No. 21 of 1971

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR (APPELLATE JURISDICTION)

BETWEEN :

SIEW SOON WAH (as Trustee)
SIEW SOON WAH and
SIEW POOI YUEN — Appellants

AND

YONG TONG HONG (a firm) — Respondents

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal from a decision of the Federal Court of Malaysia holden at Kuala Lumpur, Appellate Jurisdiction (Ong C.J., Suffian and Gill F.JJ) dated the 27th April 1971 allowing an appeal by the Respondent from the judgment and order of the High Court in Malaya at Kuala Lumpur (Raja Azlan Shah J.) dated the 16th November 1970 in favour of the Appellants. p.61

2. This appeal concerns a written Agreement dated the 1st June 1964 for the letting by one Siew Kim Chong (who is the father of the Appellants and who is hereinafter referred to as "the Appellants' Father") to the Respondent firm of business premises on the ground floor of No. 61, Jalan Pasar Bharu, Kuala Lumpur at the rent of $200/-. per month. The issues before both the Courts were firstly whether the Agreement was a genuine document and secondly what was its legal effect. Exhibit D2 p.73

3. The premises were built in about 1958, and so are not subject to the Control of Rent Ordinance 1966. They were originally let by the Appellants' father, who was then the registered proprietor of the premises, to the

Respondent firm at the rent of $150/-. per month, the Respondent firm having paid sums totalling $8,000/- at the request of the Appellants' Father to the contractor who built the premises.

Exhibit A.B.7 p.74

On the 9th April 1964, the Appellants' Father wrote to the Respondent firm terminating the tenancy and offering a new tenancy at a rent of $220/- per month. After negotiations a new tenancy was agreed at $200/- per month. On the 19th September 1967, the Appellants' Father transferred the premises to the Appellants.

4. In the meantime, on the 4th October 1966 a firm of Solicitors acting on behalf of the Appellants' Father wrote to the Respondent firm terminating the tenancy at $200/- per month and offering a new tenancy at $300/-. per month.

Exhibit A.B.8 p.75

Exhibit A.B.9 p.76

In reply, the Respondent firm's Solicitors referred to the Agreement of the 1st June 1964, under which the tenancy could not be terminated and the rent could only be increased in the case of an increase in assessment (there has been no such increase). The reaction of the Appellants' Father, through his original Solicitors and two further firms of Solicitors, was to deny that the Agreement had been signed by him and to allege that his signature on it was a forgery. He also stated that he would take steps to launch criminal proceedings, but no such proceedings have ever been commenced.

Exhibit A.B.14 p.79

Exhibit A.B.17 p.81

Exhibit A.B.21 p.84

5. In 1969, it was agreed between a further firm of Solicitors acting on behalf of the Appellants and the Respondent firm's Solicitors that the Agreement should be submitted to the Document Examiner of the Department of Chemistry at Kuala Lumpur, together with specimen signatures of the Appellants' Father, for the purpose of determining whether his signature on the Agreement was forged; but the Document Examiner was unable to form any opinion on that question.

Exhibit A.B.55 p.113

6. On the 26th October 1967, the Appellants commenced proceedings against the Respondent firm for possession of the premises and for double rent as from the 1st December 1966. The Respondent firm counterclaimed for specific performance of the Agreement. The action was heard before Raja Azlan Shah J. on the 27th February 1970.

pp.1-4

pp. 5-8

7. The original of the Agreement of the 1st June 1964 was produced at the hearing. It was stamped at the Stamp Office in Kuala Lumpur for a fee of $120/- shown as paid on the 9th June 1964. Alongside the Agreement, which was written in Chinese, was a translation headed "Rough Translation of a Chinese Agreement" apparently made for the purposes of stamp duty. This was the only translation before the Court, and, as became clear before the Federal Court, it was an erroneous and misleading translation. In particular, the translation erroneously stated that the sum of $8,000/- had been paid to the Appellants' Father "(the receipt of which sum /the Appellants' Father/ hereby acknowledges on the signing of the Agreement)", and provided that the letting was to be from the 1st July 1964 at a monthly rent of $200/- "as long as The Tenant wishes to occupy." p.73 p.52

8. The only material witness for the Appellants at the hearing was the Appellants' Father (P.W.2.) He admitted that the rent was increased to $200/- in 1964, but denied that there was any written agreement to that effect, and denied having signed the Agreement of the 1st June 1964. pp. 12-15

9. There were three witnesses for the Respondent firm. The first, Chooi Yong How (D.W.1), the father of the proprietor of the Respondent firm, gave evidence of a prior tenancy agreement made at the time of the original letting in 1958, and said that he wrote the Agreement of the 1st June 1964 based on the prior agreement. The second witness was Chooi Siang Khoon (D.W.2.) the proprietor of the Respondent firm. He also gave evidence of a prior written agreement when the premises were first let at $150/-. per month. He said that the Agreement of the 1st June 1964 was copied by his father from the prior agreement. He gave evidence that the Agreement was signed by the Appellants' Father and himself at the premises, and witnessed by a business associate, Lim Ping Choo. The third witness was Lim Ping Choo (D.W.3), who said that he saw the Appellants' Father sign the Agreement, and that he signed it himself immediately afterwards. pp. 15-16 pp.16-17 p.17

