

DALAM MAHKAMAH RAYUAN MALAYSIA  
(Bidangkuasa Rayuan)

RAYUAN SIVIL NO. 2009

ANTARA

- 1) RABAINAB BINTI RAMLI  
(No. K/P:530701-10-5584)
  
- 2) AMER A/L K. P.M. SYED MYDIN  
(No. K/P:420101-71-5189)

(BERNIAGA DI ATAS NAMA DAN  
GAYA AL-AMNAH RESTAURANT)

.... PERAYU-PERAYU /  
DEFENDAN- DEFENDAN

DAN

HANIFFA PROPERTIES SDN BHD  
(No. Syarikat: 660098-P)

....RESPONDEN / PLAINTIF

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR  
DALAM WILAYAH PERSEKUTUAN, MALAYSIA  
(BAHAGIAN SIVIL)**

**GUAMAN SIVIL NO : S2 – 22 – 50 – 2009**

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HANIFFA PROPERTIES SDN BHD  
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**GROUND OF JUDGMENT**

This is an application by the Plaintiff in Enclosure 4 for an interim injunction to prevent and stop the defendant and / or his agents, servants and workers from assaulting, blocking, threatening, annoying, harassing, making verbal and physical threats or otherwise interfering in any manner whatsoever against the plaintiff and the tenant in respect of its tenancy agreement dated 13.1.2009 with Rajendren a/l Pekshan.

Earlier an ex parte injunction was granted on 22.1.2009 restraining the Defendants until the disposal of an inter parte hearing .

The matter came before me for an inter parte hearing for the application of the said injunction in enclosure 4. After hearing submissions from both parties, I make an order in terms for the prayers in enclosure 4 with costs, out of which the Defendant now is appealing. Below are my reasons for the decision.

### **Background Facts**

The Plaintiff is the owner and landlord of a 5 storey building known as “Bangunan City Car Park” at Lot 10, City Car Park, No 5, Jalan Masjid India 50100, Kuala Lumpur.

The Plaintiff had a tenancy Agreement dated 1.1.2005 which expired on 31.12.2006. with the defendant. The Defendants are owners of a stall called “Al-Amnah Restaurant” and were tenants of the Plaintiff until 31.12.2006 when the tenancy agreement therein was not renewed.

The Plaintiff instituted an action for vacant possession and claim for double rental vide K.L. Sessions Court No 54-43-2007 against the Defendants, which was successful, which is now pending appeal in the High Court . A Stay Order dated 16.10.2008 was granted pending the disposal of the appeal in the High Court.

Under the expired tenancy Agreement the defendant was entitled to a rentable space of 1020 square feet as demarcated in H-2 of enclosure 3.

The defendant’s claim is that they are entitled to a rentable space of more than what has been demarcated in the expired tenancy agreement, on grounds of equity. The Defendant claimed that the previous owner of the said premises have agreed and allowed them to take up that extra space and renovated it at their expense.

### **Facts leading to the application for this injunction**

The Plaintiff had on 13.1.2009, entered into a Tenancy Agreement with one Rajandran a/l Pekchan (NRIC No: 570612-01-7183) (“Raja”) to rent out lettable space amounting to approximately 350 square feet in the said Premises for a period of 6 + 6 months (the “Rented Space”) – marked in red at page 48 Exhibit “H-4 of Enclosure 3.

According to the Plaintiff, the Rented Space is clearly demarcated and in no way encroaches into the Defendants’ space under the expired Tenancy Agreement. It also does not prevent the defendants from carrying out their business or enjoying quiet enjoyment of the space which they are occupying.

The Defendants and/ or their agents, servants or workers unlawfully and illegally prevented the Plaintiff’s new tenant (Raja) from moving in and subjected the Plaintiff’s new tenant to intense harassment, verbal abuse and physical threats as the Plaintiff’s new tenant attempted to unload his goods and materials onto the Rented Space.

