11 Landlord and Tenant

INTRODUCTION

The law of landlord and tenant is an important area of the law; it affects the lives and affairs of many people, whether as tenant, landlords or even as gratuitous occupant of land or house. There are three regimes that govern this field of the law: (a) the general law; (b) the National Land Code ("the Code"); (c) the Control of Rent Act, 1966 and its predecessors. The differences are plain. The Code merely deals with the creation of long term tenancies in a more solemn and elaborate

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form with all the benefits as to forfeiture and registration. The controlled tenancies of the Control of Rent Act are confined to premises built before January 1, 1948 and not since decontrolled and the legislation regulates the tenancies and affords protection from eviction.

His Royal Highness, the Sultan of Perak, whose judicial career in the superior courts of this country spanned from 1965 till the end of 1983, dealt with cases under all three regimes. The number of reported cases dealing with this part of the law in Peninsular Malaysia are not as many as one would expect. The entries in the Malaysian Law Journal for the years 1966 to 1983 total a hundred and eleven. Of these twelve were decided by the Sultan. These cases cover quite a spectrum of tenancy law. From these few cases it would be unfair to make any definite assessment of the Sultan's contribution.

The points that have been urged in some of these cases were so simple and the answer so obvious that one wonders why these were raised at all. It is therefore not suprising that the Sultan in these judgments did not deal with them in any detail. However from these judgments on can attempt to characterize the Sultan's judicial qualities. His Highness was a conservative and orthodox judge who adhered to precedents and authority closely. He did not venture beyond the written words. His Royal Highness' judgment in *Ho Ying Chye* v *Teh Cheong Huat,*[1] commented below, was described as a "remnant of the strict judicial attitude of the early period".[2] His Highness did not deal with a point unless it was raised before him. The judgments did not deal with the points as they *ought* to have been presented. That was counsel's problem, not the court's. The Sultan was a true judicial umpire. The judgments are simple; one need not have to resort to an English dictionary to understand them. The points of law were answered clearly and directly.

Subsequent events have proved His Highness both wrong and right. When proved to be wrong he made no reference to his earlier judgments. In *Ho Ying Chye* v *Teh Cheong Huat*[3] Raja Azlan Shah J (as he then was) refused to give effect to an unregistrable document to grant a lease because it attempted to pass an interest in land contrary to the Code[4]. When the same argument was adressed to the court in *Woo Yew Chee* v *Yong Yong Hoo*[5] Raja Azlan Shah Ag C J (Malaya) (as he then was) was quick to say: "We have heard that line of argument before". But with what result, His Lordship did not say!

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[1][1965] 2 MLJ 261.

[2] Wong, *Tenure and Land Dealings in the Malay States* (1975) 278.

[3] *Supra*

[4]His Highness was the trial judge in *Siew Soon Wah* v *Yong Siew Tong* where, on a similar point, he was reversed by the Federal Court [1971] 2 MLJ 105, affd [1973] 1 MLJ 131 (PC).

[5][1979] 1 MLJ 131 FC.

His Highness' interpretation of section 4(2) of the Control of Rent Act, 1966 as to repairs and renovations producing a new building, though disapproved once by the Federal Court, was later upheld. The use of similar reasoning by the Privy Council in a Singapore appeal, *Bank Negara Indonesia* v *Phillip Hoalim*[6], must have given the Sultan much satisfaction. Nevertheless His Highness did not boast about it. The Sultan was very graceful in acknowledging that he was right.

The only drawback in His Highness' judgments in these cases is the lack of reference to section 6 of the Civil Law Act, 1956 and the extent to which it precluded the application of English cases. Perhaps he felt that the English law of landlord and tenant had moved away from its status in the feudal system to that of contract. Incidents of tenure became terms of a contract.[7]

DECISIONS AND COMMENTS

GENERAL LAW

(a) Identity of landlord and tenant's implied obligation

Nachiappin
v
Lakshmi Ammal

[1966] 2 MLJ 95 High Court, Kuala Lumpur

Cases referred to:-
(1) *Tay Theng Hong* v *Heap Moh Steamship Co* [1964] MLJ 87, 92.
(2) *Gopal Das* v *Sri Thakurgi* AIR (1943) PC 83 at p 87.
(3) *Suppiah* v *Ponnampalam* [1963] MLJ 202 at p 203.
(4) *Ferguson* v *Anon* (1797) 170 ER 465.
(5) *Marsden* v *Edward Heyes Ltd* [1927] 2 KB 1.
(6) *Horsefall* v *Mather* (1815) 171 ER 141.

RAJA AZLAN SHAH J: This is an appeal from a decision of the learned magistrate sitting in Kuala Lumpur. The appellant was a tenant of the respondent's at a monthly rent of $130. At the end of the tenancy the appellant left the said premises in an untenant-like manner and thereby put the respondent to expense to re-condition it. The respondent brought an action in the lower court to recover a sum of $350 being expenses incurred to repair the damage done to the said premises. It was never adumbrated either in the court below or before me that the sum was unreasonable. She succeeded in her claim. The appellant has now appealed against that decision.

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[6][1973] 2 MLJ 3.

[7]See *UMBC* v *Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87 (PC).

The decision has been criticised on a number of grounds. Of the various criticisms urged on behalf of the appellant only four are of outstanding interest. In the first place it was urged that the facts did not justify the decision. I do not propose to go at any length into the facts of this case which have been so completely set out by the learned trial magistrate in her judgment. The learned magistrate found that the premises consisted of three bedrooms and a kitchen and that it belonged to the respondent but her husband was managing it. It was the husband who had issued receipts in respect of rents. Before the appellant moved into the house it was painted and was in good condition. It was rented out at $130 per month. The appellant kept the said premises in a very bad condition. In early June 1964 the appellant was given notice to quit and he did so at the end of June. Before the appellant left the said premises the respondent's husband went to inspect it. He found it in a condition unfit for human habitation. The walls had been scratched with charcoal and in one of the three bedrooms which had been used as a kitchen there were smoke patches and it was covered with charcoal and ashes. In that state of the evidence and from an examination of the photographs the learned magistrate came to a definite finding of fact that damage was done to the said premises and that it could not have been caused by the respondent's children, aged 8 and 10 years, as alleged by the appellant or by the respondent herself to her own property. The learned magistrate disbelieved the appellant's story and concluded with these words: '(Appellant) in my opinion was just beating around the bush. He had in fact no defence to the claim. He gave evidence of matters which had nothing to do with the claim'. Without doubt the learned magistrate had based her facts on the evaluation of the evidence of the respondent, her husband, the painter (PW2) and the appellant. In order to arrive at those facts she has had to assess the credibility of those witnesses by the advantage that was gained by seeing and hearing them. A study of the evidence *per se* is no adequate substitute for the gradual expression of that evidence by witnesses whom an appellate court cannot see or hear. All those incidents which enabled the learned magistrate to judge of the truth or materiality of the evidence are not reproduced in the record. The law applicable is tolerably clear. Before an appellate court is entitled to reject the learned magistrate's finding of fact based on credibility of witnesses, it must be shown that her evaluation of the evidence was wrong, and the onus that rests upon him is a heavy one: see *Tay Theng Hong* v *Heap Moh Steamship Co.*[1] To my mind it has not been proved to my satisfaction that there was such an error on the face of the record.

