

31,1980

No. 24 of 1979

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

DAIMAN DEVELOPMENT SDN. BHD. Appellants
(Defendants)

- and -

MATHEW LUI CHIN TECK Respondent
(Plaintiff)

AND B E T W E E N :

DAIMAN DEVELOPMENT SDN. BHD. Appellants
(Defendants)

- and -

LOH SEW WEE Respondent
(Plaintiff)

(CONSOLIDATED BY ORDER DATED 4TH FEBRUARY 1979)

CASE FOR THE RESPONDENT

COWARD CHANCE,
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Aldermanbury Square,
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Solicitors for the
Appellants

CHARLES RUSSELL & CO.
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Solicitors for the
Respondents

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20 CASE FOR THE RESPONDENT

1. This is an appeal from the judgment of the Federal Court of Malaysia (Suffian L.P., Gill C.J., Ibrahim Manan J) dated the 16th day of July 1978 dismissing with costs the Appellant company's appeal from the judgment of Syed Othman, J. in the High Court in Malaya at Johore Bahru dated the 15th day of August 1977, whereby it was ordered that the agreement entered into between the parties hereto on the 1st day of October 1972 in respect of all that piece of land situated in Taman Sri Tebrau, in the District of Johore Bahru, in the State of Johore and known as private Lot No. 949 together with a single storey semi-detached house erected thereon

p.50,1.33.
p.52,1.9
p.38,11.20-34
p.39,11.22-35

(hereinafter referred to as "the property") be specifically performed and carried into execution for and at the price of Dollars Twenty six thousand (\$26,000.00) only.

- p.33,11.24-28 2. The question for decision involves the construction and interpretation of an agreement entered into between the parties hereto on the 1st day of October 1972, the terms of which are contained in the booking proforma (hereinafter referred to as "the proforma") dated the same day and drawn by the Appellant company. 10
- p.62,1.1-
p.63,1.36
3. The point raised by this appeal is whether the proforma discloses a mere agreement to agree and subject to contract or a firm contract.
4. This action is brought by the Respondent as Plaintiff against the Appellant company, a licensed housing developer as Defendant for specific performance of the agreement dated the 1st day of October 1972 entered into between them. The Respondent's statement of claim was dated the 16th day of October 1975 and the Appellant company's statement of defence was dated the 6th day of November 1975. 20
- p.4,1.1-
p.5,1.38.
p.6,1.1-
p.7,1.30.
5. It is undisputed that on the agreement date, the 1st day of October 1972,
- p.6,11.37-40 (i) The Appellant company required that the Respondent pay a sum of \$700.00 as a booking fee.
p.23,11.9,10.
- p.6,11.37-40. (ii) The booking fee was paid and the Appellant company acknowledged receipt of the same. 30
p.23,11.10,11.
- p.6,1.40 (iii) The proforma drawn by the Appellant company was signed by the Respondent and delivered to the Appellant company, the Respondent retaining a copy of it.
p.23,1.9
- p.65,1.1- 6. On or about the 30th day of May, 1975, the Respondent received a notice from the Appellant company which stated inter alia that
p.66,1.9
- ".... In view of the amendment and additions to the building plans and the increase of material and construction costs, the adjusted price for the said property is \$35,100.00" 40
- p.66,1.10- The Respondent refused to accept the Appellant

	company's unilateral adjustment of the price to \$35,100.00 and the Appellant company refused to sell the property to the Respondent at the originally agreed price of \$26,000.00 as a result of which this action arose.	p.77,1.20
10	7. The Appellant company in paragraph 1 of its Statement of defence admitted having agreed to sell to the Respondent the property at the price of \$26,000.00 and vaguely raised its first line of defence to the Respondent's claim by alleging in paragraph 1 of its statement of defence that	p.6,11.12-15
	"....It was understood between the parties that the bookings made by the intended purchasers were subject to contract...."	p.6,11.25-28.
	and when ordered to elaborate, elaborated in the further and better particulars that the understanding was an outcome of paragraph 1 of the proforma.	p.8,11.31-42. p.10,11.17-38.
20	In paragraph 3 of its statement of defence the Appellant company vaguely raised yet its second line of defence by alleging that	p.6,1.41- p.7,1.2.
	"....the Plaintiff permitted the Defendants to make the necessary alterations which may be required from time to time and agreed to pay for the same...."	
30	and again when ordered to elaborate, elaborated in the further and better particulars that it was implied from paragraph 2 of the proforma further alleging that the Respondent would pay "for whatever conditions the authorities may impose, in the form of alterations"	p.8,1.43- p.9,1.1 p.11,11.16-31.
	8. The crux of the action is hinged on the construction of the proforma.	p.33,11.24-28.
	9. Syed Othman J. rejected the defences put forth by the Appellant company and found against the Appellant company.	p.34,1.54- p.35,1.9 p.35,11.10-20. p.36,11.24-53.
40	10. Evidence was given by the Respondent that before he agreed to purchase the property he inquired from the Appellant company as to whether the price was definite at \$26,000.00 and upon confirmation that it was fixed at \$26,000.00 agreed to the terms of the proforma and signed it. Further evidence was given that he was at all	p.23,11.19-21.