Raja had lodged a police report to safeguard him and his workers in this regard. (Refer to Report No: Dang Wangi 2169/09 in exhibit to Exhibit “H-5” and “H-6” of Enclosure 3)

Raja threatened to sue the Plaintiff for breach of contract. (Exhibit “H-11” of Enclosure 11)

The Plaintiff alleged that the Plaintiff has been placed in a situation of fear of the Defendants in its own building and is afraid of entering into further agreements given the Defendants’ violent and unreasonable behavior.

## REQUIREMENTS FOR AN INTERIM INJUNCTION

Lord Diplock laid down the basic tests to be adopted when considering the granting of an interlocutory injunction in the case of *American Cyanamid v. Ethicon Ltd* (1975) AC 396 at page 408 in the following order:

### **1<sup>st</sup> factor: Whether there is a serious question to be tried**

The court must be satisfied that the claim is not frivolous or vexatious i.e. that there is a serious question to be tried .

In determining this factor it is never the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

From the issues that have been raised in the submissions of both parties, especially with regards to the right of the Defendants to remain on the demised premises after the expiry of the tenancy agreement, there can be no doubt that there are serious questions to be tried, hence the first test of American Cyanamid case have been fulfilled. These are the issues:

- (i) The Plaintiff is a landlord/owner of the said Premises. As landlord/owner, the Plaintiff has a commercial right to rent out lettable space in its premises to various parties.

- (ii) At the commencement of this action, the defendants continue to occupy a space of approximately 1020 square feet as demarcated under the tenancy Agreement dated 1.1.2005 which had expired on 31.12.2006. The defendants alleged that they are entitled to occupy the demised premises under equity on the premise of an understanding between them and the previous owners of the building which includes the demised premises.
- (iii) From the pleadings, the Plaintiff has a valid and binding tenancy agreement with Raja which was entered on 13.1.2009 and thus has an obligation under the agreement to ensure that Raja has “quiet enjoyment” under the tenancy agreement (Exhibit “H-4”).
- (iv) The Defendants/their agents, servants or workers have demonstrated that they will not allow the Plaintiff/Raja to “quiet enjoyment” so long as they occupy the additional space/Rented Space in the said Premises.
- (v) The Plaintiff is not seeking to evict the Defendants or encroaching / blocking / impeding the area occupied by the Defendants;
- (vi) Raja has threatened to sue the Plaintiff if the Plaintiff does not resolve the problem. (Refer to Exhibit “H-11” of Enclosure 11)

Thus the Plaintiff has a good and arguable case

**2<sup>nd</sup> factor: Adequacy of Damages**

The second tests propounded by Lord Diplock is that:

“...if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant’s continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the Plaintiff’s claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding, at the trial, the court should then consider whether, on the contrary hypothesis that the Defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff’s undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial” .

The Plaintiff is a property company that owns the said Premises. The defendants are tenants, pursuant to the tenancy signed between the Plaintiff and the defendants, which actually had expired on 31.12.2006. Vacant possession of the demised premises have been decided by the Sessions Court and pending appeal in the High Court. As of the present situation the Plaintiff have a binding tenancy agreement with Raja. If the status quo is not maintained, the Plaintiff will be in breach of an agreement and will be responsible for losses suffered by the Tenant of which the Defendants may not be able to compensate.

There is no evidence to show that Defendants will be materially affected by the granting of the injunction, as the restraining order is to restrain the defendants from harassing Plaintiff's new tenant.

The Defendants will not suffer any damage whatsoever. As of now the defendant remains on the premises without paying rent to the Plaintiff, nevertheless the Plaintiff has granted a minimum 3 foot access to the Defendants and with an undertaking to grant a larger access if the Defendants requests so. As far as the daily operations of the defendants, there is no restrictions with the granting of the injunction.

It would be unfair if the Plaintiff is asked to give way to a non rent paying occupier whilst ousting a rent-paying tenant, not to mention being liable for breach of the Tenancy Agreement which has been entered into. That is most unconscionable and would severely prejudiced the Plaintiff. This conduct by the Defendants in not allowing other tenants to rent the space in close proximity to them will jeopardized the reputation of the Plaintiff in that the Plaintiff is helpless and not in control of the situation in its own premises, even to a non paying tenant.