10. Rajah Azlan Shah J. did not give his reserved judgment until the 16th November 1970. He made pp.18-22

no findings as to the credibility of any of the witnesses. But he considered that there was no written agreement between the Appellants' Father and the Respondent firm in 1964, apparently solely on the ground that the Agreement (according to the translation before him) stated that the $8,000/-. was paid on the signing thereof whereas it had in fact admittedly been

p. 21 paid in 1958. He also held in the alternative, on the basis of the relevant words in the translation before him, viz. "as long as the Tenant wishes to occupy", that he was bound on the authority of Hajara Singh v Muthukaruppan (1967) 1 M.L.J.1967, a decision of the Federal Court to hold that the Agreement was void for uncertainty by reason of s.30 of the Contracts (Malay States) Ordinance 1950 which enacts:

> "Agreements, the meaning of which is not certain or capable of being made certain, are void"

p.52 11. In the course of the hearing before the Federal Court, Ong C.J. noticed a material error in the translation of the Agreement before Rajah Azlan Shah J, and caused a certified translation to be made by an official interpreter under rule 94 of the Federal Court (Civil Appeals) (Transitional) Rules 1963. The translation is set out in full in the judgment of Ong C.J. and reads as follows :-

p.52-53 "The person Siew Kim Chong executing this document has built a shop house situated at No. 61, Jalan Pasar Bharu, Kuala Lumpur.

He desires to lease out the whole of the ground floor to Chop Yong Tong Hong and the tenancy shall be permanent.

It is clearly stated here that the rent per month shall be $200.00 of Malayan currency and hereinafter the person leasing out this house shall not increase the rent as he likes or eject the tenant by force etc.

If the rent is to be increased or reduced, the increase or reduction shall be carried out in accordance with the provisions of government proclamations and the percentage

in the increase or reduction of rent shall be determined proportionately by the increase of reduction in assessment

A deposit of $8,000.00 was received on the last day of February, 1958 and as it is feared that verbal words are not proof this document is written as evidence."

12. The judgment of the Federal Court was a single judgment of Ong C.J., read by Suffian F.J., with which Suffian and Gill F.JJ. agreed. The judgment deals only briefly with the question of the genuiness of the Agreement. But it is clear (so the Respondent firm submits) that Ong C.J. considered that the correct translation removed the sole reason for Rajah Azlan Shah J.'s finding that there was no such Agreement, and that he was satisfied on the evidence, which (so the Respondent firm submits) was overwhelming in favour of the Respondent firm, that the Agreement was genuine and had been duly signed by the Appellants' Father. pp.50-60 p.49 l.31 p.53 ll. 11-15

13. Ong C.J. then dealt at length with the relevant law, He referred to certain Malayan and English authorities and considered that it was settled that "where a tenant had gone into possession in circumstances which gave him such an interest as a Court of Equity would specifically enforce, he should be in a stronger position to resist the landlord's claim to possession that the ordinary tenant who had no answer on equitable grounds." In the case of Hajara Singh supra, relied on by Rajah Azlan Shah J., the tenant had expended money by building a house pursuant to an agreement to pay a ground rent of $4/-. per month, in consideration whereof the tenant could stay "for as long as the tenant wishes to occupy". The Federal Court held this term void for uncertainty under section 30 of the Contracts (Malay States) Ordinance 1950, and that the successor in title of the original landlord was entitled to give the tenant six months notice to quit. Ong C.J. considered that, as the tenant in Hajara Singh had been let into possession and expended money on the property in the belief that he would be left in undisturbed possession during his lifetime, an p.54 l.40 p.54 (l.10)

equity had been created under which his occupation of the property would be protected in accordance with Plimmer v. Wellington Corporation (1884) 9 A.C. 699 and Inwards v
p.55 l.33 Baker 1965 2 Q.B.29, Ong C.J. thus considered that the decision in Hajara Singh was given per incuriam and was not binding on the Federal Court.

14. After considering further authorities, Ong C.J. then dealt with the construction and effect of the Agreement. He held, following Re Midland Railway Co's Agreement Charles Clay
p.59 l.3 and Sons Ltd. v. British Railways Board 1970 Ch. 568 (Foster J.); 1971 2 W.L.R. 625 (C.A.) that the Appellants' notice of termination of the Respondent firm's tenancy was in breach of the Agreement and invalid. He further held that the agreement for a "permanent" letting showed an intention of the parties that there should be a letting in perpetuity. He did not consider
p.59 l.12 that this was void for being in breach of the provisions of the National Land Code, and concluded;

p.60 l.3 "Here it seems to me that no strain will be imposed upon the powers of this court to give effect to the expressed intention of the parties by holding that the agreement was one for the grant of as long a lease as the law allows. Section 221 (3) (b) of the National Land Code provides that the maximum term for a lease of a part only of alienated land shall be 30 years. The law permits no longer term and this court should grant the appellant no less."

p.60 l.12 15. Ong C.J. further held that the Appellants were bound by the Agreement and that, although not registered as a lease, it was nevertheless valid as a contract relating to alienated land or any interest therein by reason of section 206 of the National Land Code, which reads :-

"(1) Subject to the following provisions of this section

(a) every dealing under this Act shall be effected by an instrument complying with the requirements of sections 207-212; and

(b) no instrument effecting any such dealing shall operate to transfer the title in any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein until it has been registered under Part Eighteen

.. ..

