IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE CIVIL JURISDICTION)

[CIVIL APPEAL NO. 02(f)-12-02/2019(W)]

BETWEEN

ROHASASSETS SDN BHD
[171838-K]
(dahulunya dikenali sebagai
WISMA PERKASA SDN BHD) … APPELLANT

AND

1. WEATHERFORD (M) SDN BHD
[37008-U]

2. WEATHERFORD SOLUTIONS SDN BHD … RESPONDENTS
[512238-D]

[In the matter of the Court of Appeal Civil Appeal No. W-02(NCVC)-130-01/2016

Between

Rohasassets Sdn Bhd

(dahulunya dikenali sebagai

Wisma Perkasa Sdn Bhd) … Appellant

And

1. Weatherford (M) Sdn Bhd
[37008-U]

2. Weatherford Solutions Sdn Bhd
[512238-D] … Respondents]

CORAM: AZAHAR MOHAMED, CJM

DAVID WONG DAK WAH, CJSS

MOHD ZAWAWI SALLEH, FCJ

IDRUS HARUN, FCJ

ABDUL RAHMAN SEBLI, FCJ

JUDGMENT OF THE COURT

[1] The leave question for our determination was as follows:

> "In relation to a claim for double rent under section 28(4)(a) of the Civil Law Act 1956, whether there is a requirement on the landlord to show wilful and contumacious conduct on the part of the tenant holding over to render the tenant liable to pay the said double rent."

[2] The question may be paraphrased: If the tenant holds over after the expiry of the tenancy, is there a need for the landlord to prove wilful and contumacious conduct on the part of the tenant to entitle the landlord to charge double rent under section 28(4)(a) of the Civil Law Act 1956?

[3] The Court of Appeal had agreed with the High Court that it is a requirement under section 28(4)(a) of the Civil Law Act ("the Civil Law Act") that there must be wilful or contumacious holding over on the part of the tenant to entitle the landlord to claim double rental. Having so decided on the question of law, it found no reason to interfere with the High Court's finding of fact that there was no evidence to prove contumacious conduct on the part of the respondents.

[4] We heard arguments by the parties on 2.10.2019 and reserved judgment to a date to be fixed. We have now reached a unanimous decision and this is our judgment.

[5] Section 28(4)(a) of the Civil Law Act is couched in the following

language:

> "(4)(a) Every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not."

[6] The appellant's claim for double rent was premised on this provision and also on section 8.42 read with section 8.43 of the three tenancy agreements which stipulate:

> "**Section 8.42 Yield Up**
>
> At the expiration or earlier determination (howsoever occurring) of the tenancy hereby created, to peaceably and quietly yield up the Demised Premises to the Landlord in accordance with the terms, conditions and covenants herein.
>
> **Section 8.43 Failure to Yield Up**
>
> Without prejudice to any other right the Landlord may have against the Tenant, if the Tenant upon the expiration or earlier determination of the tenancy hereby created fails, neglects and/or refuses to yield up and vacate the Demised Premises in accordance with Section 8.42 hereof, to pay to the Landlord as agreed liquidated damages a sum equivalent to double the amount of Monthly Rental or double the rental of the Demised Premises at the prevailing market rate, whichever shall be higher from the date of expiration or earlier determination of the tenancy hereby created to the date of actual delivery of vacant possession to the Landlord."

[7] It was a promise by the respondent to pay liquidated damages in the form of double rent if, after the expiry of the tenancies they failed,

neglected, or refused to peaceably and quietly yield up and vacate the demised premises. The term used in section 28(4)(a) of the Civil Law Act for any of these acts is "holding over".

[8] The chronology of events leading to the filing of the present action by the appellant is as follows. The appellant being the registered owner of a commercial building known as Rohas Perkasa ("the premises") had let out the premises to the 1st and 2nd respondents since 2000 and 2003 respectively. The 1st respondent occupied the 11th and 12th floors while the 2nd respondent occupied the 14th floor.

[9] The 11th floor tenancy expired on 30.4.2009, the 12th floor on 31.3.2009 and the 14th floor on 31.1.2011. Before the expiry of the tenancies, which was almost 10 years later, parties began negotiations for renewal of the tenancies.

[10] The negotiations went on even after the expiry of the tenancies and dragged on for more than two years during which the appellant expressly reserved its right to charge double rent and consistently reminded the respondents both before and after the expiry of the tenancies to make payment but the respondents did not do so.

[11] The respondents knew of the appellant's right to charge double rent and in fact pleaded for it to be waived, especially in the event of a renewal of the tenancies. This is evidenced by the correspondence between the parties and the meetings between the appellant and the respondents' representatives, Knight Frank Malaysia.

[12] The appellant also relied on section 17.06 and clause 16.7 of the tenancy agreements which bind the respondents. The terms stipulated in section 17.06 and clause 16.7 of the tenancy agreements are as follows:

> "No relaxation forbearance delay or indulgence by the Landlord in exercising any of its right, power or privilege or enforcing any of the terms of this Agreement or the granting of time by the Landlord

to the Tenant shall prejudice effect or restrict the rights and powers of the Landlord hereunder nor shall acceptance of rental by the Landlord be deemed to operate as a waiver by the Landlord of any right of action against the Tenant in respect of any breach of any of the Tenant's obligations hereunder or of any subsequent or any continuing breach. A single or partial exercise of any right, power or privilege shall not preclude any other or further exercise thereof or the exercise of any other right or privilege. The rights and remedies herein provided are cumulative and not exclusive of any rights or remedies provided by law."