p.23,11.41-43 relevant times willing to sign the formal agreement of sale prepared by the Appellant company's solicitors, without requiring any amendments or alterations to the same.

p.65,1.8-
p.77,1.20 Evidence for the Respondent also showed that at all relevant times prior to the filing of the Respondent's action and to the Appellant company's filing of its statement of defence the only point put into issue by the Appellant company was the purchase price. The terms and conditions or what would constitute the terms and conditions of the formal agreement of sale to be prepared by the Appellant company's solicitors and to be signed by the Respondent pursuant to paragraph 1 of the proforma were never in issue. It is evident from the conduct of the parties that from the time that they entered into the agreement of the 1st day of October 1972 and up to the issue of the Respondent's action that, the terms and conditions of the formal agreement of sale to be prepared by the Appellant company's solicitors and to be executed by the parties hereto shall be accepted by the Respondent without question and was in fact never questioned by the Respondent. 10 20

p.24,1.40 11. Evidence for the Appellant company was given by one, Ang Thian Poh, the manager of the Appellant company who described the progress of the housing development scheme carried out by his company stating without any corroborating documentary evidence (or otherwise) that the Appellant company had to comply with a lot of requirements imposed by the authorities and that by October 1974 when the sub-division was approved the costs of building materials had also gone up. He said that the Appellant company had to increase the price of the land. He admitted that if the Respondent had agreed to the Appellant company's unilateral increase of the purchase price from \$26,000.00 to \$35,100.00 the property could have been sold to him. 30 40

p.25,11.35-36

p.26,11.10-11

p.26,11.29-31

12. It is evident that the Appellant company knew that it had no right to withdraw from the agreement of the 1st day of October 1972 to wit, that the sale of the property was not subject to contract for

p.71,11.35-38 (a) on the 24th day of June 1975, it had suggested that the Respondent should either withdraw the booking or transfer it to

someone else;

(b) it did not take the step of cancelling the said agreement and refunding the booking fee of \$700.00 to the Respondent within the said seven (7) days stated in its letter of the 23rd day of August 1975 instant or at all; and

p.74, ll.31-33

(c) on the 6th day of September 1975, it wrote to the Respondent's then solicitors, M/s Arthur Lee & Co., and gave notice that if the Respondent does not pay the 1st payment of \$2,810.00 as required by it within seven (7) days from the date thereof and sign the formal agreement of sale it would charge the Respondent interest thereon together with interest on all further payments if not paid at the rate of 10% per annum to be calculated from day to day until date of payment as provided under the terms of the Housing Developers (Control & Licensing) Rules 1970.

p.76, l.1 -
p.77, l.20.

13. On the 15th day of August 1977, Syed Othman J gave judgment for the Respondent and made an order for specific performance and costs to the Respondent. Syed Othman J gave the following among other reasons for his judgment. He held that on a proper construction of the proforma there was a binding contract of sale between the parties and save for the provision of adjustment in price at \$2.00 per sq. ft., should the document of title show a difference in measurement with the agreed basic land area of 2,800 sq. ft., there was no provision whereby the developer can make any adjustment of the purchase price. He said that the provisions of rule 10 of the Housing Developers (Control and Licensing) Rules, 1970 are quite clear. He added :

p.37, ll.13-15.

p.33, ll.47-52

p.34, ll.23-30

"The intention of sub-rule (1) is that the purchase price must be stated at the time of booking. By sub-rule (3) the booking fee is to be treated as an option or right to purchase the property at, in my view, the purchase price stated."

p.33, ll.47-52.

In reinforcement of his view that the Appellant company cannot make any adjustment of the purchase price save and except when there is a difference of measurement of the land area, he cited rule 12(1) (g) of the Housing Developers (Control and

p.34, ll.5-30.

- p.6,1.41 - Licensing) Rules 1970. On the Appellant company's
p.7,1.2. allegation that "the Plaintiff (Respondent)
permitted the Defendant (Appellant company) to
make the necessary alterations which may be
required from time to time and agreed to pay for
the same....". Syed Othman J held that no
evidence is adduced that the Respondent gave
permission as pleaded. He added :
- p.35,11.19,20.
- p.35,11.28-36. "Looking at the proforma, I cannot see any
single phrase which gives the Defendants 10
the right to alter the price of the property
in the event of any change in the house plan.
Clause 2 of the proforma gives the right to
the Plaintiff to cancel the booking in the
event of major alterations and amendments to
the layout plan. It does not give the
Defendants such right."
- p.35,11.46-48. He also held that he can find no evidence that
there was in fact any major alteration to the
layout plan. Even without considering the rules 20
p.36,1.54 - of the Housing Developers (Control and Licensing)
p.37,1.5, Rules 1970, Syed Othman J, felt inclined to think
that the terms and conditions of the sale agreement
mentioned in paragraph 1 of the proforma would only
relate to consequential matters affecting the sale,
but not the purchase price and concluded by saying:
- p.37,1.6-1.11. "Considering the case as a whole, my strong
feelings are that the Defendants have
increased the price of the property to be
sold for no other reason but that there was 30
a general increase in the price of property
in Johore Bahru."
- p.40,1.19 - 14. The Appellant company appealed to the Federal
p.41,1.32. Court of Malaysia (Suffian L.P., Gill C.J.,
p.