Pantai Mentiri Golf Club … **Appellant**

AND

Borneo Landscaping & Grassing (B) Sdn Bhd … **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 12 of 2009)

Before: Mortimer, P.; Davies and Rogers, JJ.A.
27th May, 2010.

Land Law. Tenancy agreement – landlord in breach of covenants of quiet enjoyment and non-derogation from grant by dumping rubbish. Tenant entitled to deduct cost of removing rubbish as set-off or counterclaim when paying rent. Landlord not entitled to terminate tenancy because the tenant had erected a fence.

Mr. Rudi Lee Kim Boon and Mrs Shamila of Messrs. Fathan Rudi Lee Annie Kon & Associates for the Appellant.
Mr. Sivabalan of Messrs. Sankaran Halim for the Respondent.

Cases cited in the Judgment:

Waters v. Weigall (1795) 2 Anst. 575, 145 ER 971.

Rogers, J.A.:

1. This was an appeal from a judgment of Judicial Commissioner Findlay given on 17 September 2009. The matter before the judge was an appeal from a decision of the Magistrate in respect of a claim by the appellant, Pantai Mentiri Golf Club, to obtain vacant possession of a driving range ("the premises") that had been leased by the appellant to the respondent, Borneo Landscaping & Grassing (B) Sdn Bhd. The magistrate had ordered the respondent to restore the premises and to deliver up the premises within 60 days in good condition. In addition the magistrate ordered the respondent to pay mesne profits, to be calculated at double the agreed rental, from July 2008 until the date that vacant possession was given. On appeal the Judicial Commissioner allowed the respondent's appeal. At the conclusion of the hearing of this appeal, this court reserved judgment which we now give.

Background

2. On 24 September 2004 the respondent entered a tenancy agreement with the appellant in respect of the premises for a period of 6 years from 1 August 2004 to 31 July 2010. The rent was to be $24,000 per year for the first 3 years, $30,500 per year for the fourth and fifth years and for the final year it was to be $36,000.

On 17 March 2007 officers from the Royal Customs and Excise Department together with officers from the Police Department raided the premises and discovered 10 cans of beer. Based on that, on 29 November 2007 the appellant's solicitors gave notice to the respondent that the tenancy was terminated with immediate effect and gave notice to quit. The respondent vehemently denied that it had been in breach.

3. On 27 May 2008 the respondent's solicitors wrote to the appellant complaining of the dumping of rubbish, described in the letter as debris/rubbish, around the edge of the driving range. The appellant was requested to remove the rubbish within 7 days. That was followed by a letter of 9 June 2008 wherein the respondent's solicitors complained that nothing had been done to redress the problem of the rubbish and stated that the respondent would itself undertake to clear the rubbish and estimated that it would cost $580 per day to do so. That correspondence was met with a letter of 11 June 2008 from the appellant's solicitors stating that the tenancy had been terminated and the notice to quit had been served. Finally, on 6 July 2008 the respondent sent a letter to the appellant enclosing a cheque for $12,700 which was calculated to be the rental for the period of July 2008-June 2009 based on a rent of $2,500 per month less the cost of maintenance of the grass area of the driving range calculated at $1,200 per month and the cost of 5 days clearing the rubbish amounting to $2,900.

4. There the matter remained and the present proceedings were commenced. The appellant's complaints in the amended statement of claim were first that the respondent had permitted alcohol to come onto the premises and second that the respondent had purported to set off the cost of clearing the rubbish against the annual rental for the period of 2008-2009.

The proceedings in the Magistrate's Court

5. For reasons which it is unnecessary to expound, the magistrate was not satisfied that the appellant had been responsible for bringing the alcohol which had been found on the premises. She said that she remained unsatisfied that the appellant had committed an illegal act as alleged. Furthermore, she considered that the notice of termination of the tenancy agreement was defective and was bad in law for being too short and that the notice to quit was, therefore, invalid.

