

WONG YU KE

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v.

WONG YEW KWAN

HIGH COURT MALAYA, KUALA LUMPUR
 ROHANA YUSUF JC
 [CIVIL SUIT NO: S4-22-1352-2004]
 1 AUGUST 2006

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CIVIL PROCEDURE: *Striking out - Statement of defence and counterclaim - Rules of the High Court 1980, O. 18 r. 19 - Whether there was inordinate delay in application by plaintiffs - Rules of the High Court 1980, O. 18 r. 9 - Whether s. 41 Specific Relief Act 1950 prohibits court from making declaration - Whether prejudicial to defendant - Whether defences pleaded create exception to title of plaintiff under s. 340 National Land Code - Whether there was reasonable cause of action - Whether an abuse of court process*

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This was an application by the plaintiffs to strike out the statement of defence and the counterclaim of the defendant under O. 18 r. 19(b) and/or (d) of the Rules of the High Court 1980. The plaintiffs' prayers were, *inter alia*, for a declaration that the defendant was a trespasser to the land ('the land') and delivery of vacant possession of the land. The plaintiffs and defendants were brothers. The plaintiffs were registered co-owners of the land which included a four storey building where the defendant occupied the ground floor. The plaintiffs, being registered owners, has demanded delivery of vacant possession, which was refused by the defendant. Hence, the plaintiffs filed this legal action. The issues that arose were (1) whether there was an inordinate delay in the application by the plaintiffs which was made 14 months after the close of pleadings; (2) whether s. 41 of the Specific Relief Act 1950 prohibits the court from making a declaration that the defendant was a trespasser and (3) whether the statement of defence and counterclaim of the defendant an abuse of court process.

Held (allowing plaintiffs' application):

(1) Order 18 r. 19(1) of the Rules of the High Court 1980 provided that the court may at any stage of proceedings order to be struck out or amend pleading on the grounds provided in that rule. Order 18 r. 9 Rules of the High Court 1980 does

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- A not mandate requirement of time. The clear provisions was that the court may do so at any stage of the proceeding. There was no merit in the defendant's objection. (para 7)
- B (2) Section 41 of the Specific Relief Act 1950 conferred a right to the plaintiff to seek a declaration. There was nothing to suggest the provision prohibited the court from exercising its discretion to make a declaratory order. There was nothing wrong with the declaration sought by the plaintiffs to declare the defendant as trespasser. The whole purpose was to obtain an order of vacant possession against him. It was therefore part and parcel of the plaintiffs' application for vacant possession and was not prejudicial to the defendant in any way. (para 10)
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- D (3) The plea of fraud in the statement of defence as well as in the counterclaim of the defendant was a mere speculation. The defendant had no defence but was hoping to find something to establish fraud. It would not be fair for the plaintiffs to be made to wait for the completion of the investigation by the defendant before they could exercise their rights and benefits as registered land owners. (para 16)
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- F (4) The defences pleaded were not defences that could create exception to the title of the plaintiffs under s. 340 of the National Land Code. Thus, both the statement of defence and counterclaim of the defendant disclosed no reasonable defence and no reasonable cause of action and was an abuse of court process. It was a plain and obvious case for the court to exercise its power under O. 18 r. 19(1) and (d) of the Rules of the High Court 1980. (paras 17 & 18)
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Case(s) referred to:

- Ainan Mahmood v. Syed Abu Bakar Habib Yusoff [1939] MLJ 209 (**refd**)
 Associated Leisure Ltd & Ors v. Associated Newspapers Ltd [1970] 2 QB 450 (**refd**)
- H Datuk Syed Kechik Syed Mohamed v. Govt of Malaysia & Anor [1979] 2 MLJ 101 (**refd**)
 Lee Kim Luang v. Lee Shiah Yee [1988] 1 CLJ 619; [1988] 1 CLJ (Rep) 717 HC (**refd**)
 Lee Thin Pung v. Lim Seng Kee & Anor [1948-1949] Supp MLJ 72 (**refd**)
 Malayan Banking Bhd v. Lim Tee Yong [1994] 4 CLJ 558 HC (**refd**)
- I Norwest Holdings Sdn Bhd v. Muhibbah Engineering (M) Bhd [2004] 7 CLJ 400 HC (**refd**)

Legislation referred to:

National Land Code, s. 340(2)

Rules of the High Court 1980, O. 18 r. 19(b), (d), (i)

Rules of the Supreme Court, O. 25 r. 5

Specific Relief Act 1950, s. 41

*For the plaintiff - Justin Voon (Amy Chong with him); M/s Sidek Teoh Wong & Dennis**For the defendant - Lee Lim Huat; M/s LH Lee & Co**Reported by Suhainah Wahiduddin***JUDGMENT****Rohana Yusuf JC:**

[1] This is an application by the plaintiffs in encl. 9, to strike out the statement of defence and the counterclaim of the defendant under O. 18 r. 19(b) and or (d) of the Rules of the High Court 1980. The plaintiffs' prayers are: for a declaration that the defendant is a trespasser to the land described as ground floor, No. 18 Jalan Kenanga, 52200 Daerah Kuala Lumpur (the land); delivery of vacant possession of the land; damages as mesne profit or double letting value from 1 August 2004 till delivery of vacant possession to be assessed; interest and costs. I allow the plaintiffs' application with costs. My grounds are set out below.

