DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN MALAYSIA
(BAHAGIAN SIVIL)
[NO GUAMAN: 22NCVC-167-04/2014]

ANTARA

SPICY PAKHIND RESTAURANT AND BAR SDN BHD

(NO. SYARIKAT : 837324 - U) ... PLAINTIF

DAN

HERITAGE VILLAGE KL SDN BHD

(NO. SYARIKAT: 659137 - K) ... DEFENDAN

GROUNDS OF JUDGMENT

Enclosure 13

1. Enclosure 13 is the Defendant's application filed on 26.5.2014 to strike out the Plaintiff's Writ and Statement of Claim dated 8.4.2014 under Order 18 r. 19 of Rules of Court 2012.

2. The relevant documents referred to in this application are as follows :

a. Writ and Statement of Claim dated 8.4.2014

b. Defence dated 2.5.2014

c. Counter claim dated 15.5.2014

d. Reply to Defence and Defence to Counter claim dated 27.5.2014

e. Notis Permohonan and Afidavit Sokongan dated 15.5.2014

f. Afidavit Balasan dated 6.6.2014

g. Afidavit Balasan kepada Afidavit Balasan Defendan dated 20.6.2014

3. The Defendant submitted that from the affidavit evidence and the exhibits, the Plaintiff's claim is untenable and unsustainable. Based on the facts and documents tendered and exhibits *via* affidavit, there are no legal questions to be determined by this Court as it :

a. discloses no reasonable cause of action;

b. is scandalous, frivolous or vexatious;

c. had prejudice, embarrass or delay the fair trial of the Defendant's action; and

d. is an abuse of the process of the court.

Grounds of Striking Out

4. On 1.8.2011, the Plaintiff and Defendant had entered into a Tenancy Agreement.

5. Plaintiff advanced several grounds to strike out the Plaintiff's claim. In my opinion, the main ground would be in relation to the obligation of parties under clauses **4(p), 2(i) and 2(e)** of the Tenancy Agreement which the Defendant claims contain clear meaning that it is the Plaintiff to obtain at its own cost and expenses all licenses which are necessary for its business.

6. The clauses above has stated the following agreed term :

a. Clause 4(p) - the Agreement embodies the entire understanding of the parties, and there are no other arrangement;

b. Clause 2(i) - The onus is on the Plaintiff to obtain at its own cost and expenses all licenses, consents, approval, permissions, permits and other certificates authorities which are necessary for its business;

c. Clause 2(e) - The Plaintiff undertake not to make any changes to the building without obtaining consent in writing from the Landlord, and submitting relevant plans to the Landlord for approval.

Defendant's Submission

7. The Plaintiff's claim centered on the following :

a. Plaintiff had started renovation after having received a Development Order;

b. Plaintiff had allegedly spent RM384,731.00 on renovation works;

c. Plaintiff had applied for 'lesen perniagaan' after these renovation and had sent in four applications, which were all rejected;

d. Plaintiff alleged receive knowledge that the Demised Premises were not gazetted as commercial after the Plaintiff's alleged effort to abide, follow and undertake all the necessary requirements.

8. The Defendant's contention is that Clause 2(i) of the Tenancy Agreement stipulates that it is the tenant's obligation to obtain licenses and approvals and not that of the Defendant's. Defendant further avers

that by virtue of the Draft KL 2020 City Plan, the premise is zoned as commercial.

9. Defendant further contended that the Plaintiff' action is brought as an afterthought due to unpaid sums of rent amounting to RM108,000.00 and also as an afterthought after a distress action brought the Defendant which has not been challenged by the Plaintiff and hence this action is intended to embarrass the Defendant.

10. The Defendant alleges that the Plaintiff has carried out its own renovations which were unauthorized, illegal and did not obtain the relevant approvals and did not submit the necessary plans for the renovations and it was due to that, that the license application was rejected and the Defendant further alleges that the Plaintiff had built a gate without a setback and also an illegal staircase.

