

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCILNo. 17 of 1972O N A P P E A L
FROM THE COURT OF APPEAL IN SINGAPOREB E T W E E N :

BANK NEGARA INDONESIA	(Plaintiffs)
	<u>Appellants</u>
- and -	
PHILIP HOALIM	(Defendant)
	<u>Respondent</u>

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CASE FOR THE APPELLANTSRecord

1. This is an Appeal, by leave of the Court of Appeal in Singapore, from a Judgment of that Court dated the 27th November, 1971, dismissing an appeal by the Appellants, the Plaintiffs in the Action, from a Judgment of the High Court of the Republic of Singapore (The Honourable Mr. Justice Chua) dated the 2nd June, 1970, dismissing the action with costs.

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2. The Action was instituted by the Appellants against the Respondent in the High Court of the Republic of Singapore by Specially Indorsed Writ dated the 4th March, 1969. By the Writ the Appellants claimed possession of the front room ("the demised premises") on the third floor of a building ("the building") known as No. 3 Malacca Street, Singapore, and mesne profits from the 1st March 1969 until judgment or possession. The Appellants claimed that the demised premises were let to the Respondents on a monthly tenancy at a rent of \$280.00 per month; that the tenancy was duly determined by a notice in writing to quit expiring on the 28th February, 1969; and that the demised premises were not within the Control of Rent Ordinance as the same were built and completed after the 7th September, 1947.

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3. By his Defence the Respondent denied that the Appellants were entitled to possession of the demised premises, and sought to rely upon the provisions of the Rent Control Ordinance 1953. By Paragraph 3 of his Defence the Respondent expressly pleaded (as was the fact) that the third floor of the building (on which the demised premises were wholly situate) was added to the building in the year 1958.

4. Alternatively, the Respondent sought to rely upon an alleged agreement, partly oral and partly in writing, said to have been made in 1958 between himself and one Lee Cheng Kiat, and he claimed that the Appellants were thereby estopped from claiming possession of the demised premises from the Respondent.

5. The Control of Rent Ordinance 1953 applies only to "premises" within the meaning of the Ordinance. Section 2 thereof defines "premises" in the following terms:-

"premises" means any dwellinghouse.....officeand any other building.....in which persons are employed or work and any part of any such building let or sublet separately.....but does not include any new building built or completed after 7th September 1947."

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6. The following facts were common ground and are recited in the judgment of Mr. Justice Chua:-

- (1) In 1957 the building was owned by Mr. Lee Cheng Kiat.
- (2) It was then an old building, consisting of a ground floor, first floor and a second floor.
- (3) The Respondent was a tenant of the front portion of the first floor under a monthly tenancy at a rent of \$147.40 per month. He was there carrying on practice as an Advocate and Solicitor.
- (4) In 1957 the Appellants negotiated to purchase the building, and in June 1958 extensive alterations and additions to the building ("the works") were undertaken. During the progress of the works all the tenants of the building moved out except the Respondent.

The works were completed at the end of 1958.

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- (5) The works included the addition of a wholly new third floor, and when that was completed the Respondent moved there and took possession of the demised premises, paying the same rent as before, that is to say \$147.40 per month.
- (6) The building was conveyed by Lee Cheng Kiat to the Appellants by a Conveyance dated the 7th July, 1959. p.93
- 10 (7) On the 12th January, 1961 the Appellants gave the Respondent a Notice to Quit. p.107
- (8) The Respondent did not quit, but after negotiations between the parties the Appellants granted to him a Lease ("the Lease") of the demised premises for a term of three years from the 1st March, 1961, at a monthly rent of \$280 per month. By clause 2(xiii) of the Lease the Respondent covenanted to yield up the demised premises to the Appellants at the determination of the tenancy. p.115
p.118
- 20 (9) After the expiry of the Lease in 1964 the Respondent stayed on and the Appellants continued to accept rent.
- (10) On the 13th January, 1969, the Appellants gave the Respondent a Notice to Quit expiring on the 28th February, 1969. p.128
- (11) The Respondent failed to vacate the demised premises.

30 7. The extent of the works appears from photographs which were adduced in evidence at the Trial. Dealing with the question whether the demised premises were within the Control of Rent Ordinance, Mr. Justice Chua found the following facts:- p.53

- (1) Before the works were begun the building was an old three-storeyed building. There was a balcony on the first floor. The rear portion of the ground floor was used as a godown. The first and second floors were subdivided into offices by wooden partitions. The floor of the ground floor was concrete. The rear portion of the floor of the first floor was
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of timber and the front portion was of concrete. The floor of the second floor was of concrete. The staircase, leading to the first and second floors, was of timber and was in the front portion of the building. The lift-well was of asbestos with a framework.

