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**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA SIVIL)**

10

RAYUAN SIVIL NO:M-02-628-1998

ANTARA

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**J.R. LINCKS EDUCATIONAL PERAYU
CONSULTANTS SDN. BHD.**

DAN

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GOH & SONS ENTERPRISE SDN. BHD. RESPONDEN

**(DALAM MAHKAMAH TINGGI MALAYA DI MELAKA
GUAMAN SIBIL NO:22-6-TAHUN 1995**

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ANTARA

**J.R. LINCKS EDUCATIONAL PLAINTIF
CONSULTANTS SDN. BHD.**

DAN

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GOH & SONS ENTERPRISE SDN. BHD. DEFENDAN

**(DALAM MAHKAMAH SESYEN DI MELAKA
SAMAN NO:52-211-TAHUN 1995**

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ANTARA

GOH & SONS ENTERPRISE SDN. BHD. PLAINTIF

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DAN

**J.R. LINCKS EDUCATIONAL DEFENDAN
CONSULTANTS SDN. BHD.**

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**(Yang dicantumkan Menurut Perintah Mahkamah Tinggi Melaka
bertarikh 1hb November 1996)**

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CORAM:

Y.A. DATO' ABDULL HAMID EMBONG, JCA
Y.A. DATO' NIHRUMALA SEGARA A/L M.K. PILLAY, JCA
Y.A. DATO' WIRA ABU SAMAH BIN NORDIN, JCA

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JUDGMENT

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The appellant (J.R.LINCKS EDUCATIONAL CONSULTANTS SDN. BHD.) and the respondent (GOH & SONS ENTERPRISE SDN. BHD.), were respectively, the plaintiff and defendant in Melaka High Court Civil Suit No. 22-6-1995 filed on 23/1/95, whereas the respondent was the plaintiff and the appellant was the defendant, in the Melaka Sessions Court Summons No. 52-211-1995 filed on 10/8/1995. The Sessions Court Summons was transferred to the High Court and consolidated with the High Court Civil Suit by order of Court dated 1/11/1996 (page 29 Rekod Rayuan A).The trial of the consolidated actions commenced in the High Court on 20/5/1997 and after a full trial, the learned High Court Judge dismissed with costs, on 16/9/1998, the claim of the plaintiff in Melaka High Court Civil Suit No. 22-6-1995 and allowed the claim

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5 of the plaintiff in Melaka Sessions Court Summons No. 52-
211-1995 with costs, and ordered :

- 10 (a) That the defendant (J.R.Lincks
Educational Consultants Sdn. Bhd.)
deliver vacant possession of the
premises to the plaintiff (Goh & Sons
Enterprise Sdn. Bhd.);
- 15 (b) That the defendant pay to the plaintiff
arrears of rental at the rate of RM
6000/- per month from January 1995
till July 1995;
- 20 (c) That the defendant pay the plaintiff
double rent at the rate of RM 12,000/-
from August 1995 till date of delivery of
vacant possession of the premises;

5 (d) That the defendant pay interest at the
rate of 8% per annum on (b) and (c)
above.

The appellant, J.R. Lincks Educational Consultants
10 Sdn.Bhd. (hereinafter referred to as “the plaintiff”),
dissatisfied with the decision of the learned High Court
Judge, mounted this appeal on 12 grounds. We are of the
view only grounds 1, 2, 4, 6, 7, 8 and 10 merit serious
consideration. The respondent, Goh & Sons Enterprise
15 Sdn. Bhd., shall hereinafter be referred to as “the
defendant”, and, its summons in Melaka Sessions Court
shall hereinafter be referred to as “the counterclaim”.

20 The plaintiff and the defendant were at all material times
the tenant and landlord, respectively, of the premises
known as 52C, 54C, 56C, 58C, 60A, 60B, 60C, 60 (Ground
Floor), 60 (Mezzanine Floor), 62A, 62B, 62C, 62 (Ground
Floor) and 62 (Mezzanine Floor) Jalan Kampung Hulu,

5 Melaka (hereinafter the 14 shop-lots shall, collectively, be referred to as “the said premises”).

In a nut-shell, the plaintiff’s claim was for specific
10 performance of the terms of a tenancy of the said premises,
viz. a letter dated 22nd March, 1994 as well as a written
tenancy agreement dated 11th April, 1994; and/or damages
for breach of the terms of the said tenancy agreements. The
defendant’s counterclaim, on the other hand, was for
15 vacant possession of the said premises together with
arrears of rental for the period January – June, 1995;
rental for the month of July, 1995; and mesne profit from
August 1995 till delivery of vacant possession.

20 For ease of reference and comprehension, the grounds of
appeal which merits serious consideration are reproduced
below:

25 “1. The learned trial Judge erred in fact and in law in
concluding,

5 **‘Berkaitan dengan kerugian pertama tidak ada perjanjian penyewaan yang mengakibatkan penguatkuasaan perjanjian itu. Pihak-pihak hanya sedang tawar-menawar untuk satu perjanjian penyewaan yang telah mengakibatkan pelaksanaan**
10 **perjanjian itu. Maka defendan tidak boleh dipertanggungjawabkan untuk kerugian pertama plaintif’;**

- 15 2. The learned trial Judge was wrong when interpreting special condition No. 10 of the tenancy agreement regarding the lift when holding,

20 **‘Saya berpuas hati bahawa defendan telah mengambil semua langkah yang perlu untuk mengurus lif tersebut. Plaintif tidak menunjukkan bahawa defendan gagal berusaha sedaya upaya. Selanjutnya, mengenai isu ini plaintif tidak membayar pendahuluan RM200.00 sebulan untuk penyelenggaraan dan servis lif tersebut. Defendan adalah terikat untuk mematuhi syarat ini hanya terma-terma yang diletakkan oleh plaintif dipenuhi terlebih dahulu oleh plaintif sendiri. Plaintif telah tidak memenuhinya’;**

- 25
- 30 4. The learned trial Judge was wrong when he totally failed to consider the entire evidence on the breach of the special condition under 1.03 in the tenancy agreement regarding the supply of a 3 phase electricity and by failing to make a finding of fact on this issue;

