



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

-and-

1. Chin Kim (f)
2. The Public Trustee,  
Federation of Malaya,  
Kuala Lumpur as Executor  
of the Estate of Wong  
Choong, deceased Respondents

CASE FOR THE RESPONDENTS

1. This is an Appeal by Loh Boon Siew (hereinafter called "the Appellant") from a Judgment of the Federal Court of Malaysia (Appellate Jurisdiction) (Ong Hock Thye C.J., Gill and Ali F.J.J.) dated the 9th day of December 1969 allowing with costs the Appeal of Chin Kim (a widow) and the Public Trustee, Federation of Malaya, Kuala Lumpur as Executor and Trustee of the estate of Wong Choong, deceased (hereinafter called "the Respondents") from a Judgment and Order of the High Court of Malaya at Kuala Lumpur (Dato Abdul Aziz J.) dated the 19th day of June 1969 which granted to the Appellant an Order for specific performance of an option for the purchase of land from the Respondents.

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

Record  
Pages 75-80

Pages 35-45

2. The principal issues raised in this appeal are:-

- (i) Is the agreement made on the 16th day of May 1961 contrary to public policy and illegal and void

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

Record(cont'd)

- (ii) If it was not illegal and void whether the Appellant had in fact duly exercised the option contained in the said agreement on or before the 15th day of May 1962 or at any time
- (iii) Even if the Appellant had duly exercised the option, which is denied, is he entitled to an order for specific performance in view of his laches and delay in not commencing proceedings until the 29th day of August 1966 notwithstanding rescission by the Respondents on 7th and 8th day of June 1962.

Pages 7-10.

3. By the said agreement dated 16th May 1961 Wong Choong and Chin Kim, as Vendors, gave the Appellant an option to purchase a piece of land in Kuala Lumpur with vacant possession and free from all encumbrances. On the said land there was a main house which was occupied by the Vendors and two or three other houses which were in the possession of tenants and occupied by them (the tenants). The purchase price was \$160,000/-. The Appellant was to have plans and specifications prepared for buildings to be erected on the said land and get them approved by the proper authorities. As soon as the said plans and specifications were approved by the proper authorities the Appellant should notify the Vendors in writing and at the same time pay to the Vendors \$40,000/-.

Upon receipt of the notice and the sum of \$40,000/- the Vendors should take steps to eject the tenants from the said land and for that purpose apply to the Rent Assessment Board for a certificate that the 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 that in its opinion it is in the public interest that they should be permitted to do so. The Appellant was to pay to the Vendors the balance sum of \$120,000/- of the purchase price within six months from the date of the payment of the \$40,000/-.

If the Vendors were unable to give to the Appellant vacant possession of the said land within six months from the date of the receipt of the sum of \$40,000/- the Appellant may terminate the agreement

3.

and recover the sum of \$40,000/- paid by him to the Vendors.

In the Federal  
Court of  
Malaysia

(Appellate  
Jurisdiction)

Record (cont'd)

The said agreement also provided that time was of the essence of the contract. The option was initially for a period of six months which was to be extended for a further period of six months if the plans and specifications for the new buildings were not approved within the first six months.

4. The Appellant applied through his architect to the Commissioner of the Federal Capital of Kuala Lumpur for planning permission and by a letter dated 4th October 1961 from the Planning Officer of Town Planning Branch of the Municipal Engineers Department of the Federal Capital of Kuala Lumpur planning permission was refused.

Page 97

5. By a document dated 11th November 1961 the Vendors extended to the 15th day of May 1962 the option granted by the agreement dated 16th May 1961. By a letter dated 20th November 1961 the said Planning Officer stated that the decision to refuse planning permission could not be reconsidered.

Page 11

Page 95

6. Mr. Wong Choong died on the 4th day of May 1962. Messrs. Lim Huck Aik & Co. acting as solicitors for the Appellant wrote letter dated 5th May 1962 to Messrs. Y.S. Lee & Co. the solicitors who had drawn the said agreement dated 16th May 1961, enclosing a cheque for \$40,000/- and stating that their client intended to purchase the property irrespective of whether the plans and specifications were approved or not and calling upon the Vendors to

Page 84

Page 85

"take the necessary steps under Clause 7 of the Agreement of Sale dated 16th May 1961 to enable our client to rebuild on the said land".

Messrs. Y.S. Lee & Co. sent the cheque for \$40,000/- with a letter dated 11th May 1962 to Madam Chin Kim and Madam Chin Kim as trustee of the estate of Wong Choong. Madam Chin Kim returned the cheque to Messrs. Y.S. Lee & Co. with her letter dated 12th May 1962.

