

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

B E T W E E N :

PHOENIX HEIGHTS ESTATE (PTE) LTD. (Defendants)
Appellants

- and -

10 1. LEE KAY GUAN (Plaintiffs)
2. ONG KIM LIONG (M.W.) Respondents

CASE FOR THE APPELLANTS

- 1. This is an appeal from a judgment dated 24th November 1978 of the Court of Appeal of the Republic of Singapore (Wee Chong Jin, C.J., Chua and D'Cotta JJ.), allowing an appeal from a judgment dated 30th September 1977 (Choor Singh J) by which the learned Judge ordered that judgment be entered for the Appellants (Defendants) on the Respondents (Plaintiffs) claim for liquidated damages. The learned Judge's written judgment was given on the 23rd January 1978.
2. The issue of this appeal is whether or not the Respondents are entitled to recover liquidated damages from the Appellants for the period 28th November 1974 to the 8th December 1975. The learned Judge at first instance decided that the Respondents were not so entitled. The Court of Appeal decided that the Respondents were so entitled.
3. There has been a difference between the Appellants and the Respondents as to what documents should be in the Record of Proceedings. The Appellants contend that the documents in the Supplementary Bundle should also be included. The hearing before Choor Singh J. took place on the 30th September 1977. Prior to trial both Respondents and Appellants had filed a Bundle of

Record

Documents with the Court. On the 7th September 1977 the Respondents' solicitors had filed their Bundle of Documents which was marked "AB". On the 22nd September 1977 the Appellants' solicitors filed a Bundle of Documents which was marked "K". The only documents which have been included in the Record of Proceedings from these Bundles of Documents are :

- A. The Agreement dated the 6th January 1973.
- B. The Temporary Occupation Licence dated the 28th November 1974. 10

The Supplementary Bundle contains the following documents:

<u>Items</u>	<u>Nature of Document</u>	<u>Source Bundle</u>	<u>Page</u>	
1	Letter dated 29.11.74 from Appellants to Respondents	K	S1	
2	Letter dated 11.12.74 from Respondents' solicitors Yap & Yap to Appellants' solicitors Guok and Ganosan	K	S2	20
3	Letter dated 26.12.74 from Appellants to Respondents	K	S3	
4	Letter dated 5.3.75 from Appellants to Respondents	K	S4	
5	Letter dated 17.4.75 from Respondents to Appellants	K	S5	
6	Letter dated 6.12.75 from Guok & Ganosan to Yap & Yap	AB	S6	
7	Completion account from Guok and Ganosan	AB	S7	30
8	Letter dated 12.2.76 enclosing Certificate of Fitness for Occupation from Appellants' solicitors to Respondents' solicitors	K	S8	
9	Letter dated 19.2.76 from Appellants' solicitors to Respondents' solicitors	K	S9	
10	Letter dated 21.2.76 from Respondents' solicitors to Appellants' solicitors	K	S10	40

	11	Letter dated 15.9.76 from Respondents' solicitors to Appellants' solicitors	AB	S11	<u>Record</u>
	12	Amended completion account dated 15.9.76 from Respondents' solicitors to Appellants' solicitors	AB	S12	
	13	Order of Court dated 1.4.77	K	S13	
10	14	Brief arguments in writing which were submitted by the Appellants' solicitors to the Court of Appeal on 19.4.78	-	S14- S21	
	15	Letter from Appellants' solicitors to the Registrar, Supreme Court, dated 10.11.80	-	S21- S22	
20	16	Letter from the Registrar, Supreme Court to Appellants' solicitors dated 11.11.80	-	S23	

30 The documents numbered 1 to 13 in the Supplementary Bundle were all before Choor Singh J, although it is difficult for either party to say which of them the learned Judge did and did not look at. As no oral evidence was called before the learned Judge and as there was substantially no dispute on the facts between the parties not much attention had to be given to the documents in the Supplementary Bundle at the trial. These documents do however contain facts important for the Appellants' case. Document 14, Brief Arguments in writing, was submitted to the Court of Appeal by the Appellants' solicitors in accordance with a practice often adopted before the Singapore Courts and is an indication of the facts and arguments which were before the Court of Appeal. Documents 15 and 16 indicate that all the documents 1 to 14 were in the Court files and the Appellants ask that they now be allowed to refer to Documents 1 to 14 at the hearing of this appeal.