- 35
6. The learned trial Judge was wrong in fact and in law in misconceiving the unrebutted expert evidence of SP3 on

5 the computation of loss of income which was based on
the loss of income when holding,

10 **‘Perkara yang boleh diperhatikan pada awal,
atas anggapan tuntutan plaintif memang sah, adalah
SP1 dan SP3 telah memberi angka-angka yang
berlainan mengenai kerugian yang dikatakan telah
dialami oleh plaintif. Ini membuat tuntutan plaintif
tidak dapat dikekalkan. Perkara seterusnya yang
perlu diperhatikan, atas anggapan yang sama,
15 adalah angka-angka yang diberikan oleh kedua-
kedua saksi tersebut tidak pula mengambilkira
perbelanjaan yang mungkin telah dialami oleh
plaintif dalam mengira kerugian. Kerugian yang
telah dialami oleh plaintif, jika ada, adalah jumlah
20 pendapatan yang mungkin diperolehi untuk tempoh
tersebut tolak jumlah perbelanjaan yang mungkin
telah dialami untuk tempoh tersebut. Dalam
ketiadaan keterangan sedemikian adalah mustahil
untuk menentukan kerugian yang dialami oleh
25 plaintif. Walaubagaimanapun, adalah pendapat saya
bahawa tuntutan ini tidak mempunyai merit’.**

30 7. The learned trial Judge was wrong when deciding the
notice to quit was valid without considering the issue of
sufficiency of notice and further without considering
whether a party in breach could take advantage of its
own breach by issuing a notice to quit;

35 8. The learned trial Judge was wrong in failing to take into
consideration that the defence witness DW2 had given
contradictory and false evidence regarding the problem

5 of the lift; the 3 phase electricity supply and on the
termite problem;

10 10. The learned trial Judge was wrong in ordering the
appellant to pay double rental at the rate of RM 12,000
per month from August, 1995; ”

By a letter dated 22/7/93 (page 83 Rekod Rayuan B) the
defendant offered to rent the said premises to the plaintiff
15 on terms and conditions set out in the said letter. **The offer
was accepted by the plaintiff.** The material parts of the
letter reads:

“Re: Lease of Kampung Hulu Shop-Lots to J. R. Links College

20 As requested by you we agree to rent to you the above 4 storey
shop-lots (The shop-lots include Lots 21 & 22 (Ground Floor,
Mezzanine Floor, 1st, 2nd, and 3rd Floor) and the 3rd floor of Lots
23, 24, 25, and 26) on the following terms and conditions.

25 1) RENTAL

\$6,000.00 per month for the whole premises.

30 2) COMMENCEMENT

From the date of issuance of the Certificate of Fitness
(expected date 1st of Sept. 93)

35 3) Upon confirmation and signing of the tenancy
agreement you are required to pay \$6,000.00 as
security deposit. Upon issuance of Certificate of Fitness
you are to pay one (1) month rental in advance (i.e.
40 \$6,000.00).

5 4) Deposit of \$1,500.00 for electricity and water.

5) TERMS
For a period of 3 years with an extension for a further
period of 2 years on the same terms and conditions.

10

6) PREMISES:

a) ELECTRICAL:- We agree to change the electrical
system to 3 phase together with the relevant
meters.

15

b) PASSAGE WAY:- To construct a passage way
adjoining Lots 21, 22, 23, 24, 25, and 26.

20

c) DEMOLISH WALLS:- To demolish the dividing
wall on the 3rd floor between Lots 23, 24 and 25.

To demolish dividing wall on ground floor of Lots
21 and 22.

25

d) WATER :-We agree to connect the water
supply and meters.

30

7) WATER AND ELECTRICITY DEPOSIT
You will sign the contract with the relevant authorities
and pay for the required deposit.

8) LIGHTINGS
.....

35

9) FANS
.....

40

10) PURPOSE
For office and college.

5

If you agree to the above terms, please confirm acceptance by signing a copy of this letter and we will request our lawyers to prepare the tenancy agreement and all legal fees, stamp fees to be paid by you.

10

This offer is open to you for a period of 2 weeks from this date.

15

.....

.....

(signed)

GOH & SONS ENTERPRISE SDN BHD

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We hereby agree to the lease of above shop-lots accordingly to the terms herein stipulated.

(Signed)

25

President

J. R. Lincks College

For J. R. Lincks Educational Consultants Sdn Bhd.”

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Following the acceptance by the plaintiff of the offer by the defendant to let the said premises on the terms stipulated in the letter of 22/7/93, the defendant did not immediately thereafter, prepare a formal tenancy agreement for the plaintiff to execute. The tenancy of the premises was to commence from the date of issuance of the Certificate of Fitness and the plaintiff was led to believe by the defendant that it would be on 1/9/93. However, by letter dated

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5 27/8/93 (page 85 Rekod RayuanB) the defendant wrote to
the plaintiff as follows:-

“RE: Lease of Kampung Hulu Shop-Lots to J.R. Lincks College

10 We refer to **our agreement** on the lease of the above
office/shop lots to your college dated 22nd July, 1993.

15 Please be informed that there has been a delay in the issuance
of the Certificate of Fitness by the relevant authorities and that
we are expecting the certificate to be issued tentatively by the
15th of September, 1993.

We regret any inconvenience caused.”

