NOTES OF CASES

A GOOD DEAL OF EQUITABLE SENSE

Yong Hong Tong v. *Siew Soon Wah & Ors.*

[1971] 2 M.L.J. 105

The legal basis on which the Malaysian Court of Appeal made its decision in the above case can foreseeably cause much theoretical argument as to what it could or should be.

The action was for recovery of possession by a landlord which was met with a counter-claim by the tenant for specific performance of an agreement for a lease. The tenant was let into occupation of the ground floor of the shop house in question in 1958 after he had at the landlord's request paid a sum of $8,000 to a building contractor for the construction of the house when it was near completion. He originally paid a monthly rent of $150 which was increased to $200 in 1964. It would appear that soon after the increase in rental his landlord entered into a written agreement, in Chinese, with him which stated the rent to be $200 and stipulated for any future increase or deduction only in the event of an increase or deduction in land assessment. In October 1966, the landlord served on the tenant a month's notice to quit unless the latter would accept a new tenancy at an increased rental. About a year later, the land was transferred to the respondents by the landlord, their father. They then brought this action to eject the tenant, the appellant.

The appellant relied on the written agreement which contained, *inter alia,* the following term:

> [The landlord] desires to lease out the whole of the ground floor to [the tenant] and the tenancy shall be permanent.

The agreement, if it purported to be a lease, obviously had no such effect as it was not registered and was not executed in the proper form under the Malaysian Torrens legislation. If it could nonetheless be treated as an agreement for a lease, then, as was argued before the court, it would be void and thus unenforceable on the ground of uncertainty under section 30 of the Contracts (Malay States) Ordinance, 1950. The uncertainty arose in connection with the meaning of the word "permanent". Of course, behind this dispute over a word was the issue of the uncertainty of the duration of the lease for which the agreement was sought to be specifically enforced.

In his judgment, Ong. C.J. (Malaya) (with the concurrence of Suffian and Gill F.JJ.) had no hestitation in treating the document as an agreement for a lease, and furthermore decided for the appellant ordering and declaring that the appellant be entitled to remain in peaceful possession of the ground floor, so long as he paid the agreed monthly rent of $200, as against the respondents "or their successors in title". The period of his entitlement to possession was to be for the remainder of a duration of 30 years commencing from his entry in 1958.

The 30 years' period was what the Court held to be meant by the word "permanent" in the circumstances of the case. This specific period was arrived at because under section 221 (3) (b) of the National Land Code (formerly section 47 of the F.M.S. Land Code, Cap. 138) it is the maximum period for which a proprietor of land can grant a lease relating to a part only of his land.

It could be gathered from Ong C.J.'s reasoning that the word "permanent" need not be taken to mean "perpetual", although his Lordship at one place said that the agreement was "in effect tantamount to a lease in perpetuity" (at p. 108). If the agreement were for a lease in perpetuity, the substitution of a 30 years' lease therefor in the agreement would be repugnant to the basic principle of judicial construction of contracts. But the Judge in fact proceeded on a different line which the ambiguity of the word "permanent" made possible. On its ambiguity, it will not be inappropriate to quote Du Parcq L.J. who said in *Henriksen* v. *Grafton Hotel Ltd.* ([1942] 2 KB. 184, at p. 196): " 'permanent' is indeed a relative term, and is not synonymous with 'everlasting'." "The word", said Lord Evershed in *McClelland* v. *Northern General Health Service Board* ([1957] 2 All. E.R. 129, at p. 140), "is clearly capable, according to the context, of many shades of meaning."

Ong C.J. was therefore endeavouring to ascertain what was intended by the parties to the agreement by calling the tenancy "permanent", and came to the view that:

> In the instant case it may truly be said that there was, in the minds of the contracting parties, no uncertainty as to the period of tenure. No tenant would willingly pay a large sum of money for a simple monthly tenancy which is terminable at the will of the landlord at any time, or even after the month next following. Hence the parties here had expressly agreed upon a "permanent" letting. On the faith thereof, the $8,000 was paid and the structural alterations made, doubtless at the appellant's expense, as consideration *for his remaining in undisturbed occupation for as long as he pleases,* (emphasis added) provided rent is paid at the rate stated.

Earlier his Lordship had referred to and considered, among others, two English authorities *Kusel* v. *Watson (* (1878) 11 Ch.D. 129) and *Zimbler* v. *Abrahams* ([1903] 1 KB. 577). In both these cases, the agreement for a lease was prima facie uncertain in that it did not specify the duration of the lease: the tenant in the former case was to have a lease at an agreed yearly rental "at any period he may feel disposed", and in the latter case, at a weekly rental "as long as he lives in the house and pays rent regularly". The tenants in both cases had entered into possession and had been paying rent. The English Court of Appeal approached the issue first by holding that the parties evidently did not merely intend to create a periodic tenancy, and then resolved the uncer-

tainty by holding that the parties could fairly be taken to have agreed on a lease for the life of the tenant. In the former case, as the landlord was himself a lessee, it was held that the tenant was entitled to an underlease for the residue of the head lease if he should so long live.

Apparently Ong C.J. regarded the agreement before him as falling into the same group of cases as he read "permanent" to mean "as long as [the tenant] pleases". It is interesting then to note that his Lordship did not adopt the English solution of interpreting the agreement as a lease for the life of the tenant in view of the above mentioned section 221 (3) (b) of the National Land Code. Instead, his Lordship resorted to the maximum period of lease permitted by local legislation without qualifying it for "so long as the tenant should live". This particular solution necessitated by local statutory provisions is, of course, by no means objectionable. In England, it has been suggested that since the Law of Property Act, 1925, s. 149(6), converts leases for life into leases for ninety-nine years determinable by one month's notice in writing after the death of the original lessee, the decree for specific performance in the *Kusel* v. *Watson* type of case would now be for such kind of leases under that subsection (see *Woodfall's Landlord and Tenant,* 27th ed., p. 164).

