Hong Poh Teck & 3 Ors
v
Effort Ezy Sdn Bhd

High Court, Kuala Lumpur – Suit No. WA-22NCC-94-03/2017
Noorin Badaruddin J

October 4, 2017

Civil procedure *– Summary judgment – Specific performance – Tenancy agreement – Non-compliance with specific provision in agreement for premises to be restored or reinstated to original state and condition when handing over vacant possession – Whether mere handing over of keys to premises, tantamount to handing over vacant possession – Whether triable issues raised – Civil Law Act 1956, s 28(4) – Rules of Court 2012, Order 81*

Contract *– Remedies – Specific performance – Tenancy agreement – Non-compliance with specific provision in agreement for premises to be restored or reinstated to original state and condition when handing over vacant possession – Whether mere handing over of keys to premises, tantamount to handing over vacant possession – Civil Law Act 1956, s 28(4) – Rules of Court 2012, Order 81*

The first and second plaintiffs and the third and fourth plaintiffs respectively, are the owners of the premises bearing address No. MS4-175, Jalan Legenda 8, Taman One Legenda, 75400 Melaka ("Premise 175") and No. MS4-174, Jalan Legenda 8, Taman One Legenda, 75400 Melaka ("Premise 174"). Both premises were rented to the defendant pursuant to separate tenancy agreements entered into between the defendant and the plaintiffs. The defendant informed the plaintiffs of its intention to open and remove the partition wall between Premises 174 and 175 ("the said premises") and to carry out substantial renovations. The plaintiffs agreed to the same on the condition that the defendant shall reinstate the said premises to their original state, obtain the structural approvals from the relevant authorities and return vacant possession at the defendant's own costs upon the tenancy coming to an end or upon termination or expiry for whatever reason. The defendant agreed with the plaintiffs' terms and conditions which were subsequently specifically provided for in the respective tenancy agreements.

The defendant defaulted in the rental payments and both tenancies were eventually terminated and notice to quit was served on the defendant. In accordance with the terms of the said tenancy agreements, the plaintiffs sought inter alia vacant possession of the said premises in their original state and condition with a structural plan by a professional engineer, confirming that the premises have been restored to their original state. Additionally, the plaintiffs

sought payment of double rental in the event vacant possession is not delivered by the stipulated date. The defendant failed to deliver vacant possession as required under the respective tenancy agreements and merely returned the keys to the premises and informed the plaintiffs that it had cleared the premises.

By way of a summary judgment application pursuant to Order 81 of the Rules of Court 2012 the plaintiffs sought an order that the defendant reinstate the said premises to their original position and deliver vacant possession of the same together with the outstanding rentals as well as double rental. In support of their application, the plaintiffs contended that merely returning the keys to the premises without reinstating the premises to their original state and condition, is insufficient and does not amount to giving vacant possession as required under the tenancy agreements.

The defendant by way of a preliminary objection argued that the said application cannot be entertained since there is no provision in the tenancy agreements for the plaintiff to apply for or to obtain specific performance. The defendant also argued that the plaintiffs have failed to adduce any evidence of the original state of the said premises when the same were handed over to it; that since vacant possession was returned within the stipulated time, the plaintiffs are not entitled to claim double rental; and that since the "wall deposit" is still with plaintiffs, the same can be used to rectify the defects if any (which are denied), to the party wall.

Issue

Whether there are triable issues and whether in this instance, the mere handing over of the keys to the said premises is tantamount to handing over vacant possession.

