

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
10 MAY 1973
25 RUSSELL SQUARE
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No. 34 of 1970

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N:

LOH BOON SIEW

Appellant
(Plaintiff)

AND

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CHIN KIM (F) and
THE PUBLIC TRUSTEE FEDERATION
OF MALAYA, KUALA LUMPUR as
Executor and Trustee of the
Estate of WONG CHOONG Deceased

Respondents
(Defendants)

CASE FOR THE APPELLANT

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1. This is an appeal from a Judgment and Order of the Federal Court of Malaysia (Appellate Jurisdiction) (Ong Hock Thye C.J. Gill and Ali F.J.J) dated 13th November 1969 allowing an appeal from the Judgment and Order of the High Court in Malaya at Kuala Lumpur (Dato' Abdul Aziz J.) dated 19th June 1969, whereby the Appellant was granted specific performance of an option to purchase certain land situated at Jalan Treacher, Kuala Lumpur.

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2. The principal questions which arise on this appeal are :-

(a) Did the Appellant comply with the terms of the option which was granted to him?

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- (b) Was the option void or unenforceable as being an illegal contract?
- (c) Should the relief of specific performance be refused to the Appellant on the ground of delay?
- (d) If the relief of specific performance be refused to the Appellant, is he entitled to damages for breach of contract?

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3. The Appellant commenced this Action in the High Court in Malaya at Kuala Lumpur by specially indorsed writ issued on 29th August 1966 and claimed specific performance of the option granted to him and "such other relief as may be just and necessary". The Action was heard by Dato' Abdul Aziz J. on 17th and 18th March 1969. 10

4. The option on which the Appellant relied was contained in a written agreement dated 16th May 1961 whereby the first Respondent and her husband Wong Choong (therein described as "the Vendors") in consideration of \$1200 paid to them by the Appellant (therein called "the Purchaser") granted to the Purchaser an option to purchase the land there described for \$160,000 within 6 months of the date of the said agreement. Clause 3 of the said Agreement provided: "The Purchaser shall immediately upon the signing of this Option Agreement instruct a duly qualified Architect to prepare plans and specifications of a building or buildings to be erected on the said land for submission to the proper authorities for approval and the Vendors shall sign all such plans, specifications and any other documents which may be necessary when requested to do so." Clause 5 provided that as soon as the said plans and specifications had been approved the Purchaser should so notify the Vendors and pay them \$40,000 as deposit deemed to be part payment of the purchase price of \$160,000, the balance being payable in not later than 6 months with the price of the option (namely \$1,200) being set off against the purchase price. Clause 6 provided that "If, however, the plans and specifications submitted to the proper authorities have not been approved within six months from the date hereof, this option shall be automatically extended for a 20

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further period of six months" and provided that, in this event, the consideration for the option (namely \$1,200) should belong to the Vendors absolutely and not be set off against the purchase price. Clause 7 provided:

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10 "Immediately on receipt of Dollars Forty Thousand (\$40,000) only, the Vendors hereby undertake to take such steps as may be deemed necessary including legal proceedings to evict their tenants on the said land and shall immediately apply to the President or Chairman of the Rent Assessment Board for a certificate that the Rent Assessment Board is satisfied that the Owners of the said land intend to demolish all buildings on the said land for the purpose of rebuilding and in its opinion it is in the public interest that they should be permitted to do so. All costs and expenses in this connection shall be borne by the Vendors."

20 Clause 8 enabled the Purchaser to terminate the said agreement if the Vendors had been unable to give vacant possession of the said land within 6 months of the Purchaser paying the deposit of \$40,000. Clause 12 provided that completion of the transfer should take place at the offices of Messrs. Y. S. Lee & Company. Clause 13 provided: "Time wherever mentioned in this Agreement shall be the essence of this contract".

P10 LL 8, 9

30 Clause 14 provided that the said Agreement was binding on the estates of the parties thereto.

P10 LL 10-11

5. On 11th November 1961 the First Respondent and the said Wong Choong signed a written acknowledgment that in consideration of the sum of \$1,200 paid to them by the Appellant absolutely and not by way of deduction from the purchase price and notwithstanding the provisions of Clause 6 of the said agreement of 16th May 1961 the said agreement "is hereby extended to 15th day of May 1962 by mutual consent."

