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UNIVERSITY OF LONDON
W.C.I.
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INSTITUTE OF ADVANCED

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IN THE PRIVY COUNCIL LEGAL STUDY Appeal No.6 of 1960

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

B E T W E E N

YEOW KIM PONG REALTY LIMITED Appellants

- and -

NG KIM PONG Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an Appeal from a Judgment and Decree of the Court of Appeal of the Supreme Court of the Federation of Malaya on appeal from a judgment of Sutherland J. (who had dismissed an action brought by the Respondent against the Appellants) whereby the appeal was allowed with costs and it was ordered that the Appellants should repay to the Respondent the sum of \$20,000 with interest from the 1st September 1956 and that the Respondent should recover \$8,450 as damages for breach of contract.

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2. By an agreement in writing (hereinafter called "the Sale Agreement") dated the 24th March 1956 and made between the Appellants and the Respondent, after reciting (as the fact was) that the Appellants were the registered proprietors of the 22 lots of land therein referred to, it was agreed that the Appellants should sell and that the Respondent should purchase the said lots for the aggregate sum of \$66,000.

p.4

3. The Respondent paid the sum of \$15,000 to the Appellants on or before the date of the Sale

RECORD Agreement in part payment of the purchase price of the said land and the Sale Agreement provided (inter alia) E

p.5. (a) that the Respondent should pay the balance of the purchase price as to \$24,000 on the 23rd June
p.6. 1956 and as to the remaining \$27,000 on the 23rd December 1956;

(b) that in case the Respondent should fail to F
pay either of such sums on the due date, the said "advance money" of \$15,000 should be forfeited and the Sale Agreement treated as null and void; and
(c) that as and when the balance of the purchase money was paid, the Appellants should transfer one G
lot of the said land in respect of each \$3,000 of such balance and should transfer the outstanding lots on the final payment being made.

4. The Respondent failed to pay the sum of \$24,000 to the Appellants on the 23rd June 1956; H
p.163 but on the 25th June 1956 he orally and by letter applied for an extension of time for payment. At some date before 7th July 1956 the Appellants acting by a duly authorised officer orally agreed with the Respondent to accept payment of the said I
sum of \$24,000 by two instalments of \$5,000 on the 7th July 1956 and \$19,000 on 31st July 1956.

5. The Respondent duly paid to the Appellants the said sum of \$5,000 on the 7th July 1956, but the Appellants refused to give the Respondent a A
receipt therefor save on the terms that he should agree to the terms set out in a letter (bearing
p.13 date July 7th 1956 but not delivered to the Respondent till July 24th 1956) addressed to the Appellants by the Respondent. The said letter B

was to the effect that the Appellants permitted
 an extension of time on terms (a) that payment
 of the said sum of \$24,000 should be made by
 the instalments referred to in Paragraph 4 here-
 of, (b) that construction work on the land must
 be commenced within one week "of the date hereof"
 (c) that construction work must have begun on
 any land sought to be transferred, and (d) that,
 should there be a breach of the conditions, the
 sum of \$5,000 if paid should be forfeited and
 the extension of time withdrawn. The Respondent
 on the 24th July 1956 signed and delivered to
 the Appellants an endorsement on a copy of the
 said letter whereby he agreed to the terms
 thereof.

6. On the 28th July 1956 the Respondent had
 raised a sum exceeding \$19,000 by sub-sale of
 eight lots of the said land, and the Respondent's
 Solicitors wrote to the Appellants informing them
 of this fact and requesting the titles to such
 lots so as to enable the Solicitor to the sub-
 purchasers to examine them, and saying "Our
 client will thereafter be able to make payment of
 the balance due to you in the sum of \$19,000
 before the 31st July as agreed." By letters
 dated the 31st July and 10th August 1956 the
 Appellants' Solicitors refused to send the
 titles or to transfer the lots in question
 on the ground that building operations had not
 been commenced thereon.