Held, allowing the plaintiff's application with costs

1. There is no dispute that a valid contract had been entered into between the parties and that it is specifically underlined in the tenancy agreements that the defendant is required to hand over the said premises in their original state and condition. The defendant therefore needs to restore the said premises to their original state. The defendant's contention that the plaintiffs had failed to adduce any evidence of the original state of the said premises when the same were handed over to it, that it is unclear as to what is the original state of the said premises and the works needed to be done by it to restore the said premises to the original condition and that expert evidence is required to ascertain the extent of the renovation that was purportedly carried out by it, are not triable issues. The original state of the premises and the renovation that were carried out are clearly shown in the structural plan that was approved by Majlis Bandaraya Melaka and signed

by the plaintiffs and the defendant. [*see p 841 para 26 - p 842 para 26; p 842 para 30 - p 843 para 32*]

2. In this instance, the returning of the keys to the said premises without reinstating the premises to their original state and condition, is insufficient and does not amount to giving vacant possession under the tenancy agreements. The defendant's contention that there is uncertainty of the original state or condition of the premises is lame. There is willful conduct on the part of the defendant. [*see p 844 para 34; p 845 para 37; p 845 para 40 - p 846 para 40*]

3. The "wall deposit" is not even a defence when the defendant is obliged to restore the premises to their original state as is specifically provided for in the tenancy agreements. The imposition of the double rental is pursuant to s 28(4) of the Civil Law Act 1956 and the restoration works must be backed up by the approval of the relevant authorities as is required under the tenancy agreements. [*see p 846 para 43*]

Cases referred to by the court

Amalgamated Investment and Property Co Ltd (In Liquidation) v Texas Commerce International Bank Ltd [1982] QB 84; [1981] 3 All ER 577, CA *(ref)*
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC *(ref)*
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 AMR 2871; [1995] 3 MLJ 33, FC *(ref)*
David Wong Hon Leong v Noorazman b Adnan [1996] 1 AMR 7; [1995] 4 CLJ 155, CA *(ref)*
Han Fann Chour v Sim Yong Hua [2014] 2 AMR 721; [2014] 10 MLJ 478, HC *(ref)*
Wisma Perkasa Sdn Bhd v Weatherford (M) Sdn Bhd [2017] 2 AMR 92, HC
Woolley Development Sdn Bhd v Mikien Sdn Bhd [2008] 3 AMR 501; [2008] 1 MLJ 585, CA *(ref)*

Legislation referred to by the court

Malaysia
Civil Law Act 1956, s 28(4), (4)(a)
Rules of Court 2012, Order 81, Order 81 r 1(a)
Rules of the High Court 1980

Justin Voon and Lum Kok Kiang (Justin Voon Chooi & Wing) for plaintiffs
Rajinder Singh (Rejinder Singh & Associates) for defendant

Judgment received: November 13, 2017

Noorin Badaruddin J

[1] This is the plaintiffs' application for summary judgment by way of a notice of application dated May 4, 2017 (encl 8) pursuant to Order 81 of the Rules of Court 2012 ("the ROC") for orders that the defendant, inter alia reinstate the plaintiffs' premises to its original state and to give vacant possession of the relevant premises to the plaintiffs respectively including outstanding rentals and double rental.

Salient facts

[2] The first and second plaintiffs are the owners of a premise, bearing the address of MS4-175, Jalan Legenda 8, Taman One Legenda 75400 Melaka or Nos. 28 and 28-1, Jalan Legenda 8, Taman 1-Lagenda, 75400 Melaka ("premise 175").

[3] The third and fourth plaintiffs are the owners of a premise bearing the address of MS4-174, Jalan Legenda 8, Taman One Legenda, 75400 Melaka or Nos. 26 and 26-1, Jalan Legenda 8, Taman 1-Lagenda, 75400 Melaka ("premise 174").

[4] On or around 2013, the defendant informed the plaintiffs of its intention to rent the premises 175 and 174 for the purpose of opening a "Textile Showroom" for a long period of time. The defendant also informed the plaintiffs that the defendant intended to open and remove the partition wall or party wall between premises 175 and 174 ("the premises") and also the partition wall or party wall between premise 174 and another unit next to premise 174. The defendant further informed of its intention to conduct substantial renovations in the premises.

