

CHEN WENG KHIONG

.....Plaintiff

AND

CHEN KIM SIONG

.....Respondent

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 2 of 2019)**

Before: Burrell P, Seagroatt and Lunn JJ A.
29th April 2019

Mr. David Teo Kian Khong (Messrs. Ibrahim Chee Teo & Company) for Appellant/Plaintiff
Mr. Lt. Col (R) Hj Harif bin Hj Ibrahim (Messrs. Lt Col (Rtd) Harif Ibrahim Advocates and Solicitors) for Respondent

Burrell, P.:

This is an appeal by the appellant/plaintiff against Lugar-Mawson J.C's refusal to grant leave to appeal to the appellant against the decision of Pg DP Hjh Rostaina Pg Hj Duraman J who, on the application of the respondent/defendant had set aside the ex parte injunction which had been granted to the appellant by Kifrawi C.J on 12 December 2017.

The Ex Parte Order

The appellant and respondent are brothers. The effect of the ex parte order was to restrain the respondent from evicting the appellant from a property on a plot of land (Lot 344) in Seria, together with other consequential restraints.

The plot is a Government "Temporary Ownership Land" ("TOL"). Since 1993 the respondent and his immediate family (not the appellant) have been the sole legal occupants of the lot. The registration of the TOL to the respondent is non-transferable.

The appellant came to live at the property with his brother and family after the appellant's business had failed in about 2003. This was with the respondent's consent but was originally intended to be a short term arrangement.

The appellant was a guest of his brothers, however he did not move out in spite of many requests to do so. The relationship became strained and after many years, in 2017, the respondent decided to move out and has since lived with his family in rented accommodation.

The TOL, which gives the respondent exclusive rights of occupation, contains further important conditions including:

Clause 3.7: “In the event that the TOL holder contravenes any conditions therein, the Government has the right to cancel the TOL with or without notice.”

Clause 4.5: “Prohibited to carry out businesses or any activities which are against the conditions except for activities which are allowed thereon.”

At the inter parties hearing the respondent sought to have the order set aside because:-

- i. He has the sole rights of occupation to the exclusion of the appellant.
- ii. The appellant was using the premises for business purposes (by cooking food in the premises which was for sale at a food stall, which is admitted in the Statement of Claim) thereby putting the respondent in breach of the TOL conditions which risked the revocation of his registration.
- iii. The appellant was in sole occupation contrary to the appellant’s repeated requests that he vacate the property.
- iv. The property had, through neglect, become unsafe and unfit for habitation.
- v. The respondent had received government approval, due to (iv) above, to demolish the property and build a new property thereon.

Rostaina J’s conclusion was as follows:-

“In this case, it is clear from the documentary exhibits (CKS-6-10), affidavits and other supporting documents produced by the defendant that he is the licence holder of the TOL land since 1992 and that his staying on the TOL land is subjected to being in compliance with the terms and conditions of the TOL property.

It is also clear from the documents produced that the plaintiff and his family are not amongst those listed to live on the TOL land.

It is clear from the photos exhibit CKS-5 and other supporting documents that the house on the TOL land is not safe and not fit for occupancy and need to be demolished and reconstructed.”

On 21 February 2019 Lugar Mawson J.C refused the appellant’s application for leave to appeal the setting aside but extended the date by which he was ordered to vacate the property to 1 July 2019.

This appeal

The submissions made to Rostaina J have been extensively repeated both in writing and orally in this appeal.

By a Writ and Statement of Claim (HCCS83/2017) the appellant/plaintiff makes a solitary claim namely *“An injunction to restrain the defendantetc....”* There is no claim for a declaration of legal or equitable rights, no allegation of a breach by the defendant, in short no cause of action. Mr. Teo, on behalf of the appellant informed the court that

he intended to amend the statement of claim to remedy the defect. The statement of claim is dated November 2017. It is surprising that no steps have been taken to regularize and clarify the nature of the claim prior to these interlocutory proceedings. Strangely, at paragraph (d) of the prayer "*An injunction to restrain the defendant.....from (d) damages and interest*" is sought.

Obviously, this makes no sense. In any event, how damages can flow to a plaintiff arising out of a restraint put on the defendant is difficult to understand. In short, the appellant complains that the judge should not have determined the issue on affidavit evidence alone. There were triable issues and conflicts which could only be resolved at trial. The case of *American Cyanamid v Ethicon Ltd* [1975] 1 AER 504 is extensively cited in support.

Discussion

We have come to the conclusion, without difficulty, that the submissions made on the appellant's behalf by Mr. Teo are without merit and misconceived.

No doubt the two brothers have different versions on a number of factual matters. It is a common feature of any family dispute, of which this is another unfortunate example. A court should not, and the court below in this case did not, become embroiled in disputes of facts which are largely irrelevant to the important, determinative issues in this case.

The important issues are incontrovertible and could not be the subject of serious challenge.

They are:-

- i. The appellant has no legal rights to occupy the TOL.
- ii. The property is in a serious and dangerous state of disrepair.
- iii. The government has approved (and renewed annually) plans to demolish and rebuild arising out of its unsafe condition.
- iv. The appellant, on his own admission, used the premises for business purposes in breach of the condition of the TOL.
- v. The appellant has refused numerous reasonable requests by the respondent to vacate.
- vi. Any equitable rights, if any, that the appellant may have will, in any event, survive the setting aside of the ex parte injunction.

Thus, to borrow a sentence from the *American Cyanamid* case "*....the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial....*" That is the case here.

Balance of Convenience

Although it is unnecessary to do so in this case, for the sake of completeness and to further demonstrate the weakness of the appellant's position, we briefly consider the "balance of convenience" principle.

There can be no doubt that this falls in the respondent's favour.

The house is unsafe, the respondent by force of circumstance finds himself paying rent for alternative accommodation and the appellant's conduct is in breach of the licence.

Moreover, the submission made on the appellant's behalf that damages would not be an adequate remedy should he successfully assert his right to a permanent injunction at trial, is flawed. The reasons given in support of the appellant's submission on this issue are that:- he might lose his food licence, he could lose customers and his business would be disrupted. These are all matters which directly flow from his admitted conduct in breach of the TOL thereby jeopardizing the respondent's licence at a time when he is desperately trying to erect a new and safe house for his family. *If* the appellant had been successful in restoring the ex-parte injunction and *if* the matter had gone to trial and *if* he had succeeded in getting a permanent injunction it seems likely that a state of affairs would exist that would cause the government to revoke the licence altogether. Thus, both the appellant and the respondent would be left with *nothing*.

Order

We uphold Lugar-Mawson JC's order refusing leave to appeal Rostaina J's order to set aside the ex-parte injunction. Lugar-Mawson JC's order stands save that we bring forward the date by which the appellant must vacate the property from 1 July 2019, which we regard as unnecessarily generous, to 1 June 2019 with costs to the respondent to be taxed if not agreed.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A