

- 9 MAR 1960

25 RUSSELL SQUARE  
LONDON, W.C.1.

21, 1959

No. 35 of 1958

IN THE PRIVY COUNCIL

55498

ON APPEAL  
FROM THE COURT OF APPEAL OF MALAYA

B E T W E E N

CHOW YOONG HONG (Defendant) Appellant

- and -

TAI CHET SIANG (Plaintiff) Respondent

C A S E FOR THE APPELLANT

10 1. This is an appeal from a judgment and order  
of the Court of Appeal of Malaya dated the 12th  
November 1957 setting aside the Judgment and  
Order of the High Court of Malaya at Kuala Lumpur  
dated the 4th May 1957. The suit giving rise to  
this Appeal was brought by the Respondent (herein-  
after referred to as "the Plaintiff") against the  
Appellant (hereinafter referred to as "the  
Defendant") for a refund of \$5,000 paid by the  
Plaintiff to the Defendant as a deposit upon the  
20 sale of premises known as 27 Malay Street Kuala  
Lumpur. The Trial Court dismissed the Plaintiff's  
claim on the ground that the Plaintiff had  
repudiated his contract, and awarded the Defendant  
\$2,900 damages on his counterclaim. The Court of  
Appeal reversed the Trial Court and gave judgment  
against the Defendant for \$5,000.

p.48.  
p.33.  
p.34.

30 2. The sole question for determination is  
whether the Court of Appeal was justified in  
setting aside the finding of the Trial Court that  
the Plaintiff had repudiated the contract.

3. Towards the end of 1955 the administrators  
of the estate of one Abdullah bin Haji Mohamed  
Taib deceased decided to dispose of three houses  
being numbers 27, 29 and 31 Malay Street, Kuala  
Lumpur which three houses were the property of the  
estate.

Ex.D.2.  
pp.53,54.

On the 6th October 1955 the administrators agreed to sell and transfer to the Defendant the three houses for \$75,000 upon the terms and conditions set out in a letter of the same date addressed to the Defendant by Shearn Delamore & Co. Solicitors to the administrators, as follows:-

- "i. The sale is subject to the Administrators obtaining the necessary leave of the Court.
- ii. You pay us a deposit of \$10,000/- forthwith to account of the purchase price. 10
- iii. The Administrators will apply as quickly as possible for the necessary sanction of the Court.
- iv. Upon the necessary Order of Court being extracted, the Administrators will notify you in writing that this has been done, and will call upon you to complete the purchase.
- v. The purchase will be completed within 14 days of the Administrators extracting the Court Order. In the interpretation of this provision time shall be deemed to be of the essence of the contract. 20
- vi. On the date of completion the Administrators will deliver you a registerable transfer of the above premises and you will pay the balance of the purchase price.
- vii. All outgoings and all rents and profits of the premises to be sold will be apportioned as at the date of completion and any sums found due by virtue of such apportionment will be paid by the party from whom the same is due to the other party on the date of completion. 30
- viii. The Administrators will pay the costs and expenses of obtaining the Court Order, and you will pay the Vendors' and Purchaser's Solicitors' scale charges of the Transfer and stamp duty and registration fees. 40
- ix. In the event of your failing to complete the purchase in the manner herein provided

the Administrators will be entitled to determine the Agreement by notice in writing to you, and to forfeit the deposit of \$10,000/- to account of damages for breach of contract without prejudice to their right to recover any other compensation which they are entitled to claim."

On the same day the Defendant paid a deposit of \$10,000 towards the agreed purchase of \$75,000.

10 4. On the evening of the same day the 6th October 1955 the Plaintiff, who at that time was the tenant of the house at No. 27 Malay Street, was brought to the premises of the Defendant by a land broker named Meerah. The Plaintiff wished to purchase No. 27 for \$33,000. The Defendant and Meerah showed the letter mentioned in Paragraph 3 above to the Plaintiff and explained its terms in detail and explained that the Plaintiff could purchase only subject to the terms of that letter in so far as they were applicable to a sub-purchase by the Plaintiff from the Defendant. The Defendant pointed out that the whole transaction was subject to an order of the Court approving of the sale by the Administrators and that so soon as the order was obtained the Plaintiff would have to be ready to come to the office of the said solicitors to the Administrators, Shearn Delamore & Co., to complete, and must agree to come on the day named by the Defendant, and that time was of the essence of the contract.

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p.21.  
11.9-36.

The Plaintiff thereupon agreed with the Defendant that the Plaintiff would buy and the Defendant would sell the said No. 27 Malay Street, for the sum of \$33,000 subject to the matters above referred to and that the Plaintiff would pay the Defendant as he then did the sum of \$5,000 by way of deposit.

The Defendant gave the Plaintiff a receipt for the \$5,000 as follows :-

Ex.P.1.  
p.60.