20 The certificate of fitness was not issued on 15/9/93. Firman
bin Abdullah (PW1) testified, on behalf of the plaintiff, that
a director of the defendant told him that the certificate of
fitness had not been issued on 15/9/93 because the
defendant had not complied with the Lembaga Air
requirements. The certificate of fitness was finally issued on
25 31/12/93 (page 86 Rekod Rayuan B) and **possession of
the premises was given to the plaintiff on 24/1/94.**

PW1 testified, inter-alia:

30 “The Plaintiff entered into a tenancy agreement with the
Defendant (witness referred to p 6 of A). This is the agreement.
The purpose of the tenancy is to house J.R. Lincks College

5 **at the premises.** The tenancy was to commence on 1.9.1993. The Defendant did not give us the premises on 1.9.1993. They were not able to do so as the Certificate of Fitness was not issued. (Witness referred to p 8 of A). This is a letter by the Defendant saying that the premises cannot be occupied. They
10 stated the CF is to be issued on 15.9.1993. The CF was not issued on that day. It was not issued. The director of the Defendants told me that it is because they have not complied with the Lembaga Air requirements. The CF was finally issued on 31.12.1993. (Witness referred to p 9 of A). This is the CF.
15 Possession of the premises was given to us on 24 .1.1994. The Plaintiff was affected as a result of this delay. Firstly, we had to use the Plaza Inn Hotel to conduct our lectures for October, November and December 1993. Secondly we lost two intakes of students i.e.the September 1993 intake and January 1994
20 intake. The Defendants were aware that the Plaintiff were running a college. This is reflected in the tenancy agreement under para 10. The Plaintiff entered into **another tenancy agreement** with the Defendants **subsequently**. (Witness referred to p 20 of A). It is **dated 11.4.1994**. The **date of commencement** under this agreement was **1.3.1994** for a period of 3 years. The **keys were handed** to the Plaintiff **on 24.1.1994.**”

30 The tenancy agreement, referred to by the plaintiff as dated 11/4/94 in his evidence, is found at page 97 Rekod Rayuan B. It is a formal written tenancy agreement with a SCHEDULE and an ANNEXURE which is to be read and

5 construed as an essential and integral part of the
agreement.

Part 1 of The Schedule does not set out the date of the
agreement. Nevertheless, under Part 9 of The Schedule the
10 duration of the tenancy was three (3) years and, under Part
10 and Part 11 of The Schedule respectively, the **date of
commencement** of the tenancy was **1st March, 1994** and
the **date of termination** of the tenancy was **28th February
1997**. Under Part 14 of The Schedule, the authorized use of
15 the demised premises is “As offices and as a college”. Part 15 of
The Schedule provides for termination of tenancy as
follows:

“ This tenancy is a **fixed term tenancy** and it is agreed:-

- 20 i) The Landlord shall not terminate this
tenancy before the expiration period
unless the tenant were to breach the
terms and conditions provided herein.
- 25 ii) In the event the Tenant were to terminate
this tenancy before the expiration date,
the Tenant shall pay the full balance of the
rental due under this Agreement as
compensation.”

5 Part 4 of The Schedule lists the premises as follows:

10 “4.1 All that four(4) storey shop house held under Lot 21
Town Area X, Melaka Tengah and including the Ground
Floor, Mezzanine Floor 1st, 2nd, and 3rd Floor known as
60A, B, and C, Jalan Kampong Hulu, Melaka.

15 4.2 All that (4) storey shop house held under Lot 22, Town
Area X, Melaka Tengah and known as 58A, B and C
Jalan Kampong Hulu, Melaka.

20 4.3 All the Third Floor space on Lot 23, Lot 24, Lot 25 and
Lot 28 Town Area X, Melaka Tengah with free right of
passage between the four lots. The third
floor space is numbered respectively 56C, 54C, 52C and
50C, Jalan Kampong Hulu, Melaka.

All the above premises are located in Kampong Hulu Melaka
and known hereinafter as ‘the said premises’.

25 It is to be noted that Part 4 of The Schedule makes no
reference to 62A, 62B, 62C, 62 (Ground Floor) and 62
(Mezzanine Floor) as part of the premises let to the plaintiff
although it appears from the pleadings that the said shop-
30 lots in fact form part of the premises rented to the plaintiff.
This is not disputed, thus making a total of 14 shop lots
rented out to the plaintiff for use as **a college** and offices.

5 The ANNEXURE to the Agreement contains SPECIAL
CONDITIONS including the following:

“1. RENOVATIONS

10 The Landlord agrees with the Tenant to carry out the following
renovations to the said premises **upon the signing of this
Agreement:-**

1.01 PASSAGEWAY

15 To construct a passageway and demolish the
walls adjoining the premises on the 3rd Floor of
Lots 21, 22, 23, 24, 25 and 26 by **1st April,
1994.**

1.02 DEMOLISH WALLS

20 To demolish the dividing walls on the ground
floor of Lots 21 and 22 **by 1st March, 1994.**

1.03 ELECTRICAL

25 The Landlord shall install a **3-phase electricity** to
those parts of the premises as agreed **by the 1st March
1994** and the Tenant to apply for the connection.

10. MAINTENANCE AND GENERAL REPAIR OF LIFT

30 The Tenant shall pay RM200-00 per month in advance
as contribution for the maintain and service of the lift.
**Payment shall commence from 1st April, 1994,
subject to the lift being in operation.** The Tenant
shall keep the lift clean at all times. The Landlord will
35 try its best to commission the lift by 1st April, 1994.

5 13. COMMENCEMENT OF RENTAL

The **commencement of rental** on 1st March, 1994, is subject to the Landlord to do the followings:-

- 10 a) **Complete the wiring of the 3 phase electricity.**
 b) Demolishing the portioning walls of the ground floor.
 c) To construct a passageway and demolish the walls adjoining the premises on the 3rd Floor of
15 Lots 21, 22, 23, 24, 25, and 26 by 1st April, 1994.
 ”

The plaintiff was given possession of the premises and the
20 keys on 24/1/1994 according to the PW1's testimony. This testimony was never challenged at all. Clearly, the defendant had acknowledged the plaintiff as its tenant of the premises, pursuant to the agreement dated 22/7/1993, when the defendant handed over the keys of the premises
25 to the plaintiff on 24/1/94 **after the CF was issued on 31/12/93**. A formal tenancy agreement with a Schedule and Annexure was only prepared and executed several months later. It is not very clear when this formal agreement was executed. According to PW1's testimony, it
30 was dated 11/4/94. However, in his letter dated 3/3/94

5 (page 87 Rekod Rayuan B), addressed to the defendant's
solicitors, there is a reference to the "Tenancy Agreement
dated **1/3/1994**". This is further compounded by the fact
that PART 1 of THE SCHEDULE of the formal tenancy
agreement is silent on the DATE OF AGREEMENT. Only the
10 'cover' of the agreement has a date "11/4/94". In the
absence of any clear stipulation, the 'cover' cannot form
part of the agreement. On a balance of probability, the said
formal tenancy agreement must have been executed on
11/4/94, as it was stamped on 13/4/94.