That the Malaysian Court of Appeal did not further qualify the 30 years' period by the life span of the tenant was amply clear from the Court's attitude, which Ong C.J. stressed over and again, that the particular solution must depend on the circumstances of each case. Thus far, it would seem that the case under consideration was all about construction of an agreement for a lease. But from "permament" to "30 years", there was certainly involved a judicial process much more than just construction of words. This is clearly revealed by Ong C.J.'s pains-taking reasoning in also putting in the forefront the principles of equitable justice which his Lordship expounded by relying on authorities such as *Inwards* v. *Baker* ([1965] 2 W.L.R. 212) and *Plimmer* v. *Wellington Corporation* ((1884) 9 App. Cas. 699). It would thus appear that, if the Court had been content with arriving at its decision merely by construction of the agreement despite its surrounding air of artificiality, Ong C.J. would not have resorted to those cases reputed for their relevance to the doctrine of estoppel. In *Zimbler* v. *Abrahams,* the facts as reported only showed that the tenant had entered into possession and had been paying rent. In *Kusel* v. *Watson,* the tenant had laid out money for the improvement of the premises concerned, and this factor was evidently very significant in the minds of the Judges so much so that, in their efforts to impose an equitable solution on the parties under the pretext of construction of the agreement, one of them, Bramwell L.J. comfortably admitted that "Construing this agreement" was "rather guesswork"!

In the instant case, the fact that the tenant had paid the sum of $8,000 for the building of the shop house was indeed a very material factor which in Ong C.J.'s judgment added to the equitable grounds whereby the tenant was placed in "a stronger position to resist the landlord's claim to possession than the ordinary tenant who had no answer on equitable grounds." However his Lordship made the above quoted statement after his reference to Sir T. Braddell C.J.C.'s observation in *M.P.R.L. Karuppan Chetty* v. *Suah Thian* ((1916) 1 F.M.S.L.R.

300, at p. 303) where the latter would appear to be just drawing a distinction between a tenant who had been let into occupation and one who had never entered into possession. There is therefore some doubt as to whether the Court of Appeal would have made the same decision if the tenant had not so spent the $8,000.

On the other hand, on the facts as they were, the expenditure by the tenant for the building of the shop house enabled the Court to fortify their decision with the support (if not by direct application) of the principle in *Inwards* v. *Baker.* In the comparable circumstances of the instant case, Ong C.J. had no reservation in claiming that "the court had power to determine in what way the equity so arising could be satisfied". This, then, was to put the solution which the court would give beyond the normal ambit of judicial construction of words. Admittedly such ambit is not always clear — there are many examples to show that the court while purporting to construe contracts are in fact imposing on the parties its own choice of a fair and reasonable solution. But where the circumstances of the case can give rise to a case of estoppel, it could operate independently of any contract, although in some cases, such as *Inwards* v. *Baker,* the ground on which the equitable remedy was granted could equally be said to be estoppel or implied contract, and in some other cases, both may be available (see *Hanbury's Modern Equity,* 9th ed., p. 680).

The instant case, it seems, is one such mixed situation. The Court was construing an express agreement but even if it might have gone too far in that respect, it would have reached the same decision either by finding an implied agreement to the desired effect or by a direct recourse to the doctrine of estoppel. To pin the decision exclusively on just one ground would seem unnecessary. It may be true that where consideration is not difficult to find to support a contract, express or implied, the doctrine of estoppel as such need not be called for; but in certain cases, rigidity of categorisation would only blur the legitimate role of equitable justice. Why should a solution which the Court imposes be read as or be called an agreement between the parties ?

If the Malaysian Court of Appeal has in a somewhat hidden manner applied the principle of estoppel in *Yong Hong Tang's* case, the decision in this wider sense could go to assist a tenant in similar circumstances in the absence of any agreement for a lease. Or, it would appear that even if the parties have used such expression as "perpetual lease" or have spelt out the duration of the lease, say, for 50 years in contravention of the statutory provisions, there is no reason why, if a case of estoppel is made out, a tenant who expected a lease of an enduring nature may not, irrespective and independently of the express agreement, merit a similar fair solution in equity. However, in the Court of Appeal case, even though it be seen from the angle of estoppel, one could perhaps only say that the solution given by the Court was after all not inconsistent with the express agreement between the parties. Nonetheless, there is certainly a great deal of equitable sense to be learned from the decision.

It remains to note a collateral point. It will be realised that the tenant's entitlement to possession as declared by the Court was held to be binding as against the respondents who were subsequent proprietors

of the land in question. Ong C.J. simply remarked that he "need hardly add" that the respondent took the land subject to the agreement which bound their predecessor in title. Presumably (but this is not in any way indicated in the report), the respondents obtained from their father the transfer of the land in their favour as volunteers, and were therefore not entitled to the protection of indefeasibility of title against the tenant's equitable claim under the agreement. Or there might be other unstated circumstances in which they obtained their title such as to render themselves bound in personal equity by the tenant's equitable claim. It hardly needs to be added that under the Malaysian National Land Code an equitable claim under a contract of land dealing, or for this matter any equitable interest including one arising by estoppel, will not, if it is unprotected by a caveat, bind a subsequent registered purchaser of the land concerned unless his title is open to attack in cases forming the exceptions to the principle of indefeasibility of title. Formerly, under the F.M.S. Land Code, Cap. 138, where a tenant was in possession under an unregistered lease or agreement for a lease, his claim or rights under such lease or agreement would prevail against any registered transferee of the land (s. 42(v) thereof). This however is no longer the position under the present Code.

S. Y. WONG