Phua Teck Mai v. Seng Ah Tau

District Court Appeal No. 46 of 1981

Introduction

The relevance of the Control of Rent Act in this country has once again been raised by the decision of the District Court in *Phua Teck Mai* v. *Seng Ah Tau,* where the Court took a view of this area of the law which does not seem consonant with the commercial realities of modern Singapore. The case was a classic one of a landlord of a rent controlled premise attempting to avoid the effect of the Control of Rent Act[1] by licensing (rather than leasing) his premises. His attempt failed at the District Court, where the learned Judge held that a tenancy had been created. The judge thus took the approach (adopted by a few English as well as local courts) of holding the contractual occupant to be a tenant (and therefore protected by rent control legislation) even if the contracting parties had attempted to create a license.

In the writer's opinion however, the time has come to question the validity of such an approach, and the writer proposes to deal with this issue in the following manner:

(i) The transaction between the landlord and the occupant will be examined from a contractual perspective and it will be submitted that by the law of contract, there is little justification for the Court of infer a tenancy when the parties had expressed an intention to create a licence.

(ii) Secondly, it will be suggested that the housing situation in Singapore has changed a great deal over the last 30 years since the enactment of the Control of Rent Act and that these changed circumstances necessitate a more flexible approach being taken towards agreements of the nature found in this case.

Facts

The facts of the case are relatively simple. The plaintiff, owner of a rent controlled house, entered into an agreement in 1973 with the defendant, resulting in the defendant being allowed the use and occupation (to use a neutral phrase) of these premises for a period of six years, commencing from 1st April 1973. The agreement contained a clause stating that the defendant was only a licensee. Both parties also agreed to an arrangement whereby the defendant agreed to pay $550 per month as license fee, though the agreement itself reflected a sum of only $400 per month. In addition, the defendant (at the request of the plaintiff) made a Statutory Declaration that he was only a licensee.

After the expiration of the first period of six years, the parties entered into a fresh agreement in 1979, which resulted in the defendant agreeing to pay $800 per month from April 1979 for another term of six years, in return for which he would retain the premises on conditions similar to the agreement of 1973. This time however, the defendant refused to make the Statutory Declaration to the effect that

[1] Cap. 266, Singapore Statutes, Rev. Ed. 1970.

he was only a licensee. The plaintiff thereupon refused to accept the monthly payments from the defendant and purported to terminate the license. This action was brought by him to evict the defendant.

Defence

The defendant claimed that both the agreements of 1973 and 1979 were in fact tenancy agreements and that as a tenant, he was protected by the provisions of the Control of Rent Act. His contention was that he could only have been charged $53.24 per month — this being the standard rent of the house in question. The defendant also counter-claimed under section 3(4) of the Act for refund of all the rent he had paid in excess of $53.24 per month since the agreement of 1st April 1973.

Decision

The learned District Court Judge dismissed the plaintiff's action and upheld the defendant's counterclaim. The plaintiff was made to pay to the defendant, the sum of $26,424.40. This was the excess rental *(i.e.* in excess of $53.24 per month) paid by the defendant for about 5 years between 25th October 1974 and 31st March 1979. The defendant's claim for repayment of excess rent paid for the period before 25th October 1974 *(i.e.* from 1st April 1973 to 25th October 1974) was barred by the Limitation Act.[2]

This decision seems to be unduly harsh, and in the writer's opinion, at least two sets of reasons, one contractual and the other commercial can be canvassed for supporting a conclusion that the agreement conferred only a license on the defendant.

The Contract

From a contractual viewpoint, two factors are necessary for an effective grant of a lease, namely:

(i) The tenant being granted exclusive possession and (ii) an intention on the part of both parties to create a landlord/tenant relationship.

(i) *Exclusive Possession*

If there is no exclusive possession, there can be no lease. In fact, until quite recently, the distinction between a lease and a license rested solely on the presence or absence of exclusive possession. If the grantee had exclusive possession, he was a lessee. If he did not have exclusive possession, he was only a licensee. However the position has now changed and the English Court of Appeal has held in several cases that exclusive possession is not the sole criterion. The question of whether or not there was an intention to grant a lease is now of vital importance. Lord Greene **M.R.** in *Booker* v. *Palmer*[3] summed up the position thus:

> "… whether or not the parties intend to create as between themselves the relationship of landlord and tenant, under which an estate is created

[2] Cap. 10, Singapore Statutes, Rev. Ed. 1970.
[3] (1942) 2 All E.R. 674.

> in the tenant and certain mutual obligations arise by implication of law must in the last resort be a question of intention.... "[4]

If further authority is needed, these words of Lord Somervell in *Cobb* v. *Lane*[5] should suffice. His Lordship, referring to *Errington* v. *Errington,*[6] and *Poster* v. *Robinson*[7] and *Marcroft Wagons Ltd.* v. *Smith*[8] says "… those cases show that exclusive possession is not a test negating the possibility of the occupier being a licensee...."[9]

Thus it is possible for a grantee, like the grantee in *Errington* v. *Ernngton* to have exclusive possession of the premises and yet only be a licensee. This, then being the law, in the instant case, the learned judge, after a review of the facts, came to the conclusion that the defendant had had exclusive possession of the premises. The facts which helped him reach the above conclusion were:

(a) The agreement granted the defendant "exclusive license and privilege to use "the premises and pursuant to this, the defendant had possession, use and control of the whole house without interference from the plaintiff.