[13] As it turned out, the negotiations for new tenancies failed. After the negotiations failed, the appellant by letter dated 19.8.2011 terminated the tenancies and gave notices to the respondents to quit and deliver vacant possession of the premises by 1.10.2011.

[14] The respondents did not challenge the termination nor the notices to quit but took an additional one month to vacate the premises by delivering vacant possession only on 31.10.2011 although their request for extension was refused by the appellant. In total, the 1st respondent held over for 30 months on the 11th floor and 31 months on the 12th floor. As for the 2nd respondent, it held over for 9 months on the 14th floor.

[15] After a full trial of the action, the learned High Court Judge dismissed the appellant's claim for double rent and allowed the respondents' counterclaims for a refund of the deposits.

[16] The appellant appealed to the Court of Appeal. On 13.4.2018, the Court of Appeal allowed the appeal in part and *inter alia* ordered the respondents to pay double rent but only for the period commencing from 1.10.2011 (expiry of the notices to quit dated 19.8.2011) up to 31.10.2011 (delivery of vacant possession) and not for the period commencing from the expiry of the tenancies on 31.3.2009, 30.4.2009

and 31.1.2011 up to the date of delivery of vacant possession on 31.10.2011 as claimed for by the appellant.

[17] The decision means that the appellant is only entitled to 30 days of double rent instead of 30 months if the rent is to be calculated from the date of expiry of the tenancies up to the date of delivery of vacant possession.

[18] The appellant's contention in support of its appeal was as follows:

(a) after the expiry of the tenancies, the respondents were tenants "holding over" within the meaning of section 28(4)(a) of the Civil Law Act and had no right to remain in occupation of the premises.

(b) a reading of section 28(4)(a) of the Civil Law Act shows that the court does not retain any discretion and cannot refuse to make the award of double rent (or double the value of rent) when the respondents were holding over; and

(c) there is no requirement for the appellant to show wilful conduct or contumacy on the part of the respondents to render them liable to double rent.

[19] The respondents on the other hand argued that the appellant was not entitled to charge double rent as the words "holding over" in section 28(4)(a) of the Civil Law Act refers only to cases of wrongful holding over and not to cases where the act of remaining in the premises is with the consent of the landlord pending negotiations for fresh tenancies. It was argued that to entitle the appellant to charge double rent, it must prove wrongful or contumacious conduct on the part of the respondents.

[20] It was contended that the phrase "holding over" in section 28(4)(a) of the Civil Law Act must not be given a purely literal interpretation as the language of the section is not plain and unambiguous. According to

learned counsel, it must be interpreted by adopting the purposive approach. We presume learned counsel was referring to section 17A of the Interpretation Acts 1948 and 1967 which provides:

> "17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

[21] But it is also a principle of great antiquity that where the language of the statute is clear, effect must be given to it and no outside consideration can be called in aid to find that intention: *See Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd and other appeals* [2018] 3 CLJ 557 and *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501; [2006] 3 CLJ 177.

[22] As Higgins J said in *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* [1920] 28 CLR 129:

> "The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning even if we think the result to be inconvenient, impolite or improbable."

[23] The respondents contended that since double rent is a form of damages or penal sum, there must be some form of wrongful holding over of the premises (as opposed to rightfully holding over with the

consent of the landlord) to justify the charging of double rent by the landlord.

[24] Learned counsel for the appellant on the other hand submitted that since the word "shall" is used in section 28(4)(a) of the Civil Law Act, the Court has no discretion but to impose double rent if the tenant holds over after the expiry of the tenancy. It was argued that the Court does not retain any discretion and cannot refuse to make an award of double rent (or double the value of the land) once it is established that the tenancy has expired and the tenant continues to be in occupation of the premises.

[25] We understand the contention to mean that the tenant's liability to pay double rent under section 28(4)(a) of the Civil Law Act is strict, meaning to say the tenant is liable to pay double rent irrespective of whether the tenant has any valid reason to hold over or otherwise after the expiry of the tenancy and that once the landlord has exercised his option to charge double rent, the Court has no discretion but to allow the claim for double rent.

[26] First of all, the discretion to charge double rent is vested in the landlord and not the Court. The Court's role in a dispute under section 28(4)(a) of the Civil Law Act is merely to determine whether the option to charge double rent had been properly and lawfully exercised by the landlord. If the discretion had been properly and lawfully exercised by the landlord, the Court has no discretion but to allow the claim for double rent. If, on the other hand, the discretion had not been properly and lawfully exercised, the landlord is not entitled to charge double rent and the Court will rule accordingly.

[27] In cases like the present, where the tenancy agreements provide for payment of double rent, such rent is chargeable not only by the terms of the agreements but more importantly it is chargeable by operation of law and in this regard section 28(4)(a) provides that it continues to be chargeable *"until possession is given up"* by the tenant.

[28] Learned counsel for the respondents stressed the point that the Courts below had made concurrent findings of fact that the appellant had consented to the respondents remaining in the premises after the expiry of the tenancies and had accepted monthly rentals from the respondents without any complaint and that by such consent and acceptance of the monthly rentals, a tenancy at will was created at law between the appellant and the respondents, citing *Zakaria bin Hanafi v. Ibrahim bin Hanafiah & Ors* [1999] 4 MLJ 568; *R v. Bhupal Prasad v. State of Andhra Pradesh & Ors* [1996] AIR SC 140; *Erismus Housing Ltd v. Barclays Wealth Trustees (Jersey) Ltd* [2014] EWCA Civ 303.

