

**Liew Ting Shong**

AND

**Liang Toon Department Store Sdn Bhd**

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**(Court of Appeal of Brunei Darussalam)  
(Civil Appeal No. 15 of 2005)**

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Cons, P.; Power and Mortimer, JJ.A;  
**23<sup>rd</sup> November, 2006.**

Ms Sue Ong (M/S S.Ong & Hale) for the Plaintiff.  
Ms Feridahanam (M/S D F Abang Zen) for the Defendant.

**Cases cited in the Judgment:**

*Bond v Rosling* [1861] 121 ER 753  
*Central Development Sdn. Bhd. vs Abdul Razak Holdings* [1998] JCBD 81  
*Churchward v R* [1865] L.R. 1 Q.B.173  
*Leitz Leeholme Stud Pty. Ltd. v Robinson* [1977] 2 NSWLR 544  
*Parker v Taswell* 27 LJ Ch.812  
*Rollason v Leon* 158 ER 398  
*Sideboftham v Holland* [1895] 1 Q.B.394  
*Tidey v Mollett* [1864] 148 ER 1143

**Power, J.A.:**

The Appellant (Plaintiff), LIEW TING SHONG, is suing the Respondent (Defendant), LIANG TOON DEPARTMENT STORE SDN BHD, for loss of rent arising out of the early termination by the Respondent of a tenancy of premises owned by the Appellant. A statement of agreed facts set out that:

On 5<sup>th</sup> April 1995 the defendant entered into a tenancy agreement with the plaintiff whereby the plaintiff “let to the defendant the premises (being 4 shop units) for a term of 15 years” at \$66,000 ‘annual rental’ per shop house payable monthly on the first week of each calendar month. The rentals thereafter from the 6<sup>th</sup> to the 10<sup>th</sup> year and from the 1<sup>st</sup> to the 15<sup>th</sup> year were to be increased in accordance with the rentals of the surrounding shophouses. It was further agreed that the defendant would pay \$66,000 by way of deposit as security for the due performance of the term granted and that the defendant would yield up the shophouses together with fittings and fixtures at the determination of the agreement in as good a state and condition as they shall be at the commencement of the agreement (fair wear and damage accepted).

This agreement was drafted by the defendant's solicitors, Messrs. Ho and Siong Advocates. The deposit was paid and the defendant entered into possession.

On 30<sup>th</sup> May 2000 the annual rent was revised down to \$42,000 per shophouse payable monthly in the sum of \$3,500. This reduction took effect from 1<sup>st</sup> June 2000.

On 20<sup>th</sup> August 2003 the defendant informed the plaintiff by letter that they were having financial difficulties and asked for early termination of the agreement.

On 2<sup>nd</sup> September 2003 this request was refused. On 30<sup>th</sup> April 2004 the defendant served Notice of Termination on the plaintiff stating that the keys would be handed back on 31<sup>st</sup> May 2004.

On 25<sup>th</sup> May plaintiff replied stating that the agreement was for a fixed term of 15 years, that there was no early termination clause and that the termination was wrongful. About the end of May the defendant moved out of the premises, began restoring the shophouses and stopped paying rent.

On 4<sup>th</sup> June the defendant returned the keys. On 25<sup>th</sup> June defendant demanded return of the \$66,000 deposit. On 29<sup>th</sup> July the plaintiff, by letter, accepted the repudiation and stated that he would sue for damages. Up to the date of trial the shophouses were vacant, not having been rented out.

The contention of the Appellant's counsel was that this was a fixed term tenancy for 15 years. The fallback position of the Appellant's counsel was that it was at least a yearly tenancy requiring 6 months notice.

Respondent's counsel argued that as monthly payments were stipulated it was a monthly tenancy requiring only one month's notice.

No reference was made by the Judge to s.23 of the Land Code which provides inter alia that any person wishing to lease his land shall register such lease with the Land Office and that such lease shall be null and void unless registered with the prior approval in writing of His Majesty in Council. In paragraph 3 of the amended Statement of Claim the Appellant pleaded that as the tenancy agreement had not been registered it did not take effect as such but "was still good as an agreement and was binding on the parties to it, according to its terms and conditions.....". The pleading went on to claim loss of benefit under the agreement.

For his right to claim under the agreement itself the Appellant relied upon the judgment of Sir Denys Roberts C.J. in *Central Development Sdn. Bhd. vs Abdul Razak Holdings* [1998] JCBD 81 in which, when dealing with a similarly unapproved agreement to lease, Sir Denys stated himself to be faced with the following question:

“Could the main agreement survive as an independent and legally binding contract which binds both parties and enables both parties to sue on it, or must it fall with the abortive 20 years lease?”

Sir Denys answered the first part of that question in the affirmative.

He relied when so doing upon *Leitz Leeholme Stud Pty. Ltd. v Robinson* [1977] 2 NSWLR 544 in which the Court of Appeal of New South Wales was dealing with an unregistered 6 year lease which was not valid under New South Wales law. The court held that, there having been a failure to register, the only interest created was a tenancy at will. Glass J.A. in his judgment with which Hope J.A. concurred held: “The agreement and the tenancy at will are independent sources of rights. At no stage do they merge, so that the termination of the estate automatically extinguishes the agreement..... But in so far as the memorandum operates as an agreement, it retains a separate identity as the repository of the substantial rights of the parties.”