[5] The plaintiffs informed the defendant that they will only agree to the opening of partition wall or party wall and/or any other renovations in the premises provided that the defendant agrees inter alia:

(a) to reinstate premises 175 and 174 to its original state

(b) to obtain the structural approval from the relevant authorities; and

(c) that vacant possession of the premises shall be returned to the plaintiffs respectively at the costs of the defendant when the tenancy comes to an end or terminated or expired for whatever reasons.

[6] The defendant agreed to the above terms and based on the agreement and/or understanding between the parties, tenancy agreements were drawn up and entered into by the parties respectively. The tenancy agreements inter alia provide that the defendant is obliged to restore/reinstate the premises and to give vacant possession to the plaintiffs on the expiration or sooner determination of the tenancy agreement.

[7] The salient terms of the tenancy agreement between the first and second plaintiffs and the defendant in relation to premise 175 ("tenancy agreement 175") are inter alia:

(a) The defendant is to pay the first and second plaintiffs the monthly rental of RM5,000 on or before 7th of each calendar month;

(b) On the expiration or sooner determination of the tenancy agreement, the defendant shall restore the premise to its original state and condition at the expense of the defendant where the alterations require consent/approval of the local or other competent authority.

[8] The salient terms of the tenancy agreement between the third and fourth plaintiffs and the defendant in relation to premise 174 ("tenancy agreement 174") are inter alia:

(a) The defendant is to pay the third and fourth plaintiffs the monthly rental of RM5,500 on or before 7th of each calendar month.

(b) On the expiration or sooner determination of the tenancy agreement, the defendant shall reinstate the partition wall as its original state and condition at the expense of the defendant where the alterations require consent/approval of the local or other competent authority

[9] The defendant took possession of the premises on or around April 1, 2013 based on the terms as stated in the tenancy agreements 175 and 174 ("the tenancy agreements") Thereafter, the defendant did substantial renovations to the premises based on the structural plan approved by the "Pengarah Kawalan Bangunan, Majlis Bandaraya Melaka" where the details of the renovations as stated in paragraph 8 of the amended statement of claim are as follows:

(i) Dinding "Partition Wall" atau "Party Wall" antara premis 175 dan premis 174 telah dirobohkan dan dikeluarkan untuk tingkat bawah dan tingkat 1;

(ii) Tangga-tangga ke tingkat 1 di premis 175 dan premis 174 telahpun dirobohkan dan/atau dikeluarkan untuk tingkat bawah dan tingkat 1;

(iii) Dinding "Partition Wall" atau "Party Wall" antara premis 174 dan premis pihak ketiga di sebelah yang lain juga dirobohkandan dikeluarkan untuk tingkat bawah dan tingkat 1;

(iv) Tangga baru yang besar dibina di premis 174 ke tingkat 1;

(v) Tandas untuk premis 174 di tingkat bawah dan tingkat 1 dirobohkan dan dikeluarkan;

(vi) Suatu pembinaan baru tangka air dengan dinding dibina di premis 175;

(vii) Bahagian depan premis 175 di tingkat bawah dan di tingkat 1 diroboh dan diubahsuai kepada kaca ("fixed glass");

(viii) Sahagian depan premis 174 di tingkat 1 dirobohkan dan diubahsuai kepada kaca ("fixed glass");

(ix) Tingkap-tingkap dan pintu-pintu belakang di tingkat bawah dan tingkat 1 di belakang premis 175 dan premis 174 masing-masing dirobohkan dan digantikan dengan dinding yang dibina tanpa tingkap; dan

(x) Pengeluaran meter TNB untuk tingkat bawah dan meter TNB untuk tingkat 1 untuk premis 174 dan pengeluaran meter TNB untuk tingkat 1 untuk premis 175 sehingga tinggal satu (1) meter TNB sahaja di tingkat bawah premis 174 bersamaan wayar-wayar yang dialihkan atau digantikan.