Page 12

Page 13

Then Messrs. Y.S. Lee & Co. sent to Madam Chin Kim and the Public Trustee one cheque each for \$20,000/-

Pages 14-15

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

Record (cont'd)

Pages 16-18

with letters dated 2nd June 1962. In the letter to Madam Chin Kim she was requested to "make arrangements to evict your tenants in the said land in terms of the Agreement".

Both these cheques were returned to Messrs.Y.S.Lee & Co. by Madam Chin Kim, through her solicitors Messrs. R. R. Chelliah Brothers, and the Public Trustee, on the 7th and 8th day of June 1962 respectively on the grounds that the Appellant had not duly exercised the option under the agreement.

Pages 89-92  
Page 93

7. The next step taken in this matter was the application by the Appellant for the entry of a caveat against dealings in the land which was supported by a statutory declaration that set out the Appellant's claim.

Pages 1-2

Pages 3-7

Both these documents were dated the 27th day of August 1966. Two days later the specially endorsed writ was issued. The Statement of Claim alleged that the Defendants (the present Respondents) had repudiated the Agreement of 1961 which the Plaintiff (the present Appellant) had "at all times been ready and willing to perform". Paragraph 16 was in the following terms :-

"16. The Defendants have further failed or neglected to carry out their obligations to evict all tenants on the said land and to give vacant possession of it to the Plaintiff."

and the following Order of the High Court was prayed for :-

"19. (a) the Defendants do on payment to them of the sum of \$160,000/- transfer to the Plaintiff the said land and for such purpose execute a valid and registerable transfer of such interest in favour of the Plaintiff or his nominee;

(b) in the event of the Defendants failing to execute such valid and registerable transfer within one week of such Order, the Senior Assistant Registrar of the Honourable Court do execute such transfer on behalf of the Plaintiff;

5.

(c) the Plaintiff be at liberty after the transfer of the said land to take such steps as may be necessary to evict the persons in occupation of the said land and that the Defendants do pay to the Plaintiff all costs and expenses incurred therefor".

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)  
Record (cont'd)

8. By their Defence the Respondents contended inter alia that

Pages 19-22

- (i) The said agreement was contrary to public policy and illegal as the Vendors were required to make a false application to the Rent Assessment Board, give false evidence and eject the tenants by perpetrating a fraud on the Rent Assessment Board and the tenants.

That the intention of the parties was to defeat the provisions of the Control of Rent Ordinance 1956.

- (ii) The Appellants did not at any time duly exercise the option given to them by the said agreement. That it was a condition precedent to the payment of the deposit of \$40,000/- that the Appellant should have the plans and specifications for the buildings to be erected on the said land approved by the proper authority. The Appellants had to notify the Vendors in writing of the said approval when making the payment of the \$40,000/-.

It is an undisputed fact that the Appellant never had any plan or specification approved by the proper authority for any building to be erected on the said land and consequently no notice was given by the Appellant to the Vendors of any approval.

- (iii) Time was expressly stated to be of the essence of the contract.
- (iv) In any event by his laches and delay in not beginning proceedings until the 29th day of August 1966 the Appellant had lost any right for specific performance.

In the Federal Court of Malaysia (Appellate Jurisdiction)

9. The hearing of the action by the High Court commenced on the 17th day of March 1969 when learned Counsel for the Appellant said that there were two issues :-

Record (cont'd)  
Page 24

"(1) the nature of the option Agreement - whether it is illegal;

(2) whether the option has been exercised".

Pages 24-26

The Appellant gave oral evidence and stated that he was a businessman from Penang who in 1961 wanted land in Kuala Lumpur for a showroom. On the land he agreed to buy was a house occupied by Madam Chin Kim and her husband who both agreed to move out. There were also two or three other houses and as he wanted vacant possession in order to build, it would be necessary for the Vendors to take eviction proceedings. In October 1961 he learnt from his architect that planning permission had been refused. He appealed but was unsuccessful. The option was then extended for a further six months so as to expire on the 15th day of May 1962. He referred to and produced the correspondence and other documents. In cross-examination, he admitted that he had made no further application for re-zoning of the land (that is, to allow commercial building) and neither had he again applied for approval of the building plans.

Page 26  
lines 24-26

10. Madam Chin Kim gave evidence for the Respondents and stated that her husband, Wong Choong, died on the 4th day of May 1962. She described the land and the option to purchase and said that whilst she and her husband had signed the plans for submission to the Municipality, she never had any notice that they had been approved. As far as the application to the Rent Assessment Board was concerned, she and her husband had no intention to demolish and rebuild for their own purposes.