40 4. The Appellants were the developers of a new housing estate on a site originally known as Phoenix Heights, Singapore. The Respondents were the purchasers of one of the houses formerly known as Private Lot 74, Phoenix Heights and later as No. 8 Phoenix Garden, Singapore. A Sale and Purchase Agreement ("the Agreement") was made between the Appellants (as the Vendor) and the Respondents (as the Purchaser) on the 6th January

pp.30-47

Record

1973 : the Agreement was in a form prescribed by the Housing Developers Rules 1965 and the Housing Developers (Amendment) Rules 1967, and in particular Rule 9A (as amended) and Schedule A Rule 9A (as amended) stated :

"9A(1) An agreement for sale between a housing developer and a purchaser shall be in the form prescribed in Schedule A to these Rules

(2) No amendment, deletion or alteration to any such form shall be made except with the approval of the Controller 10

(3)"

p.35
11.23-38

Under the Agreement the sale and purchase were to be completed 14 days after the Respondents had received a Notice to Complete given by the Appellants, such Notice to be accompanied by the Appellants' architects certificate that the house and ancillary works had been properly completed (Clause 11). This Notice to Complete was to be given by the Appellants on or before the 30th June 1973 or such other subsequent date as might be appointed by the Controller of Housing (Clause 11). The Agreement then contained, as required by the prescribed form, a damages provision in the event of the Appellants failing to give the Notice to Complete on time (Clause 11) :

p.35
11.42-46

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pp.35-36
11.47-1

pp.35
and 36
11.47-1

"If the Vendor shall fail to give the said Notice to Complete on the appointed day the Vendor shall pay to the Purchaser liquidated damages calculated from day to day in respect of the period commencing from the appointed date up to the date when the said Notice to Complete shall have actually been given at the rate of nine per centum (9%) per annum on the purchase price such interest to be paid and deducted from the balance of the purchase price payable on completion"

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p.30
11.38-40

The purchase price was \$180,000.00

p.7
11.23-26

5. The Appellants were delayed in completing the house and they were not in a position to give the Notice to Complete on the 30th June 1973. The date for completion was extended by the Controller of Housing to the 31st December 1973. The house was, however, completed in November 1974 and on the 28th November 1974 the Building Control Division of the Singapore Public Works Department issued a Licence for Temporary Occupation of a New Building. Although the Respondents were now able

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p.48 and
p.7
11.32 and

to take possession, they refused to do so.

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6. Under the system of registration of land titles in Singapore a Certificate of Title has to be obtained from the competent authority. Here the Certificate of Title was delayed by the competent authority without the fault of the Appellants. The Certificate of Title was required to be produced on completion. Consequently the Appellants could not give the Notice to Complete until the Certificate of Title was obtained in December 1975.

p.14
11.17-20

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7. Although the Certificate of Title had not been obtained there was no reason why the Respondents should not have entered into occupation at the end of November 1974 when the Licence for Temporary Occupation was issued. It is the usual practice in Singapore for purchasers to enter into possession when a Licence for Temporary Occupation is received even though no Certificate of Title is Available. Choor J commented that the Respondents, for some reason best known to them, refused to take possession and occupy the house on the 28th November 1974, thereby accepting that the Respondents should properly have gone into possession prior to the Certificate of Title being obtained.

p.13
11.38-41

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8. After receiving the Licence for Temporary Occupation the Appellants wrote to the Respondents on the 29th November 1974 informing the Respondents that the house was ready for occupation. The Respondents' solicitors replied on the 11th December 1974 asking for the Notice of Completion in accordance with Clause 11 and stating that the Respondents were claiming liquidated damages under Clause 11. The Respondents eventually took possession of the house on the 17th April 1975.