40 "Received from Mr. Tai Chet Siang earnest money for shop house at No.27 Malay Street, this town. It is stipulated that the price is (thirty-three thousand dollars) only. Received to-day earnest money of \$5,000 by cheque 24269. All transfer procedure as drawn up by a lawyer will be followed. This is proof."

p.57. 1.15. 5. On the 30th January 1956 the Court gave formal consent to the sale of the three properties, but as a higher offer than that made by the Defendant had been received from another possible purchaser, it was ordered by the Court that the purchase price should be increased to  $\$80,200$ . The Defendant heard of this order on 31st January 1956, and wrote to Plaintiff on the same day, accordingly.

p.21.1.39.  
Ex.D.10.  
p.61.

The effect of this order of the Court was further communicated to the Defendant by a letter dated 3rd February 1956 from Shearn Delamore & Co. to the Defendant. The Defendant by his letter of the same date 3rd February 1956 agreed to pay the enhanced figure of  $\$80,200$  and undertook to complete the purchase by the 3rd March 1956.

Ex.D.4.  
p.59.  
Ex.D.5.  
p.62.

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6. On the 31st January 1956 the Defendant by his letter of the same date advised the Plaintiff that an order had been made in the High Court at Kuala Lumpur that No. 27 Malay Street, Kuala Lumpur could be sold and called upon the Plaintiff to complete the transfer within seven days from the receipt of the letter. The Defendant pointed out that in the event of the Plaintiff's failing to complete the purchase within the period as mentioned in the letter the deposit paid would be forfeited.

Ex.D.10.  
p.61.  
Exs.D.3 and  
D.6.pp.56-58.

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The Plaintiff refused to receive the last mentioned letter at his shop and caused it to be returned to the Defendant and the Defendant then spoke by telephone to the Plaintiff on several occasions and informed him of the Court order and required him to complete. The Plaintiff on several occasions said that he would attend and complete but he failed to do so.

p.21. 1.37.  
to  
p.22. 1.10.

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7. On the 10th February, 1956 the Defendant wrote again to the Plaintiff informing him as the Defendant described it "officially" of the order of the High Court for the sale of the property and giving the Plaintiff seven days from the date of the letter to complete the transfer.

Ex.P3. p.7.

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The Plaintiff replied by his letter of the 11th February 1956 agreeing to complete the transfer and purchase of 27 Malay Street. His letter states "kindly advise me a date suitable to you when we both may go to our lawyers office

Ex.P.2. p.8.

where the transfer could be best finalised. Please bring along the title of the property for my lawyer's scrutiny".

10 The Defendant by his letter of the 29th February 1956 replied to the Plaintiff calling upon him to attend at the office of Messrs. Shearn Delamore & Co., on the 1st March 1956 between 10 a.m. and 11 a.m. to complete the transfer and pointed out that in the event of the Plaintiff failing to do so the deposit of \$5,000 paid by the Plaintiff to the Defendant would be forfeited without further dispute.

Ex.D.1. p.9.

p.22. 1.10.

20 The Defendant sent his letter of 29th February by messenger. On the same day, accompanied by one Lee, the Defendant visited the Plaintiff and tried to persuade the Plaintiff to go to the Solicitors office to complete. The Plaintiff refused to do so and said that he wanted a reduction in price to \$30,000. The Defendant again warned that if the Plaintiff did not attend to complete, his \$5,000 would be forfeited. On the next day the Plaintiff wrote to the Defendant as follows :-

" This is to acknowledge receipt of your letter dated 29th February, 1956.

Ex.D. p.10.

30 I now have to inform that you shall have to call at the office of my Solicitors, Messrs. Au Yong Brothers, with whom I have arranged for the necessary transfer of the above property to be completed. It is essential that you produce the Title Deed to my solicitor for his scrutiny.

To suit your convenience it is agreed that the meeting at my solicitor's office shall take place any day after 1st March, 1956.

I trust the above arrangement is fair to you."

40 The Appellant respectfully submits that such a proposal was quite impossible of performance by the Defendant because, as the Plaintiff knew, the Defendant was offering a transfer direct from the administrators, and that could be provided only by the said Solicitors to the Administrators and only when the Plaintiff produced his money.

p.16  
11.2-15.  
Ex.p.4

The Plaintiff's brother stated in evidence that the Plaintiff sent a reply by registered post to the Defendant's letter dated the 29th February, that in the said reply the Plaintiff asked Defendant to come to Au Yong for the transfers, and that the Defendant refused to receive the letter.

Ex.p.5.

The Plaintiff's brother stated, further, that he went to his Solicitor to issue another letter to transfer the titles, that his Solicitor sent a letter, which the Defendant refused, that on the 13th March he went personally to the Defendant to hand him a letter requesting the sellers to come to the office within 7 days; that that letter was handed to the Defendant, who opened it and asked him to take it back, that he refused to take it back, and that he signed the despatch book as having delivered the letter.