11. Plaintiff has failed to plead misrepresentation and fraud in its pleadings.

The Rejection Letters - "Lesen Premis"

12. Defendant submitted that with reference to **Ekshibit "A-3"** of **Afidavit Sokongan** it is clearly stated the reasons for the DBKL's rejection of the Plaintiff's applications are :

a. Perlu pemeriksaan semula dari Jabatan Pemudah cara Perniagaan Dan Pengurusan Penjaja;

b. Perlu pemeriksaan semula dari Jabatan Kesihatan Dan Alam Sekitar (SANITASI) dan (Alam Sekitar);

c. Tiada kelulusan Perintah Pembangunan (DO) dari Jabatan Perancangan Bandar;

d. Tiada kelulusan Pelan Bangunan Dari Jabatan Rekabentuk Bandar dan Bangunan;

e. Perlu pemeriksaan semula dari Jabatan Polis.

13. Prior to obtaining "Lesen Premis", the Plaintiff had clearly failed to obtain all necessary approvals, which are stated with clarity.

14. The reasons and/or issue were never due to whether the land usage was "residential" and/or "commercial". This is clearly an afterthought.

No Development Order - as alleged by the Plaintiff

15. Defendant further submitted that the allegation that the Plaintiff had obtained a Development Order had been alleged multiple occasions:

a. Paragraph 8 of the Pernyataan Tuntutan "setelah Plaintif menerima Perintah Pembangunan melalui pihak berkuasa tempatan" ; and

b. Paragraph 16 of **Afidavit Balasan** had stated that "setelah mendapat Perintah Pembangunan (Development Order) dari pihak DBKL". This is a bare allegation.

16. The Plaintiff had failed to show by way of affidavit evidence the supposedly Development Order. There is no proof of such Development Order.

17. Should the court find that there is no such Development Order, the Plaintiff's Writ and Statement of Claim is premised on a document which never existed, therefore, the whole Writ and Statement of Claim ought to be struck out.

18. It is further submitted that no such "Development Order" had been obtained, and there were never any application for a Development Order.

The Wrong Department

19. With regard to paragraph 16 of Afidavit Balasan, the Plaintiff refers to **Ekshibit "SAMA-8"** from Jabatan Rekabentuk Bandar Dan Bangunan, where the said approval refers in clause 2 stating that :

> "*2. Syarat-syarat Perintah Bangunan yang berkaitan dengan cadangan tersebut di atas hendaklah dipatuhi"*

20. Defendant then submitted that the Plaintiff had failed to obtain any Perintah Pembangunan (Development Order). Therefore, a successfully obtained Development Order is necessary to comply with clause 2 above.

21. Further, a sample Development Order is found in **Ekshibit "B-1"** of **Afidavit Balasan Kepada Afidavit Balasan Defendan**, wherein it is clearly stated on the title "Perintah Pembangunan".

22. The relevant authority granting a Development Order is the Jabatan Perancang dan Kawalan Bangunan, and not the Jabatan Rekabentuk Bandar Dan Bangunan.

23. Additionally, the relevant act in relation to the grant of a Development Order is the Akta (Perancangan) Wilayah Persekutuan Kuala Lumpur 1982 and not the Akta Jalan, Parit dan Bangunan 1974.

24. As such, the Plaintiff had never obtained a Development Order, which is a crucial pre-requisite to any renovation works. Thus, the Plaintiff's renovation work which was not subjected to any Development Order (not applied) is illegal (paragraph 16 of **Afidavit Sokongan**).

Mere Allegations

25. The Defendant submitted that the Plaintiff is also claiming that the Demised Premises were not gazetted as commercial.

26. The Plaintiff merely alleged that it had abided, follow and comply all the necessary requirements. The four rejection letters (**Ekshibit "A-3"** of **Afidavit Sokongan**) are clear, the Plaintiff failure to abide, follow and comply the necessary requirements are stated therein.

27. The Plaintiff had not shown any documentary proof that the necessary requirements in **Ekshibit "A-3"** of **Afidavit Sokongan** were abided, followed and complied. No documentary proof.

28. As such, the only conclusion this Court can come to is, this is an untenable bare allegation. In actual fact, there is no reasonable cause of action.

