

RHB Bank Bhd v Hiap Leong Trading Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-393
OF 2002TENGKU BAHARUDIN SHAH, SURIYADI AND HELILIAH JJCA
11 FEBRUARY 2011

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Contract — Uncertainty — Option to renew — Fixed-term tenancy — Rental and other terms and conditions for new tenancy period unresolved — Tenant continued to occupy demised premises after first term expired at same rent — No protest from landlord — Tenant vacated premises after giving one-months' notice — Whether termination wrongful — Whether new three-year tenancy term had come into being — Whether tenant's occupation on monthly tenancy only

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The appellant ('the bank') was a tenant of a four-storey shop-house owned by the respondent. The tenancy agreement between the parties was for a fixed term of three years commencing 15 January 1995 at a monthly rent of RM8,000. The tenancy determined on 14 January 1998. Before the expiry of the term, the bank's solicitor in exercising the option under cl 4(d) of the agreement informed the respondent of its intention to renew the tenancy for a further three years at the same rental but with the inclusion of a new term allowing the bank to terminate the new tenancy agreement by giving six months' notice in writing. The respondent's solicitor replied, disagreeing to the inclusion of the new term but giving notice of the respondent's wish to increase the rent by 5%. Without any consensus being reached by the parties on the rent or the other terms, the bank continued to occupy the premises from 15 January 1998 until 30 June 1998 paying the same rent per month. The respondent accepted the rent without protest. By letter dated 30 May 1998 the bank gave the respondent a months' notice of its intention to terminate the new tenancy agreement and from 1 July 1998, vacated the premises. The respondent sued the bank for RM272,500 being loss of rent for 30 months of the unexpired period of the new tenancy plus RM32,500 as expenses for restoration works to the premises. It was of the view a new three year tenancy agreement had come into being by the bank continuing to occupy the premises and paying the RM8,000 rent monthly. The bank counterclaimed for the RM24,000 deposit it had paid to the respondent. At the trial the respondent withdrew its claim for the restoration works and judgment was entered for the respondent for RM168,000, being 24 months' rent less the bank's counterclaim.

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Held, allowing the appeal with costs:

- (1) The trial judge had failed to determine whether the new tenancy agreement was a monthly agreement or for a fixed term of three years. He

- A had also misdirected himself when he decided that it was implied by the conduct of the parties that they had reached mutual agreement on the amount of rent payable (see para 12).
- B (2) On the new tenancy agreement, the parties had not agreed on whether to increase the rent by 5%; whether to include the new term proposed by the bank or what the agreed monthly rent for the new tenancy period was to be. Despite parties failing to agree on the rent payable, Messrs CH Williams Talhar was not consulted to determine the binding fair market rent as provided for in cl 4(d) of the tenancy agreement (see para 13).
- C (3) With the fundamental conditions left unsatisfied it could not be said that a new binding 3 year tenancy agreement had been reached. There was only a monthly tenancy. That being so, a one-month notice was sufficient in the circumstances of the case (see paras 14–15).

D **[Bahasa Malaysia summary**

E Perayu ('bank') adalah penyewa rumah kedai empat tingkat yang dimiliki oleh responden. Perjanjian penyewaan antara pihak-pihak adalah bagi tempoh yang ditetapkan bagi tempoh tiga tahun bermula daripada 15 Januari 1995 pada