Further reliance was placed both by Glass J.A. and Sir Denys on “a number of English decisions..... in support of the submission that an agreement for a lease is enforceable as an agreement, even if it is void as a lease – see *Bond v Rosling* [1861] 121 ER 753, *Rollason v Leon* 158 ER 398, *Parker v Taswell* 27 LJ Ch.812 and *Tidey v Mollett* [1864] 148 ER 1143.”

Sir Denys was satisfied that the rights under what he referred to as “the main agreement” and the rights under the null and void tenancy agreement “did not merge and the extinction of one did not end the other automatically”.

Relying thereon Madam Ong for the Appellant contended that the Appellant was entitled to all damages that flowed from the breach of an agreement to grant a term of 15 years i.e. the main agreement.

Madam Abang for the Respondent submitted that s.23 of the Land Code had no application to a tenancy agreement, which was the agreement in the present case, but only to an agreement to lease. She contended that s.23 had reference only to interests in land and that in Brunei a tenancy agreement had never been regarded as creating an interest in land and had therefore never been required to be registered. As at present advised we cannot agree. It seems to us at the moment to be unarguable that a tenancy agreement does not create an interest in land. Thus if it is for a period in excess of 7 years it is null and void as such an interest if it is not registered.

In the circumstances the matter which, given the above, fell for the court’s decision was whether the Appellant and the Respondent had agreed that there would be a tenancy of 15 years with no right to earlier determination.

Madam Ong contended it plainly did while Madam Abang argued that as paragraph 2(i) of the Tenancy Agreement provided that “the annual rental per shophouse shall be

B\$66,000.00 payable monthly in the sum of B\$5,500 per month.....” the agreement, was no more than a monthly tenancy determinable by notice of one month.

In discussing her conclusion the Judge, rightly observed that the terms of the agreement were “essentially a matter of contract – what they have agreed to will bind them and govern their relationship. However, there are also implied covenants by common law or by statute to deal with the basic or elementary rights and obligations, especially, where the agreement does not expressly provide for them”. The Judge went on to state “it has been held that where parties have not expressly agreed on any period of notice the common law implies at least a half year notice expiring at the end of one completed year of tenancy”. For this proposition she relied upon *Sideboftham v Holland* [1895] 1 Q.B.394. The Judge continued that, in her view, her task was “to determine the real intention of the parties at the time they entered the agreement which would have been best known to them.”

The Judge examined with care the evidence detailing the history of the personal relationship between the parties. Her finding in this regard was, in short, that the relationship of the parties had been extremely friendly at the time when they entered into the agreement. She found: “The relevance of that fact (the friendly relationship) is that it was clear, at the time of the agreement, none of the parties were really concerned with details of determination as the circumstances at the time were cordial and it comes as no surprise as none of them thought about providing a clause for early termination. It is easy to understand why. The relationship of the parties was such that they did not even contemplate that any of them will break from the agreement or even if there was a possibility to it, it can easily be done by consent on the basis of their good relationship.” She went on to hold: “I am inclined to interpret the tenancy agreement as a yearly tenancy, based on the annual rent specified although paid monthly and the fact that it was a commercial tenancy for which both had spent considerable amount of money” Given that it was a yearly tenancy she held a 6 months notice should be implied. She awarded the Appellant damages because of insufficient notice, as only one month’s notice had been given, and for early termination with such loss to be assessed by the Registrar subject to the Appellant’s duty to mitigate. She also ordered an enquiry by the Registrar as to the adequacy of the repair to the premises.

Conscientious as the Judge was in her careful examination of the evidence her decision was, in the outcome, plainly wrong. She mislead herself almost from the outset when she said that her task was “to determine the real intention of the parties at the time they entered into the agreement **which would have been best known to them.**” That was not her task. Her task, simply put, was to determine the intention of the parties in accordance with the words of the agreement drawn up by the solicitor for the defendant, into which they entered. Speculation as to what they might have done had they turned their minds to various possibilities are quite irrelevant. What is relevant is what they did and what they did was to enter into a contract which in clear terms provided for a fixed term tenancy of 15 years. Implication of an agreement to provide for early termination was simply not open. If authority be needed for that proposition it comes from as long ago as 1865 in *Churchward v R* [1865] L.R. 1 Q.B.173 where Cockburn C.J. said at 195 “where a

contract is silent, the court..... must take great care that they do not make the contract speak where it was intentionally silent; and above all that they do not make it speak entirely contrary to what, as may be gathered from the whole terms and tenor of the contract was the intention of the parties.”

The appeal must succeed except as to the order for assessment of repairs by the Registrar. Appellant is entitled to damages calculated by reference to the rent payable for the full term subject to his duty to mitigate his damages. The proper figure for mitigation is also to be assessed by the Registrar.

The deposit of \$66,000 is ordered to be set off against the overall damages which include the rent to be paid and the figure assessed for repair.

There will be an order nisi that the Appellant is to have his costs here and below which will become absolute at 12 noon on 23<sup>rd</sup> November 2006.