[29] It follows, according to counsel, that the respondents had the right to remain in the premises in their capacity as tenants at will. The meaning and creation of a tenant at will was discussed in the Court of Appeal case of *Zakaria bin Hanafi* (*supra*) where NH Chan JCA delivering the judgment of the Court said:

> "See *Cheshire and Burn's Modern Law of Real Property* (15th ed, 1994) for the meaning of "tenancy at will" according to the common law. It states at p 383:
>
> > "A tenancy at will may be created either expressly (eg *Manfield & Sons Ltd v. Botchin* [1970] 2 QB 612…) or by implication, as for example, where a tenant, with the consent of his landlord, holds over after the expiry of the lease; or where he goes into possession under a contract for a lease or under a void lease;…or a prospective tenant goes into possession during negotiations for a lease (*British Airways Board v. Bodywright Ltd* (1971) 220 EG 651."

[30] The learned judge then went on to explain the difference between a tenant at will and a tenant at sufferance at page 574:

> "A tenancy at will is quite unlike a tenancy at sufferance. A tenant

> at sufferance is a person who continues in possession and wrongfully holds over, without the consent of the landlord, after the term has come to an end. 'Such a person differs from a tenant at will because his holding over after the determination of the term is a wrongful act, and he differs from a disseisor in that his original entry upon the land was lawful': *Chesire and Burn's Modern Law of Real Property* at p 384."

[31] The difference between the two concepts was also explained by the Supreme Court of India in *Bhupal Prasad* (*supra*) in the following terms:

> "8. Tenant at sufferance is one who comes into possession of land by lawful title, but who holds it by wrong after the termination of term or expiry of the lease by efflux of time. The tenant at sufferance is, therefore, one who wrongfully continues in possession after the extinction of a lawful title…The expression of "holding over" is used in the sense of retaining possession. A distinction should be drawn between a tenant continuing in possession after the determination of the lease, without the consent of the landlord and a tenant doing so with the landlord's consent. The former is called a tenant by sufferance in the language of the English Law and the latter class of tenants is called a tenant holding over or a tenant at will…The tenancy on sufferance is converted into a tenancy at will by the assent of the landlord, but the relationship of the landlord and tenant is not established until the rent was paid and accepted. The assent of the landlord to the continuance of the tenancy after the determination of the tenancy would create a new tenancy."

[32] It was thus argued that since the respondents were holding over with the consent of the appellant, they were tenants at will and therefore not liable to pay double rent for the entire period of their holding over after the expiry of the tenancies up to the date of delivery of vacant possession.

[33] Given the nature of the dispute between the parties, our task is to determine the true meaning to be given to the words "holding over" in section 28(4)(a) of the Civil Law Act. We were advised by learned counsel for the appellant that the issue arose because of the diverse reasonings given by the former Federal Court in three cases, namely (1) *Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co Ltd* [1983] 1 MLJ 65 *("Panicka")*, (2) *Wee Tiang Yap v. Chan Chan Brothers* [1986] 1 MLJ 47 *("Wee Tiang Yap")* and (3) *Soong Ah Chow and Anor v. Lai Kok Cheng* [1986] 1 MLJ 42 *("Soong Ah Chow")*.

[34] According to counsel, the three diverse decisions of the former Federal Court in the three cases offered varying views which flowed from different facts and which resulted in varying remedies in the decisions, thereby throwing the law in a state of flux.

[35] Learned counsel for the respondents submitted otherwise, arguing that the law on the requirement to establish "wilful and contumacious" holding over on the part of the tenant to justify a claim for double rent under section 28(4)(a) of the Civil Law Act has been more than settled by the same three cases that learned counsel for the appellant referred to.

[36] On the authority of *Dalip Bhagwan Singh v. Public Prosecutor* [1998] 1 MLJ 1, we were urged upon not to depart from these three decisions. In that case Peh Swee Chin FCJ delivering the judgment of the present Federal Court said:

> "In Malaysia, the Federal Court and its forerunner, ie the Supreme Court, after all appeals to the Privy Council were abolished, has never refused to depart from its own decision when it appeared right to do so: see the above-mentioned Federal Court's cases on the question of burden of proof at the close of the prosecution's case.
>
> Though the practice Statement (Judicial Precedent) 1966, of the

> House of Lords is not binding at all on us, it has indeed and in practice been followed, though such power to depart from its own previous decision has been exercised sparingly sparingly also. It is right that we in the Federal Court should have this power to do so but it is suggested that it should be used very sparingly on the important reason of the consequences of such overruling involved for it cannot be lost on the mind of anybody that a lot of people have regulated their affairs in reliance on a ratio decidendi before it is overruled. In certain circumstances, it would be far more prudent to call for legislative intervention. On the other hand, the power to do so depart is indicated (subject to a concurrent consideration of the question of the consequences), when a former decision which is sought to be overruled is wrong, uncertain, unjust or outmoded or obsolete in the modern conditions."

[37] We were also reminded by counsel that if the interpretation given by the appellant on section 28(4)(a) of the Civil Law Act is to be accepted by this Court, then tenants, the great majority of whom are likely to be of limited means (as otherwise they would own homes of their own), may inadvertently find themselves exposed to double rent despite holding over with the consent of their landlords. That, according to counsel, cannot be just.

[38] For context and to provide a clearer picture of the issues in contention, we shall deal with the three cases in turn to see if indeed the former Federal Court had, as contended by learned counsel for the appellant, finally decided that wilful and contumacious conduct on the part of the tenant must be proved by the landlord to entitle him to charge double rent under section 28(4)(a) of the Civil Law Act. Particular attention needs to be paid to the facts of each case which, as will be seen, are not entirely dissimilar but resulting in different applications of section 28(4)(a).