15

In the light of the chronology of events between the plaintiff
and the defendant vide the tenancy of the premises, and
upon the totality of the undisputed facts and evidence in
this case, we hold the plaintiff became tenant of the
20 premises pursuant to the tenancy agreement by letter dated
22/7/1993, **immediately** upon the plaintiff being **given**
possession and the keys to the premises **on 24/1/94**,
notwithstanding the execution of a formal written tenancy
agreement subsequently, purporting to create a tenancy

5 **effective** only **from 1/3/94**. That tenancy agreement by
letter (22/7/93) was never terminated, rescinded or
repudiated. The fact that the defendant waived the rental
for the period 1/9/93 till 1/4/94 is immaterial, and does
not derail the landlord/tenant relationship already in place
10 between the parties. The subsequent formal written
agreement was nothing more than a continuation of the
tenancy created by the letter of 22/7/93. This is reinforced
by the plaintiff placing on record to the defendant's
solicitors by letter dated **3/3/94**, facts pertinent to the
15 tenancy agreement created by letter dated 22/7/93. The
facts contained in the letter were never disputed by the
defendant. The letter reads as follows:

20 "Re: Rental of Premises

We refer to your letter dated 28/2/94.

Your client's letter dated 22/7/93 is the basis on which the
Tenancy Agreement dated 1/3/94 was entered into between
25 us and your client.

The Tenancy was to commence on 1/9/93 from the expected
date of C.F. which date was altered by your client several
times giving various excuses and finally your client's En. Andy

5 Goh gave us the key to the premises and a photocopy of the
C.F. and put us in possession on 24/1/94.

We were supposed to pay the security deposit and the utility
deposit but your client failed to get ready the premises
10 described herein till today in not providing the 3-phase
electrical system, passageway, demolish walls, water
connection and lightings. Your client neglected the aforesaid
from 1/9/93 till the Agreement and as a result of which our
losses are made up as follows:-

- 15
1. Rental charges for Plaza Inn Conference
Room for lectures and lessons;
 2. Unable to take in students for the
20 September 1993 and January 1994
intakes resulting in losses amounting to
approximately Malaysian Ringgit 1.2
million.

25 Be as it may be, we entered into the contract, with the rental
to commence on 1/3/94 subject to the Landlords complying
with the installation of the 3-phase electrical system,
construction of passage way, demolition of the walls on the
ground floor and 3rd floor and as nothing have been done so
30 far we are not obliged to pay rental yet.

Though your client put us in for the delay, we never waived
our losses caused by your client and we are obliged to pay for
the premises only if the special conditions are complied with
35 and your client failed in that and is still failing. Therefore, your
1st para in your letter is of no effect. We agreed hoping you will
do your part. As for the 2nd para, though we signed the
agreement you are still failing in the special conditions to

5 make the premises worthwhile and tenantable to be occupied
by us for the purposes you are aware of a college of higher
education. If your client do not give something bargained for
we have every right to withhold payment. We never entered the
premises illegally and your clients were anxious to mitigate
10 our losses and gave the keys to the said premises so that
renting Hotel Plaza Inn conference rooms in the interim can be
avoided.

We were patient to avoid litigation out of respect of your client
15 and now since you are dragging us to litigation **we give you
one week's notice from today's date for your client to
comply with all the special conditions in the letter of offer
and the Tenancy Agreement** failing which we will resort to
our legal remedies as we might be advised.

20 TAKE NOTICE further we never waived our rights and never
had any intention to waive our losses incurred by your client's
delay in giving the occupation of the premises based on the
letter dated 22/7/93.

25 Without prejudice to the aforesaid and despite all the
shortcomings caused by your client we are prepared to send
you our Banker's cheque on your clients assurance that the
special conditions are complied with further delay."

30 The learned trial judge has, therefore, misdirected himself
on the facts and the law when he ruled that there was no
enforceable tenancy agreement on which the plaintiff could
35 claim damages for any period of time before the formal

5 written tenancy agreement was executed (purporting to
create a tenancy effective from 1/3/94) as the parties were
negotiating and bargaining prior to the said formal written
agreement. Such a finding flies in the face of the
undisputed evidence that the keys and vacant possession of
10 the premises were given to the plaintiff on 24/1/1994, after
the CF was issued, consistent with the terms and
conditions contained in the letter dated 22/7/93. The
plaintiff was not bargaining and negotiating. On the
contrary, the plaintiff was calling upon the defendant to
15 fulfill the terms and conditions of the tenancy created vide
the letter 22/7/93.

On the facts of this case, equity and good conscience
requires that the tenancy of the said premises be construed
20 in the context of:

- i) the letter dated 22/7/93;
- ii) the formal written agreement executed in April
1994, coupled with the act of the defendant

5 handing over the keys to the plaintiff on
 24/1/94;

 to determine the respective rights and obligations of the
 landlord and tenant. The consequences of any breach of
 any of the terms and conditions by either party must be
10 viewed in the spirit and context in which the tenancy of the
 premises was entered into, that is, for the use of it (14units
 of shop-lots) for the purpose of running a college for higher
 education.

15 In this appeal before us there is primarily only one main
 issue to be determined, that is, whether the plaintiff is
 entitled to any damages and, a collateral issue in relation to
 the defendant's counterclaim, that is, whether the **notice**
 issued by the defendant **dated 26/6/95 to pay arrears of**
20 **rental** amounting to RM36, 000.00 on or before 30/6/95
 and in the same breath, **to quit and deliver vacant**
 possession on 31/7/95, is valid. The question of specific
 performance by the defendant of any of the terms and
 conditions of the tenancy agreement (contained in the letter

5 dated 22/7/93 and the formal written agreement) is now
academic and does not arise since the tenancy of the
premises has expired by effluxion of time, even as at the
date of the decision by the trial judge.

10 The claim by the plaintiff for damages is broken into 2
stages, that is, a) the first stage of the tenancy agreement,
from 1/9/93 till 24/1/94 before the plaintiff went into
possession and, b) the second stage, from the time the
plaintiff went into possession till the expiry of the tenancy.