7. By letter dated the 1st September 1956 the
 Appellants' Solicitors wrote to the Respondent
 as follows :-

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pp.166,168

p.169

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"Dear Sir,

" Lots 382 & 403, Section 24 Town
of Klang.

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" We have been instructed by our
"clients Messrs. Yeow Kim Pong Realty
"Ltd. that no action has been taken by
"you to fulfil your obligations under
"the contract, or to pay the sum due to
"our clients.

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" We are therefore instructed to
"give you notice that the contract is
"terminated by reason of your breaches,
"and that all monies paid to our clients
"are forfeit.

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" In consequence you are requested to
"vacate the land forthwith since you are
"now a trespasser thereon.

" Yours faithfully,

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" (Sd.) SHEARN DELAMORE & CO."

p.170

8. On the 8th September 1956 the Respondent deposited \$19,000 with his Solicitors, who by letter of that date informed the Appellants' Solicitors that such sum was available for payment of the final instalment of the said sum of \$24,000 and asked that the titles to the land be made available on payment thereof.

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p.172

Subsequently, on or about the 19th September 1956, the Respondent's Solicitors sent the Appellants' Solicitors a cheque for \$19,000 and requested a transfer of eight lots (being one lot for each \$3,000 of the instalment of \$24,000); and by a receipt dated 21st

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p.173

September 1956 the Appellants' Solicitors acknowledged the receipt of such sum "being payment of the instalment of amount due by NG Kim Pong re land at Klang. Account Yeow Kim Pong Realty Ltd." The Appellants nevertheless

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G failed despite further requests to hand over RECORD
any titles or to take any other steps to trans-
fer any land to the Respondent. On the 25th p.178
October 1956 the Respondent's Solicitors wrote
to the Appellants' Solicitors threatening pro-
ceedings and requesting return of the \$19,000
H but stating "Our client is still willing and able
" to complete the contract and will pay this sum as
" soon as your clients are prepared to perform
" their part, but our client does not want this
I " money to lie fallow until then." The said sum
of \$19,000 was returned on the 19th November
1956; but, in the meantime, the Appellants
having persisted in their failure to perform
their part of the Sale Agreement, the Respondent
A commenced these proceedings by Statement of
Plaint dated the 16th November 1956.

9. By his Statement of Plaint the Respondent p.1
claimed the return of the two sums of \$15,000
and \$5,000 which he had paid to the Appellants
B as aforesaid with interest thereon and damages
for breach of contract. The Appellants' Defence p.11
was delivered on the 10th January 1957.

10. On the 21st June 1957 the Appellants
amended their Defence by alleging that the
C Respondent had by a Deed dated 10th May 1956 p.183
transferred the Sale Agreement to one Liew Thean
Liew (hereinafter called "Liew") for \$10,000 on
the 10th May 1956 and that Liew has assigned it
to the Appellants for \$1,500 by Deed dated the p.190
D 8th April 1957. The facts in connection with
Liew are that he is a moneylender with whom the
Respondent had deposited the Sale Agreement as