Thus, damages is not an adequate remedy for the Plaintiff. The Defendant can easily be compensated by damages if the Plaintiff fails to succeed at trial later.

### **3<sup>rd</sup> factor: Balance of convenience**

It is where there is doubt as to the adequacy of the remedies of damages available to either party or to both, that the question of balance of convenience arises. These varies from case to case.

Although in this case there is no doubt as to the adequacy of the remedies of damages, the balance of convenience tilts in favour of granting the injunction against the Defendants.

The Tenancy Agreement between the Plaintiff and the Defendants had expired and it has not been renewed. The Plaintiff is the registered proprietor of the said Premises. The Defendants are merely temporary occupiers in the said Premises during the period of the Stay Order, pending the appeal to the High Court being disposed.

By entering into a new tenancy agreement with Raja, the Plaintiff had not blocked/encroached or impede any space occupied by the Defendants as demarcated in the expired tenancy.

Plaintiff has entered into a tenancy agreement with a new tenant i.e. Raja, for the space which does not encroach on the defendant's area. Thus it is essential that this new tenant be allowed to have quiet enjoyment of their tenancy under the agreement which has been signed with the plaintiff. To disallow it would result in the plaintiff being sued for breach of the said Tenancy Agreement with Raja.

## **ISSUES RAISED BY THE DEFENDANTS**

### **1) Defendant claims to have possession in equity**

The Defendants claim is that the Plaintiff failed to disclose certain material facts, in that the defendants did not occupy the space in the building of City Car Park but however occupies the space at the walkway by the side and the back of the said building besides the Klang River, Kuala Lumpur.

Defendants' further contention is that around the year 1993, there was an agreement between the previous owners of the said building and the defendants, to allow the Defendants to remain on the said premises and run its food stall business so long as the defendants obtained the approval from DBKL and whatever costs incurred there from would be the responsibility of the defendants. Pursuant to this representation from the previous owner, the defendants have renovated the space at the walkway beside and at the back of the said building and incurred expenses to the tune of RM 190, 000.00.

Thus, premised on the same representation, the defendants continued as tenants and paying rent to the Plaintiff under a Tenancy Agreement dated 19.10.2005, upon the sale of the said Building to the Plaintiff by the previous owners. Rentals were received by the Plaintiff without any protests until the end of 2006 upon the expiry of the Tenancy Agreement dated 19.10.2005 when the Plaintiff issued a notice of vacant possession to the defendants.

Following that, the Defendants submits that the agreement/encouragement by the previous owner to allow the defendants to renovate and stay on the premises raises an equitable estoppel that entitles the defendants to continue as tenants. One of the cases referred to by the Defendants is the case of ***Mok Deng Chee v Yap See Hoi & Ors*** [1981] 2 MLJ 321, where the judgment of the Federal Court at page 323 states as follows:

*"The law on tenancy coupled with an equity or simply an equitable estoppels arose from the speech of Lord Kingsdown in Ramsden v Dyson, (1866) LR 1 HL 129 in which his Lordship referred to the principle as irrevocable licence. This principle was accepted and applied by the Privy Council in Plimmer v The City of Wellington (1884) 9 AC 699. Finally it received its judicial refinement in Inwards v Baker [1965] 1 All ER 446, 448. In this case Lord Denning MR defined the concept as follows:*

*It is quite plain from these authorities that, if the owner of 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 ... that the equity arising from the expectation of land does not fail. ... The court can look at the circumstances and see whether there is any equity arising out of the expenditure of money."*

*The principle is also known as equitable estoppels, 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."*

The Plaintiff submits that the Sessions Court has found that such equity does not exist but nevertheless the Defendants' have appealed and this matter has been fixed for hearing on 7.7.2009 at the High Court. The entire set of facts (including the Plaintiff's version of events and facts) and that of the previous owner are not before this Court so they have no bearing whatsoever on the actual issue in the Application and before the courts.