[39] In *Panicka*, the landlord had made additions and alterations to an

old two-storey building known as 25 Jalan Ah Fook, Johor Bahru and converted it into two premises No. 25 and 25A. The ground floor became No. 25 and the first floor No. 25A. The appellant became tenant of No. 25A at a monthly rental of $300 and No. 25A at a monthly rental of $680.

[40] He was served with notices to quit both premises. After the expiry of the notices, he failed to quit. The landlord obtained judgment for possession of No. 25A in the Sessions Court and the appeal to the High Court was dismissed. The landlord applied for possession of premise No. 25 in the High Court and the learned trial judge gave judgment in its favour.

[41] The learned trial judge allowed for double rent to be charged by the landlord, but only to be calculated from August 1, 1979 and not from the date of the notices to quit, that is March 1, 1971 as claimed by the landlord. There was therefore a loss of about seven and a half years of chargeable double rent incurred by the landlord. It is not clear from the report though what the date August 1, 1979 actually refers to.

[42] Aggrieved by the decision, the landlord appealed to the former Federal Court. It was held by a majority decision (Lee Hun Hoe CJ (Borneo) and Yusoff Mohamed J) that the learned judge was correct in holding that on the facts the landlord should be given double rent only from August 1, 1979 and not from March 1, 1971, the expiry date of the notices to quit.

[43] Lee Hun Hoe CJ (Borneo) who wrote the majority judgment applied the English case of *Crook v Whitbread* 88 LJKB 959 (reported on September 27, 1919) and held as follows at page 68:

> "In *Crook v. Whitbread* 88 LJKB 959 the tenant continued to be in occupation after the expiration of the notice to quit and tendered the quarter's rent due but the landlord refused it. Subsequently, the

landlord brought an action claiming double value under the Landlord and Tenant Act, 1730 and alternatively for use in occupation. Held, that, having regard to the provisions of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 which contemplated that so long as the tenant continued to pay the rent agreed and to perform the conditions of the tenancy, he should not be turned out of occupation, the defendant could not be said to be holding over contumaciously and was therefore not liable for double value under the 1730 Act. In dismissing the appeal from the decision of the County Court Judge Avory, J. referred to four cases and said at page 961:

> "In all those cases it held that there must be something in the nature of contumacy on the part of the tenant in holding over to render him liable to double value."

Although the provisions of section 28(4)(a) of the Civil Law Act may not be the same as the provisions of the Landlord and Tenant Act, 1730, *Crook v. Whitbread* 88 LJKB 959 does support the view of the Learned Judge, that is, to avoid double rent if the tenant's conduct in holding over the premises had been unreasonable. He made a decision based on the particular facts of the case. I see no reason to interfere with the exercise of his discretion."

[44] It is not entirely clear what the learned CJ (Borneo) meant to say when he said that *Crook v. Whitbread* supported the trial judge's view that double rent could be avoided if the tenant's conduct in holding over the premises had been *"unreasonable"*. This is what the learned trial judge himself had said in his judgment:

> "In terms of damages for the holding over of the premises after the tenancy has been lawfully terminated, the plaintiffs prayed for a double-rent and not mesne profit. On behalf of the plaintiffs it was submitted that the plaintiffs have the right to claim double-rent

> under section 28(4)(a) of the Civil Law Act, 1956. I found that double-rent might be awarded if the conduct of the defendant in holding over the premises had been unreasonable. And since after the judgment of the Federal Court and the undertaking given by the solicitors for the defendant to vacate premises No. 25A and No. 25 simultaneously, the defendant on July 31, 1979 had failed to do so, I allowed double-rent to be chargeable as from August 1, 1979 till date of delivery of vacant possession by the defendant."

[45] What the learned trial judge was saying was that the charging of double rent by the landlord would have been justified if the tenant's conduct in holding over had been unreasonable, which he found not to be the case in the case before him, hence his decision to allow double rent to be chargeable only from August 1, 1979 and not from the date of expiry of the notice to quit, which was March 1, 1971.

[46] In his judgment, the learned CJ (Borneo) had also made the following pertinent observations:

> "The respondents' claim is actually not rent but a penal sum which the former tenant has to pay for the inconvenience and loss he causes the landlord in refusing to give vacant possession of the premises on the determination of the tenancy. The provision, being penal in nature, must be construed with some degree of stricture."

[47] The consequence that flows from the former Federal Court's decision in *Panicka* is that the charging of double rent could be avoided if the conduct of the tenant in holding over had been reasonable. This requires a determination of the question whether an act in a given situation amounts to reasonable conduct or otherwise and whether unreasonable conduct can be equated with contumacious conduct.

[48] The English Court in *Crook v. Whitbread* interpreted the word "wilfully" in section 1 of the Landlord and Tenant Act, 1730 ("the 1730

Act") to mean *"wilfully and contumaciously*" and not merely by mistake or under a fair claim of right, which means that in England, if the holding over by the tenant is by mistake or under a fair claim of right, the landlord is not entitled to charge double rent.

[49] We are unable to find any legal definition for the word 'contumacious' used in *Crook v. Whitbread*. The *Concise Oxford English Dictionary* (11th Edition, Revised) defines it to mean "stubbornly or wilfully disobedient to authority" whilst the *Merriam-Webster Dictionary* defines it to mean "stubbornly disobedient: rebellious". In the context of the leave question before us, it will not be off the mark, we think, to equate the word with stubbornness on the part of the tenant.