6. In relation to the complaints in respect of the deduction of the cost of removing the rubbish, the appellant's case was, initially, that the respondent could not deduct any costs whether they be for clearing the rubbish or for the maintenance of the grass area. Eventually, the appellant was put in a position where it had to concede that the cost of the maintenance of the grass area could be deducted from the rent because there had been correspondence to that effect, culminating in a letter of 15 December 2006 from the appellant agreeing to the deduction.

7. As regards the deduction of the cost of clearing the rubbish the appellant's case was, first, that it had informed a Mr. Pg Hassanal of the fact that it would itself clear the rubbish when the weather and condition of the ground permitted it and, second, that, in any event, the respondent could not deduct any such costs because the cost of removal of the rubbish was something quite different from the rent.

8. The magistrate upheld the appellant's contention. She held that the respondent was in breach of its obligation to pay rent by deducting the cost of removing the rubbish. Furthermore, she held that the appellant was not liable to pay the cost of removal because it had intended to clear the rubbish itself. Finally on this aspect, although it had been suggested that the appellant's new chairman was unhappy with the respondent and wanted to terminate the tenancy, the magistrate found no merit in the respondent's allegation that the appellant had dumped the rubbish maliciously.

9. In addition to the above, the appellant had raised in the affidavit evidence an allegation that the respondent had been in breach of clause 5(v) of the tenancy agreement by erecting a barbed wire fence. The magistrate acknowledged that this matter had not been pleaded in the amended statement of claim but considered that it could not be denied that the respondent had been in breach of clause 5(v) which read:

> *"The Tenant hereby agrees and covenants with the Landlord as follows:*
> ……
> *V. Not without the previous consent in writing of the Landlord which consent Shall not be unreasonably withheld to erect make or permit or suffered to be erected or made any alterations or additions to the premises or in the layout or arrangement of the premises PROVIDED ALWAYS that all costs and expenses for such alterations or additions to the premises if so consented in writing by the Landlord are to be borne any(sic) payable solely by the Tenant and that the premises be restored to its original condition at the expiration or similar termination of this agreement."*

10. The magistrate came to the conclusion that the erection of a barbed wire fence was in contravention of the tenancy agreement and, on that basis, held that the respondent had been in breach and, for that reason also, the appellant was entitled to vacant possession.

The appeal to the High Court

11. When the matter came before the High Court there was a procedural issue which is now no longer relevant. The appellant, furthermore, did not pursue the matter in relation to the alcohol. The appellant, however, maintained its position in relation to both the deduction of the cost of clearing the rubbish and also the erection of the fence.

12. As regards the rubbish, the judge came to the conclusion that the respondent had been entitled to deduct the cost of removal of the rubbish from the rental payment. He considered the evidence both of the respondent's witness, Emanuel Cruz Teleg, who had pointed out that not only was the appellant responsible for the rubbish but that its servants had continued to dump rubbish including plastic, wood and kitchen waste as late as 11 June, at the same time as the respondent was attempting to clear it. The judge examined photographs which had been taken on that occasion. On that basis he had no difficulty in coming to the conclusion that by dumping the rubbish the appellant was in breach of its obligations as landlord and the respondent was entitled to cure that as best it could. In the circumstances, it was entitled to deduct the cost of removing the rubbish from the rent and it had not been in breach of the tenancy.

13. On the matter of the erection of the fence, the judge first of all remarked that not only was the matter not pleaded but the issue "had been hardly aired at all". It had been referred to in the affidavit of Jaidin bin Haji Berudin. He went on to say that "no-one seems to have mentioned or examined this allegation at all." He considered that it was stretching things beyond reasonableness to find that a fence, which, from the photographs, was clearly an easily removable, temporary thing, was an alteration or addition to the premises within the meaning of clause 5(v) of the tenancy agreement. He went on to say that under clause 9(iii) of the tenancy agreement the respondent had the right to install fittings and equipment. He regarded an easily removable fence of the type in question as being in the nature of a fitting rather than an alteration. Importantly the judge concluded his assessment of this aspect by saying;

> *"Further, even if it could be said that the erection of the fence was a breach of the lease, it cannot be said to be so fundamental as to amount to a breach of a condition. At most, I find that the respondent would have been entitled only to damages, not the right to terminate."*

14. In those circumstances, the judge came to the conclusion that the respondent had not been entitled to terminate the tenancy agreement and gave judgment accordingly.