(b) The defendant had both the front and back door keys and controlled the access to the house.

On the facts therefore, Ihe defendant clearly had exclusive possession. From this premise, his honour went on to hold that the parties in fact intended to create a tenancy. It is this particular conclusion of the learned Judge which seems very much open to question.

(ii) *The Intention of the Parties*

The learned Judge first stated that the whole agreement must be analysed and a conclusion arrived at, regardless of any label that may have been attached to it by the parties, quoting Jenkins L.J. in *Addiscombe Gardens Estates Ltd.* v. *Crabbe*[10] for this proposition. In the instant case, in the judge's opinion, the following facts were sufficient to show that the agreement was for a lease and that the parties had affixed a label of 'license' on it.

(a) The character of the premises were more suitable for a tenancy than a license.

(b) The granting of a license for 6 years (in 1973), being a term certain, was more appropriate to a grant of a tenancy.

(c) The payment made by the defendant (stated in the agreement) to be $400 per month, but actually $550 per month was in fact a rental payment.

(d) The defendant was saddled with an obligation to repair, a burden which is not normally imposed on a mere licensee.

[4] *Booker* v. *Palmer, supra,* at p. 676.
[5] (1952) 1 All E.R. 1199.
[6] (1952) 1 K.B. 290.
[7] (1951) 1 K.B. 149.
[8] (1951) 2 K.B. 496.
[9] *Cobb* v. *Lane,* supra, at p. 1201.
[10] (1958) 1 Q.B. 513.

(e) The agreement also provided that the defendant "… deliver up…" the premises. This expression is more appropriate to a tenant with an interest in the land.

(f) The defendant had paid a relatively large deposit ($4,000/-) which would be refunded to him on delivering up the premises at the end of the terms.

Intention in the Law of Contract

At this juncture, it may be useful to recapitulate a little and consider the task facing the court. The court was called upon to decide whether the agreements of 1973 and 1979 created a lease or only a license. It must be borne in mind that both a lease and a license are created by contract and in any particular situation, it will be the intention of the parties (arrived at by looking at all the facts and circumstances — particularly the terms of the contract) which will decide whether a tenancy or a license has arisen. In the instant case, since exclusive possession had already been proved, the answer to the question confronting the court depended entirely on the intention of the parties. It was a task (not uncommon) that had been faced by numerous judges dealing with a contractual problem — inference *(ex post facto)* of the intention of the parties when they entered into the contract. The Court has to sift through the evidence and come to a conclusion on what in its opinion was the common intention of the contracting parties.

Thus, the importance of the facts stated by the judge (above) lies in their enabling him to infer the intention of the parties. However, these facts, as evidencing intention, may be only of secondary importance when there is more direct evidence of such intention, and in this case, there was such evidence. Firstly, the agreement of 1973 contained a clause stating that the defendant was being granted a licence. Secondly, the defendant made a Statutory Declaration that he was only a licensee. Adding these two facts, to the fact that both parties knew the premises to be rent-controlled and that the grant of a tenancy would entitle a prospective occupier to the protection of the Act, it is patently clear that the intention must have been to create a licence, albeit to avoid or evade the clutches of the Act. The defendant knew and assented to this arrangement, and thus, in contract law, he would be estopped from attempting to resile from the arrangement since the plaintiff had relied and acted upon the defendant agreeing to a grant of a licence and not a lease.

Thus, the writer submits that the Statutory Declaration and the 'license only' clause are conclusive evidence of the intention of the parties. The court may have felt that a tenancy would have been created but for the Control of Rent Act, but even if this is so, it does not seem permissible for the court to impose its own interpretation (which was totally contradictory to the declared intention of the parties) on the agreement. One does not normally quarrel with the trial court's findings of facts, but in the instant case, the writer cannot but help wonder why factors like the character of premises, the grant of a term certain and the defendant being made responsible for repairs etc. were considered more important than the Statutory Declaration and the 'licence only' clause.

In the law of contract, the intention which the law will attribute to a person is always that which his conduct bears when reasonably construed, and not that which was present in his own mind.[11] It is submitted that the conduct of the parties and the agreement they reached, when reasonably construed, clearly showed that only a contract of license was intended, regardless of any private mental reservations the plaintiff or defendant may have had. Further, though it is true that the factors stated by the judge are normally found in a lease, it will not be correct to say that these factors automatically exclude a licence. They are equally consistent with a lease as well as a licence and a contract of licence may well impose upon the licensee, the obligations found in the instant case. On the other hand, a Statutory Declaration that the contract was one of a licence and a 'licence only' clause are, in the writer's opinion, definitely incompatible with a grant of a lease.