15
The claim for damages by the plaintiff can only be
considered if there has been a serious breach of the terms
and conditions of the tenancy agreement giving rise to a
loss to the plaintiff, which is not remote and reasonably
20 foreseeable as a natural and direct consequence of the
breach by the defendant landlord. Since there was a
counterclaim by the defendant for arrears of rent and
vacant possession, the validity of the notice to quit must be

5 considered in the light of the plaintiff's claim against the
defendant and not in isolation.

**Serious breaches of the terms and conditions of the
tenancy agreement by the Landlord**

10 **1. 3-phase wiring**

Under condition 6) a), contained in the letter dated
22/7/03, the defendant clearly agreed to change the
electrical system of the premises to 3-phase wiring
15 together with the relevant meters. Under condition
1.03 of the Special Conditions in the Annexure to the
formal written agreement, the defendant was
mandated, as Landlord, to "install 3-phase electricity
to those parts of the premises as agreed, by the 1st
20 March 1994". Any ambiguity in this condition (in the
light of the unequivocal condition 6) a) of the letter
dated 22/7/03), must be read contra proferentum the
defendant. 3- phase wiring for the premises (the 14
units of shop-lots) would be an essential requisite, as
25 the premises were intended for the running of a

5 college wherein several units of air-
conditioners/centralized air-condition, and other
essential electrical appliances, such as fans, lights
and computers used simultaneously, would require
electrical supply that cannot be supported by single
10 phase wiring.

PW1 testified, in examination in chief, inter-alia:

15 “The defendant was to install 3-phase power supply to the
premises. This was not done.”

He was not challenged on this assertion in cross-
examination. Nevertheless, in re-examination he reasserted
and clarified that the defendants did not install the 3-phase
20 wiring system. He testified:

“It is the obligation of the landlord to install the 3-phase
electricity. By this I mean the power must be sufficient.
25 **They did not provide the 3-phase wiring system.**”

PW4, Mohd Azli bin Abdul Rahim, a customer service
engineer from TNB testified, inter alia:

5 “ Saya tahu mengenai dokumen berkaitan dengan premises
yang diduduki oleh Plaintiff di 60 dan 62 Kampung Hulu,
Melaka. No 60 electricity supplied is 3 phase. For No 61 and
62 it is single phase. The original electricity supplied to this
10 premise was single phase including ground floor of No 60.
Permohonan untuk upgrade bekalan elektrik untuk premises
No 60 tingkat bawah dari satu fasa ke tiga fasa ada dilakukan
pada 8.10.93. permohonan dilakukan pada 8.10.93
dan pemasangan meter dilakukan pada 22.4.1994. For the
15 other premises occupied by the Plaintiff there was no
application to upgrade the system. **Selain No 60 tingkat
bawah** premises-premises lain ambil **bekalan letrik hanya
satu fasa sahaja**. Without 3-phase electric supply it is
not possible to run a 20-horsepower aircon even to the other
parts occupied by the Plaintiff. This will cause overloading and
20 cause a fire. Where there is one phase wiring then 3-phase
electricity cannot be supplied till there is upgrading. **Apart
from ground floor of No 60 the wiring on the other parts is
single phase.**”

25 **PW4 was not cross-examined at all.** His testimony stood
undisputed. The defendant has, therefore, completely
breached condition 6) a) stipulated in the letter dated
22/7/93, and special condition 1.03 of the formal written
30 agreement. The defendant has only provided 3-phase wiring
to the ground floor of No. 60, when it was incumbent on the
defendant to provide 3 phase wiring for all the 14 units of
shop lots.

5 **2. Non-commissioning of lift**

By letter dated 26/8/94 (page 115 Rekod Rayuan B)
the plaintiff wrote to the defendant, inter alia:-

10 “Please be informed that the lift to the premise which
still not been commissioned although four months have
passed. The lift is an inherent part of the premises and
we executed the tenancy contract on the assurance
15 given by yourselves that the lift would be commissioned
by the said date. As a result of your failure to comply
with this condition, the building has been rendered
unfit causing great inconvenience to us and our
students in that we are forced to walk up the 4 ½ storey
20 building daily. Further this situation has also caused us
to suffer business losses as numerous prospective
students have shied away from enrolling at the college
thinking that the building is incomplete.”

25 In examination-in-chief PW1 testified:-

30 “The Defendant did not commission the lift. It was to be
commissioned by 1.4.1994. This has not been done till
to-date. The lift is ready for commission. It was ready
for commission in 1996. (Witness referred to p 58 of A).
This is a letter from Pernas to the Defendants. With
35 regard to the lifts we wrote to the Defendants.”

5 Under cross-examination he testified:-

10 “The lift was not put into operation till now. I don’t
recollect the Defendant asking us to pay the
RM200 p. m. The lift was never commissioned. One
of the reasons I did not pay the rent was because of
the lift.”

DW2, Goh Yew Kian, is the Head of Property Administration
in the defendant company. Under examination-in-chief he
15 testified (on behalf of the defendant):-

20 “(Witness referred to p 34 of A). Under this clause the
tenant is to pay RM200 p.m. for maintenance of lift.
(Witness reads clause). At that time the lift was not in
operation. **The lift was installed in 1992.** (Witness
referred to p 17 of A)). This relates to lift. (Witness
referred to p 40 of A). (Witness reads 2nd para). Even up
to September 1994 we were not able to solve the
problem relating to the lift.”

25 Under cross-examination DW2 testified:

30 “(witness referred to Clause 10 at p 34 of A). The lift was
to be commissioned by 1.4.1994. The lift was not
commissioned by that date. It was due to some
technical fault as the PC boards were broken. Prior to
the PC boards breaking down the lift was not
commissioned. (Witness referred to p 56 of A). This
letter is dated 28.10.94. 12 months before this letter the
35 lift was in a position of being commissioned. It was not
commissioned. It is a construction procedure. We have

5 “10. MAINTENANCE AND GENERAL REPAIR OF LIFT

 The Tenant shall pay RM200-00 per
 month in advance as contribution for the
 maintain and service of the lift. Payment shall
10 commence from 1st April, 1994, subject to the lift
 being in operation. The Tenant shall keep the lift
 clean at all times. The Landlord will try its best to
 commission the lift by 1st April, 1994.”