[10] As at October 7, 2016 the defendant owed to the first and second plaintiffs an amount of RM10,000 and the third and fourth plaintiffs an amount of RM11,000 being the outstanding rental for two months in relation to premise 175 and 174 respectively. The plaintiffs then issued a letter dated October 18, 2016 through their solicitors to demand for the outstanding rental to be paid within seven days from the date of the said letter failing which the plaintiffs are entitled to terminate the tenancy agreements and the defendant is bound to reinstate the premises into its original state.

[11] The defendant did not reply nor dispute the contents of the letter dated October 18, 2016 and did not dispute the issue on the outstanding rentals for the premises. Thereafter the plaintiffs' instructed their solicitors to issue the defendants a "Notice of Termination and Notice to Quit" dated October 31, 2016 respectively to inter alia claim that:

(a) The tenancy agreements have been terminated and the defendant is required to give vacant possession of the premises to the plaintiffs respectively;

(b) The defendant is required to reinstate the premises to its original state and condition;

(c) Vacant possession of the premises are to be given based on a structural plan approved by a professional engineer with a confirmation that the premises have been restored to its original state;

(d) All the deposits for the premises have been forfeited pursuant to clause 5.2 (c) of tenancy agreement 175;

(e) The security deposit for premise 174 has been reduced to remedy any breach by the defendant pursuant to clause 5.2 (c) of tenancy agreement 174;

(f) If vacant possession is not given to the plaintiffs respectively on or before February 1, 2017, the defendant will be liable to pay the plaintiffs double rental.

[12] Again, at all material times, the defendant did not reply nor dispute all the contents of the plaintiffs' solicitors' letters dated October 18 and 31, 2016.

[13] Only on December 22, 2016 vide its solicitors letter, the defendant informed the plaintiffs that it had cleared the premises to the plaintiffs respectively by merely enclosing the keys of the premises.

[14] The plaintiffs then filed the present suit.

Summary of the plaintiffs' contentions

[15] It is the plaintiffs' contention that this is a clear cut case for summary judgment based on breach of tenancy agreements or obligations by the defendant as a tenant because the defendant had inter alia failed to pay monthly rental to the plaintiffs and also failed to deliver vacant possession of the plaintiffs' premises to the plaintiffs respectively as required under the tenancy agreements.

[16] The plaintiffs argued that the defence and averments made by the defendant do not disclose or constitute any merits or triable issues. The affidavit affirmed by Pavitar Singh, the managing director of the defendant and the deponent of the defendant's affidavit ("Pavitar") is submitted to be nothing more than a bare affidavit with bare allegations and afterthoughts without any particulars or basis.

[17] It is further contended that the returning of the keys for the premises without reinstating the premises to its original state and condition is not sufficient and does not amount to giving vacant possession as required under the tenancy agreements.

The defendant's contentions

[18] The defendant contends that it had via its solicitors' letter of December 22, 2016 returned vacant possession of the premises but the plaintiffs refused to accept such return.

[19] The defendant contended that the renovation plan approved by the "Pengarah Jabatan Kawalan Bangunan, Majlis Bandaraya Melaka" and exhibited by the plaintiffs in their supporting affidavit does not state the whole or which renovation that had been done to the premises and as such, expert evidence must be heard before the court to ascertain the extent of renovation said to have been done by the defendant.

[20] The defendant argued that the plaintiffs had failed to adduce any evidence of the original state of the premises when the premises were handed over to the

defendant. According to the defendant, that evidence would reveal what the defendant has done to the premises.

[21] According to the defendant a "wall deposit" was given to the plaintiffs and is still with the plaintiffs and as such the deposit can be used to rectify any defects (which are denied) to the party wall.

[22] The defendant further averred that since it has returned vacant possession of the premises within the stipulated time, the plaintiffs have no right to the double rental charges as demanded in the plaintiffs' solicitors letter. The defendant averred that there exists no agreement as to the additional demand by the plaintiffs in regards to the engineer's drawing said to have been required by the plaintiffs to be submitted to the relevant authority.

