from the said company, section 118 Evidence Act 1950 would have to be so amended; otherwise such proposition will not be in consonant with the said provision of the Evidence Act 1950 which does not impose the requirement that a witness testifying for a company must be duly authorized before he could take the stand in the witness box. Moreover, SP1 said she has been authorized to testify and if Defendant wishes to say that she has no authority, the onus is on the Defence to bring evidence to challenge and contradict her. There is nevertheless no such evidence to suggest to the contrary. Therefore, I hold that SP1 is a competent witness to testify whether she has or has not a written letter of authorization from the Plaintiff pursuant to section 118 Evidence Act 1950. The primary role of SP1 is as a witness for the Plaintiff and not as representative appearing for the Plaintiff in this case. The representative of the company is present in Court throughout trial. For these reasons, I find this submission by the Defendant untenable.

2nd Issue

There is no dispute that Defendant's late father, Mr. Ghaffor and subsequently the Defendant had been in possession of the said portion of Plaintiffs land for the purpose as a car park. SP1 said that no rental had ever been paid to the Plaintiff for the use of the portion of land belonging to the Plaintiff (Bundle B pages 1 - 4) and using it as car park. There is no tenancy agreement showing any rental payment. The letters from Plaintiff to Defendant's father dated 15.8.1984 (Bundle B page 5) and to the Defendant dated 14.9.2005 (Bundle B page 6) do not indicate any tenancy agreement involving Defendant paying rental to Plaintiff. Learned counsel for the Defendant is attempting to submit on the doctrine of promissory estoppel contending that the Defendant's father down to the Defendant were allowed to occupy and use the said portion of land as car park upon an encouragement from the Plaintiff to the Defendant or an expectation on the Defendant that he could continue to occupy the car park for as long as he wants. On this submission learned counsel for the Plaintiff objected that the issue of promissory estoppel is not pleaded and should not be raised in submission. He contended that even if the doctrine is to apply, the period of purported 30 years lease would have been exhausted as Defendant's father and Defendant had occupied the car park for more than 30 years.

I must say that the doctrine of equitable estoppel or promissory estoppel or proprietary estoppel of which the preconditions for its operation are set out in *Willmett v. Barber* (1880) 15 Ch D 96, is not pleaded at all by the Defendant in his Defence and for that matter the Defendant is barred from raising this in argument and this Court is not entitled to decide on it as it is not part of the Defendant's pleaded case; see *Yew Wan Leong v. Lai Kok Chye* [1990] 2 MLJ 152 F.C.

Defendant attempted to contend that there was a tenancy agreement saying in evidence that he has been paying rental of RM1.000 per month to SP1 but no receipt was issued. This evidence is nevertheless in direct conflict with the Statement of Agreed Facts (Bundle C) which categorically stated that he occupied the car park without any payment of rental. On the face of such admitted fact vide Bundle C, I must reject Defendant's evidence of the existence of a tenancy agreement involving payment of monthly rental. It is clearly an after-thought.

In the absence of any tenancy agreement as the Defendant has attempted to suggest, I agree with the submission by the Plaintiff that the position herein this case is one of tenancy at will when such occupation of the car park was without payment of rent which is determinable at the will of either party and there is no necessity for any notice nor any time frame for a party to quit (see Halsbury's Laws of England 4th Edn. Reissue para 168,169,172 and 173).

3rd Issue

Since the Defendant is in occupation of the car park on tenancy at will, he is no longer entitled to remain on the car park when the Plaintiff had elected to determine it. Although there is no requirement for notice, Plaintiff had however through its solicitors given such notice to the Defendant to quit and deliver vacant possession (Bundle B page 9). In any event, a tenancy at will comes to an end when the Plaintiff serves the writ of summons and the statement of claim claiming possession of the said portion of land used as a car park from the Defendant {*Martinali v. Ramuz* [1953] 1 WLR 1196 as cited in *Khoo Yong Seng v. Ng Choo Peng & Anor* [2003] 2 CLJ 191 @ 218). Defendant is therefore no longer entitled in law to continue with the occupation of the said portion of the Plaintiffs land.

Conclusion

Having considered this case as a whole, I find that the Plaintiff has proved its case on a balance of probabilities and I allow the Plaintiffs claim as prayed vide para 4(i) in the Statement of Claim. I am also satisfied with SP2's evidence and his conclusion that the rental of the car park as at 16.8.2007 was in the region of RM3.500.00 a month in the absence of any evidence to show otherwise. Indeed, Defence must be taken to have accepted SP2's evidence as to the fair rent when no challenge has been taken on this point. With that, I allow Plaintiffs claim for mesne profits calculated from 16.8.2007 to the date of delivery of vacant possession at RM3.500.00 per month with interest at 4% per annum and I lastly award costs of RM7,000.00 to the Plaintiff.

As to the 2nd case 22-449-2007 where parties agreed to be bound by the decision in this trial, learned counsel for Defendant, after taking instruction from the Defendant, applied to withdraw it with no order as to costs. Although learned counsel for Plaintiff prayed for costs because a few interlocutory matters had been filed in this 2nd suit and heard, I find that the cost awarded above suffices to cover this case when the hearing of which has been dispensed with upon this withdrawal. This suit 22-449-2007 is therefore struck out with no order as to costs.
