3, 1969

No. 22 of 1967

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT SINGAPORE (APPELLATE JURISDICTION)

B E T W E E N :

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

1. HO TONG CHEONG
2. HO SAN CHEONG
3. HO KOK CHEONG

10 all carrying on business under the firm name of KWONG KUM SUN CHAN

Appellants (Defendants)

- and -

OVERSEA CHINESE BANKING CORPORATION LIMITED

Respondents (Plaintiffs)

C A S E FOR THE RESPONDENTS

1. In this case the trial Judge (Chua J.) in
20 the High Court of Singapore made an order against the appellants (defendants and hereinafter called "the defendants") for possession of premises controlled by the Control of Rent Ordinance (Cap.242) on the grounds that the respondent (plaintiff and hereinafter called "the plaintiff") had made out a case for possession under section 15 (1) (h) of that Ordinance. The Federal Court of Malaysia dismissed the defendants appeal. This appeal is brought by the
30 defendants with the leave of the Federal Court given by order made 22nd August 1967 (as amended by order made 25th September 1967.

Record pp.44,46

Record p.3

2. The defendants were monthly tenants of the plaintiff of premises at number 203, South Bridge Road, Singapore. In July 1961 they commenced and completed building operations particulars of which are set out in the Statement of Claim. They carried out this work without submitting a plan to the proper authority and thereby committed a breach of section 144 (7) of the Municipal Ordinance; and the work carried out constituted breaches of the Building Bye-laws. By virtue of section 144 (12) of the Municipal Ordinance which was in force at that time, namely in July 1961, the building operations commenced or carried out by the defendants were deemed to have been commenced or carried out by the plaintiff and he was liable therefor, and by section 144 (10) of that Ordinance the plaintiff thereby became liable to a fine in respect of the commencing and carrying out of those works. Having become aware of the facts, the plaintiff on or about 23rd September 1964 gave to the defendants a notice to quit expiring on 31st October 1964. On 1st March 1965 the plaintiff issued a writ, claiming possession of the premises on the grounds that

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Record p.3
Statement of
Claim para.4

> "The defendants have knowingly committed breaches of the Municipal Ordinance and the Building Bye-laws made thereunder affecting the premises which expose the plaintiff to penalty or fine".

3. Paragraph (h) of section 15 (1) of the Control of Rent Ordinance (Cap.242) provides

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> "15 (1) In the case of all premises such an order or judgment as is referred to in section 14 of this Ordinance may be made in any of the following cases, namely:-
>
> (h) where the tenant or any other person occupying the premises under him has knowingly committed a breach of any written law regulating any business carried on upon the premises or of any provision of the Municipal Ordinance or of any rule or bye-law made thereunder affecting the premises

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which exposes the landlord to any penalty, fine or forfeiture".

4. By their answers to interrogatories administered before the trial, and by admission made at the trial, the defendants conceded

Record p.66
Record p.17

(i) that in July 1961 the defendant carried out the building operations described in the Particulars of paragraph 4 of the Statement of Claim and shown in the photographs.

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Record pp.62, 63, 64, 65

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(ii) that the defendants carried out those works without submitting a plan to the proper authority;

(iii) that there was thereby a breach of section 144 (7) of the Municipal Ordinance;

(iv) that the work carried out constituted breaches of the Building Bye-laws;

(v) that the plaintiff as owner of the land was liable under section 144 (12) of the Municipal Ordinance for the breaches committed by the defendants.

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5. At the hearing the plaintiff proved in evidence

(a) Plan P.1 dated 2/11/60; signed by the third named appellant on behalf of the defendants as tenants and also signed on behalf of the plaintiff as owner. This bears to the south-east corner of the premises the notation

Record p.7

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"Unauthorised glass and corr. iron lean-to roof over the open area to be demolished".

(b) Plan P.2 dated 6/4/61; this is an amendment to plan P.1, but like P.1 it shows an unauthorised glass and corrugated iron lean-to roof, over the open area, to be demolished.

Record p.9

(c) <u>Plan P.3</u>:- a plan prepared by the plaintiff's architect for the purpose of showing, by appropriate colouring, the extent to which the premises on and after 4th December 1963 differed from the approved plans P.1 and P.2.

6. On P.1 and P.2 there is a minute stating

"Work completed as per plan on 11/8/61"

purporting to be signed by the Chief Building Surveyor. 10

7. The above evidence was not challenged by the defendants.

Record p.10

8. The evidence of the plaintiff's architect was that on and after 4th December 1963 the roof in question was not there and that the open area in question was covered by a new floor (at first floor level) above which was a ceiling and then a roof. The witness further said that apart from the fact that a new section of building had been constructed over the open 20

Record p.10

area, the nature of the construction was such as to constitute erection of a building as defined in section 144 (11) and to contravene various Building Bye-laws.