[50] The 1730 Act which the Court in *Crook v Whitbread* referred to contains, in section 1, the following provision:

> "[I] **Persons holding over Lands, &c. after Expiration of Leases, to pay double the yearly Value**
>
> In case any Tenant or Tenants for any Term of Life, Lives or Years, or other Person or Persons, who are or shall come into Possession of ant Lands, Tenements or Hereditaments, by, from or under, or by Collusion with such Tenant or Tenants, shall ***wilfully hold over*** any Lands, Tenements or Hereditaments, after the Determination of such Term or Terms, and after Demand made, and Notice in Writing given, for delivering the Possession thereof, by his or their Landlords or Lessors, or the Person or Persons to whom the Remainder or Reversion of such Lands, Tenements or Hereditaments shall belong, his or their Agent or Agents thereunto lawfully authorised; then and in such Case such Person or Persons so holding over, shall, for and during the Time he, she and they shall so hold over, or keep the Person or Persons intitled, out of Possession of the said Lands, Tenements, and Hereditaments, as aforesaid, pay to the Person or Persons so kept out of Possession,

their Executors, Administrators or Assigns, at the Rate of double the yearly value of the Lands, Tenements and Hereditaments so detained, for so long time as the same detained, to be recovered in any of His Majesty's Courts of Record, by Action of Debt,…"

(emphasis added)

[51] For a quick comparison of this section with section 28(4)(a) of the Civil Law Act, we reproduce again section 28(4)(a):

"(4)(a) Every tenant ***holding over*** after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not."

(emphasis added)

[52] Other than the fact that the word "wilfully" in section 1 of the 1730 Act is missing in section 28(4)(a) of the Civil Law Act, the other major differences between the two provisions are these:

(i) while section 28(4)(a) speaks of *"double the amount of rent"* and *"double the value during the period of detention of the land or premises so detained"*, section 1 of the 1730 Act only speaks of *"double the yearly value of the Lands, Tenements and Hereditaments so detained."* There is no mention of double rent; and

(ii) while section 1 of the 1730 Act requires a demand to be made and written notice to be given for delivery of possession, there is no such requirement in section 28(4)(a) of the Civil Law Act.

[53] What is envisaged by section 1 of the 1730 Act is that in order to

entitle the landlord to charge double the yearly value of the land (as opposed to rental), he must prove the yearly value of the land and have it assessed and damages duly ascertained for payment by the former tenant.

[54] There is no such burden on the landlord under section 28(4)(a) of the Civil Law Act where double rent is chargeable at his option. All that he needs to prove to entitle him to charge double rent is to show that the tenant was "holding over" after the expiry of the tenancy.

[55] The requirement of "wilfully holds over" as found in section 1 of the 1730 Act can also be found in section 138 of the Property Law Act 1974 of Queensland, Australia ("the Australian Act") and section 58 of the Commercial Tenancies Act, 1990 of Ontario, Canada ("the Canadian Act"). Section 138 of the Australian Act provides as follows:

> "**138. Tenants and other persons holding over to pay double the yearly value**.
>
> Where any tenant for years, including a tenant from year to year or other person who is or comes into possession of any land by, from or under or by collusion with such tenant, **wilfully holds over** any land after –
>
> (a) determination of the lease or term; and
>
> (b) after demand made and notice in writing has been given for the delivery of possession of the land by the lessor or landlord or the person to whom the remainder or reversion of such land belongs or the person's agent lawfully authorised:

then the person so holding over shall, for and during the time the person so holds over or keeps the person entitled out of possession of such land, be liable to the person so kept out of possession at the rate of double the yearly value of the land so detained for so long as the land shall have

been so detained, to be recovered by action in any court of competent jurisdiction."

(emphasis added)

[56] Section 58 of the Canadian Act is almost similar in terms:

> "**Penalty of double value for overholding**
>
> 58. Where a tenant for any term for life, lives or years, or other person who comes into possession of any land, by, from, or under, or by collusion with such tenant, **wilfully holds over** the land or any part thereof after the determination of the term, and after notice in writing given for delivering the possession thereof by the tenant's landlord or the person to whom the remainder or reversion of the land belongs or the person's agent thereunto lawfully authorised, the tenant or other person so holding over shall, for and during the time the tenant or the other person so holds over or keeps the person entitled out of possession, pay to such person or the person's assigns at the rate of double the yearly value of the land so detained for so long as it is detained, to be recovered by action in any court of competent jurisdiction, against the recovering of which penalty there is no relief."
>
> (emphasis added)

[57] Thus, unlike the Australian and Canadian positions, our legislature had chosen not to follow the English position by omitting the word "wilfully" in section 28(4)(a) of the Civil Law Act. So, instead of requiring the act of holding over to be "wilful" as in section 1 of the 1730 Act, in section 138 of the Australian Act and in section 58 of the the Canadian Act, section 28(4)(a) of the Civil Law Act requires mere proof of "holding over" to entitle the landlord to exercise his option to charge double rent.

[58] There is no requirement under section 28(4)(a) of the Civil Law Act for the holding over to be "wilful" or, in the words of *Crook v. Whitbread*, "wilfully and contumaciously" which as we said can also be equated with stubbornness.

[59] On the face of it, it appears that the legislature had opted for a stricter and clearer approach in dealing with former tenants who hold over after the expiry of the tenancies. Wan Suleiman FJ in his dissenting judgment in *Panicka* disagreed with the majority that wilful and contumacious conduct on the part of the tenant was required to entitle the landlord to charge double rent. This was how His Lordship explained his position:

> "I am of the view that respondents are correct in saying that this leaves the Court with no discretion. At the option of the landlord the Judge will have to award double rent from March 1, 1971, the day on which the notice to quit expired.
>
> In the face of such clear statutory provision as above, the requirement of contumacy on the part of the tenant in holding over in *Crook v Whitbread* 88 LJKB 959 cannot, in my view, be applicable."