Secondly, it was urged on behalf of the appellant that the learned magistrate erred in law in admitting the photographs as evidence without the production of the originals or calling the photographer who took them. I was informed that both parties were represented in the court below. The photographs had been admitted as exhibit P1 without any objection and in fact there was no record of any objection by appellant's counsel at that stage. A passage from the judgment of the Privy Council's case of *Gopal Das* v *Sri Thakurgi*[2] is a sufficient answer to

counsel's argument. It reads: 'Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof'. That passage was applied and followed by the Court of Appeal in *Suppiah* v *Ponnampalam.*[3]

Thirdly, it was argued that the learned magistrate erred in law in that the respondent had not provided strict proof of any tenancy agreement covering any express terms as to repairs to be effected by the appellant. In other words it was said that there was no specific finding by the learned magistrate of an express obligation to repair. A consideration of the respondent's claim shows that it was not based on an express term. The present case involves a monthly tenancy under a parol agreement and therefore it is reasonable to accept the absence of any express terms as to user. In the circumstances what are the implied terms incidental to such a tenancy? In my judgment one of them is the implied obligation to use the premises in a tenant-like manner. There exists a considerable body of judicial opinion on the matter. I propose in the first place to refer to a passage from 23 *Halsbury's Laws of England* (3rd ed) at page 563:

> In the absence of an express stipulation the liability of the tenant for the maintenance of the premises depends partly on the doctrine of waste, and partly on an implied contract to use the premises in a tenant-like manner.

In *Ferguson* v *Anon,*[4] Lord Kenyon said: 'A tenant from year to year is bound to commit no waste, to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises'. As was said by Bankes LJ in *Marsden* v *Edward Heyes Ltd*[5] after referring to *Ferguson* v *Anon, supra,* that means that if a tenant commits waste he must do such repairs as will enable them to exclude wind and water. It may be that he must restore them to the state they would be in if he had committed no waste, or deliver up premises as they were demised to him, fair wear and tear excepted. At any rate he must deliver up the premises of the same character as those which were demised to him, for example, a tenant who takes a dwelling-house cannot at the end of the tenancy yield up a storehouse, or a stable, or cow-house. In other words, a tenant from year to year has an implied obligation to use the premises in a tenant-like manner. In *Horsefall* v *Mather,*[6] an action of assumpsit against a tenant at will, Gibbs CJ said that such a tenant was not liable for general repairs but added that the law implied a duty to use the premises in a husband-like manner. Both these case were referred to in the judgment of *Marsden* v *Edward Heyes Ltd, supra.* In that case the demised premises consisted of a shop on the ground floor and a dwelling house on the top floor. It was found that the premises had been gutted by the tenants and there was nothing left except the four walls of the building; all the internal fixtures and fittings and some the walls and grates had been

removed. All the three learned judges were of the unanimous opinion that the tenants had completely altered the character of the demised premises and allowed the owner's claim. Bankes LJ was of the opinion that 'the law recognises a contractual obligation upon the defendants as tenants towards their landlord in reference to the user to which the premises were to be put and the extent to which they were to be maintained and repaired'. He held the view that the facts led to the clear conclusion that there was a breach of that obligation. Scrutton LJ held that 'there is an implied contract by a tenant to use the premises in a tenant-like manner and to deliver them up at the end of the term'. Atkin LJ put the matter succintly at page 8:

> ... but no doubt the tenant would also be liable upon an obligation express or implied in the contract of tenancy. The contract of tenancy in the present case was oral, and contained no express obligation on the part of the tenants relating to their user of the premises, and so the question is whether there is an implied term in an oral agreement for a yearly tenancy that the tenant will abstain from such acts as the defendants have committed in this case. But the cases ... show that there is an obligation upon the tenant to use the premises in a tenant-like or, which is the same thing, a husband-like manner. If follows that he is under a continuing obligation to repair acts which would amount to voluntary waste and which involve a breach of the obigation to use the premises in a husbandlike manner.

When the tests as laid down in these cases are applied to the instant case it is clear that there is an implied contractual obligation upon the appellant to use the said premises in a tenant-like manner, and failure to observe it amounts to a breach of the obligation. Applying this principle of law to the facts as found by the learned magistrate it is without doubt that damage was done to the premises and therefore her conclusion was correct. The question being a question of law, the fact that the learned magistrate failed to indicate it in her judgment is not fatal to this appeal.

The final argument propounded by the appellant was that the learned magistrate had no jurisdiction to adjudicate upon the case as it involved a question of title. The appellant contended it was the case for the respondent that she was the legal owner of the premises while his case was based on the contention that the husband of the respondent was the legal owner. To my mind, such proposition was based on a misconception of the facts. The evidence disclosed that the respondent owned the premises but it was her husband who managed it, so much so that rent receipts were made in his name; on the strength of these facts it is not surprising to see that all negotiations for the letting of the premises were made by the husband, no doubt on behalf of his wife, and in this sense he was her agent. If this fact is not overlooked, a clear perspective is obtained. It appears to me perfectly clear that that was the position and therefore no question of title really comes into play. In the circumstances I am of the opinion that the judgment under appeal must be affirmed with costs to the respondent.

Appeal dismissed.

L Kandan for the Appellant.
K Sothinathan for the Respondent.

Notes

The rent receipts were issued by the husband even though the premises belonged to the wife. The Court upheld the Magistrate's finding that the wife was the landlord and not the husband because the latter only managed the premises on the wife's behalf. Estoppel does not seem to have been raised. Compare this case with *Selvam Holdings* v *Mehta* [1981] 2 MLJ 45.

The other point was that the tenant was under an implied obligation to maintain the premises in a tenant-like manner. He was liable to reimburse the landlord with the costs of the repair for the breach of that obligation. The point is so obvious that this case does not appear to have been cited in any other reported judgment.

(b) Lease and licence

Woo Yew Chee
v
Yong Yong Hoo

[1979] 1 MLJ 131 Federal Court, Kuala Lumpur

Coram: Raja Azlan Shah Ag CJ (Malaya), Wan Suleiman and Syed Othman FJJ

See under Land Law at page 645 above.

Notes

(i) Though the distinction between a lease and a licence frequently arises in cases in relation to the application or exclusion of the Control of Rent Act, 1966 it is also part of the general law. The question is one of intention to be determined by construing the document. Having referred to the provisions of the document, it was held to create a tenancy. The important incidents were the covenant for quiet enjoyment, prohibition against assignment and exclusive possession. The latter has been upheld as the only workable test: *Street* v *Mountford* [1985] 2 WLR 877 (HL).

(ii) This case also dealt with the effect of unregistrable leases: see Comments at page 724 below.

(c) Notice to quit and transmission of tenancy

Pang Soo Ha
v
Lim Kon Seng

[1967] 4 MC 81 High Court, Kuala Lumpur

Cases referred to:-
(1) *Pain* v *Cobb* (1931) 146 LT 12.
(2) *Summers* v *Donohue* [1945] 1 KB 376.

RAJA AZLAN SHAH J: The plaintiff as administrator of the estate of Phang Tung (deceased) claims against the defendant possession of rent-controlled premises known as No 315, Jalan Pudu, Kuala Lumpur, on the ground that he is a trespasser. The plaintiff's case is based on the premise that the said premises were sub-let at $175 per month to one Madam Wong Kiew who died leaving no heirs or any member of her family to survive her.

What is said on behalf of the defendant is that the premises were first sub-let to his father, Lim Swee (deceased) in 1937, and when his father died he and his mother, Madam Wong Kiew (deceased), took out letters of administration in respect of his father's estate and as such stepped into the shoes of his father *vis-a-vis* the said premises. As an alternative, he contends that his mother, being the lawful widow of his father, occupies the said premises as the lawful tenant, and at the latter's death he took possession of the said premises as the natural and lawful son of his mother. He further contends that since December 1958 he has carried on business which was duly registered under the style of Sin Hoon Coffee Shop at the said premises. In the last resort, he claims that the notice to quit is bad in law.

