

21, 1959

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
- 9 MAR 1960
25 RUSSELL SQUARE
LONDON W.C.1

IN THE PRIVY COUNCIL

No. 35 of 1958

ON APPEAL FROM THE COURT OF APPEAL OF MALAYA
55499

B E T W E E N

CHOW YOONG HONG ... (Defendant) Appellant

- and -

TAI CHET SIANG ... (Plaintiff) Respondent

CASE FOR THE RESPONDENT

Record

10 1. This is an Appeal from an Order of the
Court of Appeal of Malaya dated 12th November 1957
pursuant to leave of that Court dated 14th October
1958 allowing the Appeal of the Respondent against
the Order of the High Court of Kuala Lumpur dated
4th May 1957. The Respondent was the Plaintiff
at the trial and by the Order dated 4th May 1957
his claim against the Defendant was dismissed and
judgment was entered for the Defendant on the
Counterclaim for \$2900. On Appeal judgment was
20 entered for the Respondent on the Claim and
Counterclaim for \$5000.

p.48
p.51

p.34

30 2. It is common ground that on the 6th
October 1955 the Respondent agreed to buy from the
Appellant a property known as 27 Malay Street,
Kuala Lumpur, hereafter called the said property,
for the sum of \$33,000 and paid a deposit of
\$5000 in respect thereof. The said property
consisted of a shop with a house over the shop and
the Respondent resided and carried on business
there. Further it is common ground that the sale
was not completed.

3. By his Statement of Plaint the Respondent
alleged the above facts. He further alleged that
on numerous occasions he had called upon the
Appellant to complete but that the Appellant had

pp. 1-2

Record failed or refused to do so. Accordingly he claimed
— the return of his deposit.

pp. 3-4

4. By his written Statement of Defence and Counterclaim the Appellant denied that the Respondent had on numerous occasions called upon him to complete and alleged that it was the Respondent who refused to complete and that accordingly the deposit was forfeitable. He further alleged that by reason of the Respondent's failure to complete he had sold the said property for \$25100 and claimed as damages the difference between \$33000 and \$25100, namely \$7900.

10

5. The dispute on the claim is as to whether it was the Appellant or the Respondent who repudiated the agreement dated 6th October 1955. The same question arises on the Counterclaim. But on the Counterclaim the Respondent will further contend:

(a) that there was no evidence that the Appellant had sold the property for \$25100

20

(b) there was conclusive evidence that the Appellant could have obtained \$33000 had he so wished.

p. 53

6. At all material times prior to 6th October 1955 the said property was one of three houses belonging to a deceased's estate and the Administrators of the Estate required the permission of the Court before agreeing to sell the said property. The Solicitors acting for the Administrators were Shearn Delamore. On the 6th October by an Agreement in writing between the Appellant and Shearn Delamore acting as agents for the Administrators, the Appellant agreed to buy the three houses for the sum of \$75000. The sale was subject to the Administrators obtaining the necessary leave of the Court. There was no fixed date for completion by reference to the calendar,

30

but it was agreed that the Administrators would so soon as possible apply to the Court for leave to sell and that completion would be within 14 days of the Court Order being extracted.

Record

7. The history of events as between the Appellant and the Administrators is not in dispute and is as follows:

- 10 (a) On 30th January 1956 the Court made an Order authorising a sale at a price of not less than £80,200. p. 57
- (b) On 31st January 1957 the Administrators informed the Appellant of the decision and that accordingly the sale was off and the deposit would be returned. p. 58
- (c) On 3rd February 1956 by letter Shearn Delamore made an offer to the Appellant to sell to him the three houses for £80,200, and allowed him one month from that date in which to purchase the same. p. 59
- 20 (d) On the same day the Defendant accepted the said offer. p. 62
- (e) On 3rd March 1956 the Appellant paid to Shearn Delamore £45,200 and Amreek Singh, on behalf of the Appellant paid a further £25,000. These sums together with the £10,000 paid as deposit total £80,200. p. 19 lines 34-36
- 30 (f) One house was, at the request of the Appellant, transferred by the Administrators to the said Amreek Singh for a consideration of £30,000. Another house was transferred to Chow Ween for a consideration of £25,100. The said property was transferred to the Appellant's wife for a consideration of £25,100. These three sums total £80,200 which was the consideration p. 19 lines 38-42

Record

payable to the vendors. The names of these nominees with the appropriate signatures were given by the Appellant to Shearn Delamore on 5th March 1956 and each Memorandum of Transfer was dated 14th March 1956.