RECORD	<p>security for a loan of \$5,000, the whole of which had been repaid before the date when the Respondent commenced these proceedings and accordingly long before the date of the purported assignment to the Appellants. These facts were alleged in the Respondent's Reply dated the 24th February 1958.</p>	E
p.16.	<p>11. The case came before Sutherland J. for hearing on the 8th March 1958 and on six subsequent days, and he delivered a reserved judgment on the 1st May 1958. Having expressed his views on the facts and the law, he summed up as follows :-</p>	F
p.93	<p>"In my view,</p> <p>"(1) Plaintiff committed a breach of the "agreement he signed on the 24th July in "that he failed to begin construction on "the land sought to be transferred. This "is sufficient by itself to require that "the claim fail.</p> <p>"(2) Plaintiff did not pay the \$19,000 "as required. In this connection, "defendant was under no obligation to "let plaintiff's solicitors have titles "for examination. This also is sufficient "by itself to require failure of the "claim.</p> <p>"(3) At the time of the institution of "the suit plaintiff had no rights under "the agreement, he having assigned them. "This in itself is sufficient to require "dismissal of the claim.</p> <p>"I dismiss the suit with costs."</p>	G
p.120/ 121.	<p>"(1) Plaintiff committed a breach of the "agreement he signed on the 24th July in "that he failed to begin construction on "the land sought to be transferred. This "is sufficient by itself to require that "the claim fail.</p> <p>"(2) Plaintiff did not pay the \$19,000 "as required. In this connection, "defendant was under no obligation to "let plaintiff's solicitors have titles "for examination. This also is sufficient "by itself to require failure of the "claim.</p> <p>"(3) At the time of the institution of "the suit plaintiff had no rights under "the agreement, he having assigned them. "This in itself is sufficient to require "dismissal of the claim.</p> <p>"I dismiss the suit with costs."</p>	H
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By a Formal Order of the High Court dated the 1st May 1958 it was ordered that the Respondent's suit be dismissed with costs.

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12. The Respondent gave Notice of Appeal on the 29th May 1958 and by Memorandum of Appeal dated the 15th September 1958 he appealed to the Court of Appeal against the whole of Sutherland J.'s decision. The Appeal was heard by the Court of Appeal (Thomson C.J., SMITH J. and Ong J.) on the 15th October 1958 when judgment was reserved.

p.122

C 29th May 1958 and by Memorandum of Appeal dated p.123

D the 15th October 1958 when judgment was reserved.

13. The judgment of the Court of Appeal was delivered on the 23rd April 1959. The principal judgment was delivered by Ong J., Thomson C.J. and Smith J. saying only that they had read and

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E agreed with Ong J.'s judgment. Having stated the facts (including a review of relevant events after the 1st September 1956, which Sutherland J., had held to be irrelevant), he pointed out

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F "that before the Defendants could be held entitled to rescind the contract by reason of the plaintiff's alleged breach of the construction clause (which was Condition 3 set out in the letter of 7th July), it must first be decided whether or not that condition was lawfully en-

G "grafted on the original contract between the parties, and was such that it was binding on the plaintiff." He then said that the grounds

of rescission relied on in the Appellants' letter of 1st September 1959 were that no

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H action had been taken by the Respondent to fulfil his obligations under the contract and secondly his failure to pay the sum due, and he continued "As to the first ground, the plaintiff in truth and in fact was not in

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"breach of any of the terms of the original contract made on 24th March, 1956, except only as to the date of payment of \$24,000 by 23rd June. On that particular point the breach had been waived by the defendants when they accepted payment of \$5,000 on account on 7th July, extended the time for payment of the balance of \$19,000 to 31st July and re-affirmed the contract. As to the second ground, non-payment of the \$19,000 by 31st July in my opinion did not entitle the defendants to rescind. In the first place, payment by that date was not of the essence of the contract. This is unmistakably clear from the defendants' solicitors' letters of 31st July and 10th August. In any event these letters waived such stipulation, if there were any (see Hipwell v. Knight)."

He further said that it did not lie in the mouth of the Appellants to blame the Respondent for non-payment since they refused him reasonable facilities which would have enabled him to pay in due time, and he said that this aspect of the case was covered by Section 68 of the Contracts Ordinance, which he quoted.

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4 L.J.
Eq. 52

p.148

14. The learned Judge went on to examine the validity of the Condition as to construction having been begun which, as he said, "was engrafted subsequently on the original contract." He then set out Section 56 of the Contracts Ordinance, and said that though Clause 10 of the Sale Agreement originally made time of the essence of the contract, so that the Appellants could have rescinded and forfeited the advance money on the 25th June 1956, they reaffirmed