[23] According to the defendant the tenancy agreements were based on monthly basis and there is no breach of the tenancy agreements on its' part as all the rentals were duly paid until March 30, 2016 and thereafter no new tenancy agreement was entered into by the parties. As such, the plaintiffs have no right to the securities held by them.

The court's findings

[24] The general principles that the court has to take into account in an application made pursuant to Order 81 of the ROC can be gleaned from the Court of Appeal's decision in *Woolley Development Sdn Bhd v Mikien Sdn Bhd* [2008] 3 AMR 501 at 515; [2008] 1 MLJ 585 at 605 where Abdull Hamid Embong JCA (as he then was) in considering the appeal relating to Order 81 of the then Rules of the High Court 1980 (which is in pari materia with Order 81 of the ROC) stated as follows:

> The plaintiff in a summary judgment application under Order 81 of the RHC first needs to establish a prima facie case that "he is entitled to judgment". The burden then shifts to the defendant to satisfy the court why judgment should not be given against him (see *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 302 per Seah FJ). "Ought" in Order 81 r 3, is an expression of a strong probability. In other words, the issue in dispute must be critically investigated and be determined as genuine. This is what a defendant needs to prove to be entitled to a trial of that disputed issue.

[25] The defendant first raised a preliminary objection on the basis that the application herein cannot be entertained on the ground that the tenancy agreements do not state that the plaintiffs can apply for or obtain specific performance. As a reply to the objection, the plaintiffs referred the court to the High Court's case of *Han Fann Chour v Sim Yong Hua* [2014] 2 AMR 721; [2014] 10 MLJ 478. In that case, there was the same application by the plaintiff therein for summary judgment under Order 81 r 1(a) of the ROC seeking for relief for specific performance of an agreement for the sale of a piece of land on the basis

that the defendant had no defence to the action. It was argued in the alternative that even if there was a valid contract between the parties, the plaintiff is not entitled to a decree of specific performance as there is no clause in the agreement to purchase ("ATP") to allow for such relief. Abdul Rahman Sebli J (as his Lordship then was) made a finding as follows:

> [18] I find no merit in the argument. In the first place it is trite law that parties cannot contract out of a statutory provision. Order 81 r 1(a) of the Rules allows for the aggrieved party to apply for specific performance and no contractual term or the absence of such term in the contract can take away that right. Secondly, once the draft sale and purchase agreement had been approved by the plaintiff it formed the contract between the parties and the ATP ceased to have effect …

[26] The applicable law relating to the plaintiffs' right to specific performance is therefore clear. Order 81 of the ROC allows for the aggrieved party to apply for specific performance and that no contractual term in the contract can take away that right. The wordings of the contract need not be specified. What the court needs to look is for substance. It is the findings of this court that there is no dispute that a valid contract had materialised between the parties herein and the tenancy agreements have underlined the requirement that before the defendant hands over the premises, it needs to restore the premises to its original state. The restoration of both premises to its original state and condition are stated clearly in the tenancy agreements from the following clauses:

i. Clause 2.2

> "The Security Deposit and Utility Deposit and Wall Deposit shall be maintained at this figure during the term of this tenancy and shall not without the previous written consent of the Landlord be deemed to be or treated as payment of rent or any part thereof and the same shall be returned to the Tenant free of interest within fourteen (14) days after handover date, in condition the Tenant to reinstate or make good of the premises to its original state condition and to pay outstanding utilities bills up to the handover date.

ii. Clause 3.1 (e)

> "TENANT'S COVENANTS AND UNDERTAKING
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> The Tenant HEREBY CONVENANTS, UNDERTAKES AND AGREES with the Landlord as follows: -
>
> e) On the expiration or sooner determination of the said Term, the Tenant may remove all fixtures, fittings or other installations belonging to the Tenant and to yield up the Demised Premises in good and tenantable repair and condition, fair wear and tear excepted and if required by the Landlord, to restore the Demised Premises to its original state and condition."