Page 29  
line 19  
Page 30  
line 25

Page 30 line  
30 - Page 31  
line 43

11. Further evidence for the Respondents was given by the Public Trustee, Paramalingam s/o Kandiah, who said that he returned the cheque for \$20,000/- after consulting Madam Chin Kim. He found that "the purchaser had not carried out his obligations under the Agreement". He had never received any notice of planning approval from the Municipality. If he had received the notice and also the payment

of \$40,000/-, the Agreement required him to apply to the Rent Assessment Board for eviction. Under the Ordinance, the owners had to satisfy the Board that they intended to demolish and rebuild but there was no such intention. He heard nothing further after the correspondence in 1962 until he was served with the Writ. He had the property valued for estate duty purposes and the figure was \$125,000/-. This was the half share of the deceased. He had a further valuation made on the 7th day of April 1966 (some four months before the issue of the Writ) by which time the value had risen to \$135,000/-. In cross-examination, the witness again stated that he "returned the cheque because purchaser has not complied with the terms".

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)  
Record (cont'd)

12. In his judgment Dato Abdul Aziz J. referred to sections 24 (b), 25 and 58 of the Contracts (Malay States) Ordinance 1950 and held

Page 38 line 4-12

(i) that the agreement was not illegal although doubts as to its illegality may exist in regard to the stipulation requiring the Respondents to apply to the Rent Assessment Board

Page 38 Line 13 -  
Page 39 line 26

(ii) that even if the provisions could be viewed as an attempt to defeat the object of the Control of Rent Ordinance and as a fraud on the tenants they could be severed under section 58

Page 39 line 26-40

(iii) that the provisions as to having plans and specifications approved and the subsequent application to the Rent Assessment Board were for the benefit of the Appellant who could and did waive them.

Page 38 line 18-37

13. The Respondents respectfully submit that the reasoning and finding of the learned judge were erroneous. It is quite clear that the said agreement provided for the sale and purchase of the said land with vacant possession free from all encumbrances. It was only because vacant possession was of the essence of the transaction that all those clauses relating to the drawing and approval of plans and specifications and the subsequent application by the Vendors to the Rent Assessment Board were put in. If the Appellant was prepared

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

Record (cont'd)

to purchase without vacant possession then all those provisions and time limits were not necessary and all that he had to do was to pay the purchase price of \$160,000/- which he never did.

14. The said land was occupied by tenants who were protected by the Control of Rent Ordinance 1956 and unless they were ejected the land could not be sold or purchased with vacant possession. The tenants could not be ejected unless a false case was made out against them before the Rent Assessment Board. In order to enable the Vendors to make such a false application the Appellant agreed to have the necessary plans and specifications approved. These approved plans and specifications were for the benefit not only of the Appellant but also of the Respondents because without it the Respondents could not sell vacant land and perform their part of the said agreement.

15. The Appellant could not waive the provisions as to having plans and specifications approved without the consent of the Respondents unless the Appellant was also prepared to purchase the said land without vacant possession. He never waived the Respondents obligation to deliver vacant possession.

16. The said agreement was tainted with illegality and was void. The whole exercise of the Appellant having plans and specifications drawn and approved and of the Vendors making a false application to the Rent Assessment Board with the help of those approved plans and specifications to have the tenants ejected from the said land formed an inextricable part of the whole transaction to enable the sale and purchase of vacant land and could not be severed from the rest of the agreement.

17. The learned judge in dealing with the stipulation making time of the essence of the contract and the question as to whether the Appellant had exercised his option within time, if at all, made erroneous findings. He referred to the cases of Smith v. Hamilton (1951) 1 Ch. 174; Jamshed Khodaram Irani v. Burjorji Dhunjibhau (1915) 32 T.L.R. 156, 157; and Williams v. Greatrex (1956) 3 AER 705 which were all cases where time was not expressly made of the essence of the contract in the agreement itself.



The learned judge observed :-

"Although the contract expressly stipulates that time shall be of the essence of the agreement, the only time, in fact mentioned in the agreement was the period of six months, during which the payment of \$40,000/- should be made. And since the payment was refused, her complaint that there was no tender of the balance of the payment cannot be sustained".