29. It was submitted that the principle*, "where there are no exhibits, there would be total lack of merits and insufficient material",* enshrined in the Federal Court case of *Raphael Pura v. Insas Bhd & Anor* [2003] 1 MLJ 513 is clear, it was held:

> "*(1) (per Abdul Hamid Mohamad JCA) The High Court dismissed the application on the ground that no exhibits were attached to the affidavit in support of the application and there was 'a total lack of merits in this application which lacks bona fide'. The Court of*

Appeal dismissed the appeal on the ground that 'there was insufficient material placed before the learned judge and even if there was sufficient material, no cogent reasons were advanced by the appellant' and that there was a lack of bona fide on the part of the appellant."

30. It is trite that, where there are no exhibits which supports the allegation of the Plaintiff in affidavit, the only conclusion this Court ought to find is there is 'a total lack of merits' and 'insufficient material'.

31. Further, the Court of Appeal case of *ARL Associates Sdn Bhd v. Bank Kerjasama Rakyat Malaysia Bhd* (Rayuan Sivil No. W-02 (IM) (NCVC) 983-05/2012-unreported) sets out the law on Order 18 Rule 19(1)(a), pages 15 - 17:

"*[15] The guiding principle in determining what a 'reasonable cause of action' under rule 19(1)(a) was succinctly pronounced by Lord Pearson in Drummond-Jackson v. British Medical Association [1970] 1 All ER 1084. According to his Lordship, 'a reasonable cause of action' connotes a cause of action which has some chance of success when only the allegations in the pleadings are considered. […] Where a case is plain or obvious does not depend*

upon the length of time it takes to argue the case, but that when the case is argued, it becomes plain and obvious that the case has no chance of success, then it discloses no reasonable cause of action.

[16] When a question of law becomes an issue, this itself will not prevent the court from granting the application to strike out the claim, for so long as the court is satisfied that the issue of law is unarguable and unsustainable based on settled principle of law."

32. Not only from the face of the pleadings, this Court ought to determine that there is no reasonable cause of action.

33. This position is further entrenched upon after this Court's consideration of the whole history, the lack of documentation and bare allegations of the Plaintiff after an exchange of affidavits.

34. In addition, the Court of Appeal case of *Middy Industries Sdn Bhd & Ors v. Arensi-Marley (M) Sdn Bhd* [2013] 3 MLJ 511 at 516, it is stated that, "*in considering whether any proceedings were vexatious or frivolous, one is entitled to and ought to look at the whole history of*

the matter and it is not to be determined by whether the pleading discloses a cause of action or not."

Other tenants

35. At all material times, there were other tenants on the same row with operating business. Proof of their "Lesen Premis" and/or "Cukai Taksiran" are found in **Ekshibit "A-5"** of the **Afidavit Sokongan**.

36. Undoubtedly, the reason which the Plaintiff had come up with this scandalous, frivolous or vexatious claim, which clearly discloses no cause of action as an abuse of the court process.

37. The full context of the letter found in **Afidavit Balasan "SAMA-2"**, a letter from DBKL dated 4.2.2014, it is further stated that it is not impossible to obtain a license and renovation approval (as the other tenants on the same row/Jalan did), subject to a Development Order. Quoting the said letter :

> "*Memandangkan bangunan ini adalah kediaman sebarang bentuk pembangunan perdagangan memerlukan kelulusan Perintah Pembangunan. Sehubungan dengan itu, pemilik lot boleh merujuk*

kepada Jabatan Perancang Bandar bagi urusan permohonan Perintah Pembangunan ini."

38. In addition, the said letter was addressed to the Plaintiff's solicitors, it had referred and directed the Plaintiff and/or the Plaintiff's solicitors to the right department which is Jabatan Perancang Bandar.

39. The Plaintiff, who is represented by solicitors, at all material times of the application process, should have no excuse to not being able to apply for the right application and apply to the right department.

40. With reference again to the extract of the Federal Court case of **Raphael Pura** above, the Plaintiff are not able to prove the accurate payment to the Defendant. This is a court of law. Only physical documents ought to be considered.

41. The Plaintiff had repeatedly concoct a scandalous, frivolous or vexatious claim that there are documentation that in actual fact does not exist, only to mislead the court to think that there is a cause of action.

Vague Allegations on Fraud

42. The Plaintiff's allegations on fraud were not particularized. It is submitted that there is no fraud to begin with, even DBKL had not denied that obtaining "Lesen Premis" and/or licence for business is possible, and had even directed the Plaintiff to the right/correct department.