Background Facts

[2] The plaintiffs and defendant are brothers. The plaintiffs are registered co-owners of the land which was transferred to them by their father Wong Hong. The land includes a 4 storey building, where their father used to occupy the ground floor. The defendant was invited to join the father then doing business under the style and name Hong Kee Trading. The defendant has remained in occupation of the said land till now. The plaintiffs being registered owners has demanded delivery of vacant possession by a letter dated 31 July 2004. The defendant refused to deliver vacant possession and hence the plaintiffs filed this legal action.

A Preliminary Objections

- [3]** The defendant by written notice dated 9 May 2006 and the amended written notice dated 10 May 2006 raised four preliminary objections to the plaintiff's application. They are issues on declaration, *locus standi*, delay and multiplicity of proceeding.

Locus And Multiplicity

- [4]** Of the four preliminary objections I find the issues on locus and multiplicity of proceeding to be totally irrelevant and highly technical. I would like to deal with these two issues first. The counsel for the defence Mr. Lee Lim Huat contended that as the plaintiffs are the registered co-owners of the land on which the building is situated, the other three co-owners should also be made plaintiffs in this application. Mr Lee's argument was based on the fact that they are holding undivided interest. On this point I agree with Mr. Justin Voon, counsel for the plaintiffs that this issue should have also been raised in relation to the summons itself. This issue goes to the root of the main action and should not be an objection only pertaining to this application. I do not find such issue been raised earlier until this application is made by the plaintiffs. This issue was not pleaded in the statement of defence. I agree with Mr. Justin Voon that the affidavit filed in relation to this issue cannot be used to improve the statement of defence. In any case, it was explained in the plaintiffs' affidavit that there was a common agreement between the registered owners exhibited both in NYW1 in encl. 13 and WYK5 in encl. 15, where parties have agreed on the division of floors of the building. Besides, the registered co-owners have given full authorities to the plaintiffs as seen in the affidavits of Ng Yee Wah and Boon Chie.

- [5]** The other preliminary objection raised by the defendant is on multiplicity of proceeding. The defendant in his affidavit states that there is a case pending against the defendant in the Sessions Court KL No: S5 517275-99 for arrears of rental, after their father left the firm of Hong Kee Trading. Another two cases pending are Session Court KL No: 7-52-21207-03 and Session Court KL No: S2-52-5487-99 both are for arrears of rental and delivery of vacant possession. If there are such cases and there are multiplicities of proceeding, there should be a defence of estoppel raised. Again this is a potential ground for striking out the

statement of claim of the plaintiffs. It would have no relevance on the present application of striking out of the statement of defence and the counter-claim applied for by the plaintiffs.

[6] In summary I find that both these two preliminary objections are not relevant to the application in encl. 9.

Delay

[7] The defendant submitted that there was an inordinate delay in the application by the plaintiffs in that the application was made 14 months after the close of pleadings. I do not find any merit in this objection as the O. 18 r. 19(1) of the RHC itself provided that the court may at any stage of proceeding order to be struck out or amend pleading on the grounds provided in that rule. There are ample authorities to support this position. I am in agreement with the High Court decision in *Norwest Holdings Sdn. Bhd. v. Muhibbah Engineering (M) Berhad* [2004] 7 CLJ 400, that O. 18 r. 9 RHC does not mandate requirement of time. The clear provision is that the court may do so at any stage of proceeding.

Application For A Declaration

[8] Mr. Lee contended that the declaration sought by the plaintiffs on the status of the defendant as trespasser is against s. 41 of the Specific Relief Act 1950. Section 41 provides as follows:

41. Discretion of courts as to declaration of status or right.

Any person entitled to any legal character, or to do any right as to any property, may institute a suit against any person denying or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled and the Plaintiff need not in that suit ask for any further relief:

Provided that no court shall make any declaration where the Plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

It was the submission of Mr. Lee that s. 41 above can only be used to seek the status of the plaintiffs and cannot be used by the plaintiffs to seek the legal character of the defendant. He submitted that this section limits to a declaration to be made

A about the person himself or his co-plaintiff and not any other person. He cited the old case of *Ainan bin Mahmood v. Syed Abu Bakar bin Habib Yusoff* [1939] MLJ 209 as his authority.

B [9] Upon my careful appraisal of s. 41, I agree with Mr. Lee's interpretation on s. 41. I also find that the proviso prohibits the court from making a declaration where the plaintiff, being able to seek further relief than a mere declaration or title omits to do so. The underlying principle and rationale, suggested by Mr. Lee for the imposition of such limitation is to prevent proliferation of baseless applications for the relief for with no apparent reason. I am also in agreement with him on the rationale of this section.