The facts are as follows. In May 1937 the plaintiff's father, one Phang Tung (deceased) sub-let the said premises to Lim Swee (deceased) for $53 per month. As can be seen from the tenancy agreement, Exhibit P3, the portions sub-let consisted of six rooms upstairs and a portion of the ground floor for the purpose of carrying on business as a coffee-shop. It is not altogether clear when, but it seems to me from the bundle of rent receipts, Exhibit D12, that sometime in 1962 the rent was increased to $175 per month. During the life-time of the father, the defendant and his mother were staying at the said premises, and the coffee-shop business was carried on under the name of Sun Yuen. However sometime subsequent to the death of the father, the defendant took up residence at Cheras Road but managed and still manages the business at the said premises. The fact that since 1958 he has carried on business under the name of Sin Hoon Coffee Shop at the said premises is irrelevant and of no consequence in view of the terms in the tenancy agreement.

In May 1956 Lim Swee died, and the defendant took out letters of administration together with his mother, Madam Wong Kiew. When

his mother died in May 1965 he became the sole administrator of his father's estate until this day. I do not think that the plaintiff can seriously contest in the light of the documentary evidence before the court that the defendant is the natural and lawful son of Madam Wong Kiew (deceased). On the death of his father the tenancy of the said premises vested in the administrator as no steps were taken to terminate the said tenancy. My view is substantiated by the rent receipts, Exhibit D12, which were issued in the name of the defendant's father throughout. I am therefore satisfied that the original tenancy still subsists as it is vested in the defendant as the legal personal representative of the deceased father's estate.

The notice to quit was served on the solicitors for the defendant in his personal capacity, as distinguished from his representative capacity, on the ground that he is a trespasser. This, in my view, makes the notice bad in law. On this ground alone the plaintiff's case must fail.

Having thus arrived at this conclusion, it is not necessary for me to deal in detail with the defendant's alternative contention. Suffice it for me to say that in law there can only be one transmission of the tenancy on the death of the original tenant and there cannot be another on the second tenant's death. The authority for this proposition can be found in the case of *Pain* v *Cobb*[1] and *Summers* v *Donohue.*[2] The defendant's alternative ground is therefore untenable.

I accordingly dismiss the plaintiff's claim with costs.

Claim dismissed.

Chooi Mun Sou for the Plaintiff.
TK Tang for the Defendant.

Note

The notice to quit, addressed to the defendant in his personal capacity, was bad and ineffective because he was the representative of the deceased tenant. The notice ought to have been addressed to the estate of the tenant or to the defendant as representative of the estate. This is another point that is so obvious and exemplifies the technical rules that govern notices to quit.

(d) Waiver of notice to quit

Ho Wee Cheong
v
Ho Poi Yuen

[1967] 2 MLJ 150 High Court, Raub

Cases referred to:-
(1) *Hardial Singh* v *Malayan Theatres Ltd* [1955] MLJ 180.

(2) *Tovey* v *Tyach* [1955] 1 QB 57.
(3) *Wolfe* v *Hogan* [1949] 2 KB 194.
(4) *Court* v *Robinson* [1951] 2 KB 60 at p 73.
(5) *Greig* v *Francis & Campion* (1922) 38 TLT 519.
(6) *Barrett* v *Hardy Brothers (Alnwick) Ltd* [1925] 2 KB 220, 227.
(7) *MacMillan Co Ltd* v *Rees* [1946] 1 All ER 675.
(8) *Hong Cheok Lam* v *Ong Sim Mai* [1951] MLJ 34.
(9) *Clark* v *Grant* [1950] 1 KB 104, 105.
(10) *Doe* v *Batten (1775) 1 Cop 243 245.*
(11) *Wagner* v *Tan Eng Yeow* [1947] MLJ 23.

RAJA AZLAN SHAH J: The plaintiff claims possession of premises known as No 21, Bibby Road, Raub, in respect of which he is the registered proprietor and the defendant is the tenant.

The defendant is the sole proprietor of a business in textiles and cosmetics at premises No 19, Bibby Road, Raub, since 1947. He lives with his wife, daughter, and father on the upper floor, and on the ground floor he runs his business with the aid of eight employees, seven of whom sleep on the premises. At premises No 23, Bibby Road, his younger brother runs the same sort of business. The defendant's business expanded and he thereby prospered, and on 17th May 1958 he rented the next-door premises (the subject matter of the action) from the plaintiff's eldest sister who was then the administratrix of the estate of the plaintiff's father. The tenancy was in respect of three-fourths of the front portion of the ground floor (hereinafter referred to as the said portion) for a period of eight years ending on 30th April 1966 at a rental of $140 per month payable in arrears. The terms of the agreement are, *inter alia,* (a) that the defendant shall be entitled to make use of the rear portion jointly with the lessor, (b) that the defendant shall be at liberty during the term of the agreement to carry out any type of business he so desires, (c) that the defendant binds himself to deliver vacant possession at the expiration of tenancy on being served with three months notice to quit by the lessor, and (d) that the agreement is binding upon the heirs, successors or administrators of both parties. I have visited the said premises and notice that it is the usual type of shop-house found everywhere in this country — a front ground floor portion and an air-well in the middle leading to the kitchen portion in the rear and an upper floor ordinarily used for human habitation. The remaining quarter portion of the front ground floor is rented to a tailor. Before the defendant became the tenant the said portion was rented to one Ho Chen Fan for his business for some five months at a monthly rental of $95 plus $15 in respect of hiring of furniture. The defendant runs the business at the said portion of No21, Bibby Road, with the assistance of three employees who by their terms of service with the defendant are required to sleep on the premises in order to look after the goods. The plaintiff became the registered proprietor on 8th December 1961 and thereby became the defendant's landlord. On 4th January 1966 he caused a notice to quit to be served on the defendant who received it on 8th January 1966. On 10th January 1966 the defendant transferred his sole proprietorship in the business at No 19, Bibby Road, into his wife's

name. The defendant failed to deliver vacant possession on the expiry of the said notice and still remains in possession. Rents have been tendered and accepted by the plaintiff after the expiry of the tenancy but without prejudice to the plaintiff's pending litigation.

The plaintiff accordingly claims vacant possession, double rent, and other consequential reliefs.

The substantial question which arises for decision in the present case is whether the said portion had been let as business premises; if so let as such premises, it is clearly not amenable to the Control of Rent Ordinance, 1956. In so stating what appears to me to be the substantial question in issue, I do not forget the arguments which were addressed to me on behalf of both parties with regard to the questions of 'suitable alternative accommodation', 'reasonableness' and 'hardship' under the said Ordinance. Upon the view which I take of this case, it is not necessary to decide whether or not the arguments are well-founded.

The Control of Rent Ordinance, 1956, *prima facie*,unlike its English counterpart which gives protection in respect of dwelling houses only, extends its protection to all premises whether used for business or as dwelling houses: see *Hardial Singh* v *Malayan Theatres Ltd*[1]. However, section 1(3) and (4) of the Ordinance empowers the Ruler-in-Council to extend the provisions of the Ordinance from year to year as well as to limit its application to a particular type of premises. In the State of Pahang the provisions of the Ordinance have since 1st July 1962 been limited to affect domestic premises only: see Pahang LN 42/1962. No doubt at the inception of the tenancy the provisions of the Ordinance applied to domestic as well as to business premises, but at the date when proceedings began, that is, on 9th May 1966, the provisions of the Ordinance only affect domestic premises: see Pahang PU 13/1966. It is indeed a general conception that the applicability of the Ordinance is to be tested at a time when the proceedings began: see *Tovey* v *Tyach*[2]. Such being the case, the protection which the Ordinance extends is not dissimilar to the English counterpart.