15 The learned trial judge has, therefore, seriously misdirected
 himself in holding that he was satisfied that the defendant
 had taken all necessary steps to operate the lift and that
 the plaintiff had failed to pay RM200.00 per month for the
 maintenance and service of the lift. In his grounds of
20 judgment the learned judge stated:-

 “Saya berpuashati bahawa Defendan telah mengambil
 semua langkah yang perlu untuk menguruskan lif
 tersebut. Plaintiff tidak menunjukkan bahawa
 Defendan gagal berusaha sedaya upaya. Selanjutnya,
25 mengenai isu ini Plaintiff tidak membayar pendahuluan
 RM200.00 sebulan untuk penyelenggaraan dan servis
 lif tersebut. Defendant adalah terikat untuk mematuhi
 syarat ini hanya jikalau terma-terma yang diletakkan
 oleh Plaintiff dipenuhi terlebih dahulu oleh Plaintiff
30 sendiri. Plaintiff telah tidak memenuhinya.”

5 The learned trial judge's finding is totally against the weight
of the evidence. He failed to appreciate and evaluate the
oral testimony and contemporaneous documentary
evidence. It warrants appellate intervention to scrutinize
the record and arrive at findings of fact consistent with the
10 evidence adduced to prevent any miscarriage of justice.

**Withholding rent because the defendant in breach/
Validity of notice to quit and sufficiency of notice to
deliver vacant possession**

15 PW1 testified under examination-in-chief:-

20 **“The plaintiff stopped payment of rental to the
Defendant from January 1995.** The Plaintiff had made
numerous complaints to the Defendant about the
various breaches but we found that they were not
complying with the terms of the tenancy agreement and
did not remedy the breaches accordingly even though
they had been collecting rental from the commencement
25 of the tenancy. We felt we were taken for a ride. The
Plaintiff gave written notice to the Defendant before
stopping rent on 26/8/1994. It is at page 38 of A. The
Defendant in October 1994 attended to the sewerage
problem and provided us the dustbin. The other
30 breaches were not rectified at that time.”

5 “The Defendants did not rectify the breach with regard
to the lift and the upgrading of the power supply till to-
day [20/5/97]. With regard to the other breaches the
Defendant sealed the sewerage tank to prevent the
obnoxious smell in October 1994. As for the flooding
10 they attended to it at the end of 1996. As for the
termites they treated the ground floor around
September/October 1994. Rubbish bins were provided
in September 1994.”

15 “With all the breaches and problems the Plaintiff did not
move out of the premises was that we did not want our
reputation to be tarnished in that being a college we
had to have some degree of permanency of location.
Also we had notified the Ministry of Education that we
20 would be at these premises for the duration of 3 years.
Also it is part of the condition of the 2nd tenancy
agreement (Schedule 15 (2)) where we have agreed that
the tenancy shall be a fixed term tenancy and that in
the event of the Plaintiff terminating the tenancy before
25 the expiry date the tenant shall have to pay the full
balance rental due to the Defendant as compensation.
.....”

The letter dated 26/8/1994 written by the plaintiff to the
30 defendant is as follows:-

“We refer to the tenancy agreement dated 11 April
1994.....”

35 Please be informed that the lift to the premise which
you promised to commission by 1st of April 1994 has
still not been commissioned although four months have

5 passed. The lift is an inherent part of the premises and
we executed the tenancy contract on the assurance
given by yourselves that the lift would be commissioned
by the said date. As a result of your failure to comply
with this condition, the building has been rendered
10 unfit causing great inconvenience to us and our
students in that we are forced to walk up the 4 ½ storey
building daily. Further, this situation has also caused
us to suffer business losses as numerous prospective
students have shied away from the enrolling at the
15 college thinking that the building is incomplete.

In addition to the problem of the lift, leakages in the
façade of the building has also led to the flooding of the
premises whenever it rains. Even though numerous
20 verbal complaints have been made no action has been
taken.

Apart from this, the sewerage tanks located on the
ground floor of the premises are emitting obnoxious
25 smell making the ground floor uninhabitable. The
ground floor is also infested with termites which have
attacked our books in the library causing damages to a
tune of over one thousand ringgit. Verbal complaints
about this matter to your office too has fallen on deaf
30 ears.

Besides, our written complaint to your solicitors dated
21st March 1994 stating that the incoming power (60
amps) to the premises is insufficient to support our
35 central air-conditioning system has also not been
attended to nor remedied rendering our 20 h.p. central
air-conditioning unit to be inoperable.

5 As landlord, you have also failed to provide rubbish bins
for refuse disposal neither in front nor the rear of the
building.

10 Please bear in mind we agreed to forego our earlier
claims for losses which runs into millions of ringgit due
to your failure to honour the initial agreement dated 22
July 1993; on the express understanding that you
would cause us to suffer any further inconvenience nor
15 losses. However your continuous breach in not
commissioning the lift and in not attending to the other
complaints has put us into great distress and financial
losses.

Please take note that in view of the seriousness of the
situation, **we are forced to stop the rental payment**
20 **effective August until all the problems have been**
resolved to our satisfaction.

Further take notice that if you as landlord fail to
perform your obligations as covenanted and compensate
25 us adequately for the losses already suffered as a result
of the various breaches within 7 days; you give us no
alternative but to seek legal redress through court
action.”

30 There is no dispute that the plaintiff had faithfully observed
its obligations under the tenancy agreement dated
11/4/1994 by paying the required rental and utility
deposits on 28/3/1994 and thereafter, continued to
35 promptly and dutifully pay rental for the next 4 months

5 although the defendant was in continuous breach of the
various special conditions. In order to safeguard the
plaintiff's interest and rights and to compel the defendant
to comply with its obligations, the plaintiff wrote the letter
dated 26/8/1994 (quoted above) so as to bring the serious
10 state of affairs and the defendant's breaches to its
attention. The plaintiff made it clear, and in no uncertain
terms, that the plaintiff was forced to stop (or withhold) rent
effective August 1994 until all the problems and the
breaches have been resolved by the defendant.

