13/79

No.25 of 1977

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN:

1. ENG MEE YONG (f)
2. NG YEE HONG @ NG YUE HONG
3. NG YEE FOO @ NY YUE FOO
4. NG YEE DENG @ WOO YEE LING
5. NG YEE CHEEN @ NG YUE CHUAN
6. NG YEE THONG

Appellants (Applicants)

- and -

V. IETCHUMANAN s/o VELAYUTHAM

Respondent

CASE FOR THE RESPONDENT

1. This is an appeal from an Order of the Federal Court in Malaysia (Kuala Lumpur) made the 7th September 1976 (Gill Acting Lord President, Ong Hock Sim and Raja Azlan Shah F.JJ.) whereby that Court allowed an appeal from the Order of Ajaib Singh J., made on the 10th November 1970; removing a caveat entered by the Respondent against the Appellants' land held under Grant No.2457 for Lot 593 in the Mukim of Ampangan (hereinafter referred to as "the Appellants' land").

APPENDIX Pages 50/51

Pages 40/41

2. The salient facts which led to these proceedings are as follows :-

(i) On 16th December 1973 the Respondent agreed to purchase the Appellants' land for $777,656.25 of which $20,000 was to be (and was) paid on exchange and a further $57,765.62 was to be (and was) paid on or before 16th January 1974 and the balance of $699,890.63 was to be

Pages 28/31

APPENDIX

paid on or before 16th June 1974. The contract provided (clause 6) that failure to pay the instalments of the purchase price would result in forfeiture of sums paid as liquidated damages and termination of the contract.

Page 32

(ii) On 24th June 1974 the Appellants by their Solicitors wrote forfeiting the $77,765.62 paid under the agreement.

Pages 7-10

(iii) On 28th June 1974 the Respondent entered into a further agreement which put an end to the agreement of 16th December 1973 and in which the Respondent agreed to purchase the Appellants' land for $827,656.25 (i.e. $50,000 more than the original purchase price).

Page 8

(iv) By clause 1 of the agreement of 28th June 1974 the Appellants acknowledge receipt of the sum of $97,765.62 by way of deposit and in part payment of the purchase price of $827,656.25.

Page 8

(v) By clause 2 thereof the Respondent agreed to pay a further sum of $30,000 on or before the 29th July 1974 and although it was further provided by that clause that time should be of the essence thereof and that failure to pay the said sum on or before the 29th July 1974 would result in the deposit of $97,665.25 being irrecoverably forfeited it did not provide (in contrast to clause 6 of the agreement of the 16th December 1973) that the agreement would thereupon have no further effect.

Pages 8/9

(vi) By clause 3, the purchase was to be completed on or before the 28th September 1974 and by that clause and clause 5 failure to pay the balance of $699,890.63 on or before the date was to have similar consequences to those described above in respect of clause 2.

Page 23

(vii) Before the agreement of the 28th June was entered into the Appellants promised the Respondent that he would have the time he needed to secure his source of finance from a third party to enable him to complete the purchase.

Page 5

(viii) The Respondent failed to pay the balance of $699,890.63 on or before the 28th September 1974.

(ix) The Appellants' land was being purchased

for development but it did not have an access road and the Appellants knew that no third party would finance the development until an access road had been built. Accordingly, the Respondent, at his own expense and with the concurrence of the Appellants, put in hand the necessary procedures to ensure a right of way and construction of a road over State land. The application to the State Authorities in this respect was made on the 7th January 1974 and the road was finally completed in May 1975. The construction of the road substantially enhanced the value of the Appellants' land. The Applicants actively encouraged the Respondent to expend money in obtaining this access way. Pages 24-26

(x) The Appellants knew that the Respondent was relying on a third party to finance the purchase and were aware of the Respondent's negotiations with the third party. Those negotiations were in progress when the Applicants, by letter dated the 30th September 1974, purported to forfeit a total sum of $127,765.62. Prior thereto, the Applicants had agreed a two month extension from the 28th September 1974 (although this latter fact is disputed in the evidence) and the Applicants' said letter of the 30th September 1974 prejudiced the Respondent in the negotiations with the third party. Pages 24-26

(xi) The Respondent procured the entry on the 9th November 1974 of a private caveat binding the Appellants' land undet the provision of section 323 of the National Land Code of 1965. Page 15

(xii) The Respondent issued a writ against the Appellants (No.288/75) for specific performance of the agreement of the 28th June 1974. The writ also claimed a declaration that the Appellants were not entitled to forfeit the sum of $127,765.62. Page 27

(xiii) The Applicants applied by ex parte originating motion dated the 26th August 1975 for the following relief, namely : Pages 1-3

(i) that the caveat be removed (under section 327 of the National Land Code)

APPENDIX

(ii) damages (under section 329 of that Code); and

(iii) costs.

They succeeded on (i) and (iii) in the
Pages 35-41 High Court at Seremban. As to (ii) they did not pursue this relief and led no evidence in respect of it.

The Respondent successfully appealed to
Pages 46-51 the Federal Court and the Appellants appeal from the decision of that Court.