P. 60 8. The sale by the Appellant to the Respondent was later on the same day 6th October 1956, the only memorandum being as follows:

Kuala Lumpur, 6.10.1955

10

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.

Chow Yoong Hong

p.13
line 12
p.21 l.
11-20 9. There is a dispute as to whether the Appellant told the Respondent about his agreement with the Administrators but having regard to the subsequent history of events it is contended that this is irrelevant.

20

10. It is common ground that nothing material occurred between 6th October 1955 and 31st January 1956.

p. 61
p. 21
l. 42-46 11. On 31st January 1956 the Appellant alleged that he sent a letter to the Respondent calling on him to complete within 7 days by coming to the Appellant's house. This letter was produced by the Appellant, who in examination-in-chief alleged that it was returned to him the next day. In the written Statement of Defence it was pleaded that the envelope when returned was endorsed "Always Out - Unclaimed - Retour".

30

p. 3
l. 24-28

12. On the 10th February 1956 the Appellant admittedly wrote to the Respondent the following letter:

Record

Dear Sir,

re: House No. 27 Malay Street,
Kuala Lumpur

10 With reference to our Agreement of the 6th October 1955 and our Telephone conversation in regards to your purchase of the above property, I now write officially to inform you that an Order has been made in the High Court, Kuala Lumpur that the property may be sold. Will you, therefore, within seven (7) days from date hereof come to my shop and complete the transfer of the above property by Cash.

p. 7

20 In the event of your failing to complete the purchase of the above property within the period as aforesaid mentioned the deposit paid down by you will be forfeited by me.

Yours faithfully,

13. The history between the 31st January and 10th February 1956 is in dispute. The Respondent denies all knowledge of the letter dated 31st January and states that the first request to complete was the letter of 10th February and this was admittedly answered by the Respondent on the 11th February as follows :

30 Dear Sir,

House - 27 Malay Street
Kuala Lumpur

I thank you for your letter dated 10th February, 1956 under the captioned subject.

I am in agreement with your suggestions

Record
p. 8

to complete the transfer and purchase of the above property, but would like you to appreciate that this matter should be handled through legal channels.

Therefore kindly advise me a date suitable to you when we both may go to our lawyer's office where the transfer could be best finalised. Please bring along the Title of the Property for my lawyer's scrutiny.

10

Looking forward to hearing from you soon.

I remain,
Yours faithfully,

p. 21 1.45
p. 22 1.6

14. The Appellant's version is that between the 31st January and 10th February 1956 he was continually pressing the Respondent to settle at the office of Shearn Delamore and that the Respondent was making promises which he did not keep. This is inconsistent with the letter dated 31st January and the subsequent letter of 10th February referred to in paragraph 12 hereof. The envelope of the letter dated 31st January was not produced. If it was endorsed as alleged in his written Statement of Defence it would not be returned until several days after the 31st January. On behalf of the Respondent it will be contended that this letter was never posted, the explanation being that in the meanwhile the Appellant had learned that the permission of the Court to sell at the figure of \$75000 had been refused.

20

p. 59

30

15. Further the Respondent contends that the only vital fact is clear, namely, that on the 10th February he was ready and willing to complete.

16. What happened between 11th February and the writing of the letter dated 29th February 1956 set out hereunder is not clear from the evidence.