G the contract by accepting payment of \$5,000 and
 thereby brought the case within Section 56 of
 the Contracts Ordinance. He then held that the
 Condition as to construction having been begun
 was a penal condition because it was no concern
 of the Appellants as its performance or non-per-
 H formance would not make them (as transferors of
 the land) a penny the richer or poorer; and he
 said that he was fortified in this view by the
 fact that non-performance of this condition
 would not in his opinion have afforded any de-
 I fence to an action for specific performance. He
 then summed up his views as to this condition
 as follows :-

p.150

"In the view that I have taken of
 "Condition 3 it follows therefore (1) that
 "the defendants themselves were in default
 "from 28th July in refusing to transfer the
 "8 lots upon request made to them by the
 A "plaintiff to do so; (2) that the plaintiff
 "had a valid excuse for not paying the
 "\$19,000 by reason of the defendants' letter
 "of 31st July; (3) that the defendants were
 "not on 1st September entitled either to res-
 B "cind the contract or to forfeit the
 "plaintiff's \$20,000; (4) that the defen-
 "dants' repudiation of the contract not
 "having been accepted by the plaintiff, the
 "contract was still subsisting, and (5) that
 C "when the plaintiff left the \$19,000 on
 "deposit with the defendants' own solicitors
 "from 19th September till its refund on 19th
 "November, the defendants themselves were in
 "breach by refusing to complete the necessary
 D "transfers."

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p.153

p.154

15. The learned Judge then went on to examine the effect of the transactions in which Liew was concerned. Having quoted Section 92 of the Evidence Ordinance, he pointed out that both parties (the Respondent and Liew) to the purported assignment were agreed that it was merely an assignment by way of security for §5,000 which had been repaid, and said "If "one party to the dispositive document does "not dispute the allegation of the other than "the written word did not express the true in- "tention of the parties, then, in my opinion, "Section 92 cannot possibly serve any purpose, "because its very raison d'etre has disappear- "ed. Accordingly, when Liew said in evidence "that he advanced §5,000 to the plaintiff and "obtained by way of security the assignment of "the contract between plaintiff and defendants, "such evidence cannot be excluded by Section 92" and he held that when Liew purported to assign the Sale Agreement to the Respondent Liew's only claim under the assignment to him was a claim "to an uncertain amount by way of interest which "I very much doubt he could have recovered" and that Liew could assign to the Appellants no better rights than he himself had. "Consequently" (he said) "if the defendants (in the words of "Counsel) chose to take out"an insurance policy" "by obtaining an assignment from Liew, such pur- "ported assignment is no answer to the plaintiff's "claim." He further held that it had been proved by extrinsic evidence of surrounding circumstances that the language of the assignment to Liew "in "truth had no relation whatever to existing facts.

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B The Defendants' managing director giving evi- RECORD
dence has said as follows: "At the time we
"took P4 we did not know that there was no
"value attached to it. It is worth money.
"It is good for my case. I was prepared to
"pay \$1,500 to buy evidence." In the light
C of this admission and of the surrounding cir-
cumstances it is impossible to hold that the
defendants took the assignment from Liew as
bona fide purchasers for value in good faith.
He accordingly held that by their purported
D purchase of Liew's rights the Appellants had
not succeeded in divesting the Respondent of
his right of action.

16. The learned Judge then examined the p.156
question of damages and came to the conclu-
E sion that \$8,450 was a proper sum for the
Appellants to pay by way of compensation.

17. By a formal Order of the Court of p.157
Appeal dated the 23rd April 1959 it was
ordered (i) that the Respondent's appeal be
F allowed with costs in the Court of Appeal
and below and the judgment of Sutherland J.
dated 1st May 1958 be set aside (ii) that the
Appellants should pay the Respondent \$20,000
with interest as therein mentioned and (iii)
G that the Respondent should recover \$8,450 as
damages for breach of contract.

18. By an Order of the Court of Appeal p.160
dated the 2nd November 1959 final leave was
granted to the Appellants to appeal to His
H Majesty the Yang di-Pertuan Agong against the
said judgment of the Court of Appeal.

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19. Copies of Sections 56 and 68 of the Contract Ordinance and of Section 92 of the Evidence Ordinance are annexed hereto.