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Ex.p.7.

p.73.

The Defendant gave evidence that on the first March 1956 he was at the office of Shearn Delamore the whole day waiting for the prospective buyers to call at the office to complete transfers, that he had never refused to accept Ex.p.4., that he has never seen Exs.P.4 and P.5.

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p.22  
11.38 - 44.

p.24.  
11.47 - 48.

p.19.  
11.20-43.

8. The Plaintiff did not attend to complete and his deposit was forfeited.

p.24. 1.26.

On the 3rd March the Defendant paid the purchase price of \$80,200 for the three houses to Messrs. Shearn Delamore & Co. and they were transferred to the Defendant's nominees. In particular he sold the house No. 27 Malay Street to his wife for \$25,100. and it was duly transferred to her. At a later date the Defendant's wife sold the house No. 27 to the Plaintiff for \$33,000.

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p.15. 1.5.

p.1.

9. Thereupon the Plaintiff instituted

#### THE PRESENT SUIT

to recover from the Defendant the deposit of \$5,000 made by the Plaintiff at the time of the agreement to purchase on the 6th October 1955.

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p.1.

10. By his plaint dated 21st May 1956 the Plaintiff pleaded inter alia :

10 "3. On the 6th day of October 1955 the Plaintiff agreed to purchase from the Defendant and the Defendant agreed to sell to the Plaintiff the house erected on No.27 Malay Street, Kuala Lumpur, together with the land pertaining thereto for the sum of \$33,000/-. A copy of the agreement is attached hereto and marked P1. The Plaintiff paid to the Defendant a deposit of \$5,000/-.

5. The Plaintiff has on numerous occasions called upon the Defendant to complete the sale on payment to the Defendant of the balance of \$28,000/- but the Defendant has failed or refused to do so.

20 6. In view of the failure of the Defendant to complete the sale the Plaintiff has called upon the Defendant to refund the said Deposit of \$5,000/- but the Defendant has failed or refused to do so.

7. The Plaintiff's claim is for \$5,000/- for a return of money paid as a deposit upon the sale of the premises."

11. The Defendant by his written statement and Counterclaim dated the 18th September 1956 denied liability to refund the deposit of \$5,000 to the Plaintiff and counterclaimed for a loss of \$7,900, incurred by him on the resale of No. 27. p.3.

30 12. The Plaintiff by his reply dated the 22nd October 1956 pleaded inter alia that the time within which the Defendant required the Plaintiff to complete the transfer on penalty of forfeiture of the deposit was in any event neither fair nor reasonable, and that the Plaintiff duly replied to the Defendant's letter by a letter dated 1st March 1956 but that the Defendant refused to accept delivery of the Plaintiff's said letter. The Plaintiff further averred that he was at all material times ready and willing to complete the transfer and at no time indicated to the Defendant in any manner whatsoever that he had any intention of repudiating the agreement and that the Defendant was not entitled to forfeit the deposit since it was the Defendant who repudiated the agreement. p.5.

40 13. Both sides adduced oral evidence. The p.33.

judgment of the High Court at Kuala Lumpur was delivered on the 4th May 1957.

The Trial Court (Southerland J.) gave judgment for the Defendant on the ground that "In law and in fact I am satisfied that the transaction could, would and should have been completed at Defendant's Solicitors office. That this was not done was due to Plaintiff's resiling from his contract with Defendant because he felt he had entered into a bad bargain".

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On the counterclaim the Trial Court gave judgment for the Defendant against the Plaintiff for \$2,900.

An order dismissing the suit with costs and allowing the Defendant's counterclaim at \$2,900 was made on the 4th May 1957.

p.35.

14. The Plaintiff appealed from the judgment and order of the Trial Court to the Court of Appeal of Malaya by his Memorandum of Appeal dated the 29th August 1957.

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p.40.

15. The Court of Appeal delivered its judgment on the 17th October 1957.

The principal judgment of the Court of Appeal was delivered by the Acting Chief Justice of Singapore Knight Ag. C.J.

The relevant passage from the judgment of the Court of Appeal is as follows :-

p.43. 1.17.

"Now this Court will not lightly disturb a finding of fact recorded by the trial Judge, who had the opportunity of seeing and hearing the witnesses - nevertheless it can and should consider whether the proper inferences have been drawn by the Judge from facts which were not in controversy (Senmax v. Austin Motor Co. Ltd. 1955 1 A.E.R. 326). Throughout the whole course of these proceedings the appellant has maintained that he agreed to purchase this property from the respondent and that he was at all material times willing to complete - provided only that the respondent should satisfy his solicitor that he had a good title. It is further established that on 13th March i.e. one day before the respondent

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was in a position to provide any title at all, the appellant once more offered (through his solicitors) to complete and then subsequently he did complete by paying \$33,000 to the respondent's wife.