43. It was further submitted that the Plaintiff's allegation on fraud are vague and untenable. Defendant referred to the Supreme Court case of *Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217 at 227 - 228 :

> "*On this point we find strong support in the case of Wallingford v. Mutual Society, 3 particularly in the speeches of Lord Selborne (Lord Chancellor), Lord Hatherley and Lord Watson. Lord Selborne said at p 697:*
>
> > *With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount on an averment of fraud of which any court ought to take notice. And here I find nothing but*

perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any court to understand what it was that was alleged to be fraudulent. […]

[…] Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and bring evidence of that error, and establish it by that evidence. […]

Plaintiff's Own Incompetence and Delay

44. The Plaintiff's claim that the Defendant had caused delay is an afterthought to support this untenable claim.

45. The Plaintiff had only officially request by way of letter on the 24.9.2013.

46. On the same day, the Defendant had acceded to the Plaintiff's request and furnished the necessary documents (see **Afidavit Balasan "SAMA-7"**).

The Defendant Does Not Own the Demised Premises

47. The Defendant had no knowledge of any unjust enrichment as the Defendant is not the landlord and/or lease holder.

48. The Plaintiff's bare allegation on unjust enrichment is untenable and unsustainable in fact or in law.

49. Nevertheless, the fact that the Plaintiff could show evidence that Demised Premise is an operating and functioning business, goes to show that the fault lies in the Plaintiff alone for not being able to obtain the necessary approvals.

50. Clearly the whole Writ and Statement of Claim founded upon the fact that business license could not be obtained as it was residential and not commercial does not hold water.

51. The Plaintiff's claim is premised upon concocted issues and bare allegations, which are not particularized. At all material times, the Plaintiff had failed in their own accord, to obtain approvals and licenses which the Tenancy Agreement had clearly stated ought to be the duty and responsibility of the Plaintiff.

52. Even after four rejection letters stating clearly that there is no Development Order and even the inquiry letter (**Afidavit Balasan "SAMA-2**) by the Plaintiff's solicitors directing the Plaintiff to the right/correct department. (For an application of a Development Order), the Plaintiff had still failed to obtain the necessary approvals, licenses and/or Development Order.

53. As such the Defendant submitted that the Plaintiff's claim is untenable and unsustainable as, the issues raised to justify its claim are concocted and untenable, thus there is no reasonable cause of action and the claim is scandalous, frivolous or vexatious. These concocted issues and bare allegations that do not hold water is not *bona fide* and is an abuse of the process of the court meant to prejudice, embarrass or delay the Defendant's rightful and legitimate action in rental arrears.

54. Based on the above reasons, the Defendant submitted that the Plaintiff's Writ and Statement of Claim ought to be struck out with costs.

Plaintiff's Submission

55. The Plaintiff's claim that the representation by the Defendant had made them to enter into the Tenancy Agreement and then invested

money to carry out renovations and construction after they obtained a Development Order which was given by DBKL. The Plaintiff, then made four applications to DBKL for a business license which was were all rejected was told orally that the license was not given as the Premise can only be used for residential purposes only and not for commercial purposes by one of the DBKL officers at the DBKL counter.

56. The Plaintiff then wrote to the Pengarah Perancangan Fizikal of DBKL asking for confirmation on the type of zoning that was attached to the Premise and whether that Premise could be used to conduct a business. A reply via letter dated 4th February 2014 from DBKL stated that the zoning of the Premise was under amendment and as it stands the Premises is residential in nature [Exhibit SAMA-2 Afidavit Balasan]. Regardless of the Defendant's contentions, the fact remains that at the time at the material time, the premise was residential in nature and this is a vital point of this case.

57. Plaintiff submitted that even if the Court does accept that it is the Plaintiff's obligation to obtain licenses and approvals and not that of the Defendant's, Plaintiff also states that the Defendants had not given the Plaintiff the necessary documents needed to apply for the licenses when requested for by the Plaintiff but only provided the documents 2 years

after the Tenancy Agreement was entered into exhibit SAMA-7 ie, on 24.9.2014 after the Plaintiff had requested for it numerous times verbally. This has directly impeded and disallowed the Plaintiff from applying for the licenses even if they wanted to do so.