F sewa bulanan RM8,000. Penyewaan ditetapkan pada 14 Januari 1998. Sebelum tamat tempoh, peguamcara bank, dalam menjalankan opsyen di bawah kl 4(d) perjanjian memberitahu responden niatnya untuk memperbaharui penyewaan kepada lanjutan tiga tahun pada masa penyewaan dengan memberi notis enam bulan secara bertulis. Peguamcara responden menjawab, tidak bersetuju dengan kemasukkan terma baru tetapi memberi notis kepada hajat responden untuk menaikkan sewa sebanyak 5%. Tanpa mencapai persetujuan oleh pihak-pihak mengenai sewa atau terma-terma lain, bank terus menduduki premis dari 15 Januari 1998 hingga 30 Jun 1998, membayar sewa yang sama setiap bulan. Responden menerima sewa tanpa protes. Melalui surat bertarikh 30 Mei 1998, bank memberikan responden satu bulan notis untuk niatnya menamatkan perjanjian baru dan dari 1 Julai 1998, mengosongkan premis. Responden menyaman bank bagi RM272,500 sebagai kerugian sewa bagi 30 bulan tempoh penyewaan baru yang tidak tamat ditambah RM32,500 sebagai perbelanjaan bagi kerja-kerja pemulihan di premis. Ia berpendapat bahawa satu perjanjian penyewaan tiga tahun baru telah dimulakan oleh bank berterusan untuk menduduki premis dan membayar sewa RM8,000 sebulan. Bank menuntut balas bagi RM24,000 mendepositkan yang telah dibayar kepada responden. Ketika perbicaraan, responden menarik balik tuntutanannya bagi kerja-kerja pemulihan dan penghakiman berpihak kepada responden bagi RM168,000 iaitu 24 bulan sewaan kurang daripada tuntutan balas bank.

Diputuskan, membenarkan rayuan dengan kos:

- (1) Hakim bicara telah gagal untuk memutuskan sama ada perjanjian

penyewaan baru adalah perjanjian bulanan atau perjanjian bulanan yang ditetapkan bagi tempoh tiga tahun. Beliau juga tersalah arah apabila beliau memutuskan bahawa ia disiratkan oleh perlakuan pihak-pihak bahawa mereka telah mencapai persetujuan bagi jumlah sewa terbayar (lihat perenggan 12).

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- (2) Bagi perjanjian penyewaan, pihak-pihak tidak bersetuju untuk sama ada menaikkan sewa sebanyak 5%; sama ada untuk memasukkan tempoh baru yang dicadangkan oleh bank atau apakah sewa bulanan yang dipersetujui bagi tempoh penyewaan baru. Walaupun pihak-pihak gagal untuk bersetuju bagi sewa terbayar, Tetuan CH Williams Talhar tidak dirujuk untuk memutuskan sewa pasaran yang mengikat seperti yang diperuntukkan dalam kl 4(d) perjanjian penyewaan (lihat perenggan 13).

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- (3) Dengan syarat-syarat asas tinggal tidak dipenuhi, tidak boleh dikatakan bahawa perjanjian penyewaan tiga tahun yang mengikat telah dicapai. Hanya ada penyewaan bulanan. Dengan itu, satu bulan notis adalah mencukupi dalam hal keadaan kes (lihat perenggan 14–15).]

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Notes

For a case on option to renew, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 5525.

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Cases referred to

Lim Geak Liang v East West UMI Insurance Bhd [1997] 3 MLJ 517, FC (refd)

Teo Siew Peng v Guok Sing Ong & Anor [1983] 1 MLJ 132, CA (refd)

United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd [1968] 1 All ER 104, CA (refd)

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Appeal from: Suit No: S1–22–318 of 1999 (High Court, Kuala Lumpur)

Satish all Vasudevannair (Ida Fazlina with him) (Gulam & Wong) for the appellant.

KThavanesan all Kanapathipillai (Raja Nazrin Raja Ghazilla with him) (Ariffin & Thava) for the respondent.

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Suriyadi JCA (delivering judgment of the court):

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[1] The plaintiff (hereinafter referred to as the respondent) had filed a claim against the defendant (hereinafter referred to as the appellant) for arrears of rental. In order to resolve the suit the High Court had to determine whether a binding tenancy contract existed between them in the first place. The answer at the end of the hearing was in the positive and the learned judge accordingly allowed the claim. Being dissatisfied the appellant filed a notice of appeal and we heard the appeal. We unanimously allowed the appeal with costs.