10 In these circumstances how can it be said that he repudiated his contract? In my opinion the only possible conclusion to reach is that at all material times he was anxious to complete and that the respondent has fabricated the evidence as to the alleged repudiation and fabricated it, moreover, at some time subsequent to the filing of the Defence, which would explain how so vital an allegation came to be omitted from the pleadings. Had this aspect of the matter occurred to the learned trial judge he must inescapably, in my opinion, have drawn no inference other than one favourable to the  
20 appellant.

30 Much play has been made of the suggestion that time was of the essence in this contract - but this presents no difficulty. No mention of time was made in the agreement itself and it is quite impossible to read into it an undertaking by the appellant to complete before he was assured that he was getting a good title; indeed the reference to "the lawyer" would seem to confirm that very understandably he required assurance on this very point. I am also at a loss to see how the learned trial Judge concluded that the transaction should have been completed at the office of Messrs. Shearn Delamore & Co. According to Mr. Marsh of that firm, he had no knowledge whatsoever of the contract between the parties in these proceedings."

40 16. In a concurring judgment Smith J. observed as follows :-

"Even in the respondent's own evidence of what took place on the evening of 29th February, 1956, I can find no clear proof of repudiation by the appellant. This is what the respondent said in evidence :-

p.45. 1.26.

"I went to see Plaintiff on 29.2. with a friend Lee Nget Fah. My object was to take plaintiff to Shearn Delamore.

I saw plaintiff. He did not agree to complete. He asked for reduction in price of \$3000. He told me the other 2 houses were sold at \$30000 and there was no reason why he should pay more. I did not agree to reduce price. We would not complete unless price reduced by \$3000. I warned him if he did not complete his deposit would be forfeit. He was very angry and threatened to assault me. Nevertheless he refused to buy. In fact I had sold one of the houses for \$30000. That was to Amreek Singh. I told plaintiff his deposit would be forfeited. "

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Even if the words of the appellant did amount to a renunciation the words of the Plaintiff that the deposit would be (not 'was') forfeited do not shew that the respondent acted on the renunciation there and then.

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Nowhere in that passage does the respondent say that he treated the contract as at an end and the deposit forfeited that night.

Reading the passage as a whole it appears to me that the appellant threatened not to complete because the others were getting their houses cheaper and that the respondent in turn threatened that if the appellant did not complete his deposit would be forfeited. The position was clarified the very next day by the appellant writing to say that he was ready to complete and naming his solicitors."

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p.47.

The Chief Justice of the Federation of Malaya Thomson C.J. concurred with the reasoning of both judgments.

17. As appears from reading the evidence the Trial Judge, on the question of the repudiation which he found to have taken place, had to decide between two entirely opposed stories. The Defendant supported by an independent witness proved the refusal to complete except at a reduced price and the Plaintiff denied even that there had been any meeting or discussion of the kind spoken of by the Defendant.

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Likewise on the question of where the completion was to have taken place the evidence

10 on the two sides was flatly contradictory. The Defendant, supported by another independent witness, proved that the Plaintiff was shown the letter from Shearn Delamore and Co., and had explained to him "all that was necessary for completion." This was referred to in the receipt for the \$5,000 deposit in the words :- "all transfer procedure as drawn up by a lawyer will be followed". The Plaintiff answered this evidence by saying he had never seen nor heard of the letter in question from Shearn Delamore and knew nothing of the requirement of a Court order or of any other conditions.

20 The learned Trial Judge had to choose between these opposed stories and the facts which he found were the subject of acute controversy. It was not a question as suggested by the acting Chief Justice of Singapore of drawing inferences from facts which were not in controversy, but of a head-on conflict in the oral evidence which could be and was resolved only by the findings of the learned Trial Judge.

18. The Order of the Court of Appeal of Malaya allowing the appeal and entering judgment against the Defendant for the sum of \$5,000 was made on the 12th November 1957.

p.48

Final leave to appeal to His Majesty Yang Di Pertuan Agong in Council was given on the 14th October 1958.

p.51.

30 19. The Appellant humbly submits that the judgments and order of the Court of Appeal of Malaya be set aside and the judgment and order of the Trial Court be restored and this appeal be allowed with costs throughout for the following

#### R E A S O N S

- 40 1. BECAUSE in law and in fact the transaction could, would and should have been completed at the office of Shearn Delamore the solicitors to the administrators.
2. BECAUSE the Plaintiff resiled from his contract with the Defendant when he felt he had entered into a bad bargain.

S. P. KHAMBATTA

JOHN PLATTS-MILLS.

IN THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE COURT OF APPEAL OF MALAYA

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B E T W E E N

CHOW YOONG HONG (Defendant)  
Appellant

- and -

TAI CHET SIANG (Plaintiff)  
Respondent

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C A S E FOR THE APPELLANT

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