3. The Respondent will contend that the procedure for removal of a caveat under section 327 of the National Land Code is a summary procedure designed, in a plain case of a wrongful and unwarranted entry of a caveat to ensure its speedy removal. It will be submitted that it is quite inappropriate to utilize that section in an attempt to remove a caveat where the affidavit evidence shows a reasonable case for inquiry whether the caveator has a caveatable interest and where such inquiry can only be decided after hearing all the witnesses. Section 327 provides an exceptional jurisdiction which, if exercised, effectively shuts out the caveator from litigating to establish a right he claims to possess, and ought therefore to be exercised only where the Court has no doubt but that a trial of the issue would be futile.

The Respondent will rely on the following cases:

Macon Engineers Sdn.Bhd. v. Goh Hooi Yin [1976] 2 M.L.J. 53

Inter-Continental Mining Co.Sdn.Bhd. v. Societe des Etains de Bayas Tudjuh [1974] 1 M.L.J. 145

Jit Kaur v. Parl Singh [1974] 2 M.L.J.199

In re Peychers' Caveat [1954] N.Z.L.R. 285

Plimmer Bros. v. St.Maur (1906) 26 N.Z.L.R. 294

Nanyang Development (1966) Sdn.Bhd. v. How Swee Poh [1970] 1 M.L.J. 145.

APPENDIX

4. The issues (commented upon in more detail in the next paragraph) which will require oral evidence and cross-examination for their proper determination are as follows :-

(i) whether the Appellants were estopped from exercising any right they may have had to terminate the agreement of the 28th June 1974 on the grounds that they encouraged the Respondent to spend money on the access road which was completed in May of 1975; Pages 24-26

(ii) whether forfeiture of the $127,765.62 or some part thereof amounted to a penalty (that sum being in excess of 15% of the purchase price) against which equity would have relieved by granting the Respondent a resonable extension of time to complete.

(iii) whether, if the Respondent were, in the alternative, successful in re-claiming part of the $127,765.62 forfeited by the Appellants on the ground that the provision for forfeiture in clause 5 of the agreement of the 28th June 1974 amounted to a penalty and was not a genuine pre-estimate of actual loss, he would be entitled, in respect of the sum so recovered, to a lien or equitable charge on the Appellants' land which would be a sufficient interest to sustain the caveat; Page 9

(iv) whether the expenditure upon the access road with the Appellants' encouragement raises an equity by way of a proprietary estoppel which may be satisfied by granting the Respondent a charge over the Appellants' land to secure the re-imbursement of that expenditure or an interest in that land under a constructive trust and whether this equity is a sufficient interest to sustain the caveat; Pages 24-26

(v) whether the promise by the Appellants deposed to in paragraph 11 of the Respondent's affidavit of the 4th November 1975 that the Appellants would grant him all the time needed to arrange for the development of the Appellants' land precluded the Appellants from terminating the agreement of the 28th June 1974 without giving the Respondent the time he needed or, at the least, a reasonable time to complete the access road and procure finance from the third party. Page 23

APPENDIX

(vi) whether the agreed extension of time deposed to by the Respondent in paragraph 25 of his affidavit (which, it is appreciated, is disputed by the Appellants) precluded the Appellants from terminating the agreement when they did, namely, the 30th September 1974.

5. As to sub-paragraph (i) above the Appellants will rely on the doctrine of promissory estoppel.

> " If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him to do so"
> per L.J.Denning (as he then was) in Plasticmoda Societa per Agioni v. Davidsons (Manchester) Ltd. /1952/ 1 Lloyd's List Reports 527.

Pages 24-26

The Respondent will contend that the conduct of the Appellants in actively encouraging the Respondent to expend money in obtaining the access road, which was necessary to liberate the development value of the Appellants' land, was conduct which led the Respondent to believe that the Appellants' strict rights under clause 5 of the agreement would not be exercised until the Respondent had been given a reasonable opportunity to raise finance on the strength of the existence of the access road. The work on the road continued after the purported termination of the agreement by the Appellants and it was only completed in May of 1975. The Appellants have not challenged the evidence of the Respondent in connection with the access road or attempted to show how their conduct with regard thereto was consistent with the enforcement of their strict rights and the Respondent will accordingly contend that there must be a serious question to investigate by oral evidence and cross-examination whether the Respondent is correct in asserting that because of their conduct with regard to the road the Appellants were obliged to give the Respondent a reasonable time to complete.

The Respondent will rely on the following cases :

Crabb v. Arun District Council [1976] 1 Ch.179

Charles Rickards v. Oppenhaim [1950] 1 K.B.616

Paroutsos v. Raymond Hadley Corporation of New York [1917] 2 K.B. 473

Birmingham and District Land Co. v. London & North West Railway Co. (1888) 40 CH.D. 268.