[60] The learned judge's concern was more with the word "contumacy" than with the word "wilful". The words "holding over" in section 28(4)(a) of the Civil Law Act is not defined by the Act. *Black's Law Dictionary* (Ninth Edition) defines it to mean:

> "1. A tenant's action in continuing to occupy the leased premises after the lease term has expired. Holding over creates a tenancy at sufferance, with the tenant referred to as a *holdover*."

[61] The same dictionary defines *"tenant at sufferance"* to mean:

> "A tenant who has been in lawful possession of property and

> wrongfully remains as a holdover after the tenant's interest has expired. The tenant may become either a tenant at will or a periodic tenant. – Also termed *permissive* tenant."

[62] Going by the meaning given to the words "holding over", it does not seem to matter if the word "wilful" is there in section 28(4)(a) or otherwise, for holding over simply means an act of continuing to be in occupation of the premises after the expiry of the tenancy. What matters is the reason for the holding over.

[63] Learned counsel for the respondents referred us to the decision of the Singapore Court of Appeal in *Lee Wah Bank Ltd v. Afro-Asia Shipping Co (Pte) Ltd* [1992] 1 SLR(R) 740 where it was held that the expression "holding over" in section 19(4) of the Singapore Civil Law Act which is *in pari materia* with section 28(4)(a) of our Civil Law Act requires an intention on the part of the tenant to refuse to deliver up the demised premises with the knowledge that he has no right to remain in possession.

[64] The words *"until possession is given up by him"* in section 28(4)(a) of the Civil Law Act is not without significance when read together with the right of the landlord to charge double rent. It contemplates a situation where the tenant refuses to deliver up vacant possession without any just cause or valid reason after the expiry of the tenancy.

[65] The decision in *Crook v. Whitbread* which the majority in *Panicka* relied on also turned on section 1(3) of the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 ("the 1915 Act") which provides:

> "No order for the recovery of possession of a dwelling house which this Act applies for the ejectment of a tenant therefrom shall be made so long as the tenant continues to pay rent at the agreed rate

> as modified by this Act and performs the other conditions of the tenancy."

[66] It was in the context of the above statutory provision that the Court in that case held that the landlord's claim for double value failed, for the reason that the tenant was holding over under a fair claim of right and not contumaciously within the meaning of section 1 of the 1730 Act. The following passage in the judgment bears this out:

> "It has been held from the early times that that statute in the use of the word "wilfully" meant "wilfully and contumaciously," and not merely by mistake or under a fair claim of right: (*Wright v. Smith*, 5 Esp. 203; *Soulsby v. Neving*, 9 East, 310; *Swinfen v. Bacon*, 6 H. & N, 846; *Hirst v. Horn*, 6 M. & W. 393). In all those cases it was held that there must be something in the nature of contumacy on the part of the tenant in holding over to render him liable to double value."

[67] The "fair claim of right" here necessarily refers to the protection against ejectment accorded to the tenant by section 1(3) of the 1915 Act. Thus, so long as the tenant continues to pay rent at the agreed rate and performs the other conditions of the tenancy, no order for recovery of possession could be made by the court.

[68] This was the reason why it was held in *Crook v Whitbread* that the landlord's claim for use and occupation failed, because to allow it would defeat the purpose and object of the 1915 Act, which was passed to protect from eviction tenants to which the 1915 Act applied, so long as they continued to pay their rent and to perform the other obligations of the tenancy. As far as we know, we do not have such legislation as the 1915 Act.

[69] We now come to *Wee Tiang Yap*, reported three years after *Panicka*. In that case, the appellant's father Wee Phor Tin claimed vacant

possession of premises in Kota Bahru from the respondent, alleging that they were trespassers. The respondents were previously the tenants of the premises but Wee Phor Tin had issued a notice to quit to the respondents, the notice expiring on March 1, 1976.

[70] It subsequently appeared that Wee Phor Tin was no longer the registered owner of the premises at the date of the filing of the writ as he had transferred it to his son, the appellant. It was also agreed that the respondents had been paying rent to Wee Phor Tin right up to August 1979. Before judgment, Wee Phor Tin died and the appellant continued the action as representative of his estate.

[71] The learned trial judge held that on the death of a temporary occupation landowner his estate had no right of any kind to the land. He also held that section 116 of the Evidence Ordinance cannot prevent a tenant from contending that neither the deceased nor the widow had any title to the land. The learned judge therefore dismissed the claim and ordered that the sum of $16,800 be paid to the respondent under the counterclaim.

[72] On appeal to the former Federal Court, it was held, *inter alia*, that since the respondents had wilfully remained on the premises after the expiry of the period of notice to quit on March 1, 1976, the appellant was entitled to obtain damages for trespass in the form of double rent chargeable from the expiry of the notice to quit. The panel consisted of Wan Suleiman FJ, Seah FJ and Hashim Yeop A. Sani FJ. Wan Suleiman FJ in his judgment at page 49 referred to *Panicka* and said:

> "Our attention has also been drawn to the decision of this Court in *Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co Ltd* [1983] 1 MLJ 65 in particular the dissenting judgment therein.
>
> We note that the majority judgment was based on an English authority *Crook v. Whitbread* 88 LJKB 959. Under section 1 of the

English Landlord and Tenant Act, 1730 doing "wilfully" is a requirement. Our section does not contain that requirement. However, on the facts of the case in the present appeal, even if a wilful act is required, the respondents had wilfully remained on the premises after the expiry of the period of notice."

[73] It was a reiteration of His Lordship's dissenting view in *Panicka* that wilful and contumacious conduct on the part of the tenant is not a requirement under section 28(4)(a) of the Civil Law Act but that if wilful conduct was required to be proved, the evidence of wilfulness was there to entitle the landlord to charge double rent.