The question whether a premises or part of it is let as a domestic premises within the meaning of the Ordinance is to be decided by looking at the terms of the agreement. 'Where the terms of the tenancy provide for or contemplate the user of the premises for some particular purpose, that purpose will *prima facie* be the essential factor. Thus, if the premises are let for business purposes, the tenant cannot claim that they have been converted into a dwelling-house merely because someone lives on the premises. If, however, the tenancy agreement contemplates no specified user, then the actual user of the premises at the time when possession is sought by the landlord, must be considered': see *Wolfe* v *Hogan*[3].In this connection it would be pertinent to quote the following passage from the judgment of Denning LJ (as he then was) in that case:

> In determining whether a house or part of a house is 'let as a dwelling' within the meaning of the Rent Restriction Acts, it is necessary to look at the purpose of the letting. If the lease contains an express provision as to the purpose of the letting, it is not necessary to look further. But, if there is

> no express provision, it is open to the court to look at the circumstances of the letting. If the house is constructed for use as a dwelling-house, it is reasonable to infer the purpose was to let it as a dwelling. But if, on the other hand, it is constructed for the purpose of being used as a lock-up shop, the reasonable inference is that it was let for business purposes. If the position were neutral, then it would be proper to look at the actual user. It is a question of implied terms. It is a question of the purpose for which the premises were let.

That principle was reiterated by the learned Lord Justice in *Court* v *Robinson.*[4] It is purely a question of fact what is the real, main and substantial purpose of the premises: see *Greig* v *Francis & Campion*[5].

From the terms of the agreement, as I have appreciated it, it seems to me plain that at the time of the letting the contemplated user was that of a business premises. That is evident from a term of the agreement which provides that the defendant is at liberty to carry out any type of business on the portion let. Other circumstances pointing towards that direction are as follows: firstly, the defendant carries on his family business at premises No 19, Bibby Road, but as his business prospered he rented the said portion with the intention of extending his business there. The fact that his three employees lived on the said premises is no indication that the user is that of a domestic premises. 'The important matter is the rights under the lease, not the *de facto* user': see *Barrett* v *Hardy Bros (Alnwick) Ltd*[6]. Thus, sleeping on premises at night or having meals in them does not *ipso facto* have the effect in law of making these premises a dwelling-house: see *MacMillian Co Ltd* v *Rees*[7]. Thirdly, there is evidence that the said portion was previously let as a business premises. Fourthly, as the said portion is constructed and passed by the Town Council for the purpose of being used as a business premises, the reasonable inference is that it was let for business purposes.

Then comes the other question that the notice to quit was waived by the plaintiff by the acceptance of rent during its currency, that is, before the expiration of the said notice. The defendant's case therefore is that acceptance of rents tendered after the notice and up to but not beyond the expiration of the said notice operates as a recognition of the relationship of landlord and tenant.

The law regarding waiver is well established. Acceptance of rent after knowledge of breach of covenant which entitles the landlord to claim a forfeiture waives the forfeiture: *Hong Cheok Lam* v *Ong Sim Mai;*[8] see also the observation of Lord Goddard CJ in *Clark* v *Grant.*[9] Also, acceptance of rent in cases of holding over depends on *quo animo* the rent was received and what the real intention of both the parties was: *per* Lord Mansfield in *Doe* v *Batten;*[10] followed in *Clark* v *Grant, supra.* It is also been held that acceptance of rent up to but not beyond the expiration of notice to quit does not constitute waiver: *Wagner* v *Tan Eng Yeow.*[11]

Applying the foregoing principle laid down in *Wagner's* case, it seems plain that the notice to quit had not been waived and that the tenancy had been determined with effect from 30th April 1966.

It is now necessary to deal with the counterclaim. At the commence-

ment of the proceedings the defendant abandoned the claim in respect of the premium of $1,000. This leaves only the question of excessive rent to be determined. It would appear that the premises were first let to one Ho Chen Fan for $95 rental and $15 for hire of furniture, making a total of $110. This is *prima facie* the standard rent, that is, the rent to which the premises were first let after 25th September 1940. The meaning of 'maximum recoverable rent' is clearly defined in section 6 of the Rent Control Ordinance, 1956. The particulars in the counter claim, however, aver that the maximum recoverable rent is $120. Counsel for the defendant failed to show, and indeed I am unable to understand how that figure is arrived at. Although the plaintiff alleged that he paid for water and electricity rates, I gather, and I am satisfied from his admission in cross-examination coupled with clause 5 of the tenancy agreement (Exh P16), that that is not so. There is evidence to show that the defendant had more space in the premises than the former tenant in that he was allowed the extra use of the air-well and the rear portion of the premises. Unfortunately no specific dimensions of the extra area were given and it would be impossible for me to decide what increase in rent, if any, is permissible. In view of the unsatisfactory state of affairs I am left to ascertain on my own what the maximum recoverable rent is by invoking the provisions of section 6 of the Ordinance. Sub-section (1)(b)(iii) enacts:

> (1) Subject to the provisions of sub-section (3) of this section, the maximum recoverable rent of any premises shall be —
>
> (b) where there has been no order of the Board fixing the rent of the premises, the standard rent increased to the extent following, that is to say:
>
> (iii) in any case, to the extent set out in the third column of the First Schedule to this Ordinance in respect of the types of premises and the standard rents set out adjacent thereto in the first and second columns of the said Schedule.

The relevant part of the said Schedule is as follows:

Type of premises	*Standard rent*	%
Premises used wholly or partly for purposes other than human habitation.	Up to and including $150 per month.	25%

I am satisfied that the standard rent is $110 and therefore the permissible increase would be 25% of $110 which amounts to $27.50. The maximum recoverable rent according to my calculation would be $137.50. Any sum above this figure would be deemed to be excessive. It is common ground that the defendant was paying $140 per month since the commencement of the tenancy, that is, from 1st May 1958 until its expiration on 30th April 1966. The premises, however, became decontrolled from 1st July 1962. It is clear as from that date the premises were not subject to the said Ordinance. It is therefore evident that the defendant had been paying an excess rent of $2.50 per month, thus amounting to $125 for 50 months. He therefore succeeds on the

counter-claim to the extent of $125 with costs on the lower court scale.

There will be judgment for the plaintiff as prayed on the claim and costs. The defendant is to deliver vacant possession of the said premises forthwith.

Order accordingly.

Alexander YL Lee for the Plaintiff.
BC Lee for the Defendant.

Note

This case dispels the misunderstanding that exists as to the circumstances when an acceptance of rent would produce a waiver, that is a new tenancy. The acceptance after the expiry of a notice to quit in respect of a period before the expiry would not work as a waiver. It is otherwise when the rent is accepted for a period after an expiry of the notice.

LEASES GOVERNED BY THE NATIONAL LAND CODE
(a) Construction

Yap Phooi Yin & Anor
v
CM Boyd

[1982] 1 MLJ 151 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah Ag LP, Lee Hun Hoe CJ (Borneo) and Mohamed Azmi J

Cases referred to :-
(1) *Larrinaga & Co* v *Societe France-Americaine* (1923) 92 LJKB 455; 125 LT 65.
(2) *Ponsford & Ors* v *HMS Aerosols Ltd* [1978] 2 All ER 837.
(3) *Ex parte Dawes, In re Moon* (1886) 17 QBD 275, 286.