D [10] However, I find s. 41 to be a provision that confers a right to plaintiff, to seek a declaration. It is basically a provision that confers a right. Whilst that is so, there is nothing to suggest that the provision prohibits the court from exercising its discretion to make declaratory order. As suggested by Mr Justin Voon, so long as the declaratory order is to be made for a purpose and not just a busy body seeking for a declaration the court has a full discretion to do so. Mr Voon also submitted that another High Court in the case of *Lee Thin Pung v. Lim Seng Kee & Anor* [1948-1949] Supp MLJ 72 has done so. In that case the High Court of Penang had allowed a suit by the plaintiffs to declare the defendant as trespasser against a tenant holding over and allowed the plaintiff vacant possession of the premises in question. In the Federal Court case of *Datuk Syed Kechik bin Syed Mohamed v. Govt of Malaysia & Anor* [1979] 2 MLJ 101, the Federal Court citing O. 25 r. 5 of the Rules of the Supreme Court then, states that the courts jurisdiction to make declaratory order is only subject to its own discretion. As such I do not find anything wrong with the declaration sought by the plaintiffs to declare the defendant as trespasser. The whole purpose is to obtain an order of vacant possession against him. It is therefore part and parcel of the plaintiffs' application for vacant possession and is not prejudicial to the defendant in any way.

H [11] Having considered all the preliminary objections raised, I find that they are of no merit and all the objections are merely technical in nature. They are not issues that are prejudicial to the defendant. I now proceed to consider the application on its merits.

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The Merits Of The Plaintiff's Application

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[12] The thrust of the plaintiffs' application was based on the fact that the plaintiffs are both registered co-owners whilst the defendant has been in occupation of the property originally as licensee which has been terminated by the plaintiffs.

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[13] Premised on the Torrens system concept of indefeasibility of title the right of the defendant if any would be the exception to s. 340(2) of the National Land Code 1965. As provided in that section registered title can only be defeated on grounds of fraud, misrepresentation, forgery or by authority of law.

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[14] The defendant in the statement of defence raised the defences of; fraud, a promise by his mother to give a portion of the property due to some payment made by him as directed by the parent, that he is a licensee coupled with equity and having an irrevocable licence. Pursuant to that defence the defendant in his prayer in the counterclaim claims to own 1/4 of the land, and that he be registered as a co-owner with 1/4 share.

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[15] The defendant alleged that the transfer to the plaintiffs by their father was by way of fraud, but no particulars were pleaded in the statement of defence or the counterclaim, it is trite law that particulars of fraud must not only be pleaded, but must be specifically pleaded. In the High Court case of *Malayan Banking Berhad v. Lim Tee Yong* [1994] 4 CLJ 558 it was held by the High Court that it is established law that the expression fraud cannot be generally or vaguely pleaded. In *Lee Kim Luang v. Lee Shiah Yee* [1988] 1 CLJ 619; [1988] 1 CLJ (Rep) 717 the High Court held that a general allegation of fraud is insufficient event to amount to averment of fraud. There is good reason why fraud must be specifically pleaded and required in O. 18 r. 8(1) of the RHC. It is not to take the other party by surprise. In fact L. Denning MR in *Associated Leisure Ltd. & Ors v. Associated Newspapers Ltd* [1970] 2 QB 450 said that 'it is the duty of the counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it.

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[16] In his submission Mr. Lee suggested that though particulars of fraud are not specified, it can be done later by way of amendment. This is because the defendant is still in the process of investigating the matter. That being the case, it is clear that the plea of fraud in the statement of defence as well as in the counterclaim of the defendant is a mere speculation. As such, it is

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- A even clearer that the defendant has no defence but hoping to find something to establish fraud. In any event, fraud or forgery is not a matter barred by statute of limitation the defendant can take his time with his investigation. However, it would not be fair for the plaintiffs to be made to wait for the completion of the investigation by the defendant before they can exercise their rights and benefits as registered land owners.

- [17] Besides the general allegation of fraud the defendant raised issues of payment that had been allegedly made as directed by their mother resulting in a promise of 1/4 shares to the defendant. At the same time the defendant admitted that the property was transferred to the plaintiffs by their father. The defendant also alleged that the transfer was done without the knowledge of the defendant. The defendant further alleged that the transfer to the plaintiffs was done under mysterious situation. All these defences pleaded are not defences that can create exception to the title of the plaintiffs under s. 340 of the NLC. As such I do not see the need to dwell further into any of them.

- [18] Thus, it is clear that both the statement of defence and counterclaim of the defendant disclose no reasonable defence and no reasonable cause of action and it is an abuse of court process. It is a plain and obvious case for the court to exercise its power under O. 18 r. 19(1) and (d) of the RHC 1980. As such I allow the applications by the plaintiffs with costs.

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