58. Defendant relies on the **DRAFT** KL 2020 City Plan to prove its assertions on the zoning of the land. A grant is a document that is sealed and validated by the Registrar of Land Ownership, Kuala Lumpur (Pendaftar Hak Milik Tanah, Kuala Lumpur) and it is an official document. The **DRAFT KL 2020 City Plan is not an official document and is not the absolute document relating to land matters. It is merely a draft.** The Defendant seeks to rely upon this draft document to prove its assertions and this can only be done at trial. Further, the Draft KL 2020 City Plan as exhibited by the Defendant does not show with any certainty what is or is not a commercial premise.

59. The Plaintiff is not saying that the representation by the Defendant was made outside the agreement. The representation by the Defendant which turned out to be false is as per the Tenancy Agreement itself whereby at page 1 it is stated:

"*The Landlord has at the request of the Tenant agreed to grant and the tenant has agreed to take a lease of the Demised Premises subject to the terms, conditions and covenants expressly stated the* ***Tenant intends to operate a business described as Restaurant and Bar and the Landlord hereby acknowledge and agrees with the Tenant's intention use of Demised Premises."***

60. It is the Plaintiff's case that by including such a term in the Tenancy Agreement the Defendant has effectively made a representation that the premise is suitable for commercial purposes. Further, it is common sense to hold that the Defendant by including such a term, knew what was the purpose for which the premises was being leased for which is obviously to carry out a restaurant and bar business.

61. The Plaintiff also denies the Defendant's assertion that there was an outstanding amount of RM108, 000.00. The Plaintiff firmly states that as per the Tenancy Agreement, the Plaintiff is required to pay rental at the sum of RM6,000.00 a month for a period of two (2) years and hence they total sum that has to be paid is RM 144,000.00 which also covers a deposit of RM24,000.00 including a discount on rental for 4 months (amounting to RM 24,000.00) during the renovation period. The Plaintiff

states that to date, the sum that has been paid as per the Plaintiff's records is RM102,508.00. However there are numerous payments that were made in cash and the Plaintiff was not given receipts by the Defendant for some of the payments made.

62. The Plaintiff also states that some of the documents that prove payments have been lost and/or cannot be found by the Plaintiff and hence the exact sum paid to the Defendant cannot be proved. However the Plaintiff firmly states that all payments due to the Defendant had been paid and the amount claimed by the Defendant is not true. It is clear that this cause of action is not an "afterthought" to prevent the Defendant from claiming the rents as alleged by the Defendants. Further this cause of action is not designed to cause prejudice and embarrass the Defendant's cause of action. The Plaintiff has exhibited all the payments and receipts paid to the Defendants (which are in the possession of the Plaintiff) at exhibit **SAMA-4** totaling **to RM102,508.00.** It is common sense that only upon making such payments would the Plaintiff have such receipts. Hence it is illogical to suggest that no payments have been made.

63. The Plaintiff also avers that the Defendant had not made a demand for the outstanding sum when they sent the Plaintiff a letter

dated 10.12.2014 (which is exhibited in Exhibit **SAMA-5 of the Afidavit Balasan**) to demand that they remove all the Plaintiff's property from the premises. If it is true that the Plaintiff did not pay the sums as alleged by the Defendant, the Plaintiff questions why this issue was not brought up in the said letter or a demand made for the outstanding sum. It is clear that the issue of the outstanding sum is an "afterthought" issue by the Defendant because the Plaintiff by way of their previous lawyers had written to the Defendant and demanded that the Tenancy Agreement be terminated and asked for compensation for the losses sustained in a letter dated 17.12.2013.

64. The Plaintiff states that they have not received any notice, order and writ or has ever been served with any documents from the Court in relation to the distress action. The Plaintiff only received a letter dated 10.12.2013 from the Defendants which they only received on 23.12.2013 which ordered them to remove all their properties and belongings from the premises in 7 days failing which the Defendant would auction off the property. This letter has been exhibited in Exhibit **SAMA-5 of the Afidavit Balasan**.

