

**DALAM MAHKAMAH TINGGI D1 KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA
(BAHAGIAN SIVIL)**

GUAMAN SIVIL NO: S3-2-1340-2007

ANTARA

TRUE YOGA SDN BHD

(NO SYARIKAT : 673491-K)

.....PLAINTIF

DAN

GULATIS EXCLUSIVE SDN BHD.

(NO SYARIKAT : 227237-H)

.....DEFENDAN

GROUND OF JUDGMENT

This is the Defendant's application under Order 14A and Order 33(2) RHC to determine legal issues without having to go for full trial of the following:

“Samada opsyen yang sah berkemampuan untuk dilaksanakan wujud sekiranya pihak-pihak gagal bersetuju berkenaan ‘prevailing market rent.’”

Dan

“Secara alternatif dan/atau selanjutnya, samada opsyen yang terkandung di dalam Perjanjian Tenansi bertarikh 4hb. Disember, 2004 telah dilaksanakan secara sah oleh Plaintiff.”

Background Facts

The parties had entered into a Tenancy Agreement dated 4/12/2004 where the said agreement commencing from 11/2/2004 and would determine on 30/11/2007.

According to the terms of the said agreement, the Plaintiff (tenant) agreed to pay to the Defendant (landlord) the rental of RM100,000.00 per month of the Demised Premise at No.22-32. Jalan 22B/70A. Desa Sri Hartamas, 50480 Kuala Lumpur.

Section 6.06 of the agreement provides an option for renewal of the agreement for 2 further terms of 3 years each. Further, the Plaintiff shall exercise the option to renew at least 6 months before the date of the expiration of the agreement. Pursuant to the clause, parties shall enter into a fresh tenancy agreement which shall be executed 2 months before the date of the expiration of the agreement.

The plaintiff alleges that they had exercised the said option to renew on 7/5/07.

The Plaintiff further alleges that according to the agreement, the monthly rental should be the prevailing market rental determined by an appropriate valuer. The report tendered by the Plaintiff at Exhibit PJW-5 Enclosure 4 shows that the market value is RM 60, 000.00. The defendant contends that the normal rental for the demised Premise is at RM 125, 000.00 per month. (Refer to exhibit PJW-4 and PJW-5 of Enclosure 4).

Thus, there is a dispute as to the rate of monthly rental of the Demised Premise upon the renewal of the tenancy.

Plaintiff's refusal to agree has frustrated the renewal of the agreement, hence the tenancy was terminated. Upon the termination of the agreement, Defendant requested the Plaintiff to vacate the premises. Plaintiff refused to vacate the premises and filed this suit for a declaration that parties had exercised the option to renew the tenancy agreement and therefore the renewal is valid and binding. Defendant states that the option to renew was unenforceable because Plaintiff disagreed to the new rental sum suggested by the Defendant. The said option to renew the tenancy agreement would only apply in situation where both parties agreed to a common term.

The defendant subsequently filed the application herein under Order 14 Order 33 (2) RHC for the legal determination of issues without proceeding for a full trial.

The Law

To succeed in its Application, the Defendant must show:

- that the said issues are suitable for determination without full trial; and
- that the determination thereof would be final or substantially final as to this entire cause or matter;

thereby saving time and expense which would otherwise arise if this action was to proceed to full trial.

The principle under Order 14A and Order 33 r 2 RHC

Order 14A and Order 33 r 2 RHC provides for the final disposal of an action at an interlocutory stage. To invoke Order 14A and/or Order 33 r 2 of RHC, the relevant issue or question must be suitable for determination without a full trial of the action and should be final or substantially final as to the entire cause or matter or render the trial of the cause or matter unnecessary.

An Order 14A and/or Order 33 r 2 RHC application is only appropriate for the determination of clear issues or questions of law or construction; or where the relevant issue or question is of mixed fact and law, where the material facts relating to the said issue or question are before the Court and are either duly proved or admitted. Consequently, an application under Order 14A and/or Order 33 r 2 of the RHC will not be appropriate where extrinsic

evidence is required to be adduced and or where the facts relating to the issue or question for determination are in dispute. (Refer to Malaysian Court Practice – High Court 1)

Where the issues of fact are interwoven with the legal issues raised, it would not be desirable to split the legal and factual issues for determination. Refer to the the case of **Bank of India v Murjani Marketing** 1.3 .1991, CA transcript 91/0304 by Taylor LJ), the-English Court of Appeal said that :

“ ... where the issues of fact are interwoven with the legal issues raised it would be undesirable for the court to split the legal and factual determination, for to do so would in effect be to give legal findings in vacuo or on a hypothetical ruling, which the court will not do”

An application under Order 14A and/or Order 33 r 2 RHC should be allowed only where it is plainly and obviously appropriate to do so. Refer to the decision by Chang Min Tat FJ in the case of **Chan Kum Loong v Hii Sui Eng** [1980] 1 MLJ 313, at page 314 which states:

“ In the ordinary course of events, a preliminary point of law which does not decide the matter between the parties one way or the other is an unjustified waste of time and occasions an equally unjustified increase in costs”.