- (2) The following works were done on the ground floor. The whole of the floor was broken up and a new concrete floor laid. A strong room for the use of the Appellants was constructed. A new lift-well of brick was constructed, but the old lift, after re-conditioning, remained in use. The wooden staircase was removed and two new concrete staircases were constructed, one at the front and one at the back of the building. The staircase at the front was not in the same position as the original staircase. An airwell was constructed. 10
- (3) The following works were done on the first floor. The wooden partitions were completely knocked down and removed. Three inches of concrete were added on to the existing concrete floor in the front portion. The rear portion of the floor, which was of timber, was demolished, and a new concrete floor was laid. 20
- (4) The following works were done on the second floor. The wooden partitions were completely knocked down and removed. Three inches of concrete were added on to the existing concrete floor. The existing walls and columns were strengthened. A new wall was added on to the existing wall to support the third floor. 30
- (5) The following additional works were done. A new mezzanine floor was built, half the area of the ground floor. A new third floor was built on top of the old second floor. The whole of the front and rear of the old building were taken down and a new front and rear constructed. The balcony on the first floor was done away with. 40
- (6) The contract for the works was signed for \$157,900, but eventually cost \$306,656.89, of which (a) \$73,000 was for air-conditioning, (b) \$22,200 for re-rendering all floors and

laying new mosaic tiles on the ground floor and asphalt tiles on the first and second floors and (c) \$11,250 for new ceilings in celotex for all floors.

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10 8. Mr. Justice Chua held that the proper test to apply in deciding whether the building had become a "new building" within the meaning of the Ordinance was whether it had been subjected to such substantial structural and/or other alterations that it had become a new building in fact. This was always a question of degree depending on the facts of each particular case. p.53

9. Applying the foregoing test Mr. Justice Chua found as a fact that the works had produced such a fundamental change to the old building that it could no longer be said to exist, and that a new building had replaced it. He accordingly held that the demised premises were outside the Control of Rent Ordinance. p.55

20 10. Dealing with the Respondent's alternative claim that the Appellants were estopped from claiming possession, Mr. Justice Chua found the following facts:- p.55

30 (1) In October 1958 a Mr. Brash and a Mr. Atkinson of Messrs. Allen & Gledhill, Solicitors to the landlord, visited the Respondent and asked him to vacate his tenancy of the front portion of the first floor of the building, so that the works could be carried out, and to move, first to the rear of the first floor, and then, when the new third floor was completed, to the front portion of that floor.

40 (2) In the course of their visits, Mr. Brash and Mr. Atkinson assured the Respondent that he would have the same protection under the Control of Rent Ordinance on the third floor as he had on the first floor, and that the Appellants would not ask him to leave the premises for as long as he was practising his profession.

(3) Those assurances were subsequently repeated by Mr. Brash; and on those assurances the Respondent agreed to vacate his office in the front portion of the first floor.

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(4) The assurances were given by Mr. Brash on behalf of one Khoo Teck Puat, who was himself the Appellants' agent.

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11. Mr. Justice Chua held that, in view of the assurances given to the Respondent, the Appellants were estopped from giving the Respondent notice to quit the demised premises for as long as he carried on his profession as an advocate and solicitor thereat. Accordingly, Mr. Justice Chua dismissed the action with costs.

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12. The Appellants appealed to the Court of Appeal in Singapore from that part of the judgment of Mr. Justice Chua as directed that they were estopped from giving the Respondent notice to quit the demised premises for as long as he carried on his profession as an advocate and solicitor thereat; and the Respondent cross-appealed from that part of his judgment as declared that the building was a new building and so outside the Control of Rent Ordinance.

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13. The grounds of the Appellants' appeal were as follows:-

- (1) That the learned Judge was wrong in law in holding that the representations made by Mr. Brash and Mr. Atkinson could form the basis of a promissory estoppel.
- (2) That the learned Judge should have considered and construed the representations as a whole and held that the statement that the landlord would not claim possession or give notice to quit was merely ancillary to the representation that the Respondent should have the same protection under the Control of Rent Ordinance as he had enjoyed in respect of the part of the first floor occupied by him.
- (3) That the legal effect (if any) of the representations was to make the tenancy of the demised premises subject to an express or implied term that it would be a tenancy subject to the Control of Rent Ordinance and that such term was void and unenforceable in that it purported to oust the jurisdiction of the Court to make an order for possession.
- (4) That in any event the representations had no

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application or effect in relation to the new tenancy granted to the Respondent by the Lease nor to any further tenancy created by holding over after the expiry of the Lease.