20. The Respondent humbly submits that the judgment of the Court of Appeal was right and should be confirmed and that the Appellants' appeal therefrom should be dismissed for the following (among other) I

R E A S O N S

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(1) Because the Condition attempted to be imposed by the said letter bearing date July 7th 1956 to the effect that construction on the land comprised in the Sale Agreement must be commenced within one week of the date thereof was not binding on the Respondent. B

(2) Because the Condition similarly attempted to be imposed to the effect that construction must have begun on any land that was sought to be transferred was not binding on the Respondent. C

(3) Because when the Respondent had paid to the Appellants or their Solicitors the \$24,000 originally due on the 23rd June 1956 he was entitled to a transfer of eight of the lots comprised in the Sale Agreement irrespective of the Conditions referred to in Paragraphs (1) and (2) above. D

(4) Because the Respondent's only breach of the Sale Agreement was his failure to pay the instalment of \$24,000 on the due date and such breach was waived by the Appellants. E

(5) Because time was not of the essence of the Respondent's obligation to pay \$19,000 by July

F 31st 1956 and in any case the Appellants by their Solicitors letters waived any such stipulation.

G (6) Because the Respondent's failure to pay the said sum of \$19,000 was due to the Appellants' refusal to afford him reasonable facilities to enable him to make such payment, the Respondent is accordingly excused under Section 68 of the Contracts Ordinance from the consequences of such failure.

H (7) Because the Appellants committed a breach of the Sale Agreement from the 28th July 1956 by reason of their refusal to transfer 8 lots of the said land to the Respondent.

I (8) Because when the Respondent had paid the sum of \$5,000 towards the said instalment of \$24,000 and had deposited the balance of \$19,000 with the Appellants' Solicitors, the Appellants became obliged under the Sale Agreement to transfer 8 of the said lots to the Respondent or as he might direct and their failure to do so constituted a breach of the Sale Agreement.

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B (9) Because when he commenced these proceedings the Respondent was entitled to treat the Sale Agreement as at an end and to have the aggregate sum of \$20,000 which he had paid thereunder returned with interest.

(10) Because the Respondent has suffered damage to the amount of \$8,450 as the result of the Appellants failure to complete the Sale Agreement.

C (11) Because Sutherland J. was wrong in holding

that events happening after 1st September were irrelevant to be considered in ascertaining the rights of the parties.

(12) Because having regard to the fact that both parties to the transaction between Liew and the Respondent agreed that the purported assignment of the Sale Agreement was an assignment by way only of security for \$5,000 evidence to that effect was rightly admitted. D

(13) Because evidence of extrinsic circumstances surrounding the assignment of the Sale Agreement to Liew was rightly relied on by the Court of Appeal. E

(14) Because when he purported to assign the Sale Agreement to the Appellants Liew's only right (if any) thereunder was to recover a small sum of interest; and the Appellants by such assignment acquired only such rights as Liew possessed. F

(15) Because the judgment of the Court of Appeal is right and should be affirmed. G

J. A. WOLFE

THE SECTIONS OF THE CONTRACTS ORDINANCE REFERRED TO are as follows :-

SECTION 56

A (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

C (2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

D (3) If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non performance of the promise at the time agreed, unless at the time of such acceptance, he gives notice to the promisor of his intention to do so.

SECTION 68

F If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor

is excused by such neglect or refusal as to any non-performance caused thereby.

SECTION 92.

No evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms.

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APPEAL No.6 of 1960

IN THE PRIVY COUNCIL

ON APPEAL FROM
THE SUPREME COURT OF THE
FEDERATION OF MALAYA.

B E T W E E N

YEOW KIM PONG REALTY LIMITED

- and -

NG KIM PONG.

CASE FOR THE RESPONDENT

BULCRAIG & DAVIS,
Amberley House,
Norfolk Street,
W.C.2.

Agents for :-

LOVELACE & HASTINGS,
Kuala Lumpur,
Malaya.