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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

B E T W E E N :

LOH BOON SIEW

Appellant  
(Plaintiff)

- 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  
(Defendants)

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
10 MAY 1973  
25 RUSSELL SQUARE  
LONDON W.C.1

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RECORD OF PROCEEDINGS

LINKLATERS & PAINES,  
Barrington House,  
59 Gresham Street,  
London, E.C. 2V 7JA.

Solicitors for the  
Appellant

GRAHAM PAGE & CO.,  
49/55 Victoria Street,  
London,  
S.W.1.

Solicitors for the  
Respondents

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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TRUSTEE, FEDERATION OF MALAYA,  
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TRUSTEE OF THE ESTATE OF  
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Respondents  
(Defendants)

RECORD OF PROCEEDINGS

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5th December 1969

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26th January 1970

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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 34 of 1970

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

B E T W E E N :

LOH BOON SIEW Appellant  
(Plaintiff)

- 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  
(Defendants)

RECORD OF PROCEEDINGS

NO. 1

WRIT OF SUMMONS DATED 29th AUGUST 1966

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

Civil Suit No. 1045 of 1966

BETWEEN

Loh Boon Siew

Plaintiff

AND

Chin Kim (f).  
The Public Trustee,  
Federation of Malaya,  
Kuala Lumpur.  
As executor and trustee  
of the Estate of Wong  
Choong, deceased.

Defendants

In the High  
Court of  
Malaya at  
Kuala Lumpur

No. 1

Writ of  
Summons  
29th August  
1966

SPECIALLY INDORSED WRIT

The Honourable Dato Azmi bin Haji Mohamed,  
D.P.M.K., P.S.B., P.J.K., Chief Justice of the  
High Court in Malaya, in the name and on behalf



In the High  
Court of  
Malaya at  
Kuala Lumpur

            
No. 1

Writ of  
Summons  
29th August  
1966  
continued

of His Majesty the Yang di-Pertuan Agong.

To:

- (1) Chin Kim (f),  
No. 20, Klyne Street,  
Kuala Lumpur.
  
- (2) The Public Trustee,  
Federation of Malaya,  
High Court Building,  
Kuala Lumpur.

WE COMMAND you, that within eight (8) days after the service of this Writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of Loh Boon Siew. 10

AND TAKE NOTICE that in default of your so doing the Plaintiff may proceed therein and judgment may be given in your absence.

WITNESS, Siti Normah Yaakob, Senior Assistant Registrar of the High Court in Malaya at Kuala Lumpur. 20

Dated this 29th day of August, 1966.

Sd:

Senior Assistant Registrar,  
High Court, Kuala Lumpur.

Sd:

Braddell & Ramani  
Plaintiff's Solicitors

N.B. This Writ is to be served within twelve months from the date thereof, or if renewed, within six months from the date of last renewal, including the day of such date, and not afterwards. 30

The defendant (or defendants) may appear hereto by entering an appearance (or appearances) either personally or by solicitor at the Registry of the High Court at Kuala Lumpur.

A defendant appearing personally may, if he desires, enter his appearance by post, and the appropriate forms may be obtained by sending a Postal Order for \$3.00 with an addressed 40

envelope to the Registrar of the High Court at Kuala Lumpur.

In the High  
Court of  
Malaya at  
Kuala Lumpur

If the defendant enters an appearance he must also deliver a defence within fourteen days from the last day of the time limited for appearance, unless such time is extended by the Court or a Judge, otherwise judgment may be entered against him without notice, unless he has in the meantime been served with a summons for judgment.

                      
No. 1

Writ of  
Summons  
29th August  
1966  
continued

10

STATEMENT OF CLAIM

1. The Plaintiff is a businessman residing at No.15, Pitt Street, Penang.

2. The First Defendant is the registered owner of an undivided half share in respect of the portion of land held under Selangor Certificate of Title No. 11089 Lot 97 Section 57 in the Town of Kuala Lumpur (hereinafter referred to as "the said undivided half share in the said land").

20 3. The other undivided half share in the said land is registered in the name of her late husband Wong Choong and is vested in the second Defendant who now administers the estate of the late Wong Choong.

30 4. On the 16th day of May, 1961 the Plaintiff entered into an agreement with the First Defendant and her late husband Wong Choong by which the First Defendant and the late Wong Choong as registered owners of the said land granted the Plaintiff an option to purchase it within a period of six (6) months from date thereof.

A copy of the said Agreement dated the 16th May, 1961 is annexed hereto and marked "LBS.1".

5. A deposit of \$1,200/- was paid under the terms of the said Agreement.

40 6. It was provided inter alia in the said Agreement that the Purchaser shall immediately through his Architect apply for approval from the appropriate authorities of building plans and specifications not being approved within six (6) months of the date of the said Agreement the option

In the High Court of Malaya at Kuala Lumpur

No. 1

Writ of Summons  
29th August 1966  
continued

interest in favour of the Plaintiff his nominee;

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

(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;

10

(d) such other relief as may be just and necessary; and

(e) costs.

Dated this 29th day of August, 1966.

Sd: Braddell & Ramani.  
Solicitors for the Plaintiff  
abovenamed.

20

And the sum of \$ (or such sum as may be allowed on taxation) for costs, and also, in case the Plaintiff obtains an order for substituted service, the further sum of \$ (or such sum as may be allowed on taxation). If the amount claimed be paid to the Plaintiff or his advocate and solicitor or agents within four days from the service hereof, further proceedings will be stayed.

Provided that if it appears from the indorsement of the writ that the Plaintiff is resident outside the schedule territories as defined in the Exchange Control Ordinance 1953, or is acting by order or on behalf of a person so resident, or if the Defendant is acting by order or on behalf of a person so resident, proceedings will only be stayed if the amount claimed is paid into Court within the said time and notice of such payment in is given to the Plaintiff, his advocate and solicitor or agent.

30

This Writ was issued by Messrs. Braddell and

40

Ramani, Advocates & Solicitors, Hongkong Bank Chambers, Kuala Lumpur, Solicitors for the said Plaintiff who resides at No.15, Pitt Street, Penang.

In the High Court of Malaya at Kuala Lumpur

This Writ was served by me at on the Defendant on the day of 1966 at the hour of

No. 1

Writ of Summons 29th August 1966 continued

Indorsed this day of 1966.

(Signed)

(Address)

10

PLAINTIFF'S EXHIBITS

Plaintiff's Exhibits

Exhibit P1(1)

Agreement between Wong Choong and Chin Kim and Loh Boon Siew dated 16th May 1961. Also annexed to Writ of Summons marked "LBS.1".

Exhibit P1(1)

Agreement between Wong Choong and Chin Kim and Loh Boon Siew 16th May 1961 (also annexed to Writ of Summons marked "LBS.1")

An Agreement made the 16th day of May, 1961 Between WONG CHOONG and CHIN KIM (f) both of Klyne Street, Kuala Lumpur (hereinafter referred to as "the Vendors") of the first part and LOH BOON SIEW of No.15, Pitt Street, Penang (hereinafter referred to as "the Purchaser") of the second part and CHIN YEE WENG of No. BF-11, 6th Floor, Suleiman Court, Kuala Lumpur (hereinafter referred to as "the Broker") of the third part

20

Whereas the Vendors are the registered owners of a piece of land held under Certificate of Title No. 11089, Lot 97, Section 57, containing an area of 3 roods 34.8 poles, in the Town of Kuala Lumpur, State of Selangor, (hereinafter called "the said Land").

30

And Whereas the Vendors are desirous of selling the said land and the Purchaser are desirous of purchasing the said land.

And Whereas both the Vendors and the Purchaser have acquired the services of the Broker to negotiate the sale and purchase of the said land.

Plaintiffs  
Exhibits

Whereby It Is Agreed as follows :-

Exhibit P1(1)  
Agreement  
between Wong  
Choong and  
Chin Kim  
and Loh Boon  
Siew  
16th May 1961  
(also  
annexed to  
Writ of  
Summons  
marked  
"LBS.1"  
continued

1. In consideration of the sum of Dollars One Thousand Two Hundred (\$1,200.00) only now paid by the Purchaser to the Vendors, which sum the Vendors hereby acknowledge, the Vendors hereby grant to the Purchaser or any person or body cooperate nominated by the Purchaser in writing (hereinafter referred to as "the Nominee") this OPTION to purchase the said land for the sum of Dollars One Hundred and Sixty (\$160,000.00) only (sic)10 free from all encumbrances.
2. This option shall remain open for the period of six (6) months from date hereof.
3. 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. 20
4. All expenses and liabilities whatsoever which may be incurred in respect of such plans and specifications shall be borne by the Purchaser or the Nominee.
5. As soon as the said plans and specifications have been duly approved, the Purchaser or the Nominee shall immediately notify the Vendors in writing of such approval and shall at the same time pay to the Vendors a sum of Dollars Forty Thousand (\$40,000.00) only as deposit and such deposit shall be deemed to be part payment towards the agreed purchase price of Dollars One Hundred and Sixty Thousand (\$160,000.00) only and the Purchaser and Nominee shall pay the balance sum of Dollars One Hundred and Twenty Thousand (\$120,000.00) within six months from date of payment of such deposit and the sum of Dollars One Thousand Two Hundred (\$1,200.00) now paid by the Purchaser to the Vendors shall be set-off against the agreed purchase price. 30 40
6. If however, the plans and specifications submitted to the proper authorities have not been

approved within six months from date hereof, this option shall then be automatically extended for a further period of six months and the said sum of Dollars One Thousand Two Hundred (\$1,200.00) now paid by the Purchaser to the Vendors shall be deemed to be the consideration of the said agreed extension of six months but in this event the said sum of One Thousand Two Hundred (\$1,200.00) shall belong to the Vendors absolutely and shall not be set-off against the agreed purchase price.

Plaintiff's Exhibits

Exhibit P1(1)

Agreement  
Between Wong  
Chin Kim  
and Loh Boon  
Siew  
16th May 1961  
(also  
annexed to  
Writ of  
Summons  
marked  
"LBS.1"  
continued

7. Immediately on receipt of the sum of Dollars Forty Thousand (\$40,000.00) 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 re-building 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.

8. If, within six (6) months from the date of the said deposit the Vendors are unable to give vacant possession of the said land, the Purchaser or the Nominee has the exclusive right to terminate the Agreement and the Vendors shall immediately refund to the Purchaser or Nominee the sum of Dollars Forty Thousand (\$40,000.00) free of interest and this Agreement shall be null and void.

9. The Purchaser or the Nominee shall have the right, at his or the Nominee's own cost and expenses to lodge a Caveat against the title (s) to the said land and the Vendors hereby consent to the same, provided that upon the expiry of the said option the Purchaser or the Nominee shall remove the same at the Purchaser's or the Nominee's own expense.

10. The Vendors hereby agree to pay to the Broker a commission of Two per cent (2%) of the agreed purchase price of \$160,000.00.

Plaintiff's Exhibits

Exhibit P1(1)

Agreement Between Wong Chin Kim and Loh Boon Siew 16th May 1961 (also annexed to Writ of Summons marked "LBS.1" continued

11. The Purchaser hereby agrees to pay to the Broker a commission of Two per cent (2%) of the agreed purchase price of \$160,000.00.

12. The completion of the transfer shall be at the office of Messrs. Y.S. Lee & Company, Advocates & Solicitors, No. 10, Klyne Street, 1st Floor, Kuala Lumpur.

13. Time wherever mentioned in this Agreement shall be the essence of this contract.

14. This Agreement shall be binding upon all the parties hereto, their heirs, executors, administrators and assigns.

10

IN WITNESS WHEREOF the parties have hereunto set their hands this day and year above written.

Signed by the said WONG CHOONG and Chin Kim (f) (Vendors) in the presence of :- Sd: Wong Choong Sd: Chin Kim

Sd: Y.S. Lee Advocate & Solicitor, Kuala Lumpur.

20

Signed by the said LOH BOON SIEW (Purchaser) in the presence of :- Sd: Low Boon Siew (in Chinese)

21

Sd: Y.S. Lee Advocate & Solicitor, Kuala Lumpur.

Signed by the said CHIN YEE WENG (Broker) in the presence of :- Sd: Chin Yee Weng

30

Sd: Y.S. Lee Advocate & Solicitor, Kuala Lumpur.



EXHIBIT P1(6)

Letter. Wong Choong and Chin Kim extending Option Agreement until 15th May 1962. Also annexed to Writ of Summons marked Exhibit "LBS.2" dated 11th November 1961.

Plaintiff's Exhibits

Exhibit P1(6)

Letter. Wong Choong and Chin Kim extending Option Agreement until 15th May 1962.

Also annexed to Writ of Summons marked Exhibit

"LBS.2"

11th November 1961

10

We, Wong Choong and Chin Kim (f) both of Klyne Street, Kuala Lumpur, hereby confirm that the agreement made on the 16th day of May, 1961 between us and Mr. Loh Boon Siew of No.15, Pitt Street, Penang and Chin Yee Weng in respect of the sale of a piece of land held under Certificate of Title No. 11089 Lot 97 Section 57, containing an area of 3 roods 34.8 poles, in the Town of Kuala Lumpur, is hereby extended to 15th day of May, 1962 by mutual consent.

We hereby acknowledge the receipt of a further sum of \$1200/- being consideration of the said extension notwithstanding anything contained in Clause 6 of the said Agreement.

20

The said sum of \$1,200/- now paid by Mr. Loh Boon Siew to us shall belong to us absolutely and shall not be deducted from the agreed purchase price.

Dated this 11th day of November, 1961.

Signed by the said WONG ) Sd: Wong Choong  
CHOONG and Chin Kim (F) ) Sd: Chin Kim  
in the presence of :- ) 11.11.61

Sd: Y.S. Lee

Y.S. Lee, Solicitor for the parties.

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Plaintiff's Exhibits

EXHIBIT P1(9)

Exhibit P1(9)

Letter Y.S. Lee & Co. to Madam Chin Kim also annexed to Writ of Summons marked Exhibit "LBS.3" 11th May 1962

Letter Y.S. Lee & Co. to Madam Chin Kim dated 11th May 1962. Also annexed to Writ of Summons marked Exhibit "LBS.3".

L/K/W/56/61

11th May, 1962.

Madam Chin Kim and Madam Chin Kim as Trustee of the Estate of Wong Choong (deceased), No.20, Klyne Street, Kuala Lumpur.

10

Dear Madam,

Re: Certificate of Title No.11089, Lot 97, Section 57, Town of Kuala Lumpur

We are instructed by Mr. Loh Boon Siew to send you a cheque for the sum of \$40,000.00 made payable to you and your late husband for the payment of deposit in respect of the purchase of the land held under the above title in pursuance of the Agreement dated 16th May, 1961.

20

We understood that you are the trustee appointed under the Will of your late husband.

Please acknowledge receipt.

Yours faithfully,

Sd: Y.S. Lee

c.c.

1. M/s. Lim Huck Aik & Co., Advocates & Solicitors, 12A Beach Street, Penang.

30

2. Mr. Loh Boon Siew, 15, Pitt Street, Penang.

Encl. Cheque No. PE 355693

on Oversea Chinese Banking Corp. Ltd. Penang dated 5th May, 1962.

40

EXHIBIT P1(10)

Letter Madam Chin Kim to Messrs. Y.S. Lee & Co. dated 12th May 1962. Also annexed to Writ of Summons and marked Exhibit "LBS.4".

Plaintiff's Exhibits

Exhibit P1(10)

Letter Madam Chin Kim to Messrs.Y.S. Lee & Co. Also annexed to Writ of Summons marked Exhibit "LBS.4"  
12th May 1962

Madam Chin Kim,  
20, Klyne Street,  
Kuala Lumpur.  
12th May, 1962.

10 Messrs. Y.S. Lee & Co.,  
10, Klyne Street,  
(1st Floor),  
Kuala Lumpur.

Dear Sirs,

re: Certificate of Title  
No. 11089 Lot 97, Section  
57, Town of Kuala Lumpur

20 I regret to inform you that I am unable to accept your deposit of \$40,000.00 in respect of the purchase of the above property as this matter will now be in the hands of the Public Trustee as a result of the demise of Mr. Wong Choong.

I return herewith your cheque for \$40,000/- which please acknowledge receipt.

Yours faithfully,

Sd: Chin Kim

(Madam Chin Kim)

\_\_\_\_\_

Plaintiff's Exhibits

EXHIBIT P1(14)

Letter Y.S. Lee & Co. to MadamChin Kim dated 2nd June 1962. Also annexed to Writ of Summons marked Exhibit "LBS.5"

Exhibit P1(14)

Letter Y.S.Lee & Co. to Madam Chin Kim. Also annexed to Writ of Summons marked Exhibit "LBS.5" 2nd June 1962

L/K/W/56/61

2nd June, 1962.

Madam Chin Kim,  
No. 20, Klyne Street,  
Kuala Lumpur.

Dear Madam Chin Kim,

Re: Sale of Land held under Certificate of Title No.11089 Lot 97, Section 57, Town of Kuala Lumpur

10

With reference to your letter of the 12th May, 1962 our Mr. Lee has discussed the matter with the Deputy Public Trustee, Federation of Malaya, and it was agreed that we return the cheque for \$40,000.00 to our client in exchange for 2 cheques of \$20,000.00 each and one made payable to the Estate of Wong Choong, deceased and the other made payable to you.

20

According, we have sent a cheque for \$20,000.00 to the Deputy Public Trustee and are enclosing a cheque for \$20,000.00 payable to you for which kindly acknowledge receipt.

We confirm that our Mr. Lee has told you that our client Mr. Loh Boon Siew intends to purchase the property irrespective whether the plans and specifications have been approved or not.

Please make arrangements to evict your tenants in the said land in terms of the Agreement.

30

Yours faithfully,

C.C.  
The Deputy Public Trustee,  
Federation of Malaya,  
Kuala Lumpur.

EXHIBIT P1(15)

Letter Messrs. Y.S. Lee & Co. to The Deputy Public Trustee dated 2nd June 1962. Also annexed to Writ of Summons marked "LBS.6"

Plaintiff's Exhibits

Exhibit P1(5)

Letter Messrs. Y.S. Lee & Co. to The Deputy Public Trustee. Also annexed to Writ of Summons marked Exhibit "LBS.6" 2nd June 1962

L/K/W/56/61

2nd June, 1962.

The Deputy Public Trustee,  
Federation of Malaya,  
Kuala Lumpur.

10 Dear Sir,

Re: Estate of Wong Choong,  
deceased. Certificate of  
Title No. 11089, Lot 97,  
Section 57, Town of  
Kuala Lumpur.

We refer to the recent discussion between our Mr. Lee and your goodself about the purchase of the above land of which the Estate of Wong Choong, deceased and his wife Madam Chin Kim are co-owners.

20 We enclose our client's cheque for \$20,000.00 together with a copy of our letter to Madam Chin Kim for your retention.

Kindly acknowledge receipt.

Yours faithfully,

Sd: Y.S. Lee

c.c.  
Madam Chin Kim,  
No.20, Klyne Street,  
Kuala Lumpur.

EXHIBIT P1(16)

Plaintiff's Exhibits

Exhibit P1(16)

Letter R.R. Chelliah Brothers to Messrs.Y.S. Lee & Co. Also annexed to Writ of Summons marked Exhibit "LBS.7" 7th June 1962

Letter R.R. Chelliah Brothers to Messrs. Y.S. Lee & Co. dated 7th June 1962. Also annexed to Writ of Summons marked "LBS.7"

CHELLIAH BROTHERS  
ADVOCATES & SOLICITORS

18 Ampang Street,  
Kuala Lumpur.

7th June, 1962.

Your Ref. L/K/W/51/61  
Our Ref. RRC/JDS/98/62

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Messrs. Y.S. Lee & Co.,  
Advocates & Solicitors,  
10, Klyne Street,  
Kuala Lumpur.

Dear Sirs,

Land held under C.T.11089  
Lot 97, Section 57 Town  
of Kuala Lumpur

Madam Chin Kim has handed to us your letter dated 2nd June 1962 enclosing cheque No. PE 367036  
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dated 28th May 1962 and drawn on the Oversea - Chinese Banking Corporation Ltd. , Penang for the sum of \$20,000/- with instructions to reply thereto as follows.

As your client has not duly exercised the option under the agreements we are instructed to return to you the said cheque which is enclosed herewith.

Please acknowledge receipt of the cheque.

Yours faithfully,

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Sd: R.R. Chelliah Brothers

EXHIBIT P1(17)

Letter Public Trustee to Messrs. Y.S. Lee & Co. dated 8th June 1962. Also annexed to Writ of Summons marked Exhibit "LBS.8"

Plaintiff's Exhibits

Exhibit P1(17)

Letter Public Trustee to Messrs. Y.S. Lee & Co. Also annexed to Writ of Summons marked Exhibit "LBS.8" 8th June 1962

Department of the Public Trustee  
and

Official Administrator,  
Federation of Malaya,  
Supreme Court Building,  
Kuala Lumpur.

Jabatan Pemegang  
Amanah Raya,  
dan  
Pentadbir Pesaka,  
Persekutuan  
Tanah Melayu,  
Bangunan  
Mahkamah Besar.

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8th June, 1962.

Our Reference No.(10) in P.T. (D.E.)2

Messrs. Y.S. Lee & Co.,  
Advocates & Solicitors,  
No.10, Klyne Street,  
Kuala Lumpur.

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Gentlemen,

Estate of Wong Choong deceased

1. Thank you for your letter Ref: L/K/W/56/61 dated 2nd June 1962. In this connection I wish to refer to our discussion (Y.S. Lee/Paramalingam) on 8th June 1962 in this office.

2. The abovenamed deceased, by his Will made on 18.9.61, has appointed me as Executor and Trustee. According to the directions contained in the Will I am required to consult the widow, Madam Chin Kim before disposing of any property, movable or immovable.

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3. I have, therefore, consulted Madam Chin Kim, who as you know, is the Co-owner of the land in question, and she has requested me to state that your client has not duly exercised the option under the Agreement.

Plaintiff's  
Exhibits

Exhibit P1(17)

Letter Public  
Trustee to  
Messrs. Y.S.  
Lee & Co.  
Also annexed  
to Writ of  
Summons marked  
Exhibit "LBS.8"  
8th June 1962  
continued

4. Please acknowledge receipt of the cheque for \$20,000/- sent by you together with your letter under reference, which is now returned herewith.

I am, Gentlemen,  
Your obedient Servant.

Sd. Bani.

(P.G. Bani)

for Public Trustee,  
Federation of Malaya.

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c.c.

Madam Chin Kim,  
No. 20, Klyne Street,  
Kuala Lumpur.

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In the High  
Court in  
Malaya at  
Kuala Lumpur

No. 2

Defence  
19th September  
1966  
continued

appointed by the Will.

5. The Defendants deny paragraph 11 of the Statement of Claim except in so far as it states that the First Defendant returned the said cheque to the Plaintiff together with the letter dated 12th May 1962.

6. The Defendants deny paragraphs 15 and 17 of the Statement of Claim.

7. In the said agreement it was a condition precedent to any exercise of the option and the payment of the sum of \$40,000/- that the Plaintiff should immediately upon the signing of the said agreement instruct a duly qualified architect to prepare plans and specifications of a building or buildings to be erected on the said land and have the said plans and specifications duly approved by the proper authorities.

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The said condition was not performed. Plans and specifications of buildings to be erected on the said land have not been approved by the proper authorities.

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8. It was a further condition that as soon as the said plans and specifications had been duly approved the Plaintiff should immediately notify the First Defendant and the late Wong Choong in writing of such approval and at the same time pay the said sum of \$40,000/-. No such notice has been given to the Defendants.

9. The buildings on the said land were and are controlled by the Control of Rent Ordinance 1956 and the tenants of the said buildings were and are protected by the said Ordinance.

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10. The said agreement provided that the First Defendant and the late Wong Choong should immediately on receipt of the sum of \$40,000/- 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 re-building and in its opinion it is in the public interest that they should be permitted to do so. The said provision required the First

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Defendant and the late Wong Choong to make a false application to the President of the Rent Assessment Board and to give false evidence.

In the High Court in Malaya at Kuala Lumpur

11. The said agreement is contrary to public policy and is illegal.

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No. 2

10 12. As regards paragraph 16 of the Statement of Claim the Defendants state that apart from the illegality of the agreement the Plaintiff by his failure to have the said plans and specifications approved by the proper authorities made it impossible for the Defendants to comply with the provisions of the said agreement and to give vacant possession of the said land to the Plaintiff.

Defence  
19th September  
1966  
continued

20 13. It was provided in the said agreement that if within 6 months from the date of payment of the sum of \$40,000/- the First Defendant and the late Wong Choong were unable to give vacant possession of the said land, the Plaintiff had the exclusive right to terminate the said agreement and the First Defendant and the late Wong Choong should immediately refund the sum of \$40,000/- free of interest and the agreement should be null and void.

14. The Plaintiff has never tendered to the Defendants the balance sum of \$120,000/- of the purchase price.

15. It was an express term of the said agreement that time should be of the essence of the contract.

30 16. The Plaintiff did not on or before the 15th day of May 1962 or at any time duly exercise the option given to him by the said agreement.

17. If the Plaintiff would except for his laches and delay be entitled to specific performance of the said agreement, which is denied, he has by his laches and delay in not beginning proceedings until the 29th day of August 1966 notwithstanding rescission by the Defendants on the 7th and 8th day of June 1962 lost such right.

40 18. The Plaintiff commenced these proceedings only after the enactment of the Control of Rent Act 1966 on or about the 16th day of July 1966.

In the High Court in Malaya at Kuala Lumpur

The said Act makes it easier for land owners to eject tenants from controlled premises.

No. 2

19. Save as hereinbefore expressly appears the Defendants deny every allegation and every particular contained in the Statement of Claim as if the same were herein set out and traversed seriatim.

Defence  
19th September 1966  
continued

20. The Defendants pray that this suit be dismissed with costs.

Sd: R.R. Chelliah Brothers  
Solicitors for the Defendants.

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Delivered the 19th day of September, 1966, by Messrs. R.R. Chelliah Brothers, 18, Ampang Street, Kuala Lumpur.

No. 3

NO. 3

Plaintiff's Reply to Defence  
30th September 1966

Plaintiff's Reply to Defence dated 30th September 1966

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

Civil Suit No. 1045 of 1966

BETWEEN

Ioh Boon Siew

Plaintiff

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AND

Chin Kim (f) )  
The Public Trustee, )  
Federation of Malaya, )  
Kuala Lumpur. )  
As executor and trustee )  
of the Estate of Wong )  
Choong, deceased. )

Defendants

R E P L Y

1. The Plaintiff joins issue with the Defendants

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on their Defence and will refer to the said Agreement of 16th day of May, 1961, the document of 11th day of November, 1961 the correspondence between the parties for their effect and meaning.

In the High Court in Malaya at Kuala Lumpur

10 2. In further answer to paragraph 14 of the Defence the Plaintiff says that he has always been and is ready and willing to pay the full purchase price in accordance with the provisions of the said Agreement of the 16th day of May, 1961 but that the Defendants have at all times refused to accept even the deposit of \$40,000/-.

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No. 3  
Plaintiff's  
Reply to  
Defence  
30th September  
1966  
continued

Dated this 30th day of September, 1966.

Sd: Braddell & Ramani.

Solicitors for the Plaintiff  
abovenamed.

To:

20 Messrs. R.R. Chelliah Brothers,  
Solicitors for the Defendants  
abovenamed,  
No. 18, Ampang Street,  
Kuala Lumpur.

This Reply is filed by Messrs. Braddell & Ramani, Solicitors for the Plaintiff abovenamed whose address for service is Hongkong Bank Chambers, Kuala Lumpur.

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In the High Court in Malaya at Kuala Lumpur

NO. 4

Court Notes of evidence and Counsels speeches dated 17th March 1969

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

No. 4

Court Notes of evidence and Counsels speeches 17th March 1969

Civil Suit No. 1045 of 1966

Between

Loh Boon Siew

Plaintiff

And

- 1. Chin Kim
- 2. The Public Trustee

Defendants 10

In Open Court

17th March, 1969.

NOTES OF EVIDENCE

BEFORE DATO' ABDUL AZIZ J

Plaintiff's Counsels opening speech 17th March 1969

Mr. Ng Ek Teong with Mr. Vincent Ponniah for Plaintiff. Mr. R.R. Chelliah for Defendants.

Agreed bundle of documents - P(1).

4 further letters - P(2) A-D.

Mr. Ng Ek Teong says that the issues are mainly :-

(1) the nature of the option agreement - whether it is illegal; 20

(2) whether the option has been exercised.

Plaintiff's evidence

PW(1) affirmed, states in Hokkien:

Loh Boon Siew examination

Loh Boon Siew, businessman, 15 Pitt Street, Penang.

I am the Chairman of Boon Siew Ltd. In 1961 Boon Siew Ltd. had no office in Kuala Lumpur. I was and still am also the Chairman of Kah Motors Ltd. Penang. In 1961, Kah Motors had an office in Kuala Lumpur.. Boon Siew Ltd. intended to establish a branch in Kuala Lumpur. I was looking for land in Kuala Lumpur. I entered into agreement for 30

purchase of land in 1961. I asked my employee Lee Cheng Hock to look for land. He was the manager of Kah Motors, Kuala Lumpur. I was informed about a piece of land three days before the agreement. I came to Kuala Lumpur on 15.5.1961. Lee took me to see a piece of land. Mr. Chin the broker was also present. I was told the Vendors were asking for \$160,000. I wanted the land for a showroom. Mr. Chin, Lee and I went to see the vendors, one Wong Choong and his wife Chin Kim. The land belonged to both of them as co-owners. They wanted \$160,000. I bargained for \$140,000. I agreed to pay \$160,000. There were one big house and two or three small houses on the land. The owners occupy the main building. I required vacant possession to enable me to build. The vendors agreed to move out from the main building. In respect of the two or three small huts, it would be necessary for them to take eviction proceedings. If they demolished the main building I could build the showroom forthwith. We went to see one Mr. Y.S. Lee, a lawyer, the next day, i.e. Wong Choong, his wife, Mr. Lee Cheng Hock, Chin and myself. We gave instructions and he prepared an agreement. We signed agreement - Exhibit P1A. Witness shown Exhibit P2C. Mr. Y.T. Lee, my architect informed me that the planning permission had been refused. The letter from the Municipality was dated 4th October 1961. There was an appeal. It was again refused on 20th November 1961.

According to my agreement, I had six months from the 16th May 1961 to obtain planning approval. The option expired on 15th November 1961. I saw Wong Choong and Chin Kim with Lee on 11.11.1961. and we agreed to an extension of the option. Wong Choong and Chin Kim wanted \$1,200/- for the further extension of six months. Within six months if I paid him \$40,000, he would transfer the land to me. I insisted on a new agreement, but he refused. Wong Choong and Chin Kim signed letter P1(6). Under it the option would expire on 15th May 1962. On 5th May 1962 my lawyer Lim Huck Aik sent letter P(1)(7) and cheque for \$40,000 to Mr. Y.S. Lee - copy to Wong Choong and Chin Kim. Reads

In the High Court in Malaya at Kuala Lumpur

No. 4

Court Notes of Evidence and Counsels speeches 17th March 1969  
continued

Plaintiff's evidence

Loh Boon Siew examination continued

Exhibit P1A  
(same as P1(1))  
Exhibit P2(C)

Exhibit P2(D)  
Exhibit P2A  
Exhibit P2B

Exhibit P1(6)  
(also "LBS.2")

Exhibit P1(7)

In the High Court in Malaya at Kuala Lumpur

No. 4

Court Notes of Evidence and Counsels speeches 17th March 1969  
continued

Plaintiff's Evidence

Loh Boon Siew examination continued

agreement P1(1). Mr. Y.S. Lee was acting for all of us. Four days before the expiry of the option on 11th May, Mr. Y.S. Lee sent the cheque to Chin Kim and Chin Kim as Trustee - Exhibit P(1)(9). Wong Choong died on 4th May 1962. When I asked Lim Huck Aik to send the letter of the 5th May, I was not aware of Wong Choong's death. Identified letter P(1)(10). On 12th May 1962 Chin Kim wrote to Y.S. Lee. No copy was sent to me. I knew nothing about it. Refers to letter Exhibit P(1)(13). Mr. Y.S. Lee wrote to me with a copy to Lim Huck Aik. Identified Exhibit P(1)(14). Mr. Y.S. Lee wrote to Chin Kim. Identified Exhibit P(1)(15). Mr. Y.S. Lee wrote to the Public Trustee. Refers to Exhibit P(1)(16). Mr. Chelliah wrote to Mr. Y.S. Lee. Exhibit P(1)(17) letter from the Public Trustee. I filed caveat. Refers to Exhibit P(1)(18) onwards. I was prepared to pay the full purchase price. I was and am ready and willing to complete the agreement.

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Cross-examination:

Cross-examination

When we signed the agreement, I paid my share of the lawyer's fees. The other party paid their share. After 20th November, I have not made any application for re-zoning. No approval for the building plans had been applied. Mr. Y.S. Lee was the lawyer for three persons, Wong Choong, Chin Kim and myself. I did not tender another \$120,000 because the first payment was refused.

Re-examination

Re-examination:

Our firms also bought land for investment.

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Plaintiff's evidence continued

PW(2) affirmed, states in Cantonese:

Chin Yee Weng, Suleiman Court, Kuala Lumpur. I am a car broker.

Chin Yee Weng examination

In 1961 I was a salesman for Kah Motors. In 1961 I came to know that Mr. Loh Boon Siew was looking for land in Treacher Road. I acted as a broker in this transaction. I was to get a commission. The parties entered into agreement - Exhibit P1(1). I was also a party to the agreement. The agreement was drawn up by Mr. Y.S. Lee at that time at Klyne Street. Wong Choong had a furniture

Exhibit P1(1)

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shop at Klyne Street. That shop was three or four doors away. Wong Choong agreed to Mr. Y.S. Lee acting because they also knew him.

Subsequently, the agreeent was extended until 15th May 1962; and for that extension, a consideration of \$1,200 was made. \$1,200 was insisted upon by Wong Choong. Situated on the land was a big house occupied by Wong Choong and two or three huts.

10 Cross-examination:

Q: I put it to you that \$1,200 was not on the insistence of the vendors.

A: They wanted the money, otherwise they would not sign.

Adjourned to 2.15 p.m.

Resumed at 2.15 p.m. as before.

PW(3) affirmed, states in English:

200 Lee Yew Siong, advocate and solicitor, 13 Klyne Street, Kuala Lumpur. In 1961 I was at 10 Klyne Street, Kuala Lumpur.

Shown Exhibit P(1)(1). The document was prepared in my office. I was instructed by Wong Choong and Chin Kim (vendors) and Loh Boon Siew (purchaser) and Chin Yee Weng (broker). I knew Wong Choong and his wife. His shop was a few doors away. I knew Chin Yew Weng. I knew Loh Boon Siew. I acted for all the parties concerned in the agreement. Mr. Loh Boon Siew paid fees. It is customary for puchaser to pay the fee.

30 The document was signed by the vendors - page 6. The document was prepared by me. I attested the signatures. I was acting for all the parties until the completion as the final agreement was to be prepared in my office.

The same parties again came before me and said they wanted an extension of the option. I told them that the extension was automatic in view of Clause 6. They (vendors) told me they wanted

In the High Court in Malaya at Kuala Lumpur

No. 4

Court Notes of Evidence and Counsels speeches 17th March 1969

continued

Plaintiff's evidence continued

Chine Yee Weng examination

Lee Yew Siong examination

Exhibit P1(1)



In the High Court in Malaya at Kuala Lumpur

No. 4

Court Notes of Evidence and Counsels speeches 17th March 1969  
continued

Plaintiff's evidence continued

Lee Yew Siong examination

Exhibit P1(11) (12) & (15)

Exhibit P1(16) Exhibit P1(17)

Cross-examination

some consideration. Loh Boon Siew said that, since Wong Choong and his wife wanted \$1,200, he was prepared to pay in order to avoid further trouble. The payment was an ex-gratia payment. He was willing to pay to avoid further trouble as the vendors were not anxious to extend. Chin Kim said 'why don't you pay \$40,000 now and close the deal?' Loh Boon Siew wanted an extension.

Subsequently, I sent the letter and cheque from Lim Huck Aik - Exhibit P(1)(7). I sent the cheque to Madam Chin Kim and Madam Chin Kim as Trustee - Exhibit P(1)(8). Vide Exhibit P(1)(9) she returned the deposit. I knew that on 11th May 1962 Wong Choong had died. I did not know that the Public Trustee was his executor.

I remember speaking to the Public Trustee. I remember the Public Trustee asked that two cheques to be made out refers P(1)(13) to be dated 28th May 1962. 28th May 1962 was the date on which I spoke to the Public Trustee. The cheques were subsequently paid as per Exhibit P(1)(11) (12) (15).

The firm R.R. Chelliah replied to me returning the cheque - Exhibit P(1)(16). I also sent Exhibit P(1)(17).

At this stage, Loh Boon Siew got Lim Huck Aik to advise him and Madam Chin Kim had Mr. Chelliah as adviser, so I dropped out of the picture.

Cross-examination:

The vendors could apply for eviction without planning permission.

On 11th May 1962 when I received the cheque and sent it to Madam Chin Kim, I was merely a postman. At that time there was no building approval. I did not make enquiries as to whether Wong Choong has left a will. I spoke to Mr. Paramalingam. It could be I saw Mr. Paramalingam outside his office and he asked me to write officially and that he would consider.

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Re-examination:

On or before 29.5.1962, I must have spoken to the Public Trustee - refers to Exhibit P(1)(13). It was referred to again in my letter Exhibit P(1)(14). I had two discussions with the Public Trustee: one on or before 29th May and the other on 8th June. My first meeting with the Public Trustee was either in his office or somewhere nearby. When I saw the Public Trustee, I was acting for everybody concerned.

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The provision relating to planning approval was not a condition for the benefit of the vendors.

As far as the big bungalow is concerned, there was no necessity for eviction orders, as it was occupied by the vendors' family.

CASE FOR PLAINTIFF

DW(1) affirmed, states in Cantonese:

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Chin Kim, aged 54, living at 20 Klyne Street, Kuala Lumpur.

I am the widow of Wong Choong. He died on 4th May 1962. He was murdered by extortioners. My husband and I were the registered owners of C.T. 11089 in equal shares. On this land was some buildings - prewar buildings. Some of them were let out to tenants. That was the position on 16th May 1961. On that day, my husband and I entered into agreement with the Plaintiff, giving him the option to purchase. I did not receive any indication that the plans for the building had been approved by the Municipality. On 11th May, I received a letter from Mr. Y.S. Lee for \$40,000. At that time, Mr. Y.S. Lee was not my lawyer. I returned the cheque to him on 12th May 1962 because there was no approval from the Rent Assessment Board. Besides, my husband's property was in the hands of the Public Trustee. On 2.6.1962, I received the cheque from Mr. Y.S. Lee for \$20,000. I gave the cheque to Mr. Chelliah to be returned to Mr. Y.S. Lee because the period of option had expired. Before receipt of \$40,000, I was to

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In the High Court in Malaya at Kuala Lumpur

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No. 4

Court Notes of Evidence and Counsels speeches 17th March 1969  
continued

Plaintiff's evidence continued

Lew Yew Siong re-examination

Defendants Evidence

Chin Kim examination

In the High  
Court in  
Malaya at  
Kuala Lumpur

make an application to the Rent Assessment Board.  
We had no intention to demolish and rebuild for our  
own purposes.

Cross-examination:

No. 4  
Court Notes  
of Evidence  
and Counsels  
speeches  
17th March  
1969  
continued  
Defendants  
Evidence  
continued  
Chin Kim  
examination

I cannot remember whether I had signed any  
plans for submission to the Municipality.  
(Mr. Chelliah said that she and her husband signed  
the plans).

I received cheque for \$40,000. I signed  
agreement to sell my half share. I did not accept 10  
it because it was a cheque in two names. I did  
not ask for the cheque to be split. Exhibit P(1)(10)  
was written by a friend. I went and saw the  
Public Trustee and he wrote the letter Exhibit P(1)(17).

From the time of the death of my husband until  
the Probate was taken out, the Public Trustee was  
handling my husband's affairs. The will was found  
three days after his death. During that time, I was  
looking after my dead husband's affairs. We knew  
the contents of the will only three days after his 20  
death. It was given to the Public Trustee four or  
five days after my husband's death.

Exhibit P(1)7

I cannot remember whether I had received a copy  
of letter Exhibit P(1)(7). I say Mr. Y.S. Lee was  
not my lawyer on 5th May 1962.

Defendants  
Evidence  
continued  
18th March  
1969

ADJOURNED to 18.3.1969 at 9.30 a.m.  
18th March 1969.  
Resumed as before.

DW(2) affirmed, states in English:

Paramalingam  
examination  
Exhibit D3

Paramalingam s/o Kandiah, Public Trustee,  
Malaysia, and also executor and trustee of the  
estate of Wong Choong - Probate No. 307/62,  
Exhibit D3. Wong Choong died on 4th May 1962.  
Request was made to the Public Trustee to administer  
the property on 8th of May. On 2.6.62 I received  
a letter from Mr. Y.S. Lee, enclosing a sum of  
\$20,000. Mr. Y.S. Lee saw me before that. It was  
an informal discussion outside my office. When I  
received the letter, I studied the agreement and  
consulted the widow. After consulting her, I 40  
returned the cheque to Mr. Y.S. Lee. I found that

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the purchaser had not carried out his obligations under the agreement. Under the agreement, notice was to be received of the approval by the Municipality. I did not receive any notice. If I had received notice and payment of \$40,000, I was required to apply to the Rent Assessment Board for eviction. Under the Control of Rent Ordinance, the owners have to satisfy the Board that the owners intend to demolish and rebuild. There was no intention on their part to demolish and rebuild. I heard nothing further until I was served with writ.

The interest of the executor is to see that the will is carried out immediately after the death of the testator. For purposes of estate duty, I had the property valued. The half share of deceased was valued at \$125,000. I had it valued again on 7th April 1966. It was valued at \$135,000 for the half share

Cross-examination:

Probate will be extracted before the executor can sell the land. I would have no authority to act under the will until probate is extracted. If before the 15th May, the purchaser had asked for an agreement to sell - and even if Madam Chin Kim had agreed - I could not have sold it because there was no probate. Between date of death and date of probate, I was dealing with the estate. Under the will, she was the manageress. She was the nearest relative. Without the will, she would be the proper person to take out the letter of administration. I see a registered letter Exhibit P(4) from Lim Huck Aik with date-stamp 7th May 1962. The letter would be correct as it was in compliance with the agreement. If we knew that Wong Choong was dead, then we would write to the widow as the person dealing with the estate. Apparently I had conversation with Mr. Y.S. Lee on 28th May. As a result of the conversation, I received the letter of 2nd June - Exhibit P(1)(10) (14). As regards the ante-dating of the cheque, I might have told him to 'send cheque today'.

I returned the cheque because the purchaser had not complied with the terms.

In the High Court in Malaya at Kuala Lumpur

No. 4

Court Notes of Evidence and Counsels speeches 18th March 1969

continued  
Paramalingam examination continued

Cross-examination

Exhibit P(4)  
(same as P.1(7))

Exhibit P(1)  
(10) (14)

In the High  
Court in  
Malaya at  
Kuala Lumpur

CASE FOR DEFENDANTS

Mr. Chelliah:

Option to purchase - certain conditions must be complied. I say that the conditions are also for the benefit of the vendors.

Option to purchase - the purchasers can pay \$160,000 and take over without vacant possession.

Control of Rent Ordinance - tenant's protection.

Only owner can apply and he must show, among other things, that he had planning permission.

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Illegality -

Vendors had to apply for permission to rebuild when they had no such intention - fraud on the Rent Assessment Board and on the tenants.

Section 24(b) of the Contracts (Malay States) Ordinance, 1950.

Hee Cheng v. Krishnan  
(1955) M.L.J. 103.  
Option illegal.

20

Purchasers failed to comply with the agreement.

\$40,000 must be accompanied with notice that plans have been approved.

Plan submitted was rejected in November 1961.

Failure to send notice is failure to comply with agreement.

Section 23(b) of the Specific Relief (Malay States) Ordinance, 1950.

Section 56(1) of the Contracts (malay States) Ordinance, 1950.

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Steedman v. Drinkle & Another (1916) 1 A.C. 275 at page 279.

No. 4

Court Notes  
of Evidence  
and Counsels  
speeches  
18th March  
1969  
continued

Defendants  
Counsels  
closing  
speech

Brickles v. Snell (1916) 2 A.C. at page 603.

Whether payment to widow on 11th May had any effect?

Joint cheque useless to her.

Letter of 2nd June - on the one hand they say they would be prepared to purchase irrespective of non-vacant possession, but on the other, they say "eject your tenants".

10 Specific performance cannot be ordered. Contract rescinded by Chin Kim on 7th June 1962 and the Public Trustee on 8th June. Writ was not filed until August 1966. Control of Rent Ordinance 1966 came into force on 28th July 1966. It was easier for the landlord to get permission.

Specific performance, discretionary power. It will not be exercised where there has been a delay.

Mills v. Haywood (1877) 6 Ch. 196 at 202 - test is "ready, desirous, prompt and eager".

Mr. Ng Ek Teong:

20 Delay -

Damages. Value on 4th May 1962 1/2 share \$270,000. April 1966 different value.

Writ filed on 29th August 1966.

Mills' case can be distinguished - no payment made - no sign that he was willing to perform his part of the agreement.

Period of limitation.

Illegality -

30 Legal proceedings is not the only means contemplated by Clause 7.

If illegal, contract should be of no effect.

Section 24(b) of the Contracts (Malay States) Ordinance refers only to consideration and object.

In the High Court in Malaya at Kuala Lumpur

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No. 4

Court Notes of Evidence and Counsels speeches 18th March 1969 continued

Defendants Counsels closing speech

Plaintiff's Counsels Reply

In the High Court in Malaya at Kuala Lumpur

Section 58 of the Contracts (Malay States) Ordinance.

Purchaser failed to comply with agreement.

No. 4

Court Notes of Evidence and Counsels speeches 18th March 1969 continued

Defendants saying that only part of Clause 7 was illegal and, on the other hand, they say it was impossible for them to comply.

Plaintiff at liberty to waive.

Mr. Y.S. Lee was the agent for the vendors.

There was no question that he was not.

Plaintiff's Counsels Reply

Joint contractor - vendors jointly undertook to sell. 10

Balkrishna Moreshwar Kunte v. The Municipality of Mahad Vol. 10 ILR (Bombay) (1886) 32.

Ra'mkrishna Moreshwar & Others v. Rama'ba'i & Another Vol. 17 ILR (Bombay) 29.

Plaintiff could not sue one without the other until the probate was filed.

Death of Wong Choong - section 38 of the Contracts (Malay States) Ordinance.

Sections 43, 45 and 39. 20

Under section 39 - offer to Chin Kim is sufficient.

19th June, 1969.  
Mr. V.C. George for Plaintiff  
Mr. R.R. Chelliah for Defendants.

Judgment delivered.

Sgd. Dato'Abdul Aziz.

JUDGE  
HIGH COURT  
MALAYA.

NO. 5

Grounds of Judgment of Dato' Abdul Aziz J. dated 19th June 1969

CIVIL SUIT NO. 1045 of 1966

In the High Court in Malaya at Kuala Lumpur

No. 5

BETWEEN

Loh Boon Siew

Plaintiff

AND

1. Chin Kim

2. The Public Trustee

Defendants

Grounds of Judgment of Dato' Abdul Aziz J. 19th June 1969

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GROUND OF JUDGMENT OF DATO' ABUL AZIZ J.

This is a claim for specific performance of an agreement to sell a piece of land at Jalan Treacher, Kuala Lumpur.

The facts as I found them are briefly as follows :-

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In 1961 the Plaintiff, who was desirous of purchasing a piece of land for the erection of a motorcar showroom for his firm, came to know that a piece of land at Jalan Treacher was for sale. Consequently, Plaintiff together with Mr. Chin, the broker, and Mr. Lee, his manager, went to see Wong Choong (now deceased) and his wife Chin Kim (Defendant No. 1), the registered co-owners of the land. After some bargaining, the owners agreed to give the Plaintiff an option to purchase the land for \$160,000. Situated on the land was one big house occupied by the Defendant No. 1 and her husband, and two or three temporary small houses near the boundary rented out to tenants. Since the Plaintiff wanted to develop the land for commercial purposes, it was agreed that the Defendants should assist the Plaintiff to obtain the necessary planning approval and to obtain vacant possession. As a result, an advocate and solicitor of No. 13 Klyne Street, Kuala Lumpur was retained to prepare the necessary agreement. It is hardly necessary for me to recite the whole of the agreement except only to refer to those provisions relevant to the issues in the case. The gist of the agreement is that in consideration of a sum of \$1,200 paid by the Plaintiff, the Defendants granted an option to



In the High  
Court in  
Malaya at  
Kuala Lumpur

                      
No. 5

Grounds of  
Judgment of  
Dato' Abdul  
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1969  
continued

the Plaintiff to purchase the land for the sum of \$160,000; that the option shall be valid for a period of six months from the date of agreement (16.5.1961); that immediately upon signing the agreement the Plaintiff shall instruct an architect to prepare the plans and specifications of the intended building for approval and the Defendants shall sign all such plans; that as soon as the plans and specifications have been duly approved, the Plaintiff shall notify the Defendants in writing of such approval and at the same time pay \$40,000 as part payment towards the purchase price; that the balance of \$120,000 less \$1,200 paid shall be payable within six months from that date; that if the plans and specifications were not approved within six months (i.e. before the 15th November 1961), the option shall be automatically extended for a further period of six months; that upon the receipt of \$40,000 (i.e. after the plans have been approved), the Defendants shall "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"; and finally, it is expressly stipulated that time wherever mentioned shall be the essence of the agreement. 10 20

After signing the agreement, the Plaintiff instructed his architect to submit plans to obtain the necessary approval. On 4th October 1961, the Commissioner for the Federal Capital of Kuala Lumpur replied that the application for re-zoning of the land from "Open Development" to "Commercial Area" was refused. As the option was expiring on 15th November 1961, the Plaintiff saw the Defendants on 11th November 1961 and informed them that he wanted a new agreement, alternatively, an extension of the option. The Defendants refused to execute a new agreement, but was willing to grant an extension. In spite of the fact that the extension was automatic under the agreement, the Defendants insisted on a fresh payment of \$1,200 as a consideration for a further extension of six months which, according to the Plaintiff, he paid "in order to avoid further trouble". The Plaintiff stated - and this was not disputed - that Defendant No. 1 was willing then to transfer the land to him without any pre-condition if he paid the money within six months. 30 40

Consequently, the parties signed a supplementary agreement again before Mr. Y.S. Lee extending the agreement by mutual consent to 15th May 1962. In the meantime, the Plaintiff appealed against the refusal by the Commissioner for the Federal Capital of his application for re-zoning, but his appeal was refused on 20th November 1961. Despite the refusal, on 5th May 1962 (10 days before the expiry date) the Plaintiff who was resident in Penang exercised the option by sending a cheque for \$40,000 made out in the names of the co-owners through Messrs. Lim Huck Aik of Penang to Mr. Y. S. Lee as solicitors for the owners, not knowing that one of the co-owners had died on 4th May 1962. On 11th May 1962, Mr. Y.S. Lee forwarded the cheque to Madam Chin Kim and Madam Chin Kim as trustee of the estate of Wong Choong. It is to be noted here that in the letter accompanying the cheque the Plaintiff stated that he "intends to purchase the above property irrespective of whether the plans and specifications are approved or not". The cheque must have reached her on the same day because on 12th May 1962, Madam Chin Kim returned the cheque to Mr. Y.S. Lee 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". Consequent on this, Mr. Y.S. Lee saw the Public Trustee, who requested that two cheques for \$20,000 each be made out. Two cheques each for \$20,000 dated 28th May 1962 were, therefore, made out and sent to Madam Chin Kim and to the Public Trustee. On 7th June 1962, Messrs. Chelliah Brothers, acting on the instructions of Madam Chin Kim, and the Public Trustee, also acting on the instructions of Madam Chin Kim, returned both the cheques on the ground that "the purchaser had not duly exercised the option".

The Defendants' contentions are: firstly, that the agreement was illegal as under the agreement the vendors have to apply to the President of the Rent Assessment Board to rebuild when they had no such intention; secondly, that the conditions of the agreement are conditions precedent which must be strictly complied with by the Plaintiff before he could purchase the land; thirdly, that the payment of \$40,000 must be accompanied by a notice that the plans have been approved, and, fourthly, that time

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Grounds of  
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Grounds of  
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continued

was of the essence of the agreement and that the delay in filing the writ would disentitle the Plaintiff to an order for specific performance.

The legality of the agreement must be examined in the light of sections 24(b) and 25 of the Contracts (Malay States) Ordinance 1950 which read:

"Section 24: The consideration or object of an agreement is lawful, unless -

(b) it is of such a nature that, if permitted, it would defeat the provisions of any law".

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"Section 25: If a consideration is unlawful, the agreement is void."

The consideration of the agreement is the payment of \$160,000 with the object of effecting a transfer of the land to the Plaintiff. Neither the consideration nor the object as such can be said to be unlawful. The requirement that the Defendants sign the plans cannot be illegal as being contrary to public policy, although doubts as to its illegality may exist in regard to the stipulation requiring the Defendants to apply to the Rent Assessment Board. However, that stipulation again must be examined in the light of surrounding circumstances and the provision of the Contracts (Malay States) Ordinance. Clearly, these provisions were inserted in the agreement for the benefit of the Plaintiff firstly to enable him to get the assistance of the owners to obtain the necessary approval and subsequently to obtain vacant possession. The vendors were not interested in these provisions as they never had any intention to develop the land. Since they were inserted for the benefit of the purchaser, I hold that the Plaintiff may waive such rights and may purchase the property at any time while the option was still in force. It is manifest from the letter accompanying the cheque for \$40,000 the Plaintiff has expressly waived the right to get the assistance of the Vendors to obtain development approval, and consequently also, that part of the clause relating to the application to the Rent Assessment Board. Clause 7 reads:

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"...the vendors shall 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 ...".

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10 It would, therefore, no longer be possible for the Plaintiff to get the assistance of the Defendants to apply to the Rent Assessment Board for a certificate, as such an application would require the submission of the approved plans. Understandably so, since the evidence shows that the main building was occupied by the Defendants and no legal proceedings are, in fact, necessary because vacant possession could be given by the simple expedient of just vacating the premises. Legal proceedings, which were waived, were, apparently, in respect of the two or three temporary buildings which were rented out to tenants. According to the Plaintiff, these temporary buildings would not interfere with his development plans to construct a showroom. As regards the temporary huts, the Plaintiff could equally apply for eviction after he had purchased the land. Alternatively even if this provision could be viewed as an attempt to defeat the object of the Control of Rent Ordinance and as a fraud on the tenants, that provision being divisible from the main objects of the contract, which was to sell land, could be severed under section 58. That section reads:

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"Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement".

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The second point raised by the Defendants was that the tender must be accompanied by a notice in writing that the plans and specifications have been approved and that the tender to Mr. Y.S. Lee of a joint cheque for \$40,000 was an invalid tender. Since the first limb of this defence has

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been disposed of, it is necessary only to see whether the tender of the cheque for \$40,000 to Mr. Y.S. Lee, and, alternatively, through him to Defendant No. 1, was a valid tender. When Mr. Y.S. Lee prepared the agreement, there was no doubt that he was acting on the instructions of both parties and it was envisaged in the agreement that he should so act until the formal execution of the transfer - see clause 12 of the Agreement. No doubt the Plaintiff instructed Messrs. Lim Huck Aik to send the cheque for \$40,000 to Mr. Y.S. Lee as solicitor for the vendors, and at that time one of the Vendors had died; but as far as the Defendant No. 1 is concerned, she has not expressly or impliedly discharged him as her solicitor and, therefore, the tender to her solicitors was valid. A fortiori, since the cheque had, in fact, been received by her on 11th or 12th May 1962 (i.e. three days before the expiry date), I would hold that as far as the Plaintiff was concerned, from the tender and receipt of the receipt, he has made payment in time. The fact that a joint cheque was made out did not make it any less valid because the Plaintiff was unaware that one of the co-owners had died prior to the date of the tender. It is significant to mention here that the method of payment by cheque was not one of the grounds of defence. It was not a ground for refusing to accept the payment even at this trial, but what was submitted was that the payment by a joint cheque to co-owners was an invalid tender. Mr. Chelliah was unable to show me any authority for the proposition that payment by a joint cheque would, in the circumstances of the case, be invalid, when by the conduct of the Defendants before and after the expiry date that they would have accepted that method of payment. Consequently, I would hold that as far as the Plaintiff was concerned and, in the circumstances of the case, the tender of a joint cheque was valid tender. Since the carbon copy of the letter of Messrs. Lim Huck Aik to Mr. Y.S. Lee was also sent to Defendant No. 1, I would also hold that she had sufficient notice to her at least, if not also to her as the beneficiary of the deceased, not only of the payment under the agreement but also that the Plaintiff had waived certain conditions in the agreement. She has no valid ground whatsoever in repudiating the contract. But has the death of Wong Choong invalidated the tender to one of the

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co-promisers? The equitable principle of Wallace v. Kelsall (1840) 7 M. & W. 264 that the payment of a debt to one of the joint creditors discharges a debt owed to both of them has been applied in conjunction with Section 38 of the Indian Contract Act (similar to section 39 of our Ordinance) see Annapurnamma v. Akkayya (1913) 36 Indian Law Report (Madras) 552 and 545 and Gulmiran v. Abdul Rahim Khan (1923) 73 Indian Cases 682 (Fesh).

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Grounds of Judgment of Dato' Abdul Aziz J.  
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10           Consequently, I would hold that the payment to the Defendant No. 1 alone of the full amount to \$40,000 as required under the contract was a valid discharge of his obligation. The death of Wong Choong does not affect the contract; his representative jointly with the surviving promiser must fulfil the whole of the promise. See section 43 and 44 of the Contracts (Malay States) Ordinance 1950.

20           The last question to be considered is whether delay would disentitle the Plaintiff to specific performance. Although the agreement was entered into on 16th May 1961 and the cause of action arose in 1962 - and giving allowance for the time to take out probate - it was not until August 1966 that the writ was issued, a delay of approximately four years. However, when delay not amounting to a bar or limitation is pleaded as a defence to a suit for specific performance, the validity of that fact must be tried on the principle substantially

30           equitable. There are numerous decisions on the question of laches. In some cases, delay as short as seven months can be fatal especially where there is some other motive apart from mere delay. The proper tests applicable quoted in Arjuna Mudaliar v. Lakshmi Ammal are as follows:-

40           "It is now well established that mere delay does not by itself preclude the plaintiff from obtaining specific performance if his suit is otherwise in time. The delay must be such that it may be properly inferred that the plaintiff has abandoned his right or on account of the delay there must have been such a change of circumstances that the grant of specific performance would prejudice the defendant. Their

In the High  
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Lordships of the Judicial Committee  
pointed out in the leading case of  
Lindsay Petroleum Co. v. Hurd, 1873  
L.R. 5 P.C. 221,239: (22 W.R. 492) when  
lapse of time and delay are most material."

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"Where it would be practically unjust to  
give a remedy either because the party has  
by his conduct, done that which might  
fairly be regarded as equivalent to a  
waiver of it, or where by his conduct and  
neglect he has, though perhaps not waiving  
that remedy, yet put the other party in a  
situation in which it would not be reason-  
able to place him if the remedy were  
afterwards to be asserted; in either of  
these cases lapse of time and delay are  
most material".

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Under section 6 of the Limitation Ordinance  
1953, action for specific performance based on  
contract must be brought within six years from the  
date on which the cause of action arose. By section  
32 of the same Ordinance, the equitable jurisdiction  
to refuse relief on the ground of acquiescence, laches  
or otherwise is preserved. The prevailing view in  
India as regards delay and change of circumstances is  
given in Veena Bai v. Kesur Bavu reported in A.I.R.  
1953 Tranvancore:

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"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  
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."

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Fry in his book on Specific Performance states the law in the following terms (p.199, S.418):

In the High Court in Malaya at Kuala Lumpur

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Grounds of Judgment of Dato' Abdul Aziz J.  
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10 "The question of hardship of contract is generally to be judged of at the time at which it is entered into; if it be then fair and just and not productive of hardship, it will be immaterial that it may, by the force of subsequent circumstances or change of events, have become less beneficial to one party, except where these subsequent events have been in some way due to the party who seeks the performance of the contract .....

20 it has been determined that the reasonableness of a contract is to be judged of at the time it is entered into and not by the light of subsequent events and we have already seen that the same principle applies in considering the fairness of a contract and again the question of the inadequacy of the consideration must of course be decided at the time of the contract and not by the light of subsequent events."

Thus, the appreciation of the value of the land alone coupled with delay would not deprive the Plaintiff of specific performance.

30 In regard to the second aspect of the defence that time was of the essence and that there was failure to tender the balance of \$120,000, the question could be resolved by reference to two cases. In Smith v. Hamilton (1951) 1 Ch. 174, Harman J summed up the legal position as follows :-

40 "There are circumstances in which time can be said to be of the essence of the contract from the beginning. It is well known that time may be of the essence on a sale of licensed premises, or of a shop as a going concern, or, perhaps, it may be so on a sale of animals when they are in a certain place. But it would need very special circumstances to make time of the essence of the contract on a sale of an ordinary private dwellinghouse with vacant possession."



In the High Court in Malaya at Kuala Lumpur

He went on to quote Jamshed Khodaram Irani v. Burjorji Dhunjibhai (1915) 32 TLR 156 where the Judicial Committee of the Privy Council stated per Lord Haldane:

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Grounds of Judgment of Dato' Abdul Aziz J.  
19th June 1969  
continued

"Their Lordships did not think that that section (section 55 of the Indian Contract Act) (our section 56) laid down any principle which differed from those which obtained under the law of England as regarded contracts to sell land. Under that law equity, which governed the rights of the parties in cases of specific performance of contracts to sell real estate, looked not at the letter but at the substance of the agreement, to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended no more than that it should take place within a reasonable time."

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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.

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In Williams v. Greatrex (1956) 3 A.E.R. 705 Denning L.J. dealing with a similar question stated:

"It seems to me that this was a contract for the purchase of land, in which the parties, through their own common solicitor, put forward the period of two years as their target for completion; .....it was not a thing which was the essence of the matter. Our legal procedure is well adapted to meet such a situation. If either side wanted to bring the other up to the mark, all he had to do was to give him reasonable notice requiring him to complete. Neither side did so and therefore this is not by itself a bar to the action."

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Since there was no notice from the vendors, time is not by itself a bar to action.

In the circumstances of this case, there will be

judgment for the Plaintiff and order that upon payment of \$79,400 to each of the Defendants -

- (a) the Defendants do transfer Selangor Certificate of Title No. 11089 Lot No. 97 Section 57, Kuala Lumpur, to the Plaintiff;
- (b) the Defendants shall give vacant possession of the premises on the said land occupied by them;
- 10 (c) liberty to apply; and
- (d) costs to the Plaintiff.

In the High Court in Malaya at Kuala Lumpur

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No. 5

Grounds of Judgment of Dato' Abdul Aziz J.  
19th June 1969  
continued

Sgd. Dato Abdul Aziz

JUDGE  
HIGH COURT  
MALAYA

Kuala Lumpur  
19th June, 1969.

Mr. Ng Ek Teong with Mr. Vincent Ponniah of  
M/s Ng Ek Teong & Partners for Plaintiff.

20 Mr. R.R. Chelliah of M/s R.R. Chelliah Bros.  
for Defendants.

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In the High Court in Malaya at Kuala Lumpur

NO. 6

FORMAL JUDGMENT  
19th June, 1969

No. 6

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

Formal Judgment  
19th June  
1969

CIVIL SUIT NO. 1045 of 1966

BETWEEN  
Loh Boon Siew Plaintiff

AND

- 1. Chin Kim
  - 2. The Public Trustee, Federation of Malaya, Kuala Lumpur. As executor and trustee of the Estate of Wong Choong, deceased. )  
Defendants
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BEFORE THE HONOURABLE MR. JUSTICE DATO ABDUL AZIZ,  
JUDGE, MALAYA.

IN OPEN COURT

O R D E R

THIS SUIT coming on for hearing on the 17th and 18th day of March, 1969 in the presence of Mr. Ng Ek Teong (Mr. Vincent Ponniah with him) of Counsel for the Plaintiff and Mr. R.R. Chelliah of Counsel for the Defendants AND UPON READING the Pleadings filed herein and UPON HEARING the evidence adduced by Counsel aforesaid IT WAS ORDERED that this action do stand adjourned for Judgment AND the same coming on for Judgment this day in the presence of Mr. V.C. George of Counsel for the Plaintiff and Mr. R.R. Chelliah of Counsel for the Defendants IT IS

ORDERED that the Plaintiff do pay to each of the Defendants the sum of \$79,400.00 (Dollars: Seventy nine thousand four hundred) only AND IT IS ORDERED that the Defendants upon receipt of the said sum do transfer the land held under Selangor Certificate of Title No. 11089 for Lot No. 97 in Section 57 in the Town and District of Kuala Lumpur to the Plaintiff AND IT IS FURTHER ORDERED that the Defendants do give vacant possession of the premises on the said land occupied by them to the Plaintiff AND IT IS

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FURTHER ORDERED that the parties be at liberty to apply AND IT IS LASTLY ORDERED that the Defendants do pay the costs of this action as taxed by an officer of the Court to the Plaintiff.

GIVEN under my hand and the seal of the Court this 19th day of June, 1969.

(L.S.)

Sgd:

Senior Assistant  
Registrar,  
High Court,  
Kuala Lumpur.

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In the High  
Court in  
Malaya at  
Kuala Lumpur

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No. 6

Formal  
Judgment  
19th June  
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continued

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

NO. 7

Notice of Appeal  
16th July, 1969

CIVIL APPEAL NO. OF 1969

No. 7  
Notice of  
Appeal  
16th July  
1969

BETWEEN

- 1. Chin Kim (f) )
  - 2. The Public Trustee, )
  - Federation of Malaya, )
  - Kuala Lumpur as executor )
  - and trustee of the estate )
  - of Wong Choong deceased )
- Appellants 10

AND

Loh Boon Siew Respondent

(In the matter of Civil Suit  
No. 1045 of 1966 in the High  
Court in Malaya at Kuala Lumpur

Between

Loh Boon Siew

and

Chin Kim (f) and The Public  
Trustee, Federation of Malaya,  
Kuala Lumpur as executor and  
trustee of the estate of  
Wong Choong deceased) 20

NOTICE OF APPEAL

Take notice that Chin Kim (f) and The Public  
Trustee, Federation of Malaya, Kuala Lumpur as  
executor and trustee of the estate of Wong Choong  
deceased being dissatisfied with the decision of  
the Honourable Mr. Justice Dato Abdul Aziz given at  
Kuala Lumpur on the 19th day of June 1969 appeal  
to the Federal Court against the whole of the said  
decision. 30

Dated this 16th day of July, 1969.

Sd: R.R. Chelliah Brothers.  
Solicitors for the Appellants.

(i) that the Vendors were not interested in these provisions as they never had any intention to develop the land. Since they were inserted for the benefit of the Purchaser I hold that the Plaintiff may waive such rights and may purchase the property at any time while the option was still in force. It is manifest from the letter accompanying the cheque for \$40,000/- the Plaintiff has expressly waived the right to get the assistance of the Vendors to obtain development approval and consequently also that part of the clause relating to the application to the Rent Assessment Board.

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(ii) that it would, therefore, no longer be possible for the Plaintiff to get the assistance of the Defendants to apply to the Rent Assessment Board for a certificate

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(iii) that the legal proceedings were waived

(iv) that the Plaintiff could equally apply for eviction after he had purchased the land.

5. The learned trial Judge misdirected himself as to who was assisting whom and for what purpose. He failed to appreciate

(i) that the Appellants were required to deliver vacant possession of the land

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(ii) that the Respondent had to obtain the approval of plans in order to enable the Appellants to apply to the Rent Assessment Board to obtain vacant possession

(iii) that the Appellants had to take steps including legal proceedings to evict tenants and obtain vacant possession within six months after receipt of the sum of \$40,000/-

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(iv) that the Municipality had refused planning permission

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

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No. 8

Memorandum  
of Appeal  
26th August  
1969  
continued

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

\_\_\_\_\_  
No. 8

Memorandum of  
Appeal  
26th August  
1969  
continued

- (v) that the sum of \$40,000/- was to be paid by the Respondent only after the plans had been approved by the proper authorities
  - (vi) that the Respondent never waived his right to get the assistance of the Appellants to obtain development approval or the clause relating to the application to the Rent Assessment Board;
  - (vii) that the letter dated 2nd June 1962 written by the Solicitors for the Respondent to Chin Kim specifically requests the Appellants to "make arrangements to evict your tenants in the said land in terms of the agreement". 10
  - (viii) that the Respondent had never offered to purchase the land with the tenants
  - (ix) that the Respondent never tendered to the Appellants the full purchase price
  - (x) that although the Respondent could go through the exercise of applying for eviction after he had purchased the land, owing to the provisions of the Control of Rent Ordinance 1956, which was then in force, it was very uncertain whether he could evict the tenants, for apart from approved plans the applicant had to satisfy the Board that it was in the public interest that he should be permitted to demolish and rebuild. 20
  - (xi) that what the Respondent wanted to purchase was vacant land. 30
6. The learned trial Judge should have held that the Respondent had not at any time duly exercised the option given to him by the agreement.
7. The learned trial Judge should have held that the said agreement is contrary to public policy and illegal. He misdirected himself in holding that the illegal provisions of the agreement were divisible from the main objects of the contract and that they could be severed. He 40

failed to appreciate that the object of the agreement was not merely to purchase land but to purchase land free from all encumbrances with vacant possession.

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

\_\_\_\_\_  
No. 8

Memorandum  
of Appeal  
26th August  
1969  
continued

8. The learned trial Judge misdirected himself in holding

(i) that the only time mentioned in the agreement was the period of six months during which the payment of \$40,000/- should be made

(ii) that since payment was refused Chin Kim's complaint that there was no tender of the balance of the payment cannot be sustained

(iii) that there was no notice from the Appellants and that time was not by itself a bar to action

(iv) that the Respondent stated that Appellant No. 1 was willing at the time of granting the extension to transfer the land to him without any precondition if he paid the money within six months.

9. The learned trial Judge failed to give sufficient importance to the fact that it was an express term of the said agreement that time should be of the essence of the contract.

10. The learned trial Judge should have held that the Respondent by his delay is not beginning proceedings until the 29th day of August 1966 notwithstanding rescission of the agreement by the Appellants on the 7th and 8th days of June 1962 had in any event lost his right to specific performance. He failed to appreciate that apart from the appreciation of the value of the land conditions had changed very much in that the Control of Rent Act 1966 was passed in July 1966 making it much easier for owners of controlled premises to eject tenants and to obtain vacant possession of the premises for the purpose of development.

11. The learned trial Judge should have dismissed



In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

the suit.

Dated this 26th day of August, 1969.

Signed  
Solicitors for the Appellants.

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No. 8

Memorandum  
of Appeal  
26th August  
1969  
continued

To:

The Registrar,  
Federal Court,  
Kuala Lumpur.

and to

Messrs. Ng Ek Teong & Partners, Solicitors  
for the Respondent, Bangunan Persatuan  
Hokkien Selangor, Jalan Weld, Kuala  
Lumpur.

10

The address for service of the Appellants is  
care of R.R. Chelliah Brothers, 4th Floor,  
Bangunan Cho Tek, Jalan Tuanku Abdul Rahman,  
Kuala Lumpur.

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55.

NO. 9

Court Notes of Counsels Arguments before  
the Court of Appeal dated 12th November  
1969

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In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

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IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA  
LUMPUR

No. 9

(Appellate Jurisdiction)

Court Notes  
of Counsels  
Arguments  
before the  
Court of  
Appeal  
12th November  
1969

Federal Court Civil Appeal No. X.80 of 1969

Between

10 1. Chin Kim (f)  
2. The Public Trustee Appellants

and

Loh Boon Siew Respondent

(In the matter of K.L. High Court Civil Suit  
No. 1045 of 1966

Between

Loh Boon Siew Plaintiff

and

20 1. Chin Kim (f)  
2. The Public Trustee Defendants).

Cor: Ong Hock Thye, C.J.  
Gill, F.J.  
Ali, F.J

NOTES OF ARGUMENTS RECORDED BY ONG, C.J.

12th November 1969.

R.R. Chelliah for applts.

Ng Ek Teong for respt.

Chelliah:

2 main grounds:

30 1. Option had not been properly exercised.

2. Contract void for illegality.

3. Delay - subsidiary collateral grd.]

Appellant's  
Counsel's  
Argument  
recorded by  
Ong, C.J.  
12th November  
1969

In the Federal Court of Malaysia (Appellate Jurisdiction)

Facts not in dispute - issue turns on agreement

para. 1 - "free from encumbrances".

" 2 - 6 months.

" 3 - plans.

" 5 - applt says this is important.

" 6 - extension 6 months.

" 7 - very important (acc. to applt)

" 8 - agreement to be void.

" 13 - time of essence.

No. 9

Court Notes of Counsels Arguments before the Court of Appeal 12th November 1969 continued

Appellant's Counsel's Argument recorded by Ong, C.J. 12th November 1969 continued

Submit - effect of agreement - respt has option to buy free of encumbrances with vacant possession - essence of contract - respt had to engage architect etc. and after all done - payment of \$40,000 does not come into play - object - purpose to enable applt to give vacant possession.

10

S.12(1)(m) - only owner can apply for certificate - if scheme had been carried out it wd have reqd vendors to make a false appln to R.A.B. & to give false evidence - a fraud then resulting on the Board and on tenants.

20

Next undisputed fact is respt never got these plans approved - notice of plans being appd therefore never sent.

The sum of \$40,000 without the notice was tendered to Chin Kim on 11.5.62 together with letter from Y.S. Lee & Co. (p. 12 ) a tender before expiry.

Next, tender on 2.6.62. with letter of even date (see pp. 14 and 15 ) important

Not disputed that option was open till 15.5.62.

Grds 1 to 6 - (read out) -

30

(Option had not been duly exercised) see judgment P.38

Real consideration for the sum of \$160,000 is not merely transfer of the land but also with vacant possession - vacant possession was essence of the contract.

This exercise was not for benefit of vendors alone - but for both parties.

Therefore applt equally interested in the exercise.

Waiver - passage has been read.

10 Submit pr has not waived the obligation on the purchaser - his claim throughout was for vacant possession.

See letter - p. 14 - (para. 3) but see para. 4 - date was 18 days after option expired.

S/Claim filed 4 years later - see esp. p. 5 (para. 16).

Why send only \$40,000 - not the \$160,000/- on 2.6.62. - taking the land as it was then - if such was the intention.

20 Submit on this evidence, there was not a waiver as held by the judge.

Vendors refused the \$40,000 because plan approval not obtained.

The balance outstanding of \$120,000 was never offered.

Grd. 7 is second main ground of appeal - illegality.

Judgment p. 32

30 The intention of parties was to get the plans approved - etc. - and under s.12(1)(m) of C.R.O. 1956 - and on strength of that to apply for certificate.

Only an "owner" can apply for order under s.12(1)(m) - applt was being reqd to do something which was a fiction - the cert. if obtained wd have been obtained by false representation and false evidence.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 9

Court Notes of Counsels Arguments before the Court of Appeal 12th November 1969

continued

Appellant's Counsel's Argument recorded by Ong, C.J. 12th November 1969 continued

In the Federal Court of Malaysia (Appellate Jurisdiction)

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Court Notes of Counsels Arguments before the Court of Appeal 12th November 1969 continued

Appellant's Counsel's Argument recorded by Ong, C.J. 12th November 1969 continued

Respondents' Counsel's Argument recorded by Ong C.J. 12th November 1969

Applt relies on s.24 Contracts Ord.

And see s.58 referred to by judge - submit s.58 does not apply - but s.25.

Third main ground - see # 8 and 9 of Memo. of Appeal. See p. 43 L27 to P.44 I42 in the judgment.

But s.13 expressly made time essence of contract - 4 occasions time mentioned - paras. 2, 5, 6 & 8.

(1916) 1 A.C. 275 @ 279.  
(1916) 2 A.C. 549 @ 603-4.

10

Delay until 29.8.66.  
Contract was rescinded on 7.6.62.

The new rent received Agong's assent on 16.7.66.

Specific performance and discretionary remedy - s.21 of S.R.O. 1950.

Mills v. Haywood (1877) 6 Ch.D. 196 @ 202.

Caveat lodged - 27.8.66 - 2 days before suit.

Judge did not consider appreciation of value.

Ng Ek Teong:

Was option not properly exercised?

20

Tender on 2.6.62. (pp. 14 - 15: replies 16 - 17 ).

Fact ignored was tender on 5.5.62 - \$40,000 sent by L.H. Aik to Y.S. Lee who was solicitor for all parties - followed by Y.S. Lee's tender on 11.5. rejected by Madam Chin Kim on 12.5.

(Was tender on 5.5.62 valid? Chelliah clarifies.)

p.39 L38-I45 - (et seq.) - "I would hold ..... payment in time". (p. 40 ) - not disputed in Memo. of Appeal.

30

Option not properly exercised:

On this point by the agreement itself the vendors had committed themselves to selling the land for \$160,000 - only the purchaser had option to buy or not - if he decided to, the vendors must sell.

Therefore, there were inserted certain stipulations - in case purchaser couldn't use land for purpose intended. Vendors were not affected in any way. The price was same.

10 But if plans passed - the benefit wd go to purchaser - and to him alone - in that the land wd be open for commercial use. The Vendors again don't benefit. Hence, Cl. 5 was solely for benefit of purchaser. In such circumstances, the purchaser was entitled to say "I'd pay the \$40,000 despite not having the benefit of land being available for commercial user." This \$40,000 was a deposit (Clause 5).

20 If plans passed, then only necessity arose to inform the vendors.

But if not passed - or rejected as here - the purchaser was entitled to say "Despite no approval of plan, I hereby tender the \$40,000/-". He gave notice in effect that the plans were not passed.

Cl.6 - re automatic extension of 6 months.

30 Cl.7 - vendors undertaking to etc. - vendors undertook only to take steps - not guarantee success of application and efforts.

Cl.8 - purchaser's exclusive right to terminate - he must make his election to buy or rescind - buying without vacant possession - therefore vacant possession couldn't be essence of contract.

This right the purchaser was entitled to waive. See Hawksley v. Outram (1892) 3 Ch. 359. (answers also qn of waiver of vacant possession.)

40 Even at trial, if not before, waiver may be possible.

In the Federal Court of Malaysia (Appellate Jurisdiction)

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Court Notes of Counsels Arguments before the Court of Appeal  
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continued

Respondents' Counsel's Argument recorded by Ong C.J.  
12th November 1969

In the Federal Court of Malaysia (Appellate Jurisdiction)

See p. 366 per Romer J. "offer to waive" (also on p. 368).

Next see p. 375 (2nd para.) - p.376 - "what have the vendors to complain of?"

Morrell v. Studd & Millington (1913) 2 Ch. 648.

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Court Notes of Counsels Arguments before the Court of Appeal 12th November 1969 continued

Waiver of cl. inserted for vendors' benefit - waiver can be made at the Bar - and see p. 660 (2nd para. and 3rd para.).

Re waiver - p.34 and p. 35 - the waiver was offered at the trial.

10

P.38 - requirement that vendors sign plans etc. "I hold pf may waive etc."

And see order - at pp. 46 - 47

Adj'd. to 10 a.m.

Respondents' Counsel's Argument recorded by Ong C.J. 13th November 1969 continued

10 a.m.

13th November 1969

Counsel as before.

Q. Why the \$120,000 was not tendered subsequently?

The answer may be found in the agreement - the 5 steps that have to be taken to complete the contract:

20

- (a) the purchaser pays \$1,200 (Cl.1).
- (b) appln for planning approval.
- (c) payment of \$40,000/- within the 6 months (or extension of time).
- (d) the vendors on receipt of the \$40,000 to apply to R.A.B. for ejectment.
- (e) in the further 6 months - if vacant possession not possible - the purchaser has exclusive right to terminate.

At the stage of deposit - when tender of \$40,000 made - there was a repudiation (p.16).

30

The effect of the reply of 2.6.62 (p.14)...

Submit: letters of 7.6.62 and 8.6.62 were a clear repudiation of the agreement at that stage.

Purchaser, therefore, excused from further steps reqd. on his part in carrying out the contract.

s.39(1) Contracts Ord.

Q. of illegality:

10 Submit, in answer, there is no specific requirement that the agreement shd be suppressed or the facts. The vendor was to make application for what it was worth.

Cl. 8 doesnot state time - purchaser has to wait for the 6 months to expire.

Under Cl. 8 date of deposit would be date of tender - decision to be made 6 months after deposit whether or not exercise option. Time not of essence.

20 No qn. of illegality arises that the application to R.A.B. necessarily and inevitably requires that something illegal be done. The vendors were reqd. to make the application - how they make it did not matter.

Qn. of Laches or delay.

The lapse of time between cause of action arising and the institution of action.

In meantime - qn. of caveat - evidence on this was stopped by the judge.

30 One of the vendors had died. Grant of Probate on 12.12.62.

In June 62 action could not be commenced by reason of death of Wong Choong.

No evidence when the Purchaser became aware Probate was taken out.

In the Federal Court of Malaysia (Appellate Jurisdiction)

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Court Notes of Counsels Arguments before the Court of Appeal 13th November 1969 continued

Respondents' Counsel's Argument recorded by Ong C.J. 13th November 1969 continued



In the Federal  
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Court Notes  
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Respondents'  
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continued

Onus on party relying on defence of laches  
to prove length.

Judgment pp. 41 - 43

Penny v. Allen 44 E.R. 160 @ 164 & 166.  
the 2 cases cited in Aziz's judgment.

Kissen Gopal Sadaney v. Sett (1906) 33 I.L.R.  
Cal. 633.

Chamarti Sinha (1914) 23 I.C. 560.

Das v. Kabulan (1918) 44 I.C. 244.

Jangal Singh v. Ghulam Mahomed (1922)  
31 I.L.R. Lah. 376.

10

Morse v. Royal 33 E.R. 134 @ 141.  
If against purchaser on S.P. - ask for damages.

Appeal allowed with costs - deposit to appellants.

Intld. O.H.T.

Appellant's  
Counsel's  
Argument  
recorded by  
Gill, F.J.  
12th November  
1969

NOTES RECORDED BY GILL, F.J.

12th November 1969

Enche R.R. Chelliah for Appellants.

Enche Ng Ek Teong for Respondent.

Chelliah:

20

All the grounds of appeal can be divided into  
three compartments. Grounds 1 to 6 can be taken  
together.

Main ground that option had not been properly  
exercised. The second ground is that the contract  
is void for illegality. Time the essence of the  
contract. Delay in bringing the action.

Facts of case not really in dispute and are  
contained in documents which are in evidence. No

question of credibility of witnesses.

Case depends entirely on agreement dated 16th May, 1961 at page 7 of record. Paragraph 1, sale free from all encumbrances. Paragraph 2, option for six months. Paragraph 3, plans for approval. Paragraph 5 important, approval of plan, notice to other side and payment of \$40,000 to vendor. Paragraph 6 of agreement, extention of option. Paragraph 7 of agreement important, obligation on the part of the vendor. Time limit for action under paragraph 7 as provided in paragraph 8. Time of the essence of the contract (paragraph 13).

The effect of agreement. Respondent had option to buy free of encumbrance with vacant possession. Vacant possession essence of contract. Until plans were approved, the payment of \$40,000 did not come into play. Purpose of the exercise to enable vendors to sell with vacant possession. Section 12(1)(m) of Rent Control Ordinance, 1956 - only owner can apply. If the scheme had been carried out it would have required the vendors to make a false application to the Rent Assessment Board and to give false evidence. That would have meant fraud on the Board as well as the tenants who were protected by the Ordinance. If the intention of the agreement was to defeat the Ordinance, then it was an illegal contract.

Next undisputed fact is that the respondent never got the plans approved at any time. No notice to appellant that plans were approved. The other undisputed fact is that the sum of \$40,000 without the notice was tendered to Chin Kim (f) on 11th May, 1962. Subsequently it was tendered in two sums on 2nd June, 1962. Both tenders were rejected. No dispute that option was alive until 15th May, 1962.

I now come to grounds of appeal 1 to 6. Read grounds. The option had not been duly exercised by the respondent. Refer to grounds of judgment page 38 to page 40. Consideration for the sum of \$160,000 was not merely the transfer of the land, but transfer of land with vacant possession. Vacant possession was the essence of the contract, hence all the

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Court Notes  
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continued

Appellant's  
Counsel's  
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Gill, F.J.  
12th November  
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Court Notes  
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Appellant's  
Counsel's  
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Gill, F.J.  
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continued

provisions of the agreement. If respondent was prepared to buy without vacant possession, all these clauses were unnecessary. The provisions were for the benefit of both parties. Not true that appellants were not interested in the exercise.

The respondent has not waived the obligation of the appellants to sell with vacant possession. Right up to the end he wanted to transfer with vacant possession. Letter of 22nd June, 1962 at page 14 - last paragraph asked for eviction of tenants. So not true that there was waiver. Files statement of claim 4 years later. Statement of claim, paragraph 16 at page 5 of record. Still speaking of vacant possession. Insisted on that throughout. Why did he not send in the full amount on 2nd June, 1962, if he wanted transfer without vacant possession. He could not waive obligations on his part without waiving the obligation on the part of the others. I submit there was no waiver. sic 10 20

Position on 15th May, 1962. No plans approved. No notice. The obligation to pay \$40,000 did not arise until approval of plans. Therefore no proper exercise of option. Mere tender of \$40,000 of no consequence. Appellants rightly refused to accept the \$40,000. The balance of \$120,000/- was never offered.

The second ground is covered by ground 8 in the memorandum of appeal. Trial judge's grounds on this point. 30

Intention of the parties was to get the plans approved by the Municipality and on the strength of that to go before the Rent Assessment Board to apply for a certification under section 12(1)(m) of the Control of Rent Ordinance, 1956 and thereafter to evict tenants so as to be able to give a transfer with vacant possession. Only owner could apply. Appellants never intended to demolish. Therefore, they would have made a false application. 40

Agreement was illegal by reason of the provision therein whereby the vendors were binding themselves to apply for a certificate when they had no

intention to demolish and rebuild. Refer to section 24 of Contracts (Malay States) Ordinance, 1950. The learned trial Judge proceeded to sever under section 58 of the Ordinance. That section does not apply to the facts of this case. Refer to section 25 of the Contracts Ordinance. No severability here. Fraud on Board and to deprive tenants of their proprietary rights.

In the Federal  
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Court Notes  
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Appellant's  
Counsel's  
Argument  
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Gill, F.J.  
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continued

10 Now come to paragraphs 8 and 9 of memorandum of appeal. Refer in this connection to grounds of judgment page 43, line 27 to page 44, line 41. The learned Judge did not direct himself to the fact that there was express provision in the agreement as regards time being of the essence of the matter. Cases mentioned by the Judge do not apply. Refer to Steedman v. Drinkle & Another (1916) 1 A.C. 275, 279; Brickles v. Snell (1916) 2 A.C. 599, 603.

20 That brings me to my last ground, namely, paragraph 10 of memorandum of appeal. Contract rescinded on 7.6.62. Nothing done until August, 1966 when conditions had changed. New Rent Control Act passed on 16th July, 1966.

30 Specific performance a discretionary remedy in the hands of the Court, under section 21 of the Specific Relief Ordinance, 1950. Delay precludes specific performance. Refer to Mills v. Haywood (1877) 6 Ch.D.196, 202. Learned Judge's observation at page 43, line 24. Also mentioned section 32 of Limitation Ordinance. Failed to consider the delay for four years. Nothing done in the meantime. Caveat lodged in July 1966.

Appreciation of value. Learned Judge did not consider it.

Court adjourned and resumed after 15 minutes.

Ng Ek Teong:

40 I will deal first with the point that the option was not properly exercised. Tender on 5th May, 1962 (page 84) and later on 11th May and 2nd June 1962. From solicitor to solicitor.

Respondents'  
Counsel's  
Argument  
recorded by  
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12th November  
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Respondents'  
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continued

Tender on 5th May, 1962 found by the trial Judge to be a valid tender. Refer to page of record (grounds of judgment).

On the point that plans had to be passed first, before a deposit could be made, my submission is that looking at the agreement the vendors had committed themselves to sell the property for \$160,000/-. It was for the purchaser to buy or not to buy. If he wanted to buy, the Vendors had to sell. Therefore certain conditions in the agreement, Whether plans were passed or not passed the vendors still had to sell. Passing of plans solely for the benefit of the purchaser. If plans were passed, vendors did not benefit. Clause 5 of agreement solely for the benefit of the purchaser. He was entitled to say that he was prepared to accept transfer without the approval of plans. 10

\$40,000/- only to be paid as a deposit, as stated in Clause 5. Notice required only if plans were passed. Clause 6 for automatic extension. Only an undertaking to apply under Clause 7, not a guarantee. Exclusive right of purchase to terminate under Clause 8. Purchaser had right to decide within 6 months whether to buy or not to buy without vacant possession. Therefore vacant possession not an essence of the contract. 20

Right to waiver. Refer to Hawksley v. Outram '1892) 3 Ch.D.359, 366, 368, 375. Waiver can be made at the trial of the action. Refer to Morrell v. Studd & Millington (1913) 2 Ch. 648, 660. Refer to bottom of page 34 of record. The trial Judge dealt with this in his judgment at page 38 of record. Waiver was offered in Court. Order requiring only the vendors to give vacant possession of the land occupied by them. 30

Court adjourned until 10 a.m. tomorrow.

S.S. Gill

13th November  
1969

Ng Ek Teong (continuing):

13th November 1969

Yesterday I dealt with the question of waiver (both in respect of approval of plans and vacant possession). 40

10 Question was raised as to why the balance of the purchase price was not paid when waiver was exercised. There were various steps as regards what was to be done under the agreement and the various payments to be made. There was a repudiation of contract when the tender of \$40,000/- was made. Refer to letters at page 16 17 and 18 of record. In view of the repudiation, the purchaser was excused from performing his obligations under the agreement. Refer to sections 39 and 53 of the Contracts (Malay States) Ordinance, 1950.

20 Question of illegality argued by the other side, on the ground that the contract provided for an application on the part of the vendors to apply for a certificate from the Rent Assessment Board. Agreement says nothing about suppressing anything from the Board. Nothing wrong in requiring the vendors from making an application to the Board after stating that plans had been approved and that the intending purchaser was going to rebuild in accordance with approved plan. Refer to section 12(1)(m) of the Rent Control Ordinance, 1956. Full facts could be disclosed to the Board. The wording of the section capable of accommodating such an application. Wording of Clause 8 of the agreement. Time not of the essence in paragraph 8. Clause 13 speaks of 'time being of the essence of the contract wherever mentioned in the agreement'. Application could be made to the Board without any falsity or fraud. Therefore no illegality in the agreement.

30

Now I come to the question of laches or delay. The period between the time the cause of action arose and time the action was filed. I was prevented from introducing evidence relating to earlier applications to lodge caveat.

40 Ability of the purchaser to give in view of the fact that one of the vendors had died (Mr. Chelliah says that probate was granted on 12th December, 1962). Both vendors had to be joined. Therefore action could not be filed in June 1962 by reason of the death of Wong Choong. No evidence as to when we became aware as to when probate was taken out. Onus on person claiming

In the Federal Court of Malaysia (Appellate Jurisdiction)

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Court Notes of Counsels Arguments before the Court of Appeal 13th November 1969 continued

Respondents' Counsel's Argument recorded by Gill F.J. 13th November 1969 continued

In the Federal Court of Malaysia (Appellate Jurisdiction)

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Court Notes of Counsels Arguments before the Court of Appeal 13th November 1969 continued

Respondents' Counsel's Argument recorded by Gill F.J. 13th November 1969

laches to show when purchaser became aware of the grant. Public Trustee could not be sued until he had taken out probate.

Refer to judgment of trial Judge starting at page 41 line 19. No one prejudiced by the delay and laches. Refer to Penny v. Allen (1857) 44 E.R. 160, 164, 166. Not much change in price between the time of the repudiation and the time at which the action was filed.

Change in the law of Contract of Rent has no bearing on this case.

10

Would refer to further cases on laches Kissen Gopal Sadaney v. Kally Prosonno Sett (1906) 33 ILR Calcutta 633; Chamarti v. Sinha (1914) 23 Indian cases 560; Das v. Kabulan (1918) 44 Indian cases 244; Jangal Singh v. Gulam Mahomed (1922) 31 ILR 376; Morse v. Royal 33 E.R. 134, 141.

If court is against me on specific performance, I would ask for damages. Difference in value. I asked for other relief in the statement of claim.

20

(Court adjourned and resumed after 10 minutes).

Appeal allowed with costs here and in the court below. Deposit to appellants.

S. S. Gill

Appellant's Counsel's Argument recorded by Ali, F.J. 12th November 1969

NOTES OF ARGUMENTS RECORDED BY ALI, F.J.

12th November, 1969.

R.R. Chelliah for appellants.

Ng Ek Teong for respondent.

Chelliah:

Grounds grouped in 3 compartments.

30

Grounds 1 - 6 - together.

(1) Option had not been properly exercised.

(2) Contract void for illegality.

(3) Collateral ground: Delay.

Facts not in dispute. Mostly in documentary evidence.

Refers to agreement: P.7. Para 1, para 2 and para 7.

Para 7 - important.

Para 8 - purchase right to terminate

Para 13 - Time is of essence.

10 Submits: Respondent has option to buy land free from encumbrances. Payment of \$40,000 not come into play until plans approved. This requirement to enable appellants to give vacant possession free from encumbrances.

If scheme had been carried out it would have required the vendors to make false application to Rent Assessment Board and to give false evidence.

Reason - No intention to rebuild.

20 Not only a fraud on Board but also a fraud on tenants.

Plans not produced. Respondent never got plans approved. Application signed by appellant. No notice.

Undisputed fact that \$40,000 without notice tendered to Chin Kim on 11.5.62 with letter from Y.S. Lee.

Subsequently tendered in two sums on 2.6.62. with letters of that date. Both rejected.

30 Concedes option alive on 15.2.62.

Grounds 1 to 6 - reads.

Reads judgment pages 37 - 40 .

Submits: Consideration not only transfer of land but transfer with vacant possession.

In the Federal Court of Malaysia (Appellate Jurisdiction)

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Court Notes of Counsels Arguments before the Court of Appeal  
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continued

Appellant's Counsel's Argument recorded by Ali, F.J.  
12th November 1969



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Appellant's  
Counsel's  
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Ali, F.J.  
12th November  
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Vacant possession essence of the contract.  
That is why approved plans became necessary.

I modify what I said in Memorandum of  
Appeal. Now say these stipulations are for  
mutual interest of parties.

On waiver - Respondent has not waived  
right. Right up to the end his claim for  
vacant possession.

Refers to letter - p. 14. The date of  
this letter 2.6.62. 18 days after option  
expired. 10

In 1966 filed statement of claim - para 16.  
Why not pay \$160,000.

Submits no waiver.

Tender of \$40,000 in this case without  
approved plans is not a proper exercise of the  
option on 15.5.62.

Ground 7 : para 7 - illegality.

Pages 37 - 40 - judgment.

Intends to get certificate from Rent  
Assessment Board under s.12(1)(m) of 1956  
Control of Rent Ordinance - if plans approved  
by Municipality. Reads s.12(1)(m). 20

Reads s.24 of Contract Ordinance.

On Sec. 58. Refers to illustration.  
Submits this section inapplicable.

Sec. 25 - reads.

Grounds 8 & 9 : Reads judgment p. 43  
to p. 45.

(1) Time is of essence - expressly  
stated in agreement. Cases cited do not  
support. 30

(2) Submits 3 cases.

(1916) 1 A.C. 275; 279 - Steedman v. Drinkle & Anor.  
(1916) 2 A.C. 599 p.603/4.

Last Ground 10 - Contract rescinded on 7.6.62. (P. 16 & P. 17).

4 years 2 months to commence action.

Specific performance; discretionary remedy under sec. 21 of Specific Relief Ordinance 1950.

10 Refers to Mills v. Haywood (1877) 6 Ch. D. 196. p.202.

4 years delay

Caveat lodged on 27.8.1966.

Appreciation of value.

Short adjournment.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 9

Court Notes of Counsels Arguments before the Court of Appeal 12th November 1969 continued

Appellant's Counsel's Argument recorded by Ali, F.J. 12th November 1969 continued

EK TEONG:

On exercise of option: Tender made on 5.5.62 is signed by Y.S. Lee, acting for both parties. Tender rejected by letter of 12.5.62.

20 Chelliah - The contract not valid because no plans approved.

Vendors committed to sell land for \$160,000. Purchaser had rights to buy or not to buy.

30 If purchaser decides to buy vendor must sell. Conditions inserted in agreement for purchaser to decide. Whether plans for commercial development was passed or not purchaser has to decide. If plans were passed then it would be to the benefit of purchaser - solely for his benefit. If plans are passed vendors do not benefit. Cl.5 a devise solely for the benefit of the purchaser. In the event plaintiff entitled to pay \$40,000 even though plans approved for commercial use.

Respondents' Counsel's Argument recorded by Ali, F.J. 12th November 1969

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

₹40,000 to be paid as deposit. Cl.5.

If plans are passed, necessary to inform vendors - all in one act. If plans not passed or rejected purchaser entitled to say even if plans not approved he is paying ₹40,000. He is giving notice. He waives.

No. 9

Court Notes  
of Counsels  
Arguments  
before the  
Court of  
Appeal  
12th November  
1969  
continued

Clause 6 - automatic extension of 6 months during which to see plans to be passed.

Clause 7 - undertaking to take steps including legal possession. No guarantee to get vacant possession. 10

Clause 8 - exclusive right to terminate contract. Unilateral right in purchaser.

Respondents'  
Counsel's  
Argument  
recorded by  
Ali F.J.  
12th November  
1969  
continued

Not correct that vacant possession is essence of the contract.

Refers to Hawksley v. Outram (1892) 3 Ch.359. Waiver can be made at hearing itself. p. 366-375.

Refers to Morrel v. Studd & Millington (1913) 2 Ch. 648, p.660.

Vacant possession waived at the trial. 20

Reads judgment p.38 .

Adjourned to 10 a.m. tomorrow.

(Intld.) Ali

13th November  
1969

Ek Teong (continues)

13th November 1969

On question why ₹120,000/- not tendered.

Refers to agreement; it provides for various stages of payment. At stage of payment of ₹40,000 there is a repudiation. Page 16 Letter dated 7.6.62. This repudiation excused one from tendering the balance of ₹120,000. Refers to sec. 39(1) of Contract Ordinance. Also sec.63. 30

On illegality - refers to agreement.

No specific requirement that vendors should suppress any information. Refers to sec.12(1)(m).

expenses in this connection shall be borne by the Vendors.

8. If, within six (6) months from the date of the said deposit the Vendors are unable to give vacant possession of the said land, the Purchaser or the Nominee has the exclusive right to terminate the Agreement and the Vendors shall immediately refund to the Purchaser or Nominee the sum of Dollars Forty Thousand (\$40,000.00) free of interest and this Agreement shall be null and void.

13. Time wherever mentioned in this Agreement shall be the essence of this contract."

On May 5, 1962 - 10 days before the extended expiry date - the purchaser purported to exercise his option by remitting from Penang \$40,000/- by cheque to the solicitor in Kuala Lumpur who was acting for both parties. In the meantime Wong Choong had met an untimely death on May 5, 1962, having appointed the Public Trustee executor of his will. The latter accepted the appointment and on or about June 8, 1962 both he and the widow returned their respective shares of the \$40,000/- sent to them by cheque, on the ground that the option had not been "duly exercised". Thereafter there was no further correspondence between the parties, or any intimation given by the purchaser as to his intentions regarding the property until writ in this action was issued in the High Court on August 29, 1966.

By their defence the vendors pleaded illegality in that they were required by the agreement to make false representations to the Rent Assessment Board; default on the part of the purchaser to exercise the option in strict compliance with the terms of the agreement and that, time being of the essence of the contract, delay on his part disentitled the purchaser to specific performance.

On the first ground the learned trial judge held that, by reason of the purchaser having waived the requirement of vacant possession, the

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

No. 10

Judgment of  
the Court  
of Appeal  
delivered by  
Ong Hock  
Thye C.J.  
9th December  
1969  
continued

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

No. 10

Judgment of  
the Court  
of Appeal  
delivered by  
Ong Hock  
Thye C.J.  
9th December  
1969  
continued

vendors were no longer under any obligation to apply to the Rent Assessment Board or do anything contrary to law in connection therewith. He held further that the tender of \$40,000/- before the expiry of the option was in effect a valid exercise of the option and that the purchaser's delay - although lasting well over four years before commencement of action - did not defeat his claim, as time was not of the essence of the contract except in only one particular, namely, the initial deposit of \$40,000/-.

10

With respect, I think the judgment proceeded upon a misapprehension of what really were the material facts. The vendors' refusal of the deposit on June 8, 1962 was coupled with an unequivocal repudiation of the agreement. That left two courses open to the purchaser - either to agree to rescission of the agreement or treat the repudiation as "writ in water". This is clearly laid down in section 40 of the Contracts Ordinance 1950 as follows:-

20

"When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance."

(1) (1962) A.C. 413, 427. The effect of a repudiation by one party to a contract is thus stated by Lord Reid in White & Carter (Councils) Ltd. v. McGregor (1) :-

30

"The general rule cannot be in doubt. It was settled in Scotland at least as early as 1848 and it has been authoritatively stated time and again in both Scotland and England. If one party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the other party, the innocent party, has an option. He may accept that repudiation and sue for damages for breach of contract, whether or not the time for performance has come; or he may if he chooses disregard or refuse to accept it and then the contract remains in full effect."

40

NO. 11

Order of the Court of Appeal dated  
13th November 1969

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA  
LUMPUR

(Appellate Jurisdiction)

No. 11

Order of the  
Court of  
Appeal  
13th November  
1969

FEDERAL COURT CIVIL APPEAL NO. X80 OF 1969

BETWEEN

- 10 1. Chin Kim (f) )
- 2. The Public Trustee, )
- Federation of Malaya, )
- Kuala Lumpur as )
- executor and trustee )
- of the estate of Wong )
- Choong, deceased )

Appellants

AND

Loh Boon Siew

Respondent

(In the Matter of Civil Suit No. 1045 of 1966  
in the High Court in Malaya at Kuala Lumpur

20

Between

Loh Boon Siew

Plaintiff

And

Chin Kim (f) and The Public  
Trustee, Federation of Malaya,  
Kuala Lumpur as executor and  
trustee of the estate of  
Wong Choong, deceased

Defendants)

30

CORAM: ONG HOCK THYE, CHIEF JUSTICE, HIGH COURT IN  
MALAYA. GILL, JUDGE, FEDERAL COURT, MALAYSIA.  
ALI, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT THIS 13TH DAY OF NOVEMBER 1969

O R D E R

THIS APPEAL coming on for hearing on the 12th day

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 11

Order of the Court of Appeal 13th November 1969 continued

of November 1969 and on this day in the presence of Mr. R.R. Chelliah of Counsel for the Appellants abovenamed and Mr. Ng Ek Teong (Mr. V. Ponniah with him) of Counsel for the Respondent abovenamed AND UPON READING the Record of Appeal filed herein AND UPON HEARING Counsel as aforesaid for the parties IT IS ORDERED that this Appeal be and is hereby allowed AND IT IS FURTHER ORDERED that the Respondent do pay to the Appellants the costs of this Appeal and of the proceedings in the Court below as taxed by the proper officer of the Court AND IT IS LASTLY ORDERED that the sum of \$500/- Dollars five hundred deposited in Court be refunded to the Appellants.

10

GIVEN under my hand and the seal of the Court this 13th day of November, 1969.

Sd. Au Ah Wah

CHIEF REGISTRAR  
FEDERAL COURT, MALAYSIA.

No. 12

Order granting final leave to Appeal to the Judicial Committee of the Privy Council 8th June 1970

NO. 12

Order granting final leave to appeal to the Judicial Committee of the Privy Council dated 8th June 1970

20

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. X 80 OF 1969

BETWEEN

- 1. Chin Kim (f)
- 2. The Public Trustee Federation of Malaya, Kuala Lumpur as executor and trustee of the estate of Wong Choong, deceased

30

Appellants

AND

Loh Boon Siew

Respondent

(In the Matter of Civil Suit No.1045  
of 1966 in the High Court in Malaya  
at Kuala Lumpur

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

Between

Loh Boon Siew

Plaintiff

No. 12

And

Chin Kim (f) and The  
Public Trustee,  
Federation of Malaya,  
Kuala Lumpur as executor  
and trustee of the  
estate of Wong Choong,  
deceased

Defendants)

Order granting  
final leave to  
Appeal to the  
Judicial  
Committee of  
the Privy  
Council  
8th June  
1970

continued

CORAM: AZMI, LORD PRESIDENT, FEDERAL COURT, MALAYSIA  
SUFFIAN, JUDGE, FEDERAL COURT, MALAYSIA:  
GILL, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT  
THIS 8TH DAY OF JUNE, 1970

O R D E R

UPON MOTION made unto the Court this day by Mr.  
Yong Pung How of Counsel for the Respondent above-  
named in the presence of Mr. Joginder Singh for  
Mr. R.R. Chelliah of Counsel for the Appellants  
abovenamed AND UPON READING the Notice of Motion  
dated the 20th day of May, 1970 and the Affidavit  
of Loh Boon Siew affirmed on the 11th day of  
April, 1970 and filed in support of the said Motion  
AND UPON HEARING Counsel as aforesaid:

IT IS ORDERED that final leave be and is  
hereby granted to the Respondent abovenamed to  
appeal to His Majesty the Yang di-Pertuan Agong from  
the Judgment of the Federal Court dated the 13th  
day of November, 1969 AND IT IS FURTHER ORDERED  
that the costs of this application be costs in the  
cause.

GIVEN under my hand and the seal of the Court  
this 8th day of June, 1970.

CHIEF REGISTRAR  
FEDERAL COURT, MALAYSIA.



Plaintiff's Exhibits

EXHIBIT P1(7)

Exhibit P1(7)  
(also referred to as Exhibit P.4)  
Letter from Lim Huck Aik & Co. to Y.S. Lee & Co. 5th May 1962

Letter Lim Huck Aik & Co. to Y.S. Lee & Co. dated 5th May, 1962. (Also referred to as Exhibit "P.4.")

LIM HUCK AIK & CO.  
Advocates & Solicitors,  
Federation of Malaya, 12a, Beach Street,  
PENANG.

Telephone  
Office: 60376  
Residence: 60534

5th May, 1962.

10

Your Ref.  
Our Ref. HA:MC

Messrs. Y.S. Lee & Co.,  
10, Klyne Street,  
(1st Floor),  
Kuala Lumpur.

Dear Sirs,

re: Certificate of Title No.11089  
Lot 97, Section 57, Town of  
Kuala Lumpur

20

On behalf of Mr. Loh Boon Siew, we send you herewith to you as solicitors for Mr. Wong Choong and Madam Chin Kim the sum of \$40,000/- being deposit payable. Our client intends to purchase the above property irrespective of whether the plans and specifications are approved or not.

Will you kindly have your clients, the Vendors, take the necessary steps under Clause 7 of the Agreement of Sale dated the 16th day of May, 1961 to enable our client to rebuild on the said land.

30

Please acknowledge receipt.

Yours faithfully,  
Sgd.

c.c.  
Mr. Wong Choong,  
Madam Chin Kim,  
both of No. 20, Klyne Street,  
Kuala Lumpur.

Enc.

EXHIBIT P1(8)

Cheque for \$40,000.00 dated 5th May 1962  
enclosure to Exhibit P1(9) Letter Lim Huck  
Aik to Y.S. Lee & Co. of 11th May 1962

STAMP DUTY PAID

No. PE 355693  
6

Penang 5th May, 1962.

OVERSEA-CHINESE BANKING CORPORATION LIMITED

(Incorporated in Singapore, Head Office, Singapore)

PENANG

Plaintiff's  
Exhibits

Exhibit P1(8)  
Cheque for  
\$40,000.00  
dated 5th  
May 1962  
enclosure to  
Exhibit P1(7)  
Letter from  
Lim Huck Aik  
to Y.S.Lee  
& Co. of  
11th May  
1962.

10 Pay to Mr. Wong Choong and Madam Chin Kim or  
Bearer

Dollars Forty thousand only.

EXACTLY \$40000&00CTS.

BOON SIEW LIMITED

Sgd.

\$40,000/-

Director.

Plaintiff's Exhibits

EXHIBIT P1(13)

Letter Y.S. Lee & Co. to Loh Boon Siew dated 29th May 1962

Exhibit P1(13)

Letter  
Y.S. Lee &  
Co. to Loh  
Boon Siew  
29th May  
1962

Y.S. Lee & Co.,  
Advocates & Solicitors

Registered

WASHURAKAH Y.S. LEE  
Peguambela dan  
Peguamchara.

No. 10, Klyne Street,  
Kuala Lumpur, Tel.88423

Lee Yew Siong  
Ang Chui Lai  
Ten Chin Yong

Branch Office  
1st Floor, Cold Storage  
Bld. Wall Street, 10  
KUANTAN  
Tel.484

Your Ref.  
Our Ref. ACL/K/W/56/61

Kuala Lumpur 29th May, 1962.

Mr. Loh Boon Siew,  
No.15, Pitt Street,  
Penang.

Dear Sir,

Re: Certificate of Title No.11089 Lot 97  
Section 57, Town of Kuala Lumpur.

20

Cheque No. 355693 dated 5th May, 1962  
for \$40,000.00

We refer to our telephone conversation today between yourself and our Mr. Ang and write to you as follows:-

We request you, on instructions received by the Public Trustee in respect of the above matter that you send us two cheques as follows:-

1. One cheque in favour of the estate of Wong Choong deceased for the sum of \$20,000.00 to be dated 28th May, 1962. 30
2. Another cheque in favour of Madam Chin Kim for the sum of \$20,000.00 to be dated 28th May 1962.

We return you herewith your cheque for the sum of \$40,000.00 dated 5th May, 1962 as requested by you.

Kindly acknowledge receipt.

Encl.

Yours faithfully,

c.c.

Sgd.

Lim Huck Aik Esq.

No.12A, Beach Street, Penang.

40

87.

EXHIBIT P1(12)

Cheque for \$20,000.00 dated 28th May 1962  
and enclosure to letter Y.S. Lee & Co. to  
Chin Kim dated 2nd June 1962

STAMP DUTY PAID

No. PE 367036  
6

OVERSEA-CHINESE BANKING CORPORATION LIMITED  
(Incorporated in Singapore, Head Office, Singapore)

PENANG

Pay to Madam Chin Kim or Bearer

Dollars Twenty thousand only.

EXACTLY \$20000&00CTS.

BOON SIEW LIMITED

Sgd.

\$20,000/-

(f) Director.

Plaintiff's  
Exhibits

Exhibit P1(12)  
Cheque for  
\$20,000.00  
dated 28th  
May 1962  
and enclosure  
to letter  
Y.S. Lee &  
Co. to Chin  
Kim dated  
2nd June 1962

Plaintiff's  
Exhibits

STAMP DUTY PAID

No.  $\frac{PE}{6}$  367035

Penang 28th May, 1962.

Exhibit P1(11)  
Cheque for  
\$20,000.00  
dated 28th May  
1962 payable  
to estate of  
Wong Choong  
and enclosure  
to letter  
Y.S. Lee & Co.  
to Public  
Trustee dated  
2nd June 1962

OVERSEA-CHINESE BANKING CORPORATION LIMITED  
(Incorporated in Singapore, Head Office, Singapore)

PENANG

Pay to Estate of Wong Choong (deceased) or  
Bearer

Dollars Twenty thousand only

EXACTLY \$20,000&00CTS.

BOON SIEW LIMITED

10

Sgd.

\$20,000/-

(f) Director.

EXHIBIT P1(18)

Application by Loh Boon Siew for entry of  
a private Caveat dated 27th August 1966

NATIONAL LAND CODE

FORM 19B

(Section 323)

APPLICATION FOR ENTRY OF A PRIVATE CAVEAT

To the Registrar of Titles, Selangor,  
Kuala Lumpur.

Plaintiff's  
Exhibits

Exhibit P1(18)  
Application  
by Loh Boon  
Siew for entry  
of a private  
caveat  
27th August  
1966

10 I, Loh Boon Siew of No.15, Pitt Street,  
Penang, hereby apply for the entry of a Caveat upon  
the title to the land described in the Schedule  
below; to be expressed to bind -

The whole of the land itself described in the  
said Schedule.

2. The grounds of my claim to the land are -

20 (a) By virtue of an Agreement dated the  
16th day of May, 1961 the registered proprietors  
Chin Kim (f) and Wong Choong (deceased) granted to  
me an option to purchase the whole of the land  
held under Selangor Certificate of Title No.11089  
Lot No. 97 Section 57 in the Town and District of  
Kuala Lumpur within six (6) months of the date of  
the said Agreement. A copy of the said Agreement  
is annexed hereto and marked "A".

30 (b) By virtue of an Agreement between me and  
the said Chin Kim (f) and Wong Choong (deceased)  
dated 11th day of November, 1961 the option granted  
to me by the Agreement dated 16th day of May, 1961 was  
extended for a further period of six (6) months  
expiring on the 15th day of May, 1962; a copy of  
the said Agreement is annexed hereto and marked "B".

(c) I exercised the said option by the  
payment of the sum of \$40,000/- on the 11th day of  
May, 1962 to Chin Kim (f) by herself and Chin Kim (f)  
as trustee of the Estate of Wong Choong (deceased)  
and I confirm the exercise of the said option by

Plaintiff's Exhibits

Exhibit P1(18)  
Application by Loh Boon Siew for entry of a private Caveat  
27th August 1966

tendering the sum of \$20,000/- to the Public Trustee, Federation of Malaya and the sum of \$20,000/- to the said Chin Kim (f) on the 2nd day of June, 1962.

3. As required by Section 323 of the National Land Code, I now submit -

(a) the prescribed fee of \$20/-

(b) a Statutory Declaration by myself verifying the claim set out in paragraph 2 above.

Dated this 27th day of August, 1966.

10

Signature of the Applicant.

FORM 13B

(Section 211)

ATTESTATION

I, LIM HUCK AIK an Advocate & Solicitor of the High Court in Malaya practising at Penang hereby testify that the above signature was written in my presence this 27th day of August 1966 and is

(a) according to my own personal knowledge,

(b) according to information given to me by the following trustworthy and reliable person, namely ..... which information I verily believe, the true signature of Loh Boon Siew

20

who has acknowledged to me

(i) that he is of full age,

(ii) that he has voluntarily executed

(iii) this instrument, and that he understand the contents and effect thereof.

As witness my hand this 27th day of August, 1966.

30

Advocate & Solicitor  
Penang.

Where the address of the person claiming under this instrument is outside the Federation, an address within the Federation for the service of notice is to be added in this space.

.....

.....

SCHEDULE OF LAND

Plaintiff's Exhibits

---

Exhibit P1'18)  
Application  
by Loh Boon Siew for entry  
of a private  
Caveat  
27th August  
1966  
continued

10

Town	Lot No.	Description and No. of Title	Share of land	Registered No. of lease/ sub-lease (if any)	Registered No. of Charge (if any)
(1)	(2)	(3)	(4)	(5)	(6)
Kuala	97, Sec. 57	Selangor C.T.No. 11089	The Whole	-	-



EXHIBIT A

to the Application of Loh Boon Siew for entry of a private Caveat dated 27th August 1966 is the same document as Exhibit "P1" and "L.B.S.1" already included in this record and consequently has not been reproduced again.

EXHIBIT B

to the application of Loh Boon Siew for entry of a private Caveat dated 27th August 1966 is the same document as Exhibit P1(6) and "L.B.S.2" and consequently has not been reproduced again.

EXHIBIT P1(18)

Plaintiff's Exhibits

Statutory Declaration of Loh Boon Siew in respect of his application for entry of a private Caveat declared 27th August 1966

Exhibit P1(18)  
Statutory Declaration of Loh Boon Siew in support of his application for entry of a private Caveat 27th August 1966

I, Loh Boon Siew of No. 15, Pitt Street, Penang, do solemnly and sincerely declare as follows :-

10 (a) By virtue of an Agreement dated the 16th day of May, 1961 the registered proprietors Chin Kim (f) and Wong Choong (deceased) granted to me an option to purchase the whole of the land held under Selangor Certificate of Title No.11089 Lot No. 97 Section 57 in the Town of Kuala Lumpur within six (6) months of the date of the said Agreement. A copy of the said Agreement is attached to my application for entry of a private caveat dated the 27th day of August, 1966.

20 (b) By virtue of an Agreement between me and the said Chin Kim (f) and Wong Choong (deceased) dated 11th day of November, 1961 the option granted to me by the Agreement dated 16th day of May, 1961 was extended for a further period of six (6) months expiring on the 15th day of May, 1962; a copy of the said Agreement is attached to my application for entry of a private caveat dated the 27th day of August, 1966.

30 (c) I exercised the said option by the payment of the sum of \$40,000/- on the 11th day of May, 1962 to Chin Kim (f) by herself and Chin Kim (f) as trustee of the Estate of Wong Choong (deceased) and I confirmed the exercise of the said option by tendering the sum of \$20,000/- to the Public Trustee, Federation of Malaya and the sum of \$20,000 to the said Chin Kim (f) on the 2nd day of June, 1962.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1960.

40 Subscribed and solemnly declared)  
by the above-named Loh Boon Siew }  
at Penang in the State of Penang this 27th day of August, }  
1966

Before me,  
Sgd.  
MAGISTRATE PENANG

Plaintiff's  
Exhibits

EXHIBIT P2(A)

Letter Messrs. Y.T. Lee & Co. to Loh Boon  
Siew dated 21st November, 1961.

Exhibit P2(A)  
Letter Messrs.  
Y.T. Lee & Co.  
to Loh Boon  
Siew  
21st November  
1961

Y.T. Lee Washurakah,  
Akitek Bersekutu  
Dan

Jurutera Konkerit Kokah  
Y.T. Lee M.Inst.R.A., F.I.A.A.

Talipon:  
Pejabat 83921  
Rumah 82010

Y.T. LEE & CO.,  
Corporate Architects  
& Reinforced Concrete  
Engineers,  
No.88 Cross Street,  
Kuala Lumpur, Malaya.

21st November, 1961.

10

Loh Boon Siew Esq.,  
Boon Siew Ltd.,  
15, Pitt Street,  
Penang.

Dear Sir,

Re-zoning of Lot 97 Sect.57,  
Treacher Road, Kuala Lumpur.

With reference to the above we regret to inform  
you that your application for re-zoning of Lot 97  
Sec. 57, Treacher/Parry Road, Kuala Lumpur, from  
"Open Development" to "Commercial Area" has been  
refused.

20

Copy of letter dated the 20th November, 1961,  
from the Municipal Engineer, Federal Capital of  
Kuala Lumpur, is enclosed herewith for your  
information.

Yours faithfully,

Sd:

Y.T. LEE & CO.  
Corporate Architects  
R.C. Engineers.

30

EXHIBIT P2(B)

Letter Municipal Engineer to Messrs. Y.T. Lee  
& Co. dated 20th November, 1961

Municipal Engineer's Dept.,  
Kuala Lumpur.

20th November, 1961.

Ref. 21/KLM. 947/59

M/s. Y.T. Lee & Co.,  
88, Cross Street,  
Kuala Lumpur.

10

Dear Sirs,

Rezoning of Lot 97, Sec.57, Treacher Road,  
Kuala Lumpur

With reference to your letter of 11th  
November, 1961, regarding the above subject, I have  
to inform you that your previous application for  
re-zoning of Lot 97, Sec. 57, Treacher Road, from  
"Open Development" to "Commercial Area" had already  
been refused and the decision was conveyed to you on  
4th October, 1961.

20

It is regretted that this matter cannot now  
be reconsidered.

Yours faithfully,

Planning Officer,  
for Municipal Engineer,  
Federal Capital of Kuala Lumpur.

Plaintiff's  
Exhibits

Exhibit P2(B)  
Letter  
Municipal  
Engineer to  
Messrs. Y.T.  
Lee & Co.  
20th November  
1961

Plaintiff's  
Exhibits

EXHIBIT P2(C)

Exhibit P2(C)  
Letter Y.T.  
Lee & Co. to  
Loh Boon Siew  
6th October  
1961

Letter Y.T. Lee & Co. to Loh Boon  
Siew dated 6th October 1961

Y.T. Lee Washurakah,  
Akitek Bersekutu  
Dan  
Jurutera Konkerit Kokah  
Y.T. Lee M.Inst. R.A., F.I.A.A.

Y.T. LEE & CO.,  
Corporate Architects  
& Reinforced Concrete  
Engineers,  
No.88, Cross Street,  
Kuala Lumpur,  
Malaya.

Talipon:  
Pejabat 83921  
Rumah 82010

6th October, 1961.

10

Loh Boon Siew Esq.,  
Boon Siew Ltd.  
15, Pitt Street,  
Penang.

Dear Sir,

Re: Lot 97, Sec.57, Treacher Road/  
Parry Road, Kuala Lumpur.

With reference to the above we regret to  
inform you that your application for re-zoning of  
Lot 97, Sec. 57, Treacher/Parry Road, Kuala Lumpur  
from "Open Development" to "Commercial Area" has  
been refused.

20

Copy of the Refusal Notice dated 4th October,  
1961, from the Municipal Engineer, Federal Capital  
of Kuala Lumpur is enclosed herewith for your  
information.

Yours faithfully,

Sd:

30

Y.T. LEE & CO.  
Corporate Architects  
& R.C. Engineers.

EXHIBIT P2(D)

Letter Municipal Engineer to Messrs. Y.T.  
Lee & Co. dated 4th October 1961

COMMISSIONER OF THE FEDERAL CAPITAL OF K.L.

Town Planning Branch,  
Municipal Engineer's Dept.  
Federal Capital of  
Kuala Lumpur.

4th October, 1961.

Ref: 18/KIM.947/59  
M.T.P. 9/E

10

Dear Sir,

Refusal of Planning Permission  
for the Development of Land.

I regret to inform you that planning per-  
mission for the rezoning of Lot 97, Sec. 57,  
Treacher Road, from "Open Development" to  
"Commercial Area" in accordance with the plans and  
particulars dated 8th September, 1961 is REFUSED  
under Section 145 Town Boards Enactment (Cap.137),  
subject to confirmation of the Council.

20

The reason for refusing permission is as  
follows :-

-

Two copies of your site plan (4483) suitably  
endorsed are returned herewith.

Yours faithfully,

Planning Officer.

Plaintiff's  
Exhibits

Exhibit P2(D)  
Letter  
Municipal  
Engineer to  
Messrs. Y.T.  
Lee & Co.  
4th October  
1961

No. 34 of 1970.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL  
ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA  
(APPELLATE JURISDICTION)

B E T W E E N :

LOH BOON SIEW Appellant  
(Plaintiff)

- 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  
(Defendants)

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RECORD OF PROCEEDINGS

LINKLATERS & PAINES,  
Barrington House,  
59 Gresham Street,  
London, E.C. 2V 7JA.

Solicitors for the  
Appellant

CRAHAM PAGE & CO.,  
49/55 Victoria Street,  
London,  
S.W.1.

Solicitors for the  
Respondents

In the High  
Court of  
Malaya at  
Kuala Lumpur

No. 1

Writ of  
Summons  
29th August  
1966  
continued

shall be automatically extended for a further period of six (6) months. As consideration for such extension the deposit of \$1,200/- made under the said Agreement was to belong to the First Defendant and the late Wong Choong as Vendors absolutely and not regarded as payment towards the agreed purchase price.

7. On the 11th day of November, 1961 building plans and specifications for the said land not having been approved, the First Defendant and the late Wong Choong executed an Agreement whereby the said option under the said Agreement was extended for another six (6) months so as to expire on the 15th day of May, 1962.

10

A copy of the said Agreement dated 11th November, 1961 is annexed hereto and marked "LBS.2".

8. A further consideration of \$1,200/- was paid to the First Defendant and the late Wong Choong for this extension notwithstanding the provisions of Clause 6 of the said Agreement.

20

9. In the meantime the late Wong Choong died on or about 4th May, 1962 and his undivided half share vested in the second Defendant the Public Trustee, Federation of Malaya.

10. Notwithstanding the fact that the building plans and specifications for the said land had not been approved, the Plaintiff through his then Solicitors, nevertheless on the 11th day of May, 1962 exercised the said option to purchase the said land by tendering to the First Defendant in her own right and to her as trustee of the estate of the late Wong Choong payment by cheque of the sum of \$40,000/- towards the total purchase price as required under Clause 5 of the said Agreement. A copy of the said letter is annexed hereto and marked "LBS.3".

30

11. By a letter dated 12th day of May, 1962 the Defendant however returned the said cheque for \$40,000/- and informed the Plaintiff's Solicitors that the purchase of the property was in the hands of the second Defendant the Public Trustee as a result of the demise of the late Wong Choong. A copy of the said letter dated 12th May, 1962 is

40



annexed hereto and marked "LBS.4".

12. By two letters dated 2nd day of June, 1962 the Plaintiff's Solicitors sent cheques to Madam Chin Kim (the First Defendant) and to the Second Defendant the Public Trustee, Federation of Malaya respectively for \$20,000/- each. Copies of these letters are annexed hereto and marked "LBS.5" and "LBS.6" respectively.

10 13. Consequently the Plaintiff's Solicitors received a letter dated 7th day of June, 1962 from the Defendant's Solicitors returning the cheque for \$20,000/- and stating that as the Plaintiff had not duly exercised the option to purchase, the cheque was being returned. A copy of the said letter dated 7th June, 1962 is annexed hereto and marked "LBS.7".

20 14. The Plaintiff's Solicitors also received a letter dated 8th day of June, 1962 from the Public Trustee, Federation of Malaya returning the cheque for \$20,000/-. A copy of the said letter is annexed hereto and marked "LBS.8".

15. The Defendants have repudiated the said Agreement,

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.

30 17. The Plaintiff has at all times been ready and willing to perform his part of the said Agreement.

18. The Plaintiff has by virtue of the said Agreement lodged on the 29th day of August, 1966 a Caveat against the whole of the said land held by the First and Second Defendants.

19. The Plaintiff therefore prays for an Order that :-

40 (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

In the High  
Court of  
Malaya at  
Kuala Lumpur

\_\_\_\_\_  
No. 1

Writ of  
Summons  
29th August  
1966  
continued



In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

MEMORANDUM OF APPEAL

Chin Kim and the Public Trustee, Federation of Malaya, Kuala Lumpur as executor and trustee of the Estate of Wong Choong deceased, the appellants abovenamed, appeal to the Federal Court against the whole of the decision of the Honourable Mr. Justice Dato Abdul Aziz given at Kuala Lumpur on the 19th day of June 1969 on the following grounds:

No. 8  
Memorandum  
of Appeal  
26th August  
1969  
continued

1. The learned trial Judge failed to appreciate the full meaning and effect of the agreement dated 16th May 1961 and misdirected himself thereto. 10
2. The learned trial Judge failed to appreciate
  - (i) that the essence of the agreement was that the Appellant Vendors were on the due exercise of the option by the Respondent Purchaser obliged to transfer the land to the Respondent Purchaser free from all encumbrances with vacant possession and that if the appellant vendors were unable to give vacant possession within the prescribed time the Respondent Purchaser had the right to terminate the agreement 20
  - (ii) that the provisions requiring the Respondent Purchaser to have plans and specifications of buildings to be erected on the said land to be approved by the proper authorities were inserted in the agreement, as a condition precedent to any exercise of the option, for the benefit of the Appellant Vendors to enable them to deliver vacant possession of the said land. 30
3. The learned trial Judge misdirected himself in stating that "it was agreed that the Defendant should assist the Plaintiff to obtain the necessary planning approval and to obtain vacant possession." It was the other way round. It was the Plaintiff who had to assist the Defendants to enable them to deliver vacant possession of the land. 40
4. The learned trial Judge misdirected himself in holding

Para 8 - that time is not of the essence. Date of deposit of first tender after 6 months elapsed. Within a reasonable time. No clause giving time.

Nothing to suggest that agreement should be suppressed.

On delay or laches: Proceedings that have happened. Caveat in 1968. I was not allowed to give evidence on caveat earlier in 1962.

10 Inability on part of purchaser to sue one of the vendors.

[Chelliah: Grant of Probate granted on 12.12.62.]

In June 1962 - could not sue because of the death of one of the co-owners Wong Choong.

No evidence when he became aware that Probate was taken out.

December 1962 could not be a strict date.

Reads judgment p.42.

20 Refers to Penny v. Allen (1857) 44 E.R. p.160. Reads Head Note - p.164.

Vendor has not been repudiated.

Only \$20,000 difference. This is the effect of the delay.

Time alone is not to be a factor to determine.

Change in Rent Control legislation does not make it easier to apply for eviction.

30 Further refers to Penny v. Allen. Refers to p.166.

Kissen Gopal Sadaney v. Sett (1906) 33 I.L.R. Cal. 633.

Chamarti Sinha (1914) 23 IC.560.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 9

Court Notes of Counsels Arguments before the Court of Appeal 13th November 1969  
continued

Respondents' Counsel's Arguments recorded by Ali, F.J. 13th November 1969  
continued

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

Das v. Kabulan (1918) 44 I.C.244.

Jangal Singh v. Ghulam Mahomed (1922) 31  
I.L.R. Lahore 376.

Morse v. Royal 33 E.R. 134 at 141 - reads.

No. 9

Court Notes  
of Counsels  
Arguments  
before the  
Court of  
Appeal  
13th November  
1969  
continued

Ek Teong - asks for damages - value shown in  
evidence. Statement of claim - asks for other  
reliefs (page 6).

Adjourned for 10 minutes.

C.J. Appeal allowed with costs here and below.  
Reason and finding will be given for this  
decision.

10

(Intld.) Ali

Respondents'  
Counsel's  
Argument  
recorded by  
Ali, F.J.  
13th November  
1969  
continued

Sd. Illegible.

Setia-usaha kapada Hakim,  
Mahkamah Petsekutuan  
Malaysia  
Kuala Lumpur.

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NO.10

Judgment of the Court of Appeal delivered  
by Ong Hock Thye C.J. dated 9th December  
1969

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In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

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IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA  
LUMPUR

No. 10

(Appellate Jurisdiction)

Judgment of  
the Court of  
Appeal  
delivered by  
Ong Hock Thye  
C.J.  
9th December  
1969

Federal Court Civil Appeal No.X.80 of 1969

Between

10

- 1. Chin Kim (f)
- 2. The Public Trustee

Appellants

and

Loh Boon Siew

Respondent

(In the matter of K.L. High Court Civil Suit  
No. 1045 of 1966

Between

Loh Boon Siew

Plaintiff

and

20

- 1. Chin Kim (f)
- 2. The Public Trustee

Defendants)

Cor: Ong Hock Thye, C.J.  
Gill, F.J.  
Ali, F.J.

JUDGMENT OF ONG HOCK THYE, C.J.

This is an appeal against the decision of the High Court at Kuala Lumpur given on June 19, 1969 ordering specific performance by the vendors of an agreement dated May 16, 1961 for the sale of land.

30

Wong Choong and Chin Kim, his wife, were the registered co-owners in equal shares of a piece of land at Treacher Road in the residential zone of Kuala Lumpur. Loh Boon Siew was in search of a suitable place for his motor-car showrooms. On May 16, 1961 they entered into an agreement for the sale and purchase of this land at the price of \$160,000/- or approximately \$4/- per square foot.

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

No. 10

Judgment of  
the Court of  
Appeal  
delivered by  
Ong Hock  
Thye C.J.  
9th December  
1969  
continued

Situate on the land were the vendors' family residence and some out-houses let to tenants protected under the Control of Rent Ordinance 1956 then in force. As the land was required by the purchaser for commercial purposes, the agreement contained certain stipulations relating to planning permission to be applied for and proceedings taken by the vendors thereafter for ejectment of their tenants so as to be able to give the purchaser vacant possession. 10

Briefly, the agreement was as follows. In consideration of \$1,200/- paid to them by the purchaser the vendors granted him an option of purchase at the price of \$160,000/- to be exercised within 6 months. During such period the purchaser was to supply plans for submission by the vendors to the Authorities for planning permission. Upon receipt of such permission the purchaser was to pay the vendors forthwith the sum of \$40,000/- by way of deposit to account of the purchase price and the balance of \$120,000/- within 6 months thereafter: but, in the event of permission being refused, the option was to be automatically extended for a further 6 months, so that the expiry date became 12 months from May 16, 1961. In the event planning permission was not forthcoming and the option became extended accordingly. 20

The agreement went on to provide for the contingency where, in default of planning permission, the purchaser was still desirous to complete and paid the agreed deposit. The relevant provisions were as follows:- 30

"7. Immediately on receipt of the sum of Dollars Forty Thousand (\$40,000.00) 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 re-building and in its opinion it is in the public interest that they should be permitted to do so. All costs and 40

Where the promisee does not accept the repudiation as putting an end to the contract the legal position of the parties then is as stated by Cockburn C.J. in Frost v. Knight (2) :-

In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

No. 10

Judgment of  
the Court  
of Appeal  
delivered by  
Ong Hock  
Thye C.J.  
9th December  
1969  
continued

(2) L.R.  
7 Ex. 111,  
112

10 "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it".

20 The position of the purchaser in the instant case is thus stated in Fry on Specific Performance (6th Ed.) p.515 as follows :-

30 "Where the contract is in anywise unilateral, as, for instance, in the case of an option to purchase, a right of renewal, or of any other condition in favour of one party and not of the other, then any delay of the party in whose favour the contract is binding is looked at with especial strictness. On this principle, the delay of a purchaser in deciding whether he will or will not accept the title is an injustice, because the purchaser can enforce the contract against the vendor whether the title be good or bad, whereas the vendor can only do so in case of a good title."

40 In this case one should have thought that the purchaser would not hesitate to make his position clear one way or the other. Yet he did nothing of the sort. If he disagreed that the vendors were entitled to repudiate, he had only to say so. Had he been at all desirous of completing the purchase - even without vacant possession - all he had to do was perfectly simple, namely, give notice to the Vendors of his intention so to do and



In the Federal  
Court of  
Malaysia  
(Appellate  
Jurisdiction)

No. 10

Judgment of  
the Court  
of Appeal  
delivered by  
Ong Hock  
Thye C.J.  
9th December  
1969  
continued

tender the whole purchase price. What else were the vendors reasonably to assume by reason of his complete silence except that he acquiesced in their tearing up the agreement? What was the proper inference the Court should have drawn from his conduct? Should not he, as a reasonable man, have taken action within a reasonable time after a breach of contract by the other party, unless he in fact acquiesced in its rescission? In my opinion a lapse of over four years - between June 8, 1962 and August 29, 1966 - is not even within measurable distance of the reasonable time he needed to make up his mind. His conduct therefore compels me to conclude that he accepted the rescission. Having so agreed I cannot see how he is entitled even to damages, much less specific performance. 10

Here the purchaser had been solely responsible for a most inordinate delay. No satisfactory explanation had been given to account for it. Such delay had in fact resulted in benefits which were entirely one-sided. He had in the meantime the profitable use of his money, the whole sum of \$160,000/-, which should have earned interest amounting to \$38,400/- in 4 years at 6 per cent if reckoned to date of writ, and approximately \$67,200/- when judgment was finally delivered in the action. This not inconsiderable sum was lost to the vendors. Had the price been tendered at the proper time and accepted, the interest that should have been earned would have been a gain to the vendors. Alternatively the moneys might have been invested in other lands at the current market value in 1962 which would have made up for the bad bargain which the vendors made in 1961. It is common knowledge that land values in Kuala Lumpur had been steadily rising since 1961 to the present day. 20

For the above reasons this appeal should be allowed and the judgment of the Court below set aside with costs. 30 40

Kuala Lumpur,  
9th December, 1969.

(Sgd.) H.T. Ong  
CHIEF JUSTICE  
HIGH COURT IN MALAYA.

R.R. Chelliah Esq. for appellants  
Ng Ek Teong Esq. for respondent.

Gill and Ali F.J. concurred.