(3) Nothing in subsection (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein"

16. Ong C.J. concluded his judgment as follows:-

"I would accordingly allow this appeal, dismiss the respondents' claim, give judgment for the appellant on his counter-claim and order and declare that the appellant be entitled until February 28, 1988 to remain in peaceful possession of the ground floor of the premises without let or hindrance by the respondents or their successors in title, so long as the appellant pays rent at the rate reserved by their agreement in writing dated June 1, 1964." p.60 l.24

The Order of the Federal Court dated the 27th April 1971 was made accordingly. p.61

17. The Respondent firm submits that the substantive reasons given by Ong C.J. in arriving at his decision as to the validity and effect of the Agreement are really alternative reasons. First, as a matter of construction of the Agreement, it was the intention of the parties that the premises should be let for the longest term capable of being granted by the Appellants' Father, namely 30 years or at any rate for such term so long as the Respondent firm should wish to occupy the premises. The Respondent firm submits that such construction gives proper effect to the intention of the parties, and accords with the approach of the Court of Appeal (Jessel M.R., Baggallay and Bramwall L.JJ.) in the comparable case of Kusel v. Watson (1879) 11 Ch.D. 129. Secondly, even if the Agreement is void for uncertainty, the facts that the Respondent firm paid $8,000/-

towards the construction of the property, agreed to pay the rent of $200/- per month and entered into possession in the belief that it would have undisturbed occupation given rise to an equity in favour of the Respondent firm. That equity has been termed "proprietory estoppel" (see Snell's Equity (26th Edition) pp. 629-633), and is exemplified by the cases of Plimmer v Wellington Corporation and Inwards v. Baker supra. The Court will give effect to the equity by conferring such rights as are appropriate in the circumstances. Ong C.J. considered that a 30-year term from the 28th February 1958 so long as the Respondent firm wished to occupy the premises was appropriate in the circumstances of this case. The Respondent firm submits that this was correct and should not be disturbed.

18. The Respondent firm submits that on either alternative the Appellants, not being purchasers for value, are bound in equity by the rights of the Appellants. The Respondent firm further submits that there is nothing in the National Land Code or other legislation to prevent effect being given to either alternative.

19. As a further alternative, the Respondent firm submits that even if the Agreement is void and there was no equity created in favour of the Respondent firm, a periodic tenancy existed at the material times; and that having regard to the Agreement and all the circumstances the period of such tenancy which should be implied is at least from year to year (see Doe d. Roberton v Gardiner (1852) 12 C.B. 319). At least six months notice was thus necessary to
p.75 terminate such tenancy, and the notice for the 30th November 1966 given by the letter dated the 4th October 1964 is too short. Accordingly, the Respondent firm submits that its tenancy is still subsisting and that the Appellants are in any event not entitled to the double rent claimed. The Respondent firm humbly submits that this appeal should be dismissed and that the Appellants should be ordered to pay the costs thereof for the following among other

R E A S O N S

(1) BECAUSE the finding of Rajah Azlan Shah J. that there was no Agreement dated the

1st July 1964 between the Appellants' Father and the Respondent firm was entirely based on an English translation which was erroneous on the material matter on which he relied

(2) BECAUSE the weight of the evidence was overwhelming in favour of the conclusion that the Appellants' Father had signed the Agreement which was a genuine document

(3) BECAUSE upon its true construction, the letting was for the longest term capable of being granted by the Appellants' Father, namely 30 years, under section 221 (3) (b) National Land Code, or (alternatively) for such a term so long as the Respondent firm should wish to occupy the premises, and was not uncertain

(4) BECAUSE upon the facts an equity was created in favour of the Respondent firm whereby its occupation would be protected so long as it continued to pay the rent payable under the Agreement

(5) BECAUSE the Appellants, not being Purchasers for value, are bound in equity by the said Agreement or by the equity created as aforesaid

(6) BECAUSE in any event the tenancy created of the Respondent firm was at least a yearly tenancy, and could not be determined by less than six months' notice

(7) BECAUSE the judgment of Ong C.J. on all questions relating to this appeal was correct for the reasons given therein

NIGEL HAGUE

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CASE FOR THE RESPONDENT

STEPHENSON HARWOOD & TATHAM
SADDLERS' HALL,
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