iii. Clause 3.1. (f)

iv. "Not to make or permit to be made any structural erection or other alterations or additions to the Demised Premises or any part thereof without first obtaining the prior consent of the Landlord and (if necessary) without first obtaining the consent/approval of the Local Authority or other competent authority and complying with their regulations and by-laws thereto. In the event the such consents and necessary licenses being given, the Tenant to carry out, at his own expenses, such alterations with such materials and such manner and at such times as shall be designated by the Landlord and upon the determination of the Term hereby created, if required by the Landlord and upon the determination of the Term hereby created, if required by the Landlord, to restore the Demised Premises to its original state and condition at the expense of the Tenant."

[27] This court finds no merits in the objection raised by the defendant and the plaintiffs are entitled to make the application herein for the decree of specific performance.

[28] It is the duty of the defendant to satisfy the court that there are triable issues that are not only determinative of the parties' rights but also one that can only be resolved by viva voce evidence. In *Han Fann Chour v Sim Yong Hua* (supra) Abdul Rahman Sebli J (as his Lordship then was) stated that:

> The phrase "for some other reason" in r 3 of Order 81 does not mean just any reason which a defendant may conjure up to create difficulty. It must be a reason that has legal basis and is compelling enough to warrant a trial … Facts that are not in dispute or if disputed can be established or rebutted by affidavit evidence are not triable. Facts so proved are as good as having been proved after a full hearing.

[29] The plaintiffs are seeking for orders that the defendant inter alia reinstate premises 175 and 174 in its original state respectively and to give vacant possession of the said premises to them.

[30] The defendant contended that the renovation plan approved by the "Pengarah Jabatan Kawalan Bangunan, Majlis Bandaraya Melaka" exhibited by the plaintiffs in their supporting affidavit does not state the whole or which renovation that had been done to the premises and as such, expert evidence must be heard before the court to ascertain the extent of renovation said to have been done by the defendant. The defendant further argued that the plaintiffs had failed to adduce any evidence of the original state of the premises when the premises were handed over to the defendant. In other words, the defendant is alleging that it is not clear as to what is the original state of the said premises and the works to be done by the defendant in restoring the said premises and therefore the issues must be ventilated during the trial.

[31] It is of the considered view that that is not a triable issue. A perusal of the structural plan approved by the "Majlis Bandaraya Melaka" which was signed by the plaintiffs and the defendant, clearly shows the original state of the premises and the renovations which had been done in the premises. Furthermore, the defendant knows the original state and the renovation done on the premises as the defendant was the one who submitted the plan to the "Majlis Bandaraya Melaka" (which was signed by Pavitar). Further, the defendant was in possession and doing business in both premises since 2013. This court finds that the defendant has raised an equivocal issue which is lacking in precision and inconsistent with undisputed and indisputable facts disclosed in the affidavits and contemporary documents on the original state and the level of renovations of the premises. The defendant failed to discharge the burden to satisfy the court that it is entitled to a trial on that issue. In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, the Supreme Court has this to say:

> The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. *On the treatment of conflict of evidence* on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v Letchumanan* 5 had this to say at p 217:
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> > "Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be."
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> Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.

[32] It is of the considered view that vacant possession in this case must be in accordance with the tenancy agreements entered into by the parties herein. This court finds that the express terms of the tenancy agreements cited in the earlier paragraph clearly stipulate that the premises must first be restored or reinstate to its original state and condition.

[33] It is pertinent to note that the defendant had not replied nor disputed all the contents of the plaintiffs' solicitors' letters of October 18 and 31, 2016 at all material times until December 22, 2016 where through its solicitors' letter, the defendant stated that it had "cleared" the premises and were in the position to give "immediate possession" of the premises by merely enclosing the keys to the premises. Even in its solicitors' letter of December 22, 2016, the defendant did not dispute as to the contents of the plaintiffs' solicitors' letters of October 18 and 31, 2016. As such, the contents of those letters are deemed to be admitted. In *David*

Wong Hon Leong v Noorazman b Adnan [1996] 1 AMR 7; [1995] 4 CLJ 155, the Court of Appeal held:

> Now there are cases – business and mercantile cases in which the courts have taken notice that, in the ordinary course of business, if one man business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree.