[74] Significantly, Seah FJ and Hashim Yeop A. Sani FJ who wrote separate judgments on other issues relating to estoppel did not express their disagreement with the view expressed by Wan Suleiman FJ. It was therefore not quite correct for learned counsel for the respondents to say that Wan Suleiman FJ's view does not represent the view of the former Federal Court.

[75] Then came *Soong Ah Chow*, reported in the same year as *Wee Tiang Yap*. By a lease executed on October 3, 1961 between the landlord and the tenants, a tenancy was created for a term of 18 years from August 1, 1961 at a yearly rental of $1,800 payable at a rate of $150 per month.

[76] The said lease expired by effluxion of time on July 31, 1979. As from August 1, 1979 all tenders of rental by the tenants were consistently refused by the landlord and the tenants were asked to vacate the premises. On November 3, 1981 the landlord obtained a Certificate of Decontrol under section 23(1)(a) of the Control of Rent Act 1966 and served copies of the certificate to the tenants. On November 26, 1981 the landlord also served a notice to quit on the tenants.

[77] In an action brought by the landlord against the tenants, the learned trial judge directed the tenants to render vacant possession of the

premises and to pay double rent from August 1, 1979, that is, the date that the trial judge held them to be trespassers. The tenants appealed to the former Federal Court. It was held as follows:

(1) Because of the refusal of the landlord to accept any rental from August 1, 1979 no tenancy was created between the parties as from that date. There was therefore no tenancy existing between the tenants and the landlord after July 31, 1979 in respect of the premises; and

(2) Since the trial judge had found the tenants to be trespassers from August 1, 1979 the order to impose double rental from that date was correctly made.

[78] It is pertinent to note that the tenants in *Soong Ah Chow* were found to be trespassers from August 1, 1979, i.e. the day after the expiry of the tenancy on July 31, 1979 and therefore liable to pay double rent from that date although the notice to quit was only served on November 26, 1981, which was almost two years down the road. Hashim Yeop A. Sani FJ in delivering the unanimous decision of the Court also referred to *Panicka* and said:

> "Section 28(4)(a) of the Civil Law Act 1956 provides that every tenant holding over after the determination of his tenancy shall be chargeable, at the option of the landlord, with double rental until possession is given up by him. The effect of section 28(4)(a) was examined in *Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co. Ltd*. The majority judgment held the view that the court has discretion when to impose double rent. It seems to me that the legislature's choice of words "shall be chargeable" clearly implies some discretion. But a more difficult question is the extent of the discretion. In *Panicka's* case the trial Judge had found that the parties had come to some sort of understanding and considered it to be unconscionable for the respondents to claim double rent from

> the expiry of the notice. The majority judgment saw no reason to interfere with the exercise of this discretion. In the present case, since the trial Judge had found the appellants to be trespassers from August 1, 1979 the order to impose double rental from that date was correctly made."

[79] Was there diversity of opinion by the former Federal Court in the three cases as submitted by learned counsel for the appellant? We must admit that in a way there was, in the sense that the former Federal Court was not unanimous in deciding whether contumacious conduct on the part of the tenant is required to be established before the landlord could exercise his option to charge double rent under section 28(4)(a) of the Civil Law Act.

[80] Whilst *Panicka* by majority decided, following *Crook v Whitbread* that wilful and contumacious conduct on the part of the tenant is required to justify the charging of double rent by the landlord under section 28(4)(a) of the Civil Law Act, both *Wee Tiang Yap* and *Soong Ah Chow* did not consider proof of contumacious conduct to be necessary to entitle the landlord to charge double rent.

[81] *Panicka*, it will be noted, did not decide that it was unlawful for the landlords to charge double rent from the date of expiry of the notice to quit. The reason why the majority decided the way they did, i.e. to disallow the landlords' claim for double rent from the expiry of the notice to quit was because they agreed with the learned trial judge that it was *"unconscionable"* for the landlords to do so. The learned CJ (Borneo) explained thus:

> "Damages can only be recovered as from the determination of the lease, whatever form it may take, whether by effluxion of time, notice to quit or by re-entry under a proviso for that purpose. In our case the conduct of the parties were such that the learned Judge had to decide as to the best course to take in the absence of any

> authority to guide him. The learned Judge was of the view that the parties had come to some sort of understanding and considered it to be unconscionable for respondents to claim double rent from the expiry of the notice."

[82] As for *Wee Tiang Yap*, the charging of double rent from the date of expiry of the notice to quit (March 1, 1976) was held to be correct although the tenant had paid rent right up to August 1979, a period of more than two years after the expiry of the notice to quit. This can be taken to mean that double rent is chargeable even where the tenant continues to pay rent after the expiry of the notice to quit.

[83] *Soong Ah Chow* is more straightforward. The reason why double rent was held to be correctly made by the High Court was because the tenants were trespassers after the landlord refused to accept tenders of rental after the expiry of the tenancy and had asked the tenants to vacate the premises. The *ratio decidendi* of the case is that double rent is chargeable if the landlord has made his intention clear to the tenant that he does not wish to renew the tenancy and will not allow the tenant to hold over after the expiry of the tenancy.

[84] To recapitulate, *Panicka* was decided based on the reasonableness or otherwise of the tenant's conduct (although proof of contumacious conduct was required), *Wee Tiang Yap* on expiry of the notice to quit and *Soong Ah Chow* on refusal by the landlord to renew the tenancy and to allow the tenant to hold over after expiry of the tenancy.