RAJA AZLAN SHAH Ag LP (delivering the judgment of the Court): In this appeal the question arises as to the construction of a lease executed on August 16, 1957 and it turns upon the relative importance of a recital and the operative part of the said lease in clause 1 (iv) *infra.* The recital states that the registered proprietor of land held under CT No 15741 for lot No 537, section 62, in the town of Kuala Lumpur, in area 0 acres 2 roods 27.9 poles (hereinafter referred to as 'the said land') do hereby lease to Makhanlall (Properties) Ltd the said land together with the buildings erected thereon and known as Star Theatre as tenant for 30 years at a monthly rental as stated hereinafter, subject to the agreement and powers implied in the Land Code and subject to the stipulations, modifications, terms and conditions hereinafter contained. Then the lease continues with the operative parts. Clause 1 contains the provi-

sions for rent. It reads:

> The rent of the said land shall be as follows:
> (iv) From the beginning of the 21st year to the end of the 25th year such sum exceeding $700 as shall be agreed to by the parties hereto or as shall be fixed by an arbitrator.

Clause 2 says that the rent shall be payable in advance.

Clause 3 contains the lessee's usual covenants for the maintenance of the Star Theatre, insurance of the said building in the joint names of the lessor or lessee, entry of the premises to view the state of repairs and provisions against assignment, sub-letting or parting with possession without consent, and delivery of vacant possession with all fixtures fittings and additions. Clause 4 contains the lessor's convenants for quiet and peaceful enjoyment and option for renewal. Clause 5 provides for determination of the lease and taking possession of the said cinema and all other buildings erected by the lessee on the said land when rent is unpaid in certain circumstances. Clause 6 provides for the suspension of rent when the lessee is unable to operate or use the said cinema by reason of war, riot, civil commotion or fire. Clause 7 provides for arbitration in case of dispute or difference between the parties.

It is common ground that the said cinema was erected by the lessee at his own expense some time before the execution of the said lease. Both the signatories are now dead. There is now a dispute as to the amount of rent payable in the light of clause 1(iv). The matter went to arbitration. The arbitrator gave his final award: see *Larrinaga & Co* v *Societe France-Americaine*[1]. He then referred it to the High Court in the form of a special case, which is as follows:

> (i) In the event of the court deciding that the rental under clause 1 (iv) of the said lease should relate to the land only the fair rental under clause 1(iv) of the said lease is $5,000 per month.
> (ii) In the event of the court deciding that the rental under clause 1(iv) of the said lease should relate to the land together with the buildings erected thereon the fair rental under clause 1(iv) of the said lease is $21,000 per month.

Harun J in what must surely be the shortest judgment on record answered it with the words 'on the land only'.

The question which we have to decide is whether the operative part of the said lease, that is clause 1(iv), stands unaffected by the recital or whether the recital governs the terms of clause 1(iv). We do not pretend to speculate whether the parties really intended to include the said cinema building in assessing rent, except so far as we can gather their intention from the recital and the operative part of the said lease. We feel that the said lease must be construed as it stands, by what appears on the face of it, and nothing else. We are not now considering any question of rectification. If that is so, we should have to admit evidence which is not admissible on the question of construction. In the circumstances neither the Ponsford type of situation: see *Ponsford & Ors* v *HMS Aerosols Ltd*[2] nor the maxim *quicquid plantatur solo, solo credit:* see the

definition of 'land' as defined under section 5 of the National Land Code applies in this case. In our view the rule to be applied to the construction of the lease has been stated with clarity by Lord Esher MR in *ex parte Dawers, In re Moon.*[3] It is one entirely reasonable in itself, fundamental and long established:

> Now there are three rules applicable to the construction of such an instrument. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred.

It seems to us that the present case falls within the first rule, i.e., where the recital is clear and the operative part is ambiguous. In the present case the recital is clear and particular; it refers to the said land together with the buildings erected thereon and known as Star Theatre. But the operative part, 'the said land' in clause 1(iv) is perhaps ambiguous because it does not show whether the basis of the valuation is the land only or the land and the Star Theatre. Therefore it seems to us that the recital which is clear must determine the operative part which appears ambiguous.

The appeal is allowed with costs here and below.

Appeal allowed.

Wong Chong Wah for the Appellants.
M Shankar for the Respondent.
C Das for the Respondent/Arbitrator.

Note

Do the words "on the land" in the lease include the cinema erected by the tenant for the purpose of assessing the rent payable under the lease? Harun J held that the cinema was excluded. The Federal Court, speaking through Raja Azlan Shah, Ag LP, held that it was included. The recitals which were clear prevailed over the operative part which was ambiguous. This decision has been affirmed by the Privy Council [1985] 1 MLJ 329. Lord Templeman's reasoning proceeded on the basis that there was no ambiguity in the operative part: 'on the land' meant what it said.

(b) Effect of unregistered leases

Ho Ying Chye
v
Teh Cheong Huat

[1965] 2 MLJ 261 High Court, Kuala Lumpur

See under Land Law at page 641 above.

Notes

(i) See also the case of *Woo Yew Chee* v *Yong Yong Hoo* [1979] 1 MLJ 131 FC.

(ii) *Ho Ying Chye* was based on a 'dubious distinction' and the reasoning has since been 'discredited' (Wong, *op cit* 278, 279). It does not appear to have been cited in any later case. There is no mention of it in the local textbook on the Code: Sihombing, *The National Land Code* (1981).

(iii) The decision in *Woo Yew Chee* is correct. The point has been decided in a series of cases by both the Federal Court and the Privy Council and section 206(3) of the Code expressly recognizes the effect of such documents. No reference whatever was made to *Ho Ying Chye* which is an aberration in the law.

CONTROLLED TENANCIES

(a) Premises

Krishna Sreedhara Panicka

v

Chiam Soh Yong Realty Company Ltd

[1976] 1 MLJ 224 Federal Court, Johore Bahru

Coram: Gill CJ (Malaya), Ali and Raja Azlan Shah FJJ

Cases referred to:-

(1) *Mohamed bin Myddin* v *Teo Mek Yok* [1966] 2 MLJ 284.
(2) *Leong Yoong* v *Lee Sem Yoong* [1968] 2 MLJ 72.
(3) *AV Vandayar & Ors* v *Singami Achi & Anor* AIR (1949) PC 319.9.
(4) *Yong Chiang* v *Bong Tjhin Oi* [1973] 2 MLJ 136.
(5) *Government of State of Penang & Anor* v *BH Onn & Ors* [1971] 2 MLJ 235.
(6) *Pritam Kaur* v *Rajaratnam & Anor* [1970] 2 MLJ 109, 110.
(7) *Kai Nam* v *Ma Kam Chan* [1956] AC 358.
(8) *Eastern Realty Co Ltd* v *Chan Hua Seng* [1967] 2 MLJ 195.
(9) *Success Enterprises Ltd* v *Eng Ah Boon* [1968] 1 MLJ.75.
(10) *Bank Negara Indonesia* v *Philip Hoalim* [1973] 2 MLJ 3,4.
(11) *Tioh Kooi Lan* v *Ismailjee* [1972] 1 MLJ 64.