[34] Subsequently, the plaintiffs through their solicitors' letter dated January 6, 2017 clearly stated that the return of the keys for both premises without reinstating them to its original state and condition is not sufficient and does not amount to giving vacant possession as required under the tenancy agreements. The keys to both the premises were returned to the defendant to do the necessary to reinstate the premises to its original state and condition and that if the defendant fails to do the necessary on or before February 1, 2017, legal action will be taken against the defendant to claim for, inter alia, specific performance. Again, there was no reply nor dispute from the defendant as to the contents of the letter dated January 6, 2017 and the defendant failed to reinstate both the premises.

[35] The conduct of the defendant clearly shows that it has agreed and admitted that the tenancy agreements have been terminated lawfully and the defendant is therefore prevented from denying the existence of the fact that there was no vacant possession of the premises being handed over to the plaintiffs respectively. The doctrine of estoppel will assist the plaintiffs in this matter. In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 AMR 2871; [1995] 3 MLJ 331 the Federal Court held:

> Estoppel may assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact which would destroy the cause of action.

[36] In *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* (supra), the Federal Court followed the case of *Amalgamated Investment and Property Co Ltd (In Liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84; [1981] 3 All ER 577 and stated further as follows:

> The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case ([1982] QB 84 at 122; [1981] 3 All ER 577 at 584; [1981] 3 WLR 565 at 575) as follows:
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> > "The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of

action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. *When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.*"

(Emphasis added.)

[37] The defendant further averred that since it has returned vacant possession of the premises within the stipulated time, the plaintiffs have no right to the double rental charges as demanded in the plaintiffs' solicitors letter. The defendant forwarded the case of *Wisma Perkasa Sdn Bhd v Weatherford (M) Sdn Bhd* [2017] 2 AMR 92 where the High Court is of the view that the effect of s 28(4)(a) of the Civil Law Act 1956 is that there must be something more than mere holding over after the tenancy has expired or been determined. The High Court held that there must be present willful conduct or intent or contumacy on the part of the tenant in holding over the demised premises after the tenancy has expired or determined. The High Court took the view that there must be present an intention or conduct on the part of the tenant to refuse to deliver up the demised premises or to prevent the landlord from obtaining possession of the demised premises after the tenancy has expired or been determined with knowledge that the tenant has no right to remain in possession thereof.

[38] Section 28(4) of the Civil Law Act 1956 states:

(4) (a) Every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.

[39] The defendant therefore contended there must be a viva voce evidence to determine whether there is willful conduct on the part of the defendant in relation to the handing over of the premises and whether the plaintiffs are entitled to the double rental.

[40] As stated earlier and at the risk of repetition, the defendant knew all along what was the original state of the premises as it was the defendant who did the renovation after obtaining the approval from the relevant authority. The handing over of the keys to the premises does not tantamount to handing over vacant possession of both the premises pursuant to the tenancy agreements and is contrary to the defendant's own letter of December 22, 2016 which only states immediate possession of the premises by merely giving the keys to the premises to the plaintiff. The allegation of the uncertainty of the original state or condition of the premises is lame and this court is of the considered view that there is willful

conduct on the part of the defendant. It is clear that by not disputing the contents of the plaintiffs' solicitors' letter of October 18, 2016, the notice of termination and notice to quit dated October 31, 2016 at all material times, the defendant was trying to avoid the fact that it has failed to restore the premises to its original state and condition respectively.

[41] Paragraph 13 of the defendant's defence alleged that the plaintiffs' solicitors' letters of October 18 and 31, 2016 were not served on the defendant but it is the findings of this court that the letters were in fact duly served on the defendant and were served again on the defendant's business and registered address vide the plaintiffs' solicitors' letters of November 4, 2016. The defendant's solicitors in fact replied to the plaintiffs' solicitors' letter of November 4, 2016 via letter of December 22, 2016. As such the alleged dispute of the service of the plaintiffs' solicitors' letters dated October 18 and 31, 2016 cannot be true.