Issue No.1: “Samada opsyen yang sah berkemampuan untuk dilaksanakan wujud sekiranya pihak-pihak gagal bersetuju berkenaan ‘prevailing market rent’”

The option to renew clause in the tenancy Agreement contains an agreed formula for determining the monthly rent to be paid by the Plaintiff to the Defendant under the renewed tenancy i.e. based on the the prevailing market rental. I reproduced below the relevant clause in the Tenancy Agreement with regards to the option to renew.

SECTION 6.06: OPTION TO RENEW

“ If the tenant shall be desirous of renewing at the expiration of the term hereby created the Tenant shall at least six (6) months before the date of expiration of the tenancy herein give to the Landlord notice in writing of such its desire whereupon PROVIDED THAT there are no subsisting breaches and the Tenant has observed and performed all fundamental obligations and terms herein the Landlord shall let the Demised Premises to the Tenant for a further term and at a Rental as provided in Schedule I from the date of expiration of this tenancy at the same terms and conditions (save and except this provision for renewal) and the Tenant shall pay to the Landlord any increase in the rental as are being increased over and above the monthly rental of the last preceding term.”

“Schedule 1:

Schedule	item	Particulars
1	Option (section 6.06(a))	<p><u>Duration of Option</u></p> <p>Two (2) further terms of three (3) years each (hereinafter called “the First”, “the Second” and “Renewed Term” respectively.</p> <p><u>Rental Increment</u></p> <p>(i) The Rental increment for the First Renewed Term shall be the prevailing market rental subject to a maximum increase of 25 per centum of the monthly rental Schedule E herein”</p>

I am of the view that the terms in the option to renew clause are certain and clear i.e. regard must be had to the prevailing market rental of the Demised Premises in determining the said rental sum. Here there is an agreed formula to determine the same. The absence of an agreement between the Plaintiff and the Defendant with regards to the said rental sum is immaterial and irrelevant. Therefore the option to renew clause here is valid and enforceable; it is not void for uncertainty.

I find support to this principle in the case ***Brown v Gould and Others*** [1971] 2 All ER 1505 where the Court was concerned with the validity and enforceability of an option to renew and it was held that where the agreed formula was expressed to be based on 'market value', the Court could determine what the rental was. Megarry J in his judgment said:

“ .. I do not think that there is anything ... to preclude the court from resolving a dispute as to the rent to be made payable under a lease if the parties disagree as to the quantum resulting from the application of a proper formula to the facts of the case. If the parties disagree as to the rent payable under such a formula, then in my judgment, since the lease provides no other machinery, the court has jurisdiction to determine it.”

The same principle was applied by the Court of Appeal in the case of ***Wisma Sime Darby Sdn Bhd. V Wilson Parking (M) Sdn. Bhd.*** [1996] 2 MLJ 81 where V.C. George JCA in delivering the judgment of the Court of Appeal states:

At page 82:

“ An option clause is void for uncertainty unless the agreement provided the machinery or some formula which the courts can utilize to ascertain what is otherwise unascertainable without the parties coming to an agreement.”

At page 95:

“... we see that rental for the renewal period for the tenancy had to be agreed by the parties. The agreement for renewal was executory and there was no machinery or formula for the court to ascertain the rent if the parties could not come to an agreement on the rent. On authority and on principle the agreement to agree is bad for uncertainty .. “

Therefore the court has the jurisdiction and power to determine the monthly rent to be paid by the Plaintiff to the Defendant under the renewed tenancy based on the agreed formula contained in the option to renew clause. The option to renew is thus valid and enforceable by the Plaintiff despite the absence of an agreement between the Plaintiff and the Defendant as to the said rental sum.

The cases relied on by the Defendant (Zainal Abidin v Century Hotel Sdn Bhd [1987] 1 MLJ 236 and Wisma Sime darby Sdn Bhd v Wilson Parking (M) Sdn Bhd [1996] 2 MLJ 81) are distinguishable. The options to renew, in both cases, were held to be void for uncertainty and therefore unenforceable, because the impugned options in both cases, unlike the present case, did not contain either an agreed formula for determining the amount or rental sum to be paid or the machinery for the determination thereof.

Consequently, the issue in No 1 should be answered in the affirmative. However, a summary determination of Issue No 1 by itself will not be final as to this entire cause or matter because the amount or sum of rent to be paid by the Plaintiff to the Defendant

under the renewed tenancy has to be determined at a full trial. Evidence would have to be adduced from Valuers as to what are the prevailing market rate.