RAJA AZLAN SHAH FJ: In this appeal from the High Court, Johore Bharu, yet another thorny question as to the true construction of the Control of Rent Act, 1966 is raised. This time the question is as to the effect of the Act when a building is, by structural alterations, or, as counsel for the appellant put it, by self-induced alterations, converted into two premises, each of which is let at a separate rent, as a separate building and is

assessed and rated separately. This case is different from the case in which a house at Jalan Maaroff, Kuala Lumpur, was repaired and extended (see *Pritam Kaur* v *Rajaratnam,*[6] and another case in which the front portion of a single-storey shop-house in Slim River was gutted and repaired (see *Tioh Kooi Lan* v *Ismailjee).*[11] In both these cases, repairs and renovations were effected but the buildings were not 'buildings completed after January 31, 1948'. In the recent case of this court of *Yong Chiang* v *Bong Tjhin Oi*[4] both those cases were reviewed at some length. That was a case of rebuilding. A shophouse in Muar was looted and burnt during the war. After the fire it was an empty house with no one staying there and the ground floor was an empty space with grass growing on it. The first floor which was made of wooden plank had gone, the front wall and the top portion of the rear had collapsed but the side wall was standing and charred. The house was thereafter completely renovated and repaired and a certificate of fitness was issued by the Town Council. Suffian FJ (as he then was) had to decide whether, in view of the extensive nature of the repairs and renovations, the shophouse was completed after the relevant date. He adopted the test as stated by the Acting Chief Justice of Hongkong and approved by the Privy Council in *Kai Nam* v *Ma Kam Chan.*[7] The test is:

> Where the damage has been so extensive, so that there is nothing left which could possibly be called a building, then the existence of that building as a building is terminated and a building replacing it would be an entirely new building though it was built on the same foundations and had the same floor (page 140).

Applying that test the Lord President came to the conclusion that at the material date 'an altogether different building — a new building — has arisen from the ashes of the old even though it was built on the same foundations and had the same ground floor'.

I now ask this question: Does the test in *Kai Nam's* case apply only to cases of buildings 'thereafter' *damaged and repaired,* and, as the case may be, rebuilt, and not to cases of *bona fide repairs and renovations* (italics are mine). The Lord President seems to think so. He also seems to suggest that the test applied in *Pritam Kaur's* case is apt only to cases of repairs and renovations and not to rebuilding. It is of significance to note his reasoning in *Yong Chiang's* case. He found no difficulty in reconciling the rent statutes of Hong Kong and Singapore and our own, in spite of the different words used. Yet he did not even mention the Privy Council case in *Bank Negara Indonesia* v *Philip Hoalim*[10] which was delivered in May, 1973. It may well be that that case was not yet reported when *Yong Chiang's* was decided. Be that as it may, I do not like to suggest that *Yong Chiang's* case was *per incuriam.*

Bank Negara Indonesia is a case of self-induced repairs and renovations. In that case extensive repairs were carried out to an old two-storey building in Malacca Street, Singapore. The foundation and the lateral walls remained, but the front and rear facades were entirely removed and replaced; the ground floor and rear of first floor were replaced by a new concrete floor; a new third floor and a mezzanine

floor were added, the existing walls strengthened to support them; and a new strong room and lift well were constructed. The trial judge held that the works carried out went far beyond repairs and that there had been such a fundamental change to the old building that it could no longer be said to exist as such. The Court of Appeal reversed that finding on two grounds, one of which was that the former building was still a substantial building which was in no danger of collapse and that it could still be used for the professional or commercial activities of the tenants. This reasoning did not find favour with their Lordships who took the view that the question of collapse was irrelevant. Their Lordships dismissed the appeal because they felt constrained to do so by authority. The speech of Lord Wilberforce throws no doubt on the matter, that whether an old building which has been altered, or reconstructed, becomes a new building is a question of fact and degree: see *Eastern Realty Co Ltd* v *Chan Hua Seng*[8] *per* Wee Chong Jin CJ and *Kai Nam* v *Ma Kam Chan, supra.* The former case is concerned with repairs and extensions. The Chief Justice of Singapore adopted the *Kai Nam* test and said that the test is always a question of degree whether a building because of such substantial and/or other alterations becomes a new building. *Kai Nam* v *Ma Kam Chan* is a case of rebuilding, and the test also is a question of fact and degree.

It seems to me, on principle and authority, that whatever the case may be, be it a case of self-induced repairs and renovations or extensions, or damage and repairs or rebuilding, the test is the same — the degree of change effected. This line of reasoning, in my opinion, is also implicit in the judgment of the Lord President in *Yong Chiang's* case where he opinioned that, in spite of the dissimilarity in the three rent statutes, the test whether a building is excepted from the operation of any of the statutes is the same, and that is, the degree of change effected.

It is significant to note that in *Pritam Kaur's* case I adopted the reasoning of Winslow J in *Success Enterprises Ltd* v *Eng Ah Boon*[7] who followed the test of Wee Chong Jin CJ in *Eastern Realty Co Ltd,* which in turn was approved and applied in *Bank Negara Indonesia* v *Philip Hoalim. Eastern Realty Co Ltd* v *Chan Hua Seng* is a case of repairs and extensions and the test applied was the degree of change effected. In *Pritam Kaur's* case I held that the repairs and extension work were not so substantial as to affect the general structure of the house. Although I did not say in so many words it is implicit in my judgment that it is a question of substance and degree. In other words it is a question of degree of change effected. If this test was applied to cases of repairs and renovations as was done in *Eastern Realty Co Ltd* v *Chan Hua Seng, Success Enterprises Ltd* v *Eng Ah Boon,* and *Bank Negara Indonesia* v *Philip Hoalim, a fortiori* it applies to the present case under appeal — repairs and extensions. To hold otherwise, in my opinion, would make the decisions in *Eastern Realty Co Ltd* and *Bank Negara Indonesia* untenable.

With respect, the *Kai Nam's* test as applied by the Lord President in *Yong Chiang's* case and also by the Privy Council in *Bank Negara Indonesia* v *Philip Hoalim* is pertinent not only to cases of buildings

'thereafter' damaged and repaired and, as the case may be, rebuilt, but also to cases of *bona fide* repairs and renovations. But in applying the test to the latter category of cases, the court must be astute to see that the owner is not violating the restriction imposed by the Act by some small, and possibly colourable, alterations of the structure. If there is a substantial structural alteration to the building so that it has changed its identity, and two different premises are in fact created, each of which is let at a separate rent as a separate building, and is assessed and rated separately, then it can be said that the building has ceased to exist as such and that two different buildings have come into existence. And if the buildings came into existence after the relevant date, then they are excepted from the operation of the Act.

On this point the learned president found that 'the alterations carried out to the first floor of what before 1958 was No 25, Jalan Ah Fook were so substantial that they had the effect of fundamentally changing the identity and character of that part of the building, namely, that from being part of one entity known as No 25, Jalan Ah Fook it had now since 1959 become a separate independent entity and also from being a place consisting of many rooms let out for human habitation'. The question of change of identity and character is primarily an inference to be drawn by him. It is a question of fact and degree. If he has directed himself properly, this court can only interfere if it is quite plain that he has come to the wrong conclusion.

That brings me to the question of burden of proof. It is now said that the learned president erred when he followed *Mohamed bin Myddin* v *Teo Mek Yok*[1] and called upon the appellant/tenant to begin. I agree that up to the point he is clearly wrong. Our rent law does not prescribe a change affecting the general principles of evidence regarding the burden of proof enacted in section 102 of the Evidence Act, 1950. Under that section the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. In this case the respondent/landlord claims possession against the appellant/tenant who seeks protection under the Act. It is not denied that the said tenant is a tenant of the premises within the meaning of the Act. And as such he is entitled to protection unless the landlord can bring himself within the proviso of section 4(2)(a) of the Act. The onus thus lay on the landlord to prove that the building was completed after the relevant date: see *Leong Yoong* v *Lee Sem Yoong*[2] and echoed in *Yong Chiang's* case. Be that as it may, I think the matter is now academic as the whole of the evidence is on record — see *A V Vandayar & Others* v *Singami Achi and Another*[3] as applied in *Yong Chiang's* case (page 137).