As far as this court is concerned, since it has been raised by the Counsel of the defendants in its submission, this court will address the issue and is of the view that any representation or encouragement (if any) given by the previous owner of the said building to the Defendants happened in 1993 and does not bind the Plaintiff as there is no evidence before this court to show that the Plaintiff is privy to such representation/encouragement. After all the Plaintiff bought the said building which includes the said premises from the previous owner on 19.10.2005. If any relief is to be sought, it should be with the previous owner.

Moreover, there is in evidence, of Plaintiff's letter dated 23.2.2006 in exhibit C of Enclosure 8 reminding the Defendants that their tenancy was about to expire on 31.12.2006. Subsequently, another letter was sent to the Defendants dated 22.12.2006 reminding the Defendants of the expiry date of the tenancy and at the same time Defendants were put on notice that the Plaintiff had no intention of renewing the tenancy with the defendants. As such the Plaintiff had clearly indicated at that point in time that the Defendants were to vacate the said premises (Refer to exhibit D in enclosure 8). By these letters from the Plaintiff, there was certainly no encouragement from the Plaintiff to the Defendants that they were entitled to remain on the said premises.

Thus there is no equitable estoppels or possession in equity as alleged by the Defendants.

## **2) Alleged failure by Plaintiff to observe Stay Order dated 16.10.2008**

A reading of the Stay Order dated 16.10.2008 (Exhibit "R-10" of Enclosure 8) which stays the Order dated 8.8.2008 (Page 39, Exhibit "H-3" of Enclosure 8) would only suggest that the Plaintiff cannot evict the Defendants and claim double rental, pending the disposal of the Appeal to the High Court.

No evidence is adduced in the affidavits that shows that the Plaintiff had attempted to evict the Defendants and the Defendants are allowed to operate and manage their business. The fact remains that the Defendants' license to operate its business was terminated by DBKL at the end of 2008 pursuant to the tenancy being terminated by the Plaintiff. This fact would defeat the submission of the Defendants of equitable estoppel as the promise/encouragement given by the previous owner for the defendants to remain on the demised premises was on the understanding that approval from DBKL is to be obtained.

The Defendants have not denied that they were allowed to maintain their business within the terms stipulated by the expired tenancy agreement pending the said appeal being disposed by the High Court.

What the defendants are seeking from this court is to allow them to occupy additional space in excess of the 1020 square feet, without paying any rent, and to breach another tenancy agreement between the Plaintiff and Raja until the Appeal is disposed. This is certainly unconscionable.

### **3) That the Plaintiff is allegedly bound by an arrangement between the Defendants and the Previous Owner**

This has been addressed partly when counsel raise the issue of equitable estoppels. What is clear is that, there is no conclusive evidence on what this arrangement between the Defendants and the previous owner was.

The Plaintiff is only bound by the Sale and Purchase Agreement it signed between Shen & Sons (Pages 24 to 37 of Exhibit "H-7" of Enclosure 9). It is also abundantly clear from Page 33 of Exhibit "H-7" that the Defendants' tenancy was limited to 1020 square feet and expired on 31.12.2006.

### **4) Alleged knocking down/ removal carried out by the Plaintiff**

From the exhibits, the Defendants' consent was obtained by the Plaintiff prior to knocking down the signage of the defendants'.

The Defendants were offered an opportunity to do so yet Defendants refused to dismantle structure belonging to them but instead asked the Landlord to carry out the acts of knocking down (See Exhibit "H-9 Of Enclosure 9) and has given a letter to this effect.

The Defendants have not shown that their businesses are affected by the Plaintiff's actions in renting out the rented space to Raja.

Hence the court grants the order for the interlocutory injunction as prayed for in enclosure 4 with costs.

t.t Y.A Datin Zabariah bt. Mohd Yusof  
Tarikh : 26.3.07