Issue No.2: “Samada opsyen yang terkandung di dalam Perjanjian Tenansi bertarikh 4.12.2004 telah dilaksanakan secara sah oleh Plaintiff”

The Defendant contends that the exercise of the option to renew by the Plaintiff was invalid. Reasons being:

- the Plaintiff’s assertion that the monthly rent to be paid by the Plaintiff to the Defendant under the renewed tenancy should be RM 60,000.00 per month was contrary to the terms of the option to renew. The Defendant states that the option to renew contemplated an increase in the monthly rent to be paid under the renewed tenancy over and above the monthly rent RM 100, 000.00 paid under the original tenancy agreement; and
- the installation of a water tank on the rooftop of the demised premises was done without the consent of the Defendant and was therefore in breach of the original tenancy agreement.

This first reason stated above entails the proper construction of the Schedule 1 of the Tenancy Agreement, which may be summarily determined.

The bone of contention of the Defendant here seems to stem from the presence of the operative word “increment” present in the said

said Schedule. The Defendant states that the word "increment" anticipates an increase in the rental from the rate in the original monthly rental.

I am of the view that the proper construction of Schedule 1 is that the monthly rental which is to be paid under the renewed tenancy shall be based on the prevailing market rate, (subject, in the event there is an increase in the prevailing market rate, the maximum increase is 25 % above the original rate paid under the original tenancy). I disagree with the interpretation of the Defendant as to Schedule 1, as the operative words in the said Schedule 1 i.e. "prevailing market rental" in the option to renew clause is being disregarded by the Defendant. The option to renew clause in the said Schedule does not necessarily mean an increase in the rental. It depends on what is the prevailing market rate at the relevant time to be applied. Thus, in the event the prevailing market rate has fallen and is lower than the original rate in the original tenancy, then the rental may be lower than the rate in the original tenancy. In the event the prevailing market rate of rental has increased, then the maximum increase is subject to 25 % of the rate of the original tenancy.

Therefore it is not contrary to the terms of the original tenancy agreement when the Plaintiff asserts that the rental to be paid to the Defendant under the renewed tenancy is RM 60,000.00 which is lower than the original monthly rental.

On the issue of the installation of the water tank on the rooftop of the Demised Premises, there is a dispute between the Plaintiff and the defendant. The Plaintiff's case is that the said water tank was installed with the knowledge of the Defendant. As a result there was no breach committed by the Plaintiff and the exercise of the Plaintiff on the option to renew was accordingly valid, whereas the Defendant is contending that it had not given its consent to the said installation prior to the option to renew.

Furthermore, the Plaintiff claims that throughout the duration of the original tenancy period, it had duly paid the monthly rental and the Defendant had unequivocally accepted. The Plaintiff submits that, even if there is a breach of the terms of the tenancy agreement (which the Plaintiff is denying) the conduct of the Defendant in accepting the monthly rental shows that the Defendant had waived that breach. Refer to the case of ***Expert Clothing Service and Sales Ltd v Hillgate House Ltd and Anor*** [1985] 2 AER 998 where Slade LJ said that:

“.....counsel for the plaintiffs is right in submitting that cases where there has been an acceptance of rent fall into a special category. In such cases the established legal effect of such acceptance is so clear that, whatever the particular circumstances of the case, it is probably not open to the landlord to submit that he has not waived the relevant breach...”

The conduct of the Defendant also give rise to the principle of estoppel, in that by accepting the monthly rental without protests, and if the Defendant has knowledge of the installation of the water tank, then the Defendant is estopped from asserting that the Plaintiff had breached the terms of the original tenancy.

Conclusion

Thus, for the reasons stated above, the present case does not satisfy the test for summary determination under order 14A and Order 33 (2) RHC.

Issue No. 1 appears to raise a pure question of law which may be capable of being summarily determined. But, that summary determination of Issue No. 1 by itself will not be final as to this entire cause or matter, as the amount or sum of rent to be paid by the Plaintiff to the Defendant under the renewed tenancy has to be determined at a full trial.

Further Issue No. 2 is made up of two (2) parts: The first part raises a question of construction on the option clause to renew, which may be capable of being summarily determined. However, the 2nd part raises a question of mixed fact and law which should only be determined after a full trial, as the facts related to that issue are in dispute. Hence, a full trial of Issue No.2 (or part thereof) is required. Since Issue No.2 should not be summarily determined, the determination of Issue No.1 by itself, at this stage, may not have the effect of substantially disposing off this cause or matter.

Therefore, contrary to the object or purpose of Order 14A and Order 33 r 2 of the RHC, the Defendant's Application will not save time and expense. In fact, there is a likelihood that if the Defendant's Application is allowed it may ultimately lead to delay and more expense.

It is for these reasons that the application of the Defendant is dismissed with costs.

t.t. Datin Zabariah Mohd Yusof

Tarikh : 3.6.2009

Bagi pihak Plaintiff : Encik T.Sudha

Tetuan Shook Lin & Bok

Bagi pihak Defendan : Encik Nizam Bashir & Fatimah Bashir

Tetuan Fatima, Tan & Cheah