65. The Plaintiff firmly states that all renovations were done after obtaining the Development Order (Perintah Pembangunan) from DBKL

as exhibited in **Exhibit "SAMA-8" of the Afidavit Balasan**. The Plaintiff also firmly denies the Defendant's allegations that the Plaintiff has built a gate without a setback and also an illegal staircase, as the abovementioned where pre-existing.

66. Plaintiff referred to Order 18 Rule 8 of The Rules of Court 2012, cited in *Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615 [TAB7] which provides that :

> "**A party shall in any pleadings subsequent to a statement of claim plead specifically any matter**, for example performance, release, any relevant statute of limitation, fraud or any fact showing illegality:
>
> a. which he alleges makes any claim or defense of the opposite party not maintainable;
>
> b. **which, if not specifically pleaded, might take the opposite side by surprise**; **or**
>
> c. **raise issues of fact not arising out of the preceding pleading**."

67. Taking into account the above provision of the Rules of Court, it was submitted that the Plaintiff is well within its rights to raise issues of misrepresentation and has done so in its Reply to the Defense and Reply to the Counterclaim dated 27.5.2014 which has been reproduced below and also exhibited as "**SAMA-6**" in the Afidavit Balasan.

> "9 (a) *The Plaintiff pleads that the Defendant knew and was fully aware of the Plaintiff's intention to lease the premises for a commercial/business purpose and misrepresented to the Plaintiff that the premises was fit and proper for commercial purposes. The representation made by the Defendant was false as stated in paragraph 8 above, whereby the Pengarah Perancangan Fizikal of DBKL confirmed that the premises was residential in nature and if the Plaintiff had known that the premises was not commercial in nature, they would not have entered into the agreement. Due to the misrepresentation of the Defendant, the Plaintiff suffered the losses as provided in paragraph 9 of the Statement of Claim."*

68. The Plaintiff has pleaded the particulars of misrepresentation above in satisfaction of Order 18 Rule 12 of the Rules of Court 2012. Whereby the Defendant made a representation to the Plaintiff which induced the Plaintiff into the Agreement, the representation turned out to

be false which then caused losses to the Plaintiff. It is the substance and not form that is pertinent here.

69. The Plaintiff avers that the premise is now being rented out to or has been sold to another occupier who is using the premise as was renovated by the Plaintiff, and the Defendant is receiving a profit from a higher rental or higher selling price due to the renovations that were done. This amounts to unjust enrichment for the Defendant.

70. The Plaintiff submitted that taking into account the principles of law cited above, this Court should dismiss this application with costs due to the overwhelming force of precedents cited above which this court is bound by. The Plaintiff's pleadings does disclose a valid cause of action and have raised questions fit to be decided at trial and it would be inappropriate for this court to discount the effectiveness of those causes of action without the advantages of a full trial and further it is not scandalous, frivolous and vexatious, or may prejudice, embarrass or delay the fair trial of the action and/nor is an abuse of the process of Court for the above reasons.

Opinion of the Court

71. It is trite law that striking out for no reasonable cause of action is only appropriate in cases which are **plain and obvious so that a judge can say at once that a statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to the relief which he asks for**. So long as the pleadings disclosed some cause of action or raised some question fit to be decided by the judge, the mere fact that the case was weak and not likely to succeed at the trial was no ground for the pleadings to be struck out. It cannot be said that they were frivolous, vexatious or may prejudice, embarrass or delay the fair trial of the action or that these pleadings were otherwise an abuse of the process of the court (*Bandar Builder Sdn Bhd v. United Malaysian Banking Corporation Bhd* [1993] 3 MLJ 36). This principle was enunciated by Mohamed Dzaiddin, SCJ (as he then was) :

> *"The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd), and this summary procedure can only be adopted when it can be clearly*

seen that a claim or answer is on the face of it 'obviously unsustainable' (see AG of Duchy of Lancaster v. L & NW Rly Co)."

"The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in pari materia with our O. 33 r. 2 of the RHC) (see Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd 7). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable."