15 It cannot be disputed that apart from attending to the
septic tank and the termite problems, the defendant failed
to remedy the breaches under the special conditions, in
particular, the commissioning of the lift and the supply of 3
20 phase electricity. The water leakage and flooding problem
was also not attended to until very much later. Naturally,
the breaches and problems caused hardship and business
losses to the plaintiff. The condition of the premises (lack of
air-conditioning and non-operation of lift) would discourage

5 many prospective students from enrolling. Erosion in the
confidence and reputation of the college would be an
inevitable consequence.

In the above circumstances, has the plaintiff the right to
10 withhold rent, especially when the plaintiff contends that
its losses as a result of the breaches far exceeds the rent
due and, that the defendant has refused or neglected to
compensate the plaintiff's for its losses? In *British Anzani
(Felixstowe) Ltd v International Marine Management (UK) Ltd*
15 [1979] 2 All ER 1063, it was held:

“(iii) The existence of the common law right
amounting to set-off against rent did not,
however, preclude the defendants from relying on
the doctrine of equitable set-off, since, except in
20 case of distress or replevin, **equity had never
refused to interfere to protect a tenant whose
landlord was bringing proceedings based on
non-payment of rent if the tenant had a bona
fide cross-claim for unliquidated damages
against the landlord**, provided the tenant had
25 no common law remedy and fulfilled the
preconditions for the application of the equitable
doctrine.

5 (iv) In order to rely on the doctrine of equitable set-off the defendant had to show, inter alia, that their counterclaim was so directly or closely connected with the plaintiff's claim as to go to the foundation of that claim.

10

(v) However, it was not essential for the application of the doctrine for the claim and counterclaim to arise out of the same contract: it was sufficient if the defendants' counterclaim arose out of a transaction so closely connected with the lease that it would be manifestly unjust not to allow a set-off. Since the defendants counterclaim arose out of alleged breaches of the agreement of 7th June 1973 which had rendered the warehouses unfit in part for the purposes for which they were leased, and because **it would be manifestly unjust to allow the plaintiffs to recover rent without taking into account damages caused by the plaintiffs' failure to perform their part of the agreement**, the defendants had established a sufficiently close connection between the transactions for them to raise their counterclaim as a set-off against the plaintiffs' claim."

15

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We are of the view the *ratios* quoted above support and establish the plaintiff's right to withhold rent based on the doctrine of equitable set-off of the plaintiff's unliquidated cross-claim against the defendant's claim for arrears of

35

5 rent. Consequently, the plaintiff cannot be said to be in
breach of the tenancy agreement with regard to the
payment of the reserved rent within the time and manner
stipulated therein. The defendant cannot equate the
equitable **withholding** of the rent with willful **non-**
10 **payment**. In the circumstances of this case, the fixed term
tenancy cannot be terminated before its expiration on
28/2/1997, grounded on an alleged default in payment of
the monthly rental. The notice of termination of tenancy
dated 26/6/95 is invalid. When there is a cross-claim by
15 the tenant arising from the breaches of the landlord, then,
the landlord does not have an automatic right to terminate
the tenancy by issuing a notice to quit. It would be grossly
inequitable for a party in breach to take advantage of its
own breach.

20 The plaintiff was at all material times operating a college at
the demised premises where third party interests (primarily
that of the students) are directly affected by any
interruption to the use of the premises by a sudden and

5 unexpected termination of the tenancy. Any notice to quit
business premises must give adequate and sufficient time
for the tenant to find new premises to relocate and continue
its business from there. The notice dated 26/5/95, giving
35 days to give vacant possession, is unreasonable. In our
10 view, any valid notice to terminate a fixed term tenancy of
business premises, in order to be sufficient and reasonable
in the absence of any express and unambiguous term in
the agreement, shall be not less than 3 months.

15 In the above circumstances, we are of the view that the
learned trial judge has misdirected himself on the law and
the facts when he held the said notice to quit and deliver
vacant possession was valid. We hold that in the
circumstances of this case, the withholding of rent by the
20 tenant is permitted in law and the defendant cannot
terminate the fixed term tenancy prematurely. We further
hold that the defendant is, therefore, not entitled to mesne
profits for the unexpired period of the fixed tenancy.

5 **SPECIFIC PERFORMANCE/DAMAGES**

The learned trial judge was correct in holding that the question of specific performance did not arise as the tenancy had expired by effluxion of time. However, on the question of damages, we are of the view that the learned trial judge had erred in holding that PW1 and PW3 had given different figures in the computation of the loss and, by reason thereof, the claim of the plaintiff was not maintainable. We hold that in view of the serious breaches of the terms of the tenancy agreement by the defendant already discussed above, the plaintiff is entitled to a claim in damages. We also hold that the learned trial judge erred in his finding that the figures given by the said 2 witnesses had not taken into consideration the expenses incurred by the plaintiff in computing the loss. He held that the loss suffered by the plaintiff, if any, would be the total income that is likely to be received for the period (of the fixed term) less the total likely expenses for the said period. He held there was absence of such evidence and, therefore, it was impossible to determine the loss suffered by the plaintiff.

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5 He further held that the claim by the plaintiff was without merit.

The learned trial judge failed to appreciate the totality of the evidence and that the **evidence of PW3** (an experienced
10 accountant) **was never challenged** at all. PW1 produced a schedule of fees for the various courses (exhibit P1). The average number of students was determined as between 40 and 50 students by reference to the infrastructure of the premises and the expected student intake. Documents
15 pertaining to student inquiries were produced and student intake for the relevant periods was established through the student admission records.

PW3 prepared a report on the loss suffered by the plaintiff
20 from 1/3/1994 to 28/2/1997 and he was never cross-examined at all. It was marked P6 (Rekod Rayuan C-2 page1409). PW3, who is a certified public accountant, testified:

25 “On the instructions of the Plaintiff I prepared a report on the loss suffered by the Plaintiff from 1 March 1994 to 28 February 1997. (Witness shown a report). This is

5 the report – marked as P6. This is a loss of income
report for that period. Their estimated loss for 3 years is
\$1,459,500.00. This is at appendix 1 of P6. This figure
is a comparison from the previous premises and the
current premises and on a progressive method. At the
10 previous premises the income was about \$802,087.07
for the 3 years. At the present premises it \$396,032.80.
By “progressive basis” is meant when a new college is
started the student intake goes on a progressive basis.
Normally the intake increases from 20 – 30% from
15 previous intake.