[42] It is also the findings of this court that the averments made in Pavitar's affidavit do not disclose or constitute defence on the merits nor any triable issues. This court agrees with the submission by the learned counsel for the plaintiffs that Pavitar's affidavit is nothing more than a bare affidavit with bare allegations and afterthoughts without any particulars or basis. The averments as to the imprecision of the plaintiffs' solicitors letters, the "wall deposit" which is with the plaintiffs, the imposition of the "double rental", the absence of agreement as to the engineer/architect's drawing, no new tenancy entered and the tenancy was on a monthly basis are all issues which were not pleaded in Pavitar's affidavit.

[43] In any event, it is of the considered view that those issues which are not pleaded do not constitute triable issues. This court agrees with the plaintiffs' submissions that a "wall deposit" is not even a defence when the defendant is obliged to restore the premises to its original state which is clear from the terms of the tenancy agreements. The imposition of the double rental is pursuant to s 28(4) of the Civil Law Act 1956 and the restoration works must be backed up by the approval of authorities which is required under the terms of the tenancy agreements and the law. As such the engineer/architect's drawing is required to be submitted to the relevant authorities.

[44] In regards to the allegation that no new tenancy was entered and the tenancy is on a monthly basis, this court finds that in the plaintiffs' solicitors' letter of October 18, 2016 to the defendant, the plaintiffs stated that the defendant is in the second term of the tenancy of the renewal. The letter stated as follows:

> (i) You have entered into a Tenancy Agreement dated 1/4/2013 ("said Tenancy Agreement") with our clients in respect of the Demised Premises known as "MS4-174, Jalan Legenda 8, Taman One Legenda, 75400 Melaka" ("Demised Premises") based on a rental of RM5,500.00 per month based on the understanding reached that you wish to rent the Demised Premises for long

term basis and what was agreed was an initial term of 3 years and expected 3 consecutive renewal terms of 3 years each;

(ii) You took possession of the Demised Premises on/or about 1/4/2013;

(iii) …

(iv) The first 3 years term expired on 31/3/2016 and you are now in the First Renewal Period (Second Term) of the Tenancy;

[45] The defendant did not dispute what was stated in that letter. Further, clause 7.2 and clause 6.2 of the tenancy agreements respectively were highlighted to this court that shows the defendant is a monthly tenant and is still subject to by the terms and conditions of both the tenancy agreements. Clauses 7.2 and 6.2 of the tenancy agreements respectively are similarly worded as follows:

> If the tenant shall with consent of the Landlord continue in occupation of the demised premises after the expiry of the term hereby granted, the tenant shall be deemed to be a monthly tenant only at the rate of rental hereby reserved for operation immediately prior to the expiration of the term such tenancy to be determinable by thirty (30) days notice in writing by either party expiring at any time and otherwise to be subject to the same covenants and conditions as are herein contained or implied and no holding over by the tenant beyond the term hereby created shall be construed as creating a tenancy from year to year.

[46] This court is of the considered view that the defence and the averments in the affidavit filed on behalf of the defendant are denials that do not constitute evidence and points of law and are unsustainable. In addition, the defence and the affidavit by the defendant did not condescend into particulars as to how plaintiffs' claims are without basis.

Conclusion

[47] This court is satisfied that the plaintiffs have established a prima facie case for summary judgment based on breach of tenancy agreements or obligations by the defendant as the defendant has failed to pay the monthly rental and deliver vacant possession of the premises to the plaintiffs respectively pursuant to the tenancy agreements. The defendant failed to satisfy the court why judgment should not be entered against it and failed to satisfy that there is a triable issue.

[48] Premised on the above, this court granted order in terms of encl 8 with costs.