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pp.S1 and
S2

S S
pp.S2 and
S3

p.13
11.41-44

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9. The Licence for Temporary Occupation was subject to automatic renewal until such time as the maintenance period was over. The Respondents were able to mortgage the property as soon as the Agreement was made (as they in fact did to the Chung Khiaw Finance Ltd well before the Notice to Complete) and to transfer the property by means of an assignment of rights, title and interests; a caveat had been lodged with the Registrar of Titles so that the Respondents' interest was fully protected. This is normal procedure in Singapore when dealing with property under the Lands Title Act.

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p.S17
11.7-16

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p.S17
11.16-19

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Record

p.14 11.11 and 12	10. The Appellants gave to the Respondents Notice to Complete on the 6th December 1975. The Appellants could not give Notice to Complete before that date because the Certificate of Title which was required to be produced was delayed by the competent authority through no fault of the Appellants and the Appellants were unable to make title to the land until such Certificate of Title was issued. When such Notice to Complete was given on the 6th December 1975 the Appellants also sent their completion account which allowed a credit to the Respondents of \$14,512.26 for liquidated damages due from the 1st January 1974 to the 28th November 1974. Such completion account showed a balance due to the Respondents from the Appellants of \$13,742.26.	10
p.14 11.17-20 S p.S6 S p.S7 11.17-20 S p.S7 11.26 and 27.	11. On the 31st December 1975 the Respondents issued the Writ of Summons claiming, inter alia:-	
p.2 11.26- 28	(1) liquidated damages of \$20,984.00	
p.2 11.39 and 40	(2) further liquidated damages from the 18th April 1975 to the date of completion	20
pp.4-6 p.5 11.32-37	The Statement of Claim dated the 19th January 1976 claiming liquidated damages from the 1st January 1974 to the 17th April 1975 at 9% per annum based on \$180,000.00 amounting to \$20,984.00.	
S p.S9	12. On the 19th February 1976 the Appellants' solicitors sent to the Respondents' solicitors a cheque for \$4,742.26 (being the said liquidated damages from 1st January 1974 to 28th November 1974) of \$14,512.26 less \$9,770.00 (being \$9,000.00 now due because the Certificate of Fitness for occupation had been issued and a further \$770.00 for fees and costs). This cheque was not accepted by the Respondents.	30
pp.10 and 11	13. The High Court on the Respondents' application under Order 14 on the 1st April 1977 gave leave to enter judgment against the Appellants for the said sum of \$4,742.26 (being \$13,742.26 less \$9,000). This was in respect of liquidated damages from the 1st January 1974 to the 28th November 1974 when the Licence for Temporary Occupation was granted. The \$9,000 deduction was the amount now due because the Certificate of Fitness had been issued.	40
p.11 11.6-8		
pp.31 and 2 11.47-2		
pp.11 and 12	14. The action was tried by Choor Singh J who gave judgment on the 30th September 1977 that judgment be entered for the Appellants with costs	

Record

and that the amount paid into Court by the Appellants should be paid out to the Appellants. The learned Judge in his later written judgment held that:

- (a) the house was ready for occupation on the 28th November 1974 and authority to occupy it was granted by the Building Authority in the form of a Licence for Temporary Occupation; p.14
11.29-33
- 10 (b) the Respondents had no valid reason for not taking possession and occupying the house on the 28th November 1974; p.14
11.33-35
- (c) the Respondents claim for damages was in essence a claim for compensation for financial loss suffered by them from the 28th November 1974 to the 8th December 1975; p.14
11.36-39
- 20 (d) during the period from 28th November 1974 to the 16th April 1975 the Respondents could have been in the occupation of the house but they refused to take possession and gave no valid reason for not doing so; for this period they were not entitled to any damages; pp.14 and
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11.47-3
- (e) during the second period from the 17th April 1975 to the 8th December 1975 the Respondents were in occupation of the house and suffered no financial loss at all; p.14
11.44-47
- 30 (f) on the facts of the case the Respondents were entitled to damages only up to the 28th November 1974 when the Licence for Temporary Occupation was issued and they were offered possession of the house; p.15
11.4-8
- (g) there should be judgment for the Appellants with costs up to the date of payment for the Respondents and costs after the date of payment in to the Appellants, the amount paid into Court to be paid out to the Appellants. p.12
11.16-21
15. No oral evidence was called by either party before the learned Judge, nor was any application made to call such oral evidence.
- 40 16. By a Notice of Appeal dated 11th October 1977 the Respondents appealed to the Court of Appeal of the Republic of Singapore. The appeal came on before Wee Chong Jin, C.J. Chua and D'Cotta JJ. A single judgment of the Court of Appeal of the Republic of Singapore was delivered on the 24th November 1978. The learned Judges' judgment first set out the material provisions of the Agreement : pp.15
and 16
pp.22-27

Record

- pp.23 and 24
11.10-31
p.24
11.32-34
- (a) Clause 3 dealing with the terms as to payment of the purchase price by instalments,
- (b) Clause 10 dealing with obtaining approval for the sub-division of the property sold,
- (c) Clause 11 dealing with completion, service of the Notice to Complete and liquidated damages.
- The learned Judges then set out the facts, summarised Choor Singh J's judgment and then stated or decided as follows:
- p.26
11.41-43
- (1) The Agreement is similar to a building contract. 10
- p.26
11.43-46
- (2) The Agreement contains a definite date from which liquidated damages for delay in giving a Notice to Complete are to run.
- pp.26-27
11.46-7
- (3) The provision in question is clearly a genuine pre-estimate of the loss which is likely to flow from a breach of the contract and accordingly is recoverable without proof of the actual loss suffered.
- p.27
11.8-18
- (4) The difficulty which the Appellants had encountered in that the competent authority had delayed in issuing a Certificate of Title and the resulting inability to give the Notice to Complete did not affect the bargain between the parties. 20
- p.27
11.19-25
- (5) The appeal succeeded and the Respondents were entitled to judgment calculated in accordance with the provisions of Clause 11 for the period 29th November 1974 to 7th December 1975 together with costs both in the Court of Appeal and below.
17. The Appellants respectfully submit that the Court of Appeal of the Republic of Singapore erred in the following respects: 30
- (1) The Court of Appeal failed to give any or any sufficient weight to the fact that the Respondents were in possession of the house from the 17th April 1975 onwards.
- (2) The Court of Appeal failed to give any or any sufficient weight to the fact that the Respondents could have been in possession of the house from the 28th November 1974 to the 16th April 1975. 40
- pp.35 and 36
11.23-1
- (3) The Notice to Complete provision in Clause 11 is in the context of the Purchaser still awaiting possession and of the Notice to Complete commencing

the machinery of sale and purchase culminating in possession being given to the Purchaser : it is not apt for a situation where the Purchaser is already in possession. The Court of Appeal erred in assuming that Clause 11 was appropriate to a situation where the Purchaser was already in possession.