This appeal

15. On this appeal Mr. Lee, who appeared on behalf of the appellant, argued that the judge had been wrong to "lump" the question of the costs of the removal of the rubbish together with the payment of rent. His argument was that the provisions of clause 4 and 5(i) were to the effect that rent should be paid yearly in advance and did not permit any deduction whether of a counterclaim or set-off. The payment of rent and the counterclaim for the wrongful dumping of rubbish by the landlord were 2 separate matters and that the tenancy agreement did not provide, in any way, for deductions of any sort. His argument was that by deducting the cost the respondent had acted in a way which was a unilateral variation of the tenancy agreement and that was not permissible. In written submissions he also

said that the judge's finding of malice was in error and that the judge had not given proper weight to the appellant's evidence that the appellant was intending to clear the rubbish when the weather and ground conditions permitted it.

16. In relation to the fence, Mr. Lee argued that the matter had been sufficiently aired. He referred to the fact that Mr. Emanuel Cruz Teleg had, indeed, exhibited photographs which he had taken and that that had been clearly in response to the appellant's evidence. It was said that it was wrong for the judge to have held that the matter had been hardly aired at all. Part of his argument was that there was no basis for the judge to hold that the erection of the fence was in order to prevent the dumping of the rubbish. As regards clause 9(iii) of the tenancy agreement which referred to the respondent being entitled to install "furniture fitting and equipment", the argument was that the judge had misinterpreted that and should have considered the clause as referring to "furniture fitting" rather than "fitting".

17. It is clear that the appellant must have been responsible for the dumping of the rubbish. As the judge noted, the fact that rubbish of that nature was dumped, apparently on the area leased to the respondent, was a matter which called for an explanation. That explanation has never been given. Clearly the respondent was entitled to take whatever action was necessary to remove what was a gross breach of its rights as a tenant. As such the respondent had a valid counterclaim against the appellant and was entitled to deduct the amount as a counterclaim from the rent due to the appellant.

18. In relation to the point that the rent and the cost of removal of the rubbish were separate matters, it can be observed that there is no suggestion that rent does not remain payable. The matter is simply that the respondent is entitled to the cost of removal of the rubbish; by its breach of its obligation as a landlord the appellant had created a situation which the respondent was entitled to take steps to rectify and the costs involved could be recovered from the appellant, as the landlord. Therefore, the appellant had incurred a liability which could be relied upon by the tenant as a set-off irrespective of whether the tenant raised the matter as a counterclaim: see for example the decision in *British Anzani (Felixstowe)Ltd. v. International Marine Management (U.K.) Ltd.* [1980] 1 Q.B. 137 and the analysis of the previous authorities starting with the case of *Waters v. Weigall* (1795) 2 Anst. 575, 145 ER 971 and the cases which have followed thereafter. The position is also set out in the passage in *Halsbury's Laws of England* Vol. 27(2) para 234.

19. The allegation that the fence was a breach of the tenancy agreement was contained in the affidavit of Jaidin bin Haji Berudin sworn on Thursday 9 October 2008; the trial before the magistrate commenced the following Monday 13 October 2008. Whether as a result of the lateness of the introduction of the allegation or for some other reason, the evidence in relation to it was, as the judge said, sparse to say the least. The matter hardly features in the evidence and the best that could be referred to were photographs produced by the respondent. The

extent and location has as a result not been established. It would appear to be something which could be easily removed. It may be said that what can be seen in the photographs, is that the fence was more in the nature of a temporary item rather than a substantial fixture. On the evidence adduced in relation to it, it is far from established that the erection of the fence was a matter which would give the appellant the right to terminate the tenancy. The judge's conclusion as quoted in paragraph 13 above can thus not be faulted. On that basis the appellant's complaint must fail.

Conclusion

20. This appeal, therefore, falls to be dismissed. There should be an order that unless application is made before 1 June 2010 there will be an order of costs in favour of the respondent.

Mortimer, P.

Davies, J.A. **Rogers, J.A.**