6. As to (ii) the Respondent will contend that the provision for forfeiture in clause 5 of the agreement of the 28th June 1974 was not a genuine pre-estimate of damages and that, at least so far as the sum of $127,765.62 exceeded the deposit of $97,765.62, the forfeiture thereof was penal in character. In such circumstances equity can relieve against the forfeiture by granting a purchaser more time to complete. The Respondent will rely on the following cases :- Page 9

Re Dagenham (Thames) Dock Co. (1873) L.R. 8 Ch.App.1022

Starside Properties Ltd. v. Mustapha [1974] 2 A.E.R. 567.

The appropriate Court to decide whether such relief would be granted is the Court which hears all the evidence.

7. As to (iii), the Respondent will rely on Rose v. Watson Volume X House of Lords Cases at 672 for the proposition that he would, at the least, have a lien or equitable charge on the Appellants' land to secure the recovery of the sum, or part of the sum, forfeited by the Appellants. In making good such claim to an equitable charge the Respondent will rely on the unfulfilled promise by the Appellants to allow him the time he needed to complete the access road and to arrange his finance for the purchase. Page 23

8. As to (iv), in the alternative to the submission that the circumstances surrounding the access road and the Appellants encouragement of the Respondent in that connection precluded

APPENDIX

the Appellants from terminating the agreement when they purported to do so, the Respondent will submit that those circumstances and encouragement would incline the Court to say that it was against conscience for the Appellants to retain the benefit of the access road without reimbursement of the Respondent and that the Appellants accordingly hold the land on a resulting or constructive trust for the Respondent proportionate to his expenditure (see Hussey v. Palmer [1972] 1 W.L.R. 1286) alternatively, hold the land subject to an equitable charge to secure repayment of such expenditure.

Page 23

9. As to (v), the Respondent will contend that the promise deposed to in paragraph 11 of his affidavit must at least have had this effect, namely, that a court of equity would estop the Appellants from going back on that promise and insisting on enforcing their strict legal rights to forfeit moneys paid and terminating the agreement. The Respondent will rely on Crabb v. Arun District Council [1976] 1 Ch.179 where Lord Denning M.R. at 188 said:

> "Short of a binding contract, if he makes a promise that he will not insist upon his strict legal rights - then, even though that promise may be unenforceable in point of law for want of consideration or want of writing - then, if he makes the promise knowing or intending that the other will act upon it, and he does act upon it, then again a court of equity will not allow him to go back on that promise:"

The Respondent will, in addition to arguing that the promise deposed to as aforesaid was operative by way of equitable estoppel, submit that the promise took effect contractually. despite the provisions of section 92 of the Evidence Ordinance No.11 of 1950, on the ground that that promise constituted a separate collateral contract (in consideration of the Respondent entering into the main contract, which contained an increment in the purchase price of $50,000) whereby the Appellants agreed not to enforce their strict rights to forfeit and terminate until the Respondent had been given a reasonable opportunity to arrange his finance: see City and Westminster Properties (1934) Ltd.

v. Mudd [1959] 1 Ch.129 and Evans (J) Ltd. v. Andrea Merzario Ltd. [1976] 1 W.L.R. 1078. APPENDIX

The Respondent will under this head finally draw the attention of their Lordships to the absence from clauses 2 and 5 of the agreement of the 28th June 1974 of a provision for determination of the agreement (in contrast to clause 6 of the earlier agreement) and the Respondent will submit that the silence of the agreement in this respect can be filled by the oral evidence of the separate agreement, deposed to as aforesaid, by virtue of proviso (b) to section 92 of the Evidence Ordinance of 1950. Pages 8/9 Page 30

10. As to (vi) the Respondent will submit that the disputed fact as to whether an extension of time was or was not agreed cannot be decided on affidavit and if it should prove to be the case that the Respondent's evidence is accepted, the purported termination by the Appellants on the 30th September 1974 would have amounted to a wrongful repudiation of the agreement. That wrongful repudiation prejudiced the Respondent's negotiations with the third party with, it appears from the evidence, a consequent temporary financial embarrassment for the Respondent. Page 25

11. In the Respondent's respectful submission, it was the Federal Court's recognition that there were in this case issues which could only be resolved at trial after hearing oral evidence and cross-examination which led that Court to uphold the Respondent's appeal from the judgment of the High Court. The Respondent will rely on the often-quoted principle of the caveat system that caveats exist for the protection of "alleged as well as proved interests". Page 48

The Respondent humbly submits that this appeal should be dismissed with costs for the following among other

R E A S O N S

BECAUSE there are serious issues between the parties which it is quite inappropriate to resolve on affidavit evidence.

JULES SHER

No.25 of 1977

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

1. ENG MEE YONG (f)
2. NG YEE HONG @ NG YUE HONG
3. NG YEE FOO @ NY YUE FOO
4. NG YEE DENG @ WOO YEE LING
5. NG YEE CHEEN @ NG YUE CHUAN
6. NG YEE THONG

Appellants
(Applicants)

- and -

V. LETCHUMANAN s/o VELAYUTHAM

Respondent

CASE FOR THE RESPONDENT

MESSRS. SMILES & CO.,
Solicitors,
15 Bedford Row,
London WC1R 4EF

Ref: P/RJ/6
Tel: 01/242/0616