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14. The Court of Appeal dismissed the appeal, and allowed the cross-appeal. In the course of their judgment, the Court treated the submission that the representations had no application or effect in relation to the new tenancy granted by the Lease or to any further tenancy created by holding over after the expiry of the Lease as a contention that the Respondent had waived his right to rely on the defence of estoppel, and they held that since waiver had not been raised in the pleadings the point was not open to the Appellants in the appellate court. p.89
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15. On the 24th January 1972 the Appellants were granted leave to appeal to the Judicial Committee of the Privy Council against the whole of the judgment of the Court of Appeal. p.91
- 20 16. Two issues arise on this Appeal:-
- First Issue: Whether the demised premises are within the definition of "premises" in the Control of Rent Ordinance 1953.
- Second Issue: Whether, on the facts found by Mr. Justice Chua, the Appellants are estopped from giving the Respondent notice to quit the demised premises for as long as he carries on his profession of an advocate and solicitor thereat.
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17. On the First Issue, the Appellants will seek to submit that the demised premises clearly constitute a "new building" within the meaning of the Control of Rent Ordinance. The demised premises are entirely situate upon the third floor of the building which, as was expressly pleaded by the Respondent in his Defence, was added to the building in 1958. The demised premises thus form "part of a building let or sublet separately", such part being wholly built after the 7th September 1947; and are accordingly outside the definition of "premises" in the Ordinance. p. 5
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18. The point that the demised premises themselves constitute a new building (as distinct from the point that they form part of a new building) appears not to have been taken by the Appellants in either of the Courts below; although it was foreshadowed in argument before Mr. Justice Chua. If necessary, the Appellants intend to apply in the course of the hearing of the Appeal for leave to introduce this new point, on the grounds that:

- (1) the point is one of construction of a statute as applied to facts which are not in dispute; and 10
- (2) the Judicial Committee is in as good a position to form a conclusion as the Courts below would have been if the question had been argued before them.

The Appellants will rely, in support of their application, on statements of the principles on which an appellate court will allow a new point to be raised before it found in:

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- (a) the speech of Lord Herschell in The Tasmania (1890) 15 App.Cas. 223 at p.225
- (b) the Advice of the Judicial Committee, delivered by Lord Watson, in Connecticut Fire Insurance Company v. Kavanagh, (1892) A.C. 473 at p.480
- (c) the Advice of the Judicial Committee, delivered by Lord Guest, in Warehousing & Forwarding Co. of East Africa Ltd. v. Jafferalli & Sons Ltd. (1964) A.C.1 at p.10. 30
- (d) the judgment of Lord Justice Willmer in the Court of Appeal in Donaghey v. P. O'Brien & Co. (1966) 1 W.L.R. 1170 at p.1179, which was concurred in by Lord Reid and Lord Guest when that case came before the House of Lords as Donaghey v. Boulton & Paul Ltd. (1968) A.C. 1 at pp.23 and 31.

19. If the submission that the demised premises form a new building is rejected, or if leave to raise it as a new point is not given, then the Appellants will submit that the demised premises

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are outside the Control of Rent Ordinance for the reasons given by Mr. Justice Chua, viz:- that the building, of which they form part, is a new building within the meaning of the Ordinance.

10 20. The Appellants submit that, in considering whether the building was a new building, Mr. Justice Chua correctly appreciated the nature and effect of the evidence, and applied the proper test, viz: whether the old building had been subjected to such structural and/or other alterations that it had become a new building in fact; and that his conclusion that there had been such a fundamental change to the old building that it could no longer be said to exist and that a new building had replaced it was in accordance with the weight of the evidence and ought not to have been disturbed by the Court of Appeal. On the question what constitutes a new building the Appellants will rely upon statements made in the following decisions:

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- 20 (a) Eastern Realty Co. Ltd. v. Chan Hua Seng, (1967) 2 M.L.J. at p.197;
- (b) Kai Nam v. Ma Kam Chan, (1956) A.C. 358;
- (c) R. v. Sidmouth Rent Tribunal, ex parte Sellek, (1961) 1 K.B. 778, at p.782;
- (d) Shannon v. McMahon, (1946) I.R. 327 at p.332.

30 21. On the Second Issue, the Appellants submit that the representations found by Mr. Justice Chua to have been made were incapable in law of forming the subject-matter of an estoppel. The doctrine of promissory estoppel is limited to modifying the existing obligations of persons who have contractual rights against others and who induce those others to believe that those rights will not be enforced. The representations in the present case were not related to any subsisting contractual relationship between the parties and could not have led the Respondent to believe that the Appellants would not enforce some existing contractual right. The Appellants will rely, in support of their submission, on the formulation of the doctrine of promissory estoppel in:-

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- (a) the speech of Lord Cairns in Hughes v. Metropolitan Railway Co. (1877), 2 App.Cas. 439 at p.448;

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- (b) the speech of Lord Simonds in Tool Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd. (1955) 1 W.L.R. 761 at p.764;
- (c) the speech of Lord Hodson in Ajayi v. R.T. Briscoe (Nigeria) Ltd. (1964) 3 All E.R. 556 at p.559; and
- (d) Spencer Bower on Estoppel at p.341.