Record

- 10 (4) When holding that the Agreement contains a definite date from which liquidated damages for delay in giving a Notice to Complete are to run, the Court of Appeal failed to distinguish between these two situations :-
- (i) failure to give Notice to Complete when the Purchaser is awaiting possession, and
- (ii) failure to give Notice to Complete when the Purchaser is (or could be if he wished) already in possession.
- 20 (5) The liquidated damages, at 9% per annum on the purchase price of \$180,000 and referred to expressly by this Agreement as interest, can only be justifiable as a genuine pre-estimate of damages if they are to apply when the Purchaser, having paid the bulk of the purchase price, is then deprived of possession; then the 9% is a genuine pre-estimate of what the Purchaser suffers through his lack of possession. If the Purchaser goes into (or could go into if he wished) possession, then he obtains the benefit of the purchase price which he has paid. The Court of Appeal in these
- 30 circumstances should not have held (as they did) that the liquidated damages were a genuine pre-estimate of the loss which is likely to flow from a breach of contract in giving the Notice to Complete : they should have held that the liquidated damages were a genuine pre-estimate of the loss which is likely to flow from a breach of contract in giving the Notice to Complete when the Purchaser was still out of possession.
- 40 (6) The Court of Appeal failed to have regard to the primary purpose of the liquidated damages provisions in Clause 11, i.e. to dissuade the Vendor from delay in construction and giving possession of the house.
- (7) The Court of Appeal should have held that the damages were a penalty if the Agreement made them due on a failure to give the Notice to Complete when the Purchaser was already (or could be if he wished) in possession.
- (8) The Court of Appeal should not have held (as

p.26
11.43-46

pp.35 and
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p.26

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they did) that the Agreement is similar to a building contract. They should have regarded it as an agreement for the sale of land and should have had regard to the Housing Developers Rules 1965 and the Housing Developers (Amendment) Rules 1967 and the provision therein in Rule 9A(1) that an agreement in the form prescribed in Schedule A is an agreement for the sale of land; alternatively the Court of Appeal ought to have regarded the Agreement partly as an agreement for the sale of land and partly as a building contract.

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(9) The Court of Appeal, on the basis that the Agreement was an agreement for the sale of land or partly an agreement for the sale of land should have applied the rule in Bain v Fothergill (1874) L.R. 7 H.L. 158 and Rowe v School Board for London (1887) 36 Ch D.619 and held that damages were not recoverable for delay in giving the Notice to Complete, particularly in circumstances where possession had been given.

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p.35

(10) If the effect of Clause 11 is to entitle a Purchaser who has taken possession to recover liquidated damages for delay in giving Notice to Complete, then to that extent such Clause is contrary to law, contrary to public policy, void and invalid.

pp.28 and 29

18. On the 19th March 1979 the Court of Appeal of the Republic of Singapore made an order granting the Appellants leave to appeal to the Judicial Committee.

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pp.21-27

19. The Appellants respectfully submit that the judgment of the Court of Appeal of the Republic of Singapore was wrong and ought to be reversed and that this appeal ought to be allowed with costs in the Judicial Committee, in the Court of Appeal and in the High Court from the date of payment in, for the following (amongst other)

R E A S O N S

1. BECAUSE the Respondents were in, or could have been in, possession of the house.
2. THE damages provisions in Clause 11 do not operate where the Respondents have or could have taken possession.
3. THE damages provisions in Clause 11 if they apply to a situation where there is a failure to give a Notice to Complete at a

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time when the Purchaser is in possession are not a genuine pre-estimate of damages and so are a penalty.

Record

4. THE damages adjudged due to the Respondents are all in respect of periods when the Respondents either were in possession or could have entered into possession.
5. THE Agreement was an agreement for the sale of land and damages for delay in giving Notice to Complete are not recoverable.
6. IF the effect of Clause 11 is to entitle a Purchaser who has taken possession to recover damages for delay in giving Notice to Complete, then to that extent Clause 11 is contrary to law, contrary to public policy, void and invalid.

DESMOND WRIGHT

HOWARD CASHIN

Dated this *24th* day of *November* 1981

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Le Brasseur & Bury,
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Agents for Murphy & Dunbar,
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Appellants' solicitors.

To the Judicial Committee

And to Yap & Yap,
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30 Respondents' solicitors

This Case for the Appellants was lodged with the Judicial Committee of the Privy Council on the *24th* day of *November* 1981.

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