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A [2] To appreciate the appeal we herewith reproduce the agreed facts and they are as follows:

B [3] The appellant was the tenant of the ground floor to the third floor of a four storey shop-house known as No 142, Jalan 2/3A, (Pasar Borong Development) 68100 Batu Caves, Kuala Lumpur ('the premises'). The respondent was the registered owner of the premises. Both the appellant and the respondent had entered into a tenancy agreement on 24 April 1995, spanning three years starting from 15 January 1995, with a monthly rental of RM8,000. It would determine on 14 January 1998. The appellant used the premises as a bank and any business relating to banking on the terms and conditions contained in the said tenancy agreement.

D [4] As permitted by the tenancy agreement, by a letter dated 13 August 1997, the appellant's solicitor informed the respondent of its intention to take up the option of renewing the existing tenancy for a further three years period, also at RM8,000 per month subject to the same terms and conditions. In this letter it was also proposed to the respondent that an additional term be included, a provision that allowed it to terminate the second tenancy agreement by giving the respondent six months notice in writing. However, the respondent did not reply to the above letter or to a reminder sent on 12 September 1997.

F [5] It was not disputed that the respondent through its solicitor, wrote to the appellant on 23 October 1997, disagreeing to the inclusion of the additional term proposed by the appellant, and at the same time wishing to increase the rental by 5%. Despite the want of meeting of the minds the appellant continued to occupy the said premises from 15 January 1998 onwards until 30 June 1998 ie for an additional period of six months. During this six months period the respondent accepted the rental of RM8,000 per month without any protest. By a letter dated 30 May 1998, a one month notice was issued by the appellant, stating its intention to terminate the new tenancy agreement, and with effect from 1 July 1998 vacated the premises.

H [6] Due to the termination of the new tenancy the respondent commenced an action for the recovery of RM272,500, consisting of RM240,000 being loss of rental for thirty months ('unexpired period') under the new tenancy agreement of three years, and RM32,500 being expenses incurred for restoration works to the said premises. In a gist, as far as the respondent was concerned, by the appellant continuing to stay in the premises, and paying the monthly rental of RM8,000, a new three years tenancy agreement had concretised. By the termination the appellant had breached the new agreement thus causing losses to the respondent. The appellant counterclaimed for RM24,000 for the deposit paid to the respondent. At the trial, the respondent withdrew its claim for restoration works and judgment was entered for

RM168,000 (being rental for 24 months from 15 June 1998 to 14 January 2001 less the amount counterclaimed by the appellant of RM24,000). A

[7] The non-agreed facts before us were as follows, namely:

- (a) the new tenancy agreement was exercised in accordance with cl 4(d) of the tenancy agreement, which created a new tenancy for a fixed term of three years from 15 January 1998 to 14 January 2001; B
- (b) the rental for the said premises after 14 January 1998 was agreed upon by both parties through an implied conduct of parties notwithstanding the requirement of cl 4(d); C
- (c) despite the non-compliance of cl 4(d), and the uncertainty pertaining to the amount of rental payable, the occupation was not on a monthly basis; and iv. the appellant breached the new tenancy by issuing one month notice to determine it, and that the respondent thus was entitled to recover the rentals from 15 June 1998 to 14 January 2001. D

[8] With cl 4(d) as provided for in the tenancy agreement being central to this appeal, we herewith reproduce it. It reads: E

...Upon the expiration of the term of the Tenancy hereby granted and referred to in clause 1 hereof, if the Tenant shall at its option be desirous of renewing the Tenancy for a further term of three (3) years and shall not less than six (6) months prior to the expiration of the term of the Tenancy give to the landlord a notice in writing of its desire to renew the Tenancy, the Landlord shall grant to the Tenant a tenancy in respect of the said Demised Premises for such further term of three (3) years commencing immediately upon the expiration of the Tenancy (hereinafter referred to as 'the Second Tenancy') subject to all other aspects to the same terms and conditions as are herein contained at a monthly rental to be determined as follows: F