Basically the losses on income, losses on profit and
losses on wasted expenditure. In loss of income the
expenditure is normally fixed so that the income is on a
20 progressive scale. In such a situation the expenditure is
fixed. In loss or profit the expenditure is variable to the
income. In loss of wasted expenditure the income is not
certain and the expenditure is wasted. P6 is based on
the loss of income method. In preparing P6 I did not
25 take into account the expenditures. This is because the
expenditure are fixed. A teacher can teach a class with
1 student to the maximum. If a class has more than 50
students the expenditure increase will be marginal. P6
is a fair report as the method used is the norm. This
30 method is normally is used to make calculation for
schools and private college.

(Witness referred to P2). This was given to me. From P2
the loss claimed is \$405,775.00. According to P6 the
35 loss is \$1,459,500.00. The difference is because the
student number used by PW1 is very small whereas in a
normal situation the number can be between 20 – 30.
In P6 I took into account the actual loss and prospective

5 loss of income. I am qualified to prepare this loss of
income report. I consider myself as an expert in
preparing this kind of reports. I have prepared such
reports before as an expert.”

10

In Appendix 4 of his report, PW3 set out a summary of
background information as follows:

15

“The college was established in March 1990 at the
Bastion House, 1 Jalan Kota, Melaka and operated
there till September 1993.

Thereafter it operated from its present premises since
March 1994.

20

The college is situated in a 5 storey building having its
address as 60-62, Jalan Kampung Hulu, Melaka.

The college is occupying the ground floor to third (3rd)
floor (including the mezzanine floor) all in five (5) floors.

25

In total it is occupying fourteen (14) shop lots.

The college has the following facilities available:-

30

1. Eight (8) Lecture rooms
2. Four (4) Tutorial rooms
3. One (1) Computer Laboratory
4. One (1) Student Lounge
5. One (1) Typographical Laboratory
6. The library can accommodate 100 students

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There are fourteen (14) lecturers full time and part time teaching various courses.”

10

In Appendix 2 of his report, PW3 set out the “INCOME THAT CAN BE DERIVED IN CONDUCTING PROFESSIONAL COURSES.” He detailed as follows:

“The following professional courses were offered:-

15

1. The Chartered Association of Certified Accountants (Level)
2. The Institute of Chartered Secretaries and Administration (Pre – Professional levels)
3. Chartered Institute of Marketing
4. Private Secretarial Course
5. Bachelor of Laws (LLB)-University of London

20

25

(Apart from these courses the college also conducts the B.A. in English of the University of London, the LCCI Diploma, GCE A Level and, IBBM Diploma courses)

30

The fees for the professional courses is between RM 2,725/- to RM 3,225/-.

35

From previous record of attendance for each popular professional course the student number can be at least about ten (10) students. Taking five (5) popular professional courses from above, the student number

5 can be fifty (50) students per intake and minimum
course fee is RM 2,725/- per student.

10 The maximum number for the English Language
Proficiency Course can be about fifty (50) students per
intake and the course fee is RM625/- per student.”

There were 3 intakes of students at the College every year,
15 that is, in January, April and September. In Appendix 3 of
his report, PW3 worked out the losses for the period
September 1993 till January 1997, that is, from intake
No.10 till intake No. 20. His detailed computation is based
on the ideal number of students set at 50 throughout the
20 period in question for the professional courses and the
English Language Proficiency course and the actual
number of students. In Appendix 3, PW3 has computed the
losses at RM 1,459,500.00.

25 We find the basis of computation by PW3 of the plaintiff's
loss of income fair and reasonable.

5 In the above circumstances, based upon the unchallenged
 report P6 prepared by PW3, we assess general damages for
 the plaintiff as follows:

Loss for the period January 1994 till March 1994: 167,000.00

(inability to take students for the

10 January 1994 intake, i.e. intake No. 11)

Loss for the period April 1994

till February 1997,

i.e. expiry of tenancy on 28/2/97:

1,124,500.00

15 (loss vide intake No. 12 till intake No. 20)

1,291,500.00

Less

Arrears of rental for 31 months at

RM6, 000.00 per month (i.e. from August 1994

20 till February, 1997, covering the period the

plaintiff began with-holding rent in August1994

till the expiry of tenancy on

28th February 1997): 186,000.00

Less

25 Deposit 24,000.00

 162,000.000

162,000.00

 1,129,500.00

30

5 *Add*

RM 30,000.00 deposited in Court

by plaintiff and paid out to the defendant: 30,000.00

10 Total: RM1,159,500.00

We are unanimous that this appeal be allowed. The
 15 decision of the learned trial judge vide Melaka High Court
 Civil Suit No. 22-6-1995 and Melaka Sessions Court
 Summons No. 52-211 1995 is set aside. The appellant's
 claim in High Court Melaka Civil Suit No. 22-6-1995 is
 allowed and general damages is assessed at
 20 RM1,159,500.00, with interest at 8 % per annum from date
 hereof (19/11/07).

The respondent shall be entitled to vacant possession of the
 premises at the expiration of the tenancy on 28/2/1997, in
 25 the absence of any renewal of the said tenancy and in such
 event, the appellant shall pay the respondent double rent at
 the rate of RM 12,000/- per month from March, 1997 till

5 date of delivery of vacant possession with interest thereon
at 8% per annum.

The appellant shall be entitled to its costs here and the
Court below. Deposit to be refunded to the appellant.

10

(DATO' NIHRUMALA SEGARA A/L M.K. PILLAY)

Judge

Court of Appeal

PUTRAJAYA

15

Reference:

20 *British Anzani (Felixstowe) Ltd v International Marine
Management (UK) Ltd* [1979] 2 All ER

Peguam Perayu:

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 2. Cik Asma Mohd Yanus
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19 NOVEMBER 2007