72. In *Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor* [1998] 2 MLJ 498, Gopal Sri Ram JCA (as he then was) quoted the judgment of Raja Azlan Shah J (as he then was) in *Mooney & Ors v. Peat Marwick Mitchell & Co & Anor* [1967] 1 MLJ 87 at p 88 :

"It is firmly established that the power exercised under r. 4 [the precursor to O. 18 r. 19]' is only appropriate in cases which are plain and obvious so that a judge can say at once that a statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to the relief of which he asks for': see the judgment of

Lindley MR in Hubbuck & Sons v. Wilkinsons Heywood & Clark Ltd [1899] 1 QB 86 at p 91. Where the situation arises, the pleadings and particulars alone shall be considered and all the allegations in it shall be presumed to be true, and it is only on that assumption that any suitable case can be made for this application: see Peck v. Russell [1923] 4 FMSLR 32 at p 34. ***The court cannot and indeed is not empowered to look behind the pleadings and particulars if it discloses a reasonable cause of action. So long as the statement of claim discloses some ground of action, the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out****: see Boaler v. Holder [1886] 54 LT 298. A recent exposition of the law is afforded by the judgment of Danckwerts LJ in Wenlock v. Moloney [1965] 1 WLR 1238 at p 1243* :

> *"Under the rule (ie, 25 r. 4) it had to appear on the facts of the plaintiff's pleadings that the action could not succeed or was objectionable for some other reason. No evidence could be filed .... But, as the procedure was of a summary nature the party was not to be deprived of his rights to have his case tried by a proper trial unless the matter was clear."*

After stating that the former rules are now incorporated in the revised Rules of the Supreme Court, O. 18 r. 19, he continues:

> *"But this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge."*

In essence, therefore, principle is that pleadings ought not to be struck out save in plain and obvious cases.

73. By looking at the entirety of the Plaintiff's pleading, the issue before the Court is whether there exists a cause of action. The Defendant claims that the Plaintiff's case ought to be struck off because clause 2 (i) of the Tenancy Agreement according to the Defendant clearly provides that the obligation to obtain a license is not the Defendant but the Plaintiff's obligation. In my opinion, the issue in this case is not just about the meaning of Clause 2(i) of the Tenancy Agreement but the fact that despite the Plaintiff having made four applications to DBKL for a business license, not only the applications were all rejected but was told orally that the license was not given as the

Premise can only be used for residential purposes only and not for commercial purposes by one of the DBKL officers at the DBKL counter.

74. The Plaintiff in their Statement of Claim pleaded that, premised on the representation by the Defendant they had entered into the Tenancy Agreement and then invested money to carry out renovations and construction in anticipation that the Plaintiff's applications for business license would be granted. Though the Court can deal with Clause 2 (i) of the Tenancy agreement by giving its true meaning and effect and may consider the conduct of the Plaintiff by making various applications for license as possibility that it is the Plaintiff's obligation, however, the real issue before this Court as pleaded by the Plaintiff is whether the premise can only be used for residential purposes only and not for commercial purposes. In my opinion, applications for license would become useless or impossible if the premise itself is not for commercial purposes. It is a question of facts which in my opinion can only be established by Plaintiff and Defendant providing oral testimony of witnesses during full trial. The Defendant is to prove that the premise was for commercial purposes and the Plaintiff is to prove otherwise. This can only be achieved by calling the respective officer of DBKL to state the correct facts.

75. I agree with the Plaintiff that the Defendant cannot rely on the KL 2020 City Plan to prove its assertions that the premise in question comes under the Commercial area. A grant is a document that is sealed and validated by the Registrar of Land Ownership, Kuala Lumpur (Pendaftar Hak Milik Tanah, Kuala Lumpur) and it is an official document. KL 2020 City Plan is not an official document and is not the absolute document relating to land matters. The Defendant seeks to rely upon this document to prove its assertions and this can only be done at trial.

76. Further, the Defendant has referred to the letter found in **Afidavit Balasan "SAMA-2"**, a letter from DBKL dated 4.2.2014, which stated that it is not impossible to obtain a license and renovation approval subject to a Development Order. In support of the allegation the Defendant exhibited a sample Development Order which is found in **Ekshibit "B-1"** of **Afidavit Balasan Kepada Afidavit Balasan Defendan** wherein it is clearly stated on the title "Perintah Pembangunan". The Defendant alleged that since the Plaintiff has failed to show the Development Order, the Plaintiff's claim lacks merits and insufficient material". By reason of that, the Federal Court case of *Raphael Pura v. Insas Bhd & Anor* [2003] 1 MLJ 513 would apply and the Plaintiff's case ought to be struck off.