- (i) Being a rent to be mutually agreed upon by the parties hereto based on the fair market rent for similar premises in the vicinity then prevailing or G
- (ii) Being a rent in an amount not exceeding fifteen per centum (15%) increase from the rent of Second the Tenancy;

whichever shall be lower ALWAYS PROVIDED that in the event that the parties hereto shall be unable to reach mutual agreement on the rent payable under Clause 4.0(d)(i) above then subject to Clause 4.0 (d)(ii) above the fair market rent shall be determined by Messrs. C.H. Williams Talhar & conclusive and shall be binding on the parties hereto... H

[9] The appellant submitted before us that the exercise of the option was a question of law and we could hear this appeal even though this question was not raised at the High Court. Conversely, the respondent's counsel ventilated that the issue before us hinged on facts thus barring us from hearing this appeal. I

A We alluded to the case of *Lim Geak Liang v East West UMI Insurance Bhd* [1997] 3 MLJ 517, and decided that we could proceed with the matter. The Federal Court there had opined that:

B ...When a question of law was raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it was not only competent but expedient, in the interest of justice, to entertain the plea (*Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55 followed).

C [10] The appellant submitted that the option clause provided, inter alia, that if it was desirous of renewing the tenancy agreement for another three years, it must give the respondent a written notice, not less than six months prior to the expiration of the tenancy. Further, the respondent shall grant a tenancy for a further period of three years (the second tenancy agreement) subject to all the terms and conditions having been agreed upon. The appellant ventilated that even though 13 July 1997 was the last date yet one month after that date matters were still unclear. Evidence was alluded to by the appellant to establish the uncertain situation especially the respondent's intention to increase the rental by 5% and rejecting inclusion of the new clause in the new tenancy agreement.

D [11] Despite the above uncertainties the appellant continued paying rental of RM8,000 every month; and accepted by the respondent without protest. Before vacating the premises the appellant also gave one month notice to the respondent of its intention to terminate the tenancy.

E [12] Having perused the notes of proceedings and the grounds of judgment we found that the learned judge failed to discuss the real issue. We found that the learned judge failed to determine whether the new tenancy agreement was a monthly agreement or a three years agreement. Further we found that the learned judge had misdirected himself when he decided that it was implied by the conduct of the parties that they had reached a mutual agreement on the amount of rent payable.

F [13] From the facts, and pertaining to the new tenancy agreement, we found that the parties had yet to agree:

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- (a) on the other aspects of the terms and conditions to the mutual satisfaction of both parties;
 - (b) whether to increase the rental by 5%;
 - (c) whether to include the new provision as requested by the appellant;
 - (d) on the agreed monthly rental; and
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- (e) despite parties failing to reach mutual agreement on the rent payable, Messrs C H Williams Talhar was not consulted to determine the binding fair market rent. A

[14] With the fundamental conditions left unsatisfied it could not be said that a three years tenancy agreement had been reached. Unless the acceptance corresponds with the offer of the appellant, let alone never at anytime mutually agreed upon, it could not be said a binding contract had been sealed in this case (*United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 All ER 104). The Singapore Court of Appeal in *Teo Siew Peng v Guok Sing Ong & Anor* [1983] 1 MLJ 132 had succinctly said: B

It is settled law that an option is a unilateral contract which does not become binding on the grantor of the option until the exact terms of the option are complied with. C

[15] Before us therefore was only a monthly tenancy, with this monthly tenancy defence sufficiently laid down in the statement of defence. That being so a one month notice was sufficient in the circumstances of the case. D

[16] Based on the above grounds, we were satisfied that the respondent had failed to establish its case on a balance of probability hence allowing the appeal with costs. We meted down the consequential orders in the following manner: E

- (a) the appeal be allowed with costs; F
- (b) the respondent to refund RM173,336, a sum paid earlier by the appellant pursuant to an order dated 28 July 2000;
- (c) the deposit be refunded to the appellant; and
- (d) interest be charged on the RM173,336. G

Appeal allowed with costs.

Reported by Ashok Kumar H

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