The Respondent says that he instructed Au Yong, a Solicitor, to complete but Au Yong was not called as a witness. The Appellant says there was one telephone call but does not say what was said. The letter is as follows:

Record
p.13 1.15-20
p.22 1. 9

29th February 1956

Dear Sir,

House - 27 Malay Street, K.Lumpur

10 With reference to your letter of the 11th instant, I have to request you to be kind enough to call at the office of Messrs. Shearn & Delamore, Advocates & Solicitors of 52 Ampang p. 9 Road, Kuala Lumpur on the 1st day of March 1956 between the hour of 10 a.m. to 11 a.m. to complete the transfer of the above property,

In the event of your failing to do so, the deposit sum of \$5,000/- paid by you to me will be forfeited to me without any further dispute.

20 Yours faithfully,

17. The subsequent events on 29th February are in dispute. According to the Respondent he had no interview with the Appellant after receipt of letter dated 29th February. But on the 1st March 1956 he wrote to the Appellant a Registered letter agreeing to complete. This letter was returned to him next day with the endorsement "Refused". This was produced and is Exhibit P.4. This Exhibit was not sent over with the other Exhibits and is therefore not in the Record. A photostat copy of the envelope is in the Schedule to this Case. The envelope is still sealed, the Court having treated the Respondent's office copy as the original.

30

p.16 1.1-5

18. On the return of the letter P.4, the Respondent instructed his present Solicitor who

p.16 1.6-9

Record

on 2nd March 1956 wrote a further letter to the Appellant calling on him to complete. This letter was returned between the 7th and 13th March with several endorsements. The letter and envelope were produced and are P.5. P.5 was not sent on with the Record. Accordingly a photostat copy appears in the Schedule to this Case.

19. After the return of letter dated 2nd March, the Respondent again saw his Solicitor as a result of which another letter was written dated 13th March 1956. This letter was delivered to the Appellant personally by hand by the Respondent's brother who signed the Appellant's despatch book to confirm delivery. He stated that the Appellant read it in his presence and then requested him to take it back and that he refused and did not do so.

p.16 1.10-20 10

20. Admittedly no reply was made to this letter. The fact that the Respondent was a ready and willing purchaser is demonstrated by the fact that on or about the 16th April 1956 he purchased the said property from the Appellant's wife for \$33000.

p.24 1.26-28 20

21. All the above facts are incontrovertible. The Appellant relies on one controvertible fact, namely an interview between himself and his friend Lee Nget Fah with the Respondent on the 29th February 1956 after the sending of the letter of that date. At the said interview it is alleged that the Respondent stated that he had learned that the other two houses were being sold for \$30,000 and that he would only pay \$30,000 whereupon the Appellant said that if he would not complete he would forfeit the deposit. The Respondent denies that there was any such interview and the first mention of it is when the Respondent was in the witness box. There was no plea that the Respondent had repudiated the contract on that date.

p.24 1.16-30
p.27 1.20-25 30

22. The Respondent contends that the above

10 facts are only consistent with the conclusion that he was at all material times a ready and willing purchaser. The Respondent further contends that the only rational explanation is that on the 29th February 1956 the Appellant found himself in the happy position of having made a fair profit and being in the position of having the money to complete without the assistance of the Respondent's money and accordingly arranged completion without the Respondent with a view to extracting further moneys from the Respondent whom he knew to be an eager purchaser. Accordingly he arranged to put the said property in the name of his wife to avoid an action for specific performance. He then wrote the letter dated 29th February demanding settlement by 11 o'clock next day well knowing that the Respondent would reply by asking for particulars to be given to his Solicitor as set out in letter dated 11th February. This reply is forthcoming and the Respondent's name is on the outside of the envelope. Accordingly the letter is refused. Next day there is another letter from a Solicitor. This appears from the outside of the envelope. Again delivery is refused. The Appellant then got his \$33,000 from the Respondent on the 16th April 1956 and then tries to get another \$12,900 by forfeiting the deposit of \$5000 and claiming that he had lost another \$7,900 because he had had to sell at \$25,100. There was no evidence of any such sale, the figure of \$25,100 merely being entered on the transfer to make the total sale by the Administrators to the Appellant's nominees total \$80,200.

20

30

23. The case was tried by Sutherland J. on 20th March and 9th April 1957. At the trial Shearn Delamore were then acting as Solicitors for the Appellant. In the course of a very brief judgment, the trial Judge said, "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 the contract because he felt he had

40

Record

entered into a bad bargain". He awarded \$2900 on the Counterclaim but gave no reason.