77. The Plaintiff has stated that all renovations were done after obtaining the Development Order (Perintah Pembangunan) from DBKL as exhibited in **Exhibit "SAMA-8"** of the Afidavit Balasan. Again, the issue before this Court is whether Perintah Pembangunan (Development Order) as exhibited by the Plaintiff is the Development Order which the Plaintiff's claim to have allowed them to renovate the premise or the sample shown by the Defendant which shows the title "Development Order". It is not the job of this Court to speculate the documents and its contents and determine which one is the so called the Development Order. The evidence must be obtained from DBKL officers to establish the documents and the process for application for Development Order. In any event the purported Development Order shown by the Defendant is only a sample document which in my opinion does not have evidential value and is prejudicial to the Plaintiff.

78. In *Sivakumar a/l Varatharaju Naidu v. Ganesan a/l Retanam* [2011] 6 MLJ 70, it was held by the Court of Appeal that the power to strike out must be exercised by the court sparingly. It is a rule of thumb that if it can be shown that the pleadings do disclose some cause of action or that it has raised some question fit to be decided, then the case should be set down for argument notwithstanding that the chances of success are minimal. **The pleadings must be entirely hopeless,**

baseless or without foundation in law or in equity before they can be struck out.

79. In *Saripah bte Manap v. Emar Sdn Bhd* (in dissolution) [1998] 1 MLJ 323 it was held that summary procedure under O. 18 r. 19(1)(a) and (b) should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable. **If it can be shown that the pleadings do disclose some cause of action or have raised some questions fit to be decided, however slight the chances are of succeeding, that case should not be struck off.**

80. By reasons of the above said, in my considered opinion, there are some question fit to be decided and the case should be set down for argument. The Plaintiff's pleadings in this case do disclose some cause of action or have raised some questions fit to be decided. In other words there are issues to be tried.

81. The issue to be tried is whether the Defendant had misrepresented (**taking into account the letter from DBKL which clearly states that as it stands, the premise is residential in nature**) to the Plaintiff that the premise is fit and proper for commercial usage as stated in the Tenancy Agreement. The Plaintiff would not have entered into the

Tenancy Agreement and invest money into renovations if they knew that they could not run their business on the premises.

82. In *Omega Holdings Bhd v. Dato' Tiah Thee Kian* [2002] 6 MLJ 20 it was held that the **summary process of terminating the plaintiff's claim upon affidavit evidence was inappropriate without the advantage of oral evidence, cross examination, discovery and interrogatories**.

83. On the other issues raised by the Defendant in this application, my opinion is that since I have decided that there are triable issues and the case should be set down for full trial, the issues have become not relevant for purposes of striking out the Plaintiff's case.

84. In the circumstances of this case, the Defendant's application in Enclosure 13 is dismissed with Cost of RM1,000.00.

Dated: 25 SEPTEMBER 2014

(KAMALUDIN MD SAID)
HAKIM
MAHKAMAH TINGGI KUALA LUMPUR

COUNSELS:

For the plaintiff - Sangeet Kaur Deo (& Jeremy Vinesh with him); M/s Karpal Singh & Co

For the defendant - Chin Ze Yi; M/s David Gurupatham & Koay

Case(s) referred to:

Raphael Pura v. Insas Bhd & Anor [2003] 1 MLJ 513

ARL Associates Sdn Bhd v. Bank Kerjasama Rakyat Malaysia Bhd (unreported)

Middy Industries Sdn Bhd & Ors v. Arensi-Marley (M) Sdn Bhd [2013] 3 MLJ 511

Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd [1992] 2 MLJ 217

Bandar Builder Sdn Bhd v. United Malaysian Banking Corporation Bhd [1993] 3 MLJ 36

Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor [1998] 2 MLJ 498

Sivakumar a/l Varatharaju Naidu v. Ganesan a/l Retanam [2011] 6 MLJ 70

Saripah bte Manap v. Emar Sdn Bhd (in dissolution) [1998] 1 MLJ 323

Omega Holdings Bhd v. Dato' Tiah Thee Kian [2002] 6 MLJ 20

Legislation referred to:

Order 18 rule 19 of the Rules of Court 2012