It is always a question of law, which will warrant the interference of this court, whether there is any evidence to support the president's findings of fact and whether the inferences he has drawn are possible inferences from the facts as found. It seems to me that in this case I cannot say that he is so clearly wrong that this court can interfere. The material facts, so far as they are known, are not disputed, and the inferences which he has drawn are possible inferences from the facts

found. The fact that there is no evidence of extensive or irreparable damage can find no place in determining the question whether a building is completed after the relevant date and therefore excepted from the operation of the Rent Act: see *Bank Negara Indonesia* v *Philip Hoalim.*

I would dismiss the appeal with costs.

Appeal dismissed.

CKG Pillay for the Appellant.
Keith Sellar for the Respondents.

Notes

(i) Raja Azlan Shah FJ was a member of the Court in *Krishna Sreedhara's* case. Gill CJ had agreed with him. But Ali FJ dissented. The original view of Raja Azlan Shah J did not find unanimous acceptance. However, His Lordship answered the cause of Ali FJ's dissent:

> ...that the court must be astute to see that the owner is not violating the restriction imposed by the Act by some small, and possibly colourable alterations of the structure.
>
> [This view was ultimately upheld unanimously in 1982 in *Krishna Sreedhara Panicka* v *Chiam Soh Yong Realty Co Ltd (No 2)* [1983] 1 MLJ 65 (FC). No more dissent has since been heard.]

(ii) As to domestic premises, see *Ho Wee Cheong* v *Ho Poi Yuen, supra.* In this case, the short question was whether the premises were 'domestic' premises and thus protected under the Control of Rent Ordinance, 1956 as applied in Pahang. The premises were used for business. The relevant date, the judge held, for the determination was the date of the proceedings. And the mere fact that some employees slept in the premises did not render it a domestic premises. Both points are covered by previous local authority: *Wong Yue* v *Lim Teong Koon* [1958] MLJ 193 and *Abdul Kadir* v *Kadherbhoy* [1949] MLJ 43 *per* Willian CJ. Neither was cited. This decision has very little relevance under the Control of Rent Act, 1966.

(iii) As to excluded premises, see *Pritam Kaur* v *Rajaratnam & Anor* [1970] 2 MLJ 109. In this case the recementing of the floor, conversion of the kitchen into a sitting room, repairs to the roof and replacement of plank walls was held insufficient to fall within the category of 'buildings completed after January 31, 1948', so as to be excluded from the application of the Act. They were 'not so substantial as to have transformed the general structure of the house so that it can be said that the ... premises ... is a new and different house in fact from the old one ... the new house having shed all the attributes of the old...'

The judge applied the same test at first instance in *Tioh Kooi Lan* v *Ismailjee* but when that case reached the Federal Court, he was upheld on the facts but his test was subjected to adverse criticism.

But in *Yong Chiang* v *Bong Oi Tijhin* [1973] 2 MLJ 136 the Federal Court, two of whose members, Suffian FJ and Azmi LP also sat in *Tioh Kooi Lan,* reverted to Raja Azlan Shah J's test claiming that it ought to be limited to "repairs and alterations and not a rebuilding". Raja Azlan Shah J did not for a moment say that it applied to rebuilding. Suffian FJ justified the position: that the court in *Ismailjee* "shied away from laying down a definite general principle".

(b) Rent

(i) Pritam Kaur
v
Rajaratnam & Anor

[1970] 2 MLJ 109 High Court, Kuala Lumpur

Cases referred to:-
(1) *Success Enterprises Ltd* v *Eng Ah Boon* [1968] 1 MLJ 75.
(2) *Penang Motors (1950) Ltd* v *Suah Motors* [1959] MLJ 133.
(3) *Lee Lee Choon* v *Teng Ai Cheng* [1966] 1 MLJ 128.
(4) *Syed Ahmed Al-Junied & Ors* v *Reshty* [1966] 2 MLJ 124 FC.

RAJA AZLAN SHAH J: In this case, the plaintiff, the owner of the premises No 22, Jalan Maaroff, claims vacant possession against the defendants, the tenants of the said premises. The monthly rental chargeable in respect of the premises is disputed: the defendant tenants claim that the premises are subject to the Control of Rent Act, 1966 and rental is and was at all material times $7, this sum having been fixed by the Rent Assessment Board in 1955; the plaintiff claims that the premises, though built before 31st January 1948, have been removed out of the ambit of the Rent Act by virtue of the premises being so substantially altered in 1961 as to constitute new premises and that the rental is $46, this sum having been agreed upon by the defendants when the plaintiff consented to repair and extend the premises. The plaintiff contends that she has duly determined the said monthly tenancy by a notice to quit served on the defendants who, after the expiry of the said notice on 31st August 1967, are now remaining in occupation of the premises as trespassers. She alleges that the defendants have not paid rental at the rate of $46 per month since 1st January 1962 although its payment has been demanded by her or her attorney at the premises on many occasions. In addition to vacant possession, the plaintiff claims arrears

of rent from 1st January 1962 to 31st August 1967 and double rental per month from 1st September 1967 until vacant possession.

The defendants contend that the said notice to quit is bad and that there was no valid or lawful demand. They claim that the plaintiff has refused and still refuses to accept the rental of $7 per month tendered by them.

The issues that arise for determination are first, whether the premises are rent-controlled and secondly, whether the defendants were in arrears of rent and if so, whether the tenancy was lawfully terminated.

In order to determine whether the premises are still subject to the provisions of the Rent Act, 1966, it must be shown that the building was not so reconstructed or so substantially altered as to constitute new premises. It is disputed as to which party effected the alterations and as to the amount spent on them. The plaintiff claims she spent $1,490 on repairs and extension which were carried out in 1961 at the request of the defendants. The defendants claim that they were the ones who carried out the repairs and extension work in 1966 at a sum of about $400 and they produced bills and a letter to an insurance company for a loan to support their testimony. It does not seem necessary to decide which party effected the repairs because the only relevant question is the determination of whether the alterations were substantial enough to bring the premises outside the ambit of the Rent Act. But even if it were necessary, I would be inclined to accept the defendants' version of the story. It seems more plausible that the premises should look like it is now, as represented by the 4 photographs put in as exhibits, after a sum of $400 is spent on it rather than a sum of $1,490. Then again, where the plaintiff cannot offer any concrete evidence to substantiate her allegations, the defendants did substantiate theirs by producing receipts of bills and a letter to an insurance company for a loan to help finance their expenses incurred in repairs and extension work.

The alterations effected on the premises were recementing of the floor, the conversion of the kitchen into a sitting hall, the repairs to the roof and the replacement of the plank walls. In all, the house was extended one and a half times. Are these alterations substantial enough to enable the house to be deemed 'new premises'? Mr Devaser for the plantiff argues that the onus of proving the substantiality of the alterations is lower in the Rent Act of 1966 than in the Rent Ordinance of 1956. This, he contends, is due to the marked absence of the adjective 'new' in the definition of buildings outside the Rent Act, 1966 which adjective was present in the 1956 Rent Ordinance. He argues that under the 1966 Act it is no more necessary, as it was under the 1956 Ordinance, to satisfy the court that it is an entirely new building, but so long as the building, no matter when built, was completed, presumably in its alteration work, after 31st January 1948, it would be outside the 1966 Rent Act. I cannot find any merit in this argument. The phrase 'buildings completed after 31st January 1948' in section 4(2) of the 1966 Rent Act envisages either of two situations:

(i) a building on which construction work was started before 31st January 1948 but which is still uncompleted till a date after 31st

January 1948;

(ii) a building completed before 31st January 1948 but which has since that date been so fundamentally changed that it can no longer be said to exist and another building has replaced it.