24. It is contended that his finding on the claim cannot be supported having regard to the incontrovertible evidence. Further there was no evidence that the Appellant suffered any damage, let alone damage in excess of \$5000, the amount of the deposit. This itself is a clear indication that the trial Judge had not drawn the correct conclusions from the evidence.

10

25. The Respondent appealed to the Court of Appeal and the Appeal was heard on the 14th, 15th and 16th October 1957 before Knight C.J., Smith and Thompson J.J. and was unanimously allowed.

26. In the course of his judgment Knight C.J. said:

"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 appellant".

20

p.43 1.37-49

and

30

"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.

p.44 1.10-15

For the above reasons I would allow this appeal with costs here and in the Court below".

Record

27. Smith J. agreed with Knight C.J. He then considered the evidence of the Appellant as to the alleged interview with the Respondent on the 29th February 1956 and added:

10

"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".

p.46 1.21-28

28. Thompson J. agreed with Knight C.J.

20

29. The Respondent humbly submits that the Appeal should be dismissed for the following among other

REASONS

30

- (1) Because the only conclusion to be drawn from the incontrovertible evidence is that the Respondent was at all material times a ready and willing purchaser.
- (2) Because the Appellant did not plead a verbal repudiation of the contract on the 29th February 1956 or that he had accepted such repudiation.
- (3) Because there is nothing in the Agreement dated 6th October 1955 or in the evidence to justify a finding that completion had to take place on any particular day or at any particular place.

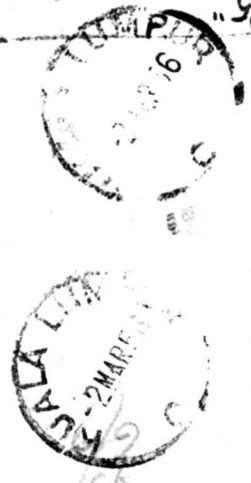
- (4) Because there is no evidence that the Appellant suffered any damage.
- (5) Because the findings and reasoning of the Court of Appeal are right and should be upheld.

IAN BAILLIEU

EXHIBIT - P 5

20.3.57
P. 176/56
P. 176/56
P. 176/56

BANNON & BAILEY,
KUALA LUMPUR,
MALAYA



BANNON & BAILEY,
ADVOCATES, SOLICITORS,
NOTARIES PUBLIC,
COMMISSIONERS FOR OATHS.

C. MILLS
M. EDGAR
J. S. H. SKRINE

TELEGRAPHIC ADDRESS
"BANNON" KUALA LUMPUR.

TELEPHONE No. 5138/9

CODES
BROOMHALLS RUBBER,
BENTLEYS
P.O. Box 80.

Ourref: ME/S/11633/56.

Sadhu Bunting
Kuala Lumpur

2nd March, 1956.

Chow Yodng Hong, Esq.,
No. 120 High Street,
Kuala Lumpur.

Dear Sir,
House 27 Malay Street, K. Lumpur.

We have to inform you that we have been instructed by Mr. Tai Chet Siang of No. 27 Malay Street, Kuala Lumpur, that on the 6th October 1955 you agreed to sell to our client the land and house erected thereon and known as No. 27 Malay Street, Kuala Lumpur for the sum of \$33,000/- and our client paid you a deposit of \$5,000/-.

We are now instructed to request you to call at our office within one week from the date hereof, and on your handing us the title to the land and execute a valid and registerable transfer over the same free from encumbrances, our client will pay you the balance purchase price of \$28,000/-.

Yours faithfully,

Bannon & Bailey

A. R. REGISTERED

-P5-



Chow Yodng Hong Esq.
No. 120 High Street
Kuala Lumpur.

R
No 9643
Kuala Lumpur 6



No. 35 of 1958

IN THE PRIVY COUNCIL

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

CASE FOR THE RESPONDENT

LIPTON & JEFFERIES
Princes House,
39 Jermyn Street,
London, S.W.1.

Solicitors for the Respondent