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)  
Record (cont'd)

Time was mentioned in the said agreement on four occasions. Further, the mere payment of \$40,000/- without any plans and specifications having been approved, and without a notice in writing, at the same time, of such approval, was not compliance by the Appellant of the stipulations of the agreement and was properly rejected by the Respondents. The learned judge misunderstood the position as to the payment of the balance sum. If the Appellant intended to purchase the said land without vacant possession, he should have tendered the whole of the purchase price before the 15th day of May 1962. The Appellant did not duly exercise the option.

18. The learned judge further held that delay coupled with appreciation of value of the land was no bar to the granting of specific performance and found for the Appellant granting him the relief which he claimed.

Page 41  
line 19  
Page 44  
line 40

19. The Respondents appealed against the said decision to the Federal Court of Malaysia and in their grounds of appeal asserted that the learned trial judge of the High Court had misdirected himself as to the nature and essence of the said agreement and as to the law applicable. The grounds of appeal also asserted that the trial judge should have held that

Pages 50-54

- (i) the agreement was void as it was tainted with illegality
- (ii) the Appellant had not duly exercised the option contained in the said agreement
- (iii) even if the Appellant had duly exercised the option he was not entitled to an order for specific performance in view of

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

his laches and delay in not commencing proceedings until the 29th day of August 1966 notwithstanding rescission by the Respondents on the 7th and 8th day of June 1962.

Record (cont'd)

Pages 75-80

20. The appeal was heard by the Federal Court of Malaysia on the 12th day of November 1969 and at the conclusion of the Hearing the Court announced that the Appeal would be allowed with costs. The judgment of the Court was delivered by Ong Hock Thye C.J. on the 9th day of December 1969. He stated that the judgment of the learned trial judge proceeded upon a misapprehension of what really were the material facts.

Page 78  
lines 11-27

He said that the Respondents' refusal of the deposit was coupled with an unequivocal repudiation of the agreement. That left two courses open to the Appellant either to agree to rescission of the agreement or treat the repudiation as "writ in water". The Appellant did nothing to make his position clear and by reason of his complete silence it was reasonable for the Respondents to assume that he acquiesced in their rescission. In his lordship's opinion a lapse of over four years was not even within measurable distance of the reasonable time the Appellant needed to make up his mind. He stated that the Appellant had been solely responsible for a most inordinate delay which had in fact resulted in benefits which were entirely one sided.

Page 80  
lines 9-13

21. The Respondents respectfully submit that the decision of the Federal Court of Malaysia on the question of delay was correct.

22. Ong Hock Thye C.J. did not in his judgment deal with the questions as to whether the said agreement was void for illegality and whether the Appellant had in fact duly exercised the option contained in the said agreement.

23. The Respondents respectfully submit that this Appeal should be dismissed (with costs) because the decision of the Federal Court in Malaysia was correct and should be affirmed and also for the following among others

R E A S O N S

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)  
Record (cont'd)

1. The said Agreement was void for illegality as it required the perpetration of a fraud on the Rent Assessment Board and the tenants of the said land and the parties intended to defeat the provisions of the Control of Rent Ordinance 1956.
2. The provisions requiring the Appellant to have plans and specifications drawn and approved and those requiring the Respondents to make a false application to the Rent Assessment Board with the help of those approved plans and specifications to have the tenants of the said land ejected formed an inextricable part of the whole transaction to enable the sale and purchase of vacant land and was for the benefit of both the Appellant and the Respondents.
3. Those provisions cannot be severed from the rest of the agreement.
4. The provisions requiring the Appellant to have plans and specifications drawn and have them approved cannot be unilaterally waived by the Appellant.
5. The Appellant did not at any material time agree to purchase the land with the tenants. At all times he wanted vacant possession of the land.
6. The Appellant did not duly exercise the option contained in the said agreement.
7. Time was expressly stated in the Agreement to be of the essence.
8. In any event in view of his delay of over four years in commencing proceedings the Appellant is not entitled to an order for specific performance or any other relief.

R.R.CHELIAH.

JOHN A. BAKER

No. 34 of 1970

IN THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL

ON APPEAL  
FROM THE FEDERAL COURT OF  
MALAYSIA

---

(APPELLATE JURISDICTION)

BETWEEN:-

LOH BOON SIEW Appellant

-and-

CHIN KIM (F)  
AND THE PUBLIC TRUSTEE  
FEDERATION OF MALAYA  
KUALA LUMPUR AS  
EXECUTOR AND TRUSTEE  
OF THE ESTATE OF WONG  
CHOONG, Deceased

Respondents

---

CASE FOR THE RESPONDENTS

---

Messrs. Graham Page & Co.,  
49/55, Victoria Street,  
Westminster, S.W.1.

Solicitors for the Respondents