The test whether the old building was so substantially or fundamentally altered so as to become a 'new building' under the 1956 Ordinance or merely another 'building completed after 31st January 1948' under the 1966 Act remains the same. Mr Devaser cannot use the aforesaid argument to contend that the said premises are outside the 1966 Rent Act on the ground that alterations to it were completed after 31st January 1948 even though the alterations cannot be said to have fundamentally changed the premises. Here, the premises were completed before 31st January 1948. I do not consider that the repairs and extension work have been so substantial as to have transformed the general structure of the house so that it can be said that the present premises at No 22, Jalan Maaroff is a new and different house in fact from the old one before the alterations were effected, the new house having shed all the attributes of the old: see *Success Enterprises Ltd* v *Eng Ah Boon*[1]. Therefore, since the premises cannot fall within either of the two categories envisaged by the phrase 'building completed after 31st January 1948' they are subject to the provisions of the 1966 Rent Act.

It must now be determined whether the defendants were in arrears of rent to entitle the plaintiff to an order for possession. The plaintiff contends that when the amount of rent was fixed by the Rent Assessment Board in 1955, the landlord, one Kandiah, was not made a party to the proceedings and that since the order was made between one David who is alleged to be merely a tenant and the sub-tenant, the order could not be binding on the landlord and accordingly could not be binding on the plaintiff as present owner of the house and land. However, one Kandasamy, who is an 'independent witness' according to the plaintiff, supported the testimony of the defendants when he testified that David was the owner of the house and that Kandiah was merely the owner of the land. The order was therefore made between the owner of the premises and the tenant and would be binding on all subsequent landlords and tenants of the premises: section 8(8) of the Rent Ordinance 1956. By section 26 of the Rent Act, this order has still binding force.

The defendants can only be said to be in arrears of rent as from the date the lawful demand for payment is made: see *Penang Motors (1950) Ltd* v *Suah Motors.*[2] What constitutes a lawful demand? The plaintiff relies on the case of *Lee Lee Choon* v *Teng Ai Cheng*[3] to contend that the word 'demand' should be construed in its popular sense and not as a formal demand made in accordance with the strict rules of the common law. But this does not necessarily infer that the plaintiff can demand, be it orally or by letter, any amount he chooses. To be lawful, the amount demanded must be that sanctioned by law. In this case, the Rent Assessment Board having fixed the maximum recoverable rent at $7, the only lawful rent that can be demanded by the plaintiff is $7.

Evidence was given for the plaintiff to show that demands for rent were made orally in 1961, 1962, 1963 and by letter in 1967. All these demands were for a rental of $46 which are clearly unlawful, seeing that the maximum recoverable rental is only $7. Even if there had been an agreement to raise the rental to $46, the demand for the increased rental would also be unlawful; the increase in rent not having been sanctioned by the Rent Assessment Board: see *Syed Ahmed Al-Junied & Ors* v *Reshty*[4].On the other hand, the defendants gave evidence to show that they had offered and are still willing to pay the plaintiff the rental of $7. In the circumstances, the only conclusion that can be drawn is that the defendants were not in arrears of rent, there having been no lawful demand for rent made by the plaintiff. No order for possession can be made and accordingly, the plaintiff's claim for double rental fails.

The plaintiff's action is dismissed with costs and the defendants are entitled to the tenancy of the premises at the maximum recoverable rental of $7 per month.

Action dismissed.

KL Devaser for the Plaintiff.
G Vadiveloo for the Defendant.

Notes

(i) The non-payment of an unlawful increase did not entitle the court to make an order for possession. To be lawful the amount demanded should have the sanction of the law. The tenant had offered to pay the lawful or proper increase.

This was distinguished in *Lim Cheng Chiat* v *Lim Im* [1977] 1 MLJ 257 where the amount lawfully due had not been paid or offered to be paid. The failure to do so there founded an order for possession for non-payment of rent.

(ii) As to recovery of overpayment, see *Ho Wee Cheong* v *Ho Poi Yuen* [1967] 2 MLJ 150. In this case, the tenant successfully claimed overpayment of rent he had paid when his premises were subject to the Control of Rent Ordinance. The claim was made well after the Ordinance ceased to be applicable. This was plainly wrong because the Ordinance had expired when the claim was made and section 15 of the Interpretation and General Clauses Ordinance 1948 did not preserve the right. This decision is inconsistent with *Kong Cheng Whum* v *Tengku Besar Zabaidah* [1970] 1 MLJ 169 (FC). The problem will not arise under the 1966 Act.

(ii) Natesan
v
Goh Gok Hoon

[1968] 2 MLJ 3 Federal Court, Kuala Lumpur

Coram: Azmi CJ (Malaya), Ong Hock Thye, FJ and Raja Azlan Shah J

Cases referred to:-
(1) *Errington* v *Errington* [1952] 1 All ER 149 at p 155.
(2) *Addiscombe Garden Estates Ltd* v *Crabbe* [1957] 3 All ER 563 at p 571.
(3) *Cook* v *Shoesmith* [1951] 1 KB 755.
(4) *Ong Keng Huat* v *Shaw & Shaw Ltd* [1957] MLJ 46.

RAJA AZLAN SHAH J: The learned judge has delivered an elaborate and, in my view, a most convincing judgment with which I agree. .

I venture to express my own view on the question of double rent which the learned judge ordered against both the tenant and the sub-tenant, i.e., the present appellant on the expiry of the sixty days period in the event of their holding over. In my judgment, there was clearly an order for delivery of possession against both the tenant and the sub-tenant who the learned judge found has forfeited his claim to the protection of the provisions of section 19 of the Control of Rent Ordinance 1956. In those circumstances it must follow that in view of the provisions fo section 28(4) of the Civil Law Ordinance 1956 read with section 22 of the Control of Rent Ordinance the learned judge was justified in ordering double rent against both the tenant and the present appellant. The decision of this court in the case of *Ong Keng Huat* v *Shaw & Shaw Ltd*[4] must be distinguished on the facts. There the learned trial judge had no power to give judgment in accordance with the landlord's claim for double rent from Novemver 30, 1954 which was the date the tenant was asked to deliver up vacant possession. It is quite plain that as on that date no court order for recovery of possession was made against the said tenant and consequently the case was hit by the provisions of section 13(4) of the Civil Law Ordinance (Laws of the Straits Settlements Vol II, Cap 42, which bears semblance to section 28(4) of our Civil Law Ordinance) read with section 17 of the Control of Rent Ordinance 1948 (now section 22).

I agree that the whole appeal be dismissed.

Appeal dismissed.

RR Chelliah for the Appellant.
YL Kandan for the Respondent.

(c) Immoral user of premises

Ho Kean
v
Kong Lai Soo

[1974] 2 MLJ 63 Federal Court, Ipoh
Coram: Ali, Ong Hock Sim and Raja Azlan Shah FJJ

See under Practice and Procedure at page 896 below.

Note

The landlord, on appeal to the High Court [1973] 2 MLJ 150, had obtained vacant possession under section 16(1)(d) of the 1966 Act on the ground that the premises had been used for an immoral purpose when the tenant's son acted indecently towards the landlord's daughter. Raja Azlan Shah FJ held that though the judge had set out the principle rightly he had applied it wrongly. The user must have been intentional but an occasional and isolated act on the premises could not provide 'the link between the guilty act and the premises'. The judgment is an accurate exposition of the second limb of section 16(1)(d).