9. There was no cross examination of this witness.

10. The defendants called no evidence.

Record p.13

11. The contentions for the defendants were

(a) a landlord is not exposed to any penalty etc. unless a complaint is 30 made (meaning a complaint laid under the Ordinance), and in this case there has never been a complaint;

(b) by section 392 of the Municipal Ordinance no person is liable to any fine or penalty unless a complaint respecting the offence was made within 12 months; this period of 12 months had expired without a complaint being made;

(c) the Municipal Ordinance was repealed by the Local Government Integration Ordinance which came into force 1st September 1963, and from that date the person primarily liable where work is carried out in contravention of the Ordinance is the person who carried out the work, not the owner;

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(d) hence the plaintiff was never exposed to any penalty fine or forfeiture;

(e) in deciding whether the plaintiff was entitled to possession under section 15 (1) (h) the Court should look at the facts existing either at the date when the tenancy was determined, or at the date when the writ was issued; and on each of these dates the plaintiff was not exposed to any penanty fine or forfeiture;

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(f) it had not been proved, and there was evidence, that the defendants knew that they were committing a breach of the Municipal Ordinance at the time of their doing so.

Record pp.14, 20

12. In a reserved judgment delivered 24th November 1966 Chua J.

Record p.16

(1) found as a fact that in July 1961 the defendants carried out building operations over the open area at the back of the premises knowing full well that a covering over the open area was illegal;

Record pp.21, 22

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Record p.21

(2) held that "knowingly" qualifies the nature of the act and it merely means that a defendant knew what he was doing, that is he did it consciously or intentionally;

and

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(3) held that ".... immediately a tenant commits a breach of any provision of the

Record p.20

Municipal Ordinance or any Bye-law made thereunder affecting the premises he removes the fetter on the landlords right to recover possession and he loses the protection of the Control of Rent Ordinance and the landlords right for action for recovery of possession arises".

13. The judgment of the Federal Court of Malaysia was given on 6th April 1967. In the leading judgment Buttrose J. said that he was unable to find any reason for disturbing the trial Judge's finding of fact with which he was in complete agreement and that in any event and on any of the three different interpretations of the word "knowingly" contained in the judgments Whilton J. in Sarah Cashin -v- Goh Kah Seng 1955 MLJ 52, Ambrose J. in Nathan Brothers -v- Tong Nam Contractors Limited 1959 MLJ 240 and Chua J. in the present case, the Plaintiff had succeeded in making out a case. He also said:-

Record p.31
Record p.32

Record p.32

"Before leaving this aspect of the case I think I should refer to the fact that the defendants elected to call no evidence at the trial. In these circumstances the Trial Judge was entitled to consider the effect of section 107 of the Evidence Ordinance which provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The fact as to whether the defendants knowingly committed the breaches complained of was surely something especially within their own knowledge. Furthermore there was the presumption provided by section 115 (g) of the same Ordinance that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it".

14. Section 107 of the Evidence Ordinance provides:-

"When any fact is especially within the knowledge of any person the burden of proving that fact is upon him".

Section 115 (g) of the Evidence Ordinance provides:-

"that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it".

15. Buttrose J. also cited the passage in the judgment of Chua J. set out in paragraph 12 (3) above and said

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"Support for this view, with which I agree, is found in Chung Lai Heng v. Murugappa Chettiar 1952 M.L.J. 232 and Ang Ah Bak v. S.E.A.C. Co., 1966 2 M.L.J. 45 which was upheld by the Federal Court whose judgment has not yet been reported".

Record p.34

This last mentioned judgment has since been reported in 1968 M.L.J. 170.

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16. The other members of the Federal Court, namely Wee Chong Jin C.J. and Tan Ah Tah J., agreed with the judgment of Buttrose J.

Record p.35

17. On behalf of the respondents it will be contended that this appeal should be dismissed with costs for the following and other

R E A S O N S

(1) BECAUSE if the requirement imported into paragraph (h) of section 15 (1) by the word "knowingly" is or includes a requirement that the defendants when they committed the act in question knew it to be contrary to law, the trial judge found as a fact that the defendants so knew when they caused the open area to be covered in, and that finding was supported by the evidence before him.

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(2) In the alternative, BECAUSE the judge was entitled to find that the defendants so knew by reason of section 107 of the Evidence Ordinance (Cap...) and further or alternatively

by reason of section 115 (g) of that Ordinance.

(3) In the further alternative, BECAUSE the requirement imported into paragraph (h) of section 15 (1) by the word "knowingly" is satisfied if the act which constitutes a breach was committed consciously or intentionally, whether or not it was known to be contrary to law.

(4) BECAUSE the requirement imported into paragraph (h) by the words "which exposes the landlord to any penalty fine or forfeiture" merely qualifies the breaches to which paragraph (h) applies, and is satisfied if a breach, at the time when it was committed, was one which so exposed the landlord. 10

LIONEL A. BLUNDELL.

RONALD BERNSTEIN.

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LIMITED

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C A S E FOR THE RESPONDENTS

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