[85] The factual matrix of the case before us does not fit in with the factual bases of any of these cases. In the case before us, there were negotiations for renewal of the tenancies before and after the expiry of the tenancies and the appellant did not ask the respondents to vacate the premises while negotiations were in progress. All the appellant did was to reserve its right to charge double rent and to remind the respondents to pay double rent.

[86] We do not think there is an alternative to the argument that after the expiry of a tenancy, there is no tenancy in existence between the parties as the tenancy has come to an end and it is then not a matter of right for the tenant to hold over without the landlord's consent and without paying double rent if the tenant has decided to charge double rent pursuant to section 28(4)(a) of the Civil Law Act.

[87] On expiry of the tenancy, section 28(4)(a) kicks in to give the landlord the right, at his option, to charge double rent and the double rent continues to be chargeable until possession is given up by the tenant who holds over without the landlord's consent. The landlord may decide not to charge double rent at all or even allow the tenant to hold over for free after the expiry of the tenancy but that is entirely a matter for the landlord to decide.

[88] The legislative scheme of section 28(4)(a) of the Civil Law Act is clearly to give the landlord the right of option to charge double rent if the tenant fails or refuses to deliver vacant possession of the demised premises after the expiry of the tenancy. The right is given by statute and can only be taken away by statute.

[89] But that said, it does not mean that holding over *simpliciter* is all that the landlord needs to prove in a claim for double rent under section 28(4)(a) of the Civil Law Act. To entitle the landlord to charge double rent, there must be failure or refusal by the tenant to give up possession after being told to do so by the landlord. This has to be so because the landlord's claim is actually not rent but a penal sum which the former tenant has to pay for the inconvenience and loss the tenant causes the landlord in refusing to give up possession: *Panicka (supra).*

[90] At the risk of repetition, it needs to be emphasized that the Court's duty in a claim under section 28(4)(a) of the Civil Law Act is merely to determine whether the option to charge double rent had been exercised properly and lawfully by the landlord. The Court is not concerned with

contumacious conduct on the part of the tenant who holds over. Even if the tenant is not guilty of contumacious conduct, the tenant is still liable to pay double rent if the landlord has decided to charge double rent and does not consent to the tenant's holding over and has asked the former tenant to vacate the premises.

[91] Therefore, the question in the present appeal is not whether the respondents were holding over contumaciously or otherwise after the expiry of the tenancies. The question is whether they were holding over with or without the appellant's consent, express or implied by conduct. We do not think section 28(4)(a) of the Civil Law Act can be construed to mean that double rent is chargeable irrespective of whether consent to hold over has been given by the landlord or otherwise.

[92] On the facts of the present case, it is clear that the respondents' holding over was with the tacit approval of the appellant. This was also the concurrent findings of fact by both courts below and we see no reason to interfere with such findings of fact.

[93] One feature of the case that stands out is that the appellant did not make its intention clear to the respondents that it did not wish to renew the tenancies and wanted the respondents to give up possession after the expiry of the tenancies. In fact, by agreeing to negotiate for renewal of the tenancies, the appellant had evinced an intention to renew the tenancies subject to finalisation of the terms. Nor did the appellant make it clear to the respondents that it would not allow the respondents to hold over without paying double rent while negotiations for renewal of the tenancies were ongoing.

[94] Crucially, throughout the period of negotiation for renewal of the tenancies, the appellant accepted tenders of rent from the respondents without any complaint and did not issue any notice to quit, not until after the failure of the negotiations, and this too was done some two years after the expiry of the tenancies. Therefore, the appellant by conduct had

waived its right to charge double rent.

[95] This is not a typical case where the tenant refused to quit come what may after the expiry of the tenancy. The fact is, when the notices to quit were finally issued by the appellant after the failure of the negotiations for renewal of the tenancies, the respondents willingly delivered vacant possession, albeit late by one month. So, when the respondents were asked to leave after negotiations for renewal of the tenancies failed, they left without kicking up a fuss.

[96] The fact that the appellant reserved its right to charge double rent and had consistently reminded the respondents to pay double rent during the period of negotiation for renewal of the tenancies is neither here nor there as the appellant continued to accept tenders of rental by the respondents and, we repeat, did not at any time ask the respondents to vacate the premises as was done by the landlords in *Panicka*, *Wee Tiang Yap* and *Soong Ah Chow*.

[97] Clearly, therefore, the respondents were tenants at will and not tenants at sufferance as rightly submitted by learned counsel for the respondents and were not trespassers during the period the parties were negotiating for renewal of the tenancies.

[98] The respondents only became trespassers from the date of expiry of the notices to quit on 1.10.2011 up until the date they gave up possession of the premises on 31.10.2011. The Court of Appeal was therefore correct in ordering double rent to be charged only for the period commencing from the date of expiry of the notice to quit up until the date of delivery of vacant possession.

[99] For all the reasons aforesaid, our answer to the leave question is in the negative, that is, in relation to a claim for double rent under section 28(4)(a) of the Civil Law Act 1956, there is no requirement on the landlord to show contumacious conduct on the part of the tenant

holding over to render the tenant liable to pay the said double rent.

[100] Although our answer to the leave question is in the appellant's favour, the appeal must stand dismissed as the respondents were holding over with the appellant's consent and therefore in lawful possession of the premises for the period between the date of expiry of the tenancies and the date of expiry of the notices to quit. Accordingly, we dismiss the appeal and affirm the decision of the Court of Appeal. We award costs to the respondents subject to payment of the allocator fee.

Dated: 26 NOVEMBER 2019

ABDUL RAHMAN SEBLI
Judge
Federal Court of Malaysia

Counsel:

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