The Statutory Declaration and 'License Only' Clause as Viewed by the Court

The learned Judge dismissed both the declaration and the 'licence only' clause as devices used by the plaintiff to put a label of licence on a tenancy agreement and stated that the nature of the agreement was not changed by the defendant agreeing to call it a licence. As authority for this conclusion, the Judge quoted *Facchini* v. *Bryson*[12] where despite such a 'licence only' clause, the English Court of Appeal held that a tenancy had been created. A consideration of the facts would, however, show *Facchini* v. *Bryson* to be distinguishable from the instant case. Here not only was there a 'licence only' clause, but there was also the Statutory Declaration made by the defendant. It would make a mockery of Court procedure to allow one who has made solemn declarations under oath to turn around and deny them or plead a defence that he was unaware of the import of such a declaration.

From a contractual perspective, then, in the instant case, if the District Court had wanted, there would have been no impediment in finding that the intention of the parties was to create a licence and not a tenancy. In fact, it would have been difficult to hold otherwise.

Further, in *Facchini* v. *Bryson,* the Court was concerned about the fact that giving effect to the 'licence only' clause would drive a serious hole through the Rent Control Act.[13] The decision therefore turned at least partly on policy considerations. Can then the District Court's judgment be supported? The answer depends on the relevance of *Facchini* v. *Bryson* to the local situation, as a matter of policy.

[11] This principle of law is illustrated by *Upton-on-Severn R.D.C.* v. *Powell* (1942) 1 All E.R. 220. See also *Anson's Law of Contract* (25th Ed.) at p. 25.

[12] (1952) 1 T.L.R. 1386.

[13] *Facchini* v. *Bryson, supra,* at p. 1390 where Denning L.J. says "… It is so simply a matter of finding the true relationship of the parties … or else we might find all landlords granting licences and not tenancies, and we should make a hole in the Rent Acts through which could be driven — I will not in these days say a coach and four — but an articulated vehicle".

The Policy Argument

(i) *The Position in England Thirty Years Ago*

Facchini v. *Bryson* was decided in England in 1952, barely a few years after the end of World War II, Rent Control legislation had been imposed there because of the severe housing shortage, accentuated by manpower and other resources (especially building materials) being diverted for the war effort. The conditions which necessitated the imposition of the Act were still prevalent when the case was decided.[14] It was thus necessary to ensure that the Act was not avoided by technical rules, even if both parties had the intention to avoid the effect of the Act. Thus it is not surprising that *Facchini* v. *Bryson* was decided the way it was.

(ii) *The Situation in Modern Singapore*

Thirty years later, in Singapore, the circumstances are totally different, and these changed conditions call for a different, less stringent approach towards agreements of this nature. The construction industry in Singapore is booming. We have had three decades of continuous progress and modernisation and the Housing and Development Board has had unparalled success in its housing schemes — so much so that close to 65% of our population now live in flats. All this adds up to one conclusion — the Control of Rent Act does not perform as important a social function as it did in the first few years of its inception. In 1966, Professor T.T.B. Koh estimated that in the open market, rent controlled premises should fetch three times the rental imposed by the Act.[15] Now after the property boom, the disparity is even more enhanced. The changed socio-economic conditions have precipitated several calls for decontrol and the legislature has responded with some measures for decontrol.[16] It is clear that the Act has become an anachronism.

Thus, in these circumstances vastly different from those of England in 1952, is it still necessary for the courts to go out of their way to protect occupiers of rent controlled premises? The writer is not advocating that tenancy agreements which contravence the Control of Rent Act should be given effect to. The submission merely is that when two parties have voluntarily agreed to a contract of a license, (even if this very clearly to avoid the Act) there is no social necessity to hold that a tenancy had been granted. The tenant in the instant case was allowed to get an undeserved windfall in the form of a refund of all the payments he had made in excess of $53.24 per month over a period of 5 years. It is undeserved because one can hardly call him the victim of a rapacious landlord. It was a contract he had willingly entered into and it would seem that in the present circumstances, it is the landlord who deserves sympathy for his inability to realise the market value of his assets.

Conclusion

To summarize briefly, the court could have quite easily have held that the contract of 1973 created only a licence and that both parties

[14] See *The Post War Rent Control Controversy* by Willis R. Knight, referred to in T.T.B. Koh "Rent Control in Singapore" (1966) 8 Mal. L.R. 32 at p. 34
[15] *Supra,* at p. 33.
[16] See *e.g.,* Control of Rent (Exemption) Notification 1980.

are bound by the agreement. Viewed from the contractual perspective, this would seem to be the most plausible solution. Such a conclusion would also be justified by policy considerations. The building boom and the great rise in the commercial value of land call for an approach whereby the full potential of real property in this country can be realised. Thirdly, this would also seem to be the most equitable solution, in the instant case. It is thus hoped that in cases like this in future, the courts will take a more liberal view and give effect to the intended arrangement of the contracting parties. Further, the case illustrates the fact that the time has come to consider whether this country still needs rent control legislation. The signs are that the Control of Rent Act may have outlived its usefulness.

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* I would like to express my appreciation for the assistance given by Mrs. Lim Lin Heng, Senior Lecturer in the Faculty of Law, National University of Singapore, in the preparation of this note.