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40 6. At the hearing of the Action oral evidence was given for the Appellant/Plaintiff by the Appellant himself, Chin Yee Wong who acted as broker in the transaction and was a party to the agreement of 15th May 1961, and Lee Yew Siong, who was the lawyer who prepared both the agreement of 15th May 1961 and the document of

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11th November 1961 on the instructions of the Appellant and the first Respondent and the said Wong Choong. On behalf of the Respondents/Defendants oral evidence was given by the first Respondent and by one Paramalingam, an officer of the second Respondent. The uncontradicted evidence of the said Paramalingam was to the effect that the one half undivided share of the said land owned by the said Wong Choong was valued at the date of his death for the purposes of estate duty at \$125,000. 10

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7. The facts as found by the learned judge in his judgment delivered on 19th June 1969 were, in summary, that in 1961 the Appellant wished to purchase land for the erection of a motor-car showroom for his firm, and learnt that certain land, of which the first Respondent and her husband the said Wong Choong were the registered co-owners of one undivided half share each, was for sale. On this land was situated one big house occupied by the first Respondent and the said Wong Choong and two or three temporary small houses near the boundary rented out to tenants. As the Appellant wished to develop the land, the first Respondent and the said Wong Choong agreed to assist the Appellant to obtain planning approval and vacant possession. The learned judge then summarised the provisions of the agreement of 15th May 1961 (which he found was prepared by the said Lee Yew Siong) and went on to find that after signing the said agreement the Appellant instructed his architect to submit plans for development, consent for which was refused on 4th October 1961. The learned judge then found that on 11th November 1961 the Appellant met the first Respondent and the said Wong Choong and stated that he wanted a new agreement or an extension of the option. As a result of this meeting the document of 11th November 1961 (which the learned judge found was also prepared by the said Lee Yew Siong) was executed. The Appellant appealed against refusal of consent for his development but this appeal was refused on 20th November 1961. The learned judge then found that on 5th May 1962 the Appellant (who was resident in Penang) exercised the option by sending a cheque for \$40,000 made 20 30 40

10 out in the names of the co-owners through Messrs. Lim Huck Aik of Penang to the said Lee Yew Siong as solicitors for the owners, not knowing that one of the co-owners (namely the said Wong Choong) had died on 4th May 1962, and stating in his letter accompanying his cheque that he "intends to purchase the above property irrespective of whether the plans and specifications are approved or not". On 11th May 1962 the said Lee Yew Siong forwarded the cheque to the First Respondent as co-owner and as trustee for the estate of the said Wong Choong, and she returned the cheque to him on 12th May 1962 on the ground "of the demise of Mr. Wong Choong and that as far as the deceased was concerned, the matter will now be in the hands of the Public Trustee." Following this, the learned judge found that the said Lee Yew Siong saw the Public Trustee, who requested that two cheques for \$20,000 each be made out. This was done and cheques dated 28th May 1962 were sent to each of the Respondents, only to be returned on 7th June 1962 on the instructions of the first Respondent on the ground that "the purchaser had not duly exercised the option."

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30 8. On the facts so found, the learned judge held that the Appellant had exercised the option and was entitled to specific performance of it. He rejected the Respondents contention that the Appellant was disentitled to this relief on the ground of delay in bringing the Action. He quoted with approval the Indian case of Veena Bai v Kesur Bavu A.I.R. 1953 Travancore:

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44 1.42

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11.24-44

40 "We do not dispute the correctness of the proposition that long delay or laches may be a circumstance taken into account by courts in granting relief for specific performance, but the rule is subject to certain qualifications recognised at least by the Indian High Courts. Delay which is short of the period prescribed by the Indian Limitations Act and which is not of such a character as to give rise to an inference of waiver or abandonment of right is no bar to a suit for specific performance unless it is shown to have prejudiced the defendant , laches to bar the plaintiff's right

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"must amount to waiver, abandonment or
"acquiescence and to raise the presumption
"of any one of these the evidence of conduct
"must be plain and unambiguous".

p38 1.4 -
39 1.40

9. The learned judge also rejected their claim that the agreement was illegal because (under Clause 7 of the Agreement of 15th May 1961) the Vendors had to apply to the President of the Rent Assessment Board to rebuild when they had no such intention, holding that neither the consideration nor the object of the said agreement were unlawful within the meaning of the Contracts (Malay States) Ordinance 1950, that these provisions in Clause 7 were inserted for the benefit of the Purchaser and could be waived by him, and that, even if the provisions in this Clause could be viewed as an attempt to defeat the object of the Control of Rent

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P39 1.40-
P41 1.18

Ordinance 1956, these provisions were severable under Section 58 of the Contracts (Malay States) Ordinance 1950. The Respondents also contended that the option had not been exercised because the deposit of \$40,000 was not accompanied by a notice in writing that the plans and specifications had been approved (which contention the learned judge rejected because these provisions were inserted for the benefit of the Purchaser and could be waived by him) and because the tender to the said Lee Yew Siong of a joint cheque for \$40,000 was an invalid tender. The learned

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P44 1.42

judge held that the tender was valid because in the circumstances of the case the Appellant was entitled to make the tender to the said Lee Yew Siong and although the Appellant had no notice of the death of the said Wong Choong, such death did not in any event affect the contract or prevent the Appellant from validly discharging his obligation. Finally, the learned judge also rejected an argument that because the Appellant failed to tender the balance of the purchase price following the return of the two cheques for \$20,000 each of 7th June 1962 he was disentitled to relief on the ground that time was made of the essence of the contract.

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10. On 16th July 1969 the Respondents gave notice of appeal to the Federal Court of Malaysia

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(Appellate Jurisdiction) on the grounds set out in their memorandum of appeal dated 26th August 1969.

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11. The appeal was heard on 12th and 13th November 1969 before Ong Hock Thye C.J. and Gill and Ali F.J.J. and an Order was made allowing the appeal with costs (both of the appeal and of the hearing in the court below) on 13th November 1969.

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10 12. The judgment of the Court was delivered by Ong Hock Thye C.J. on 9th December 1969. The learned Chief Justice, after reviewing the facts and referring to the defences raised in the court below, held that the refusal of the deposit on June 8th 1962 was coupled with an unequivocal repudiation of the agreement, leaving two courses open to the Appellant, namely either to agree to rescission of the agreement or to treat the repudiation as "writ in water." 20 The learned Chief Justice then went on to hold that in the absence of any indication from the Appellant for over 4 years that he wished to complete the purchase, the Appellant's conduct was such that he must be taken to have accepted rescission of the agreement.

13. On 8th June 1970 final leave was granted to the Appellant by the Federal Court of Malaysia (Appellate Jurisdiction) to pursue this appeal.

P 82, 83

30 14. On the hearing of this appeal the Appellant wishes to contend that if he is not entitled to the relief of Specific Performance he is nevertheless entitled to damages for breach of contract. The uncontradicted evidence is that at the date of the death of the said Wong Choong an undivided one half share in the said land was worth \$125,000. The question of damages was referred to in argument before Dato' Abdul Aziz J. by the Appellant's Counsel, and the matter was also raised in argument by the Appellant's 40 Counsel before the Federal Court of Malaysia (Appellate Jurisdiction).

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15. The Appellant respectfully submits that this appeal ought to be allowed, with costs

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throughout, for the following among other

R E A S O N S

1. BECAUSE no conduct of the Appellant between the date of the refusal of the deposit and the date when the present proceedings were commenced was of such a character as to give rise to any inference that he was waiving or abandoning any of his rights under the said Agreement.
2. BECAUSE the Federal Court was wrong in holding that the Appellant's conduct was such that he had accepted rescission of the contract by the Respondents and therefore had no remedy against them 10
3. BECAUSE even if the Appellant's conduct was such that he was not entitled to the relief of specific performance, he nevertheless was and is entitled to damages for breach of contract.
4. BECAUSE, for the reasons therein stated, the Judgment of Dato' Abdul Aziz J. was right and ought to be restored. 20

RAYMOND WALTON

RUPERT EVANS

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CASE FOR THE APPELLANT

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