22. Alternatively, the Appellants will submit that, on the evidence, the representation that the landlords would not claim possession or give notice to quit was merely ancillary to the representation that the Respondent should continue to have the same protection under the Control of Rent Ordinance as he had previously enjoyed; that the only effect of such a representation would be to make the tenancy subject to a term that it was subject to the Ordinance; and that such a term would be void and unenforceable as an attempt to oust the jurisdiction of the Court to make an order for possession. In support of their submission that the parties could not by agreement bring the tenancy within the protection of the Ordinance the Appellants will rely upon Rogers v. Hyde (1951) 2 K.B. 923. 10 20

23. The Respondents further submit that the representation that they would not serve a notice to quit the demised premises for as long as the Respondent carried on his profession thereat was related to the initial tenancy of the demised premises, which was a periodic tenancy determinable (unless otherwise agreed) by notice to quit; and that the same had and could have no application to the term of three years granted by the Lease, or to any subsequent holding over. The Appellants submit that the initial periodic tenancy, to which the representation related, was determined by operation of law upon the grant and acceptance of the Lease; and that thereupon the effect of the representation was exhausted. Further, the representation was not apt to be applied to a tenancy for a fixed term of years, and the Appellants contend that the same could not preclude them from seeking possession of the demised premises from the Respondent, whether upon the expiry of the term granted by the Lease in accordance with the covenant in that behalf on his part therein contained, or by duly determining any 30 40

subsequent holding over. In support of their submission that the initial tenancy was determined by the grant and acceptance of the Lease, the Appellants will rely upon:

(a) the judgment of Lord Mansfield in Davison d. Bromley v. Stanley (1768) 4 Burr. 2210 at p.2213; and

(b) the judgment of Sir Raymond Evershed M.R. in Foster v. Robinson (1950) 2 All E.R. 342 at p.347.

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24. The Court of Appeal refused to entertain the Appellants' submission that the representations ceased to have effect upon the grant of the Lease, upon the ground that this was an allegation of waiver which had not been taken in the pleadings. The Appellants humbly submit that the point, properly understood, is not one of waiver at all, but of the true effect of the only representations which had been proved; and that it was plainly open to the Appellants to contend that the only representations which had been proved did not have the consequences contended for by the Respondent.

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25. Accordingly, the Appellants submit that the Court of Appeal ought not to have refused to entertain argument upon the present contention; but in any event the question raises a pure point of law as applied to facts which are not in dispute, and if necessary the Appellants will seek leave to raise the question as a new point upon the hearing of the Appeal.

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26. The Appellants humbly submit that the whole of the judgment of the Court of Appeal dated the 27th November 1971 was wrong and ought to be set aside, and that in lieu thereof an Order ought to be made for possession of the demised premises, and for mesne profits to be assessed in the High Court of the Republic of Singapore, for the following, among other

p.83

R E A S O N S

40 (1) BECAUSE the demised premises form "part of a building let or sublet separately", such part being wholly built after the 7th September 1947, and are accordingly outside the definition of "premises" in the Control of Rent Ordinance 1953.

- (2) BECAUSE the works undertaken in 1958 produced such a fundamental change to the building of which the demised premises form part that the same is to be treated as a new building within the meaning of the Control of Rent Ordinance 1953 and so outside the definition of "premises" therein contained.
- (3) BECAUSE the representations proved to have been made were not related to any subsisting contractual relationship between the parties and were incapable of giving rise to a promissory estoppel. 10
- (4) BECAUSE the only effect of the representations was to make the tenancy subject to a term that it was subject to the Ordinance, and that such a term was void and unenforceable.
- (5) BECAUSE the representations related to the initial periodic tenancy of the demised premises, and the effect thereof was exhausted when that tenancy was determined by operation of law upon the grant and acceptance of the Lease. 20
- (6) BECAUSE the representations were not apt to preclude the Appellants from seeking possession of the demised premises from the Respondent, whether upon the expiry of the term granted by the Lease in accordance with the covenant in that behalf on his part therein contained, or by duly determining any subsequent holding over. 30
- (7) BECAUSE the judgment of the Court of Appeal was wrong and ought to be set aside.

H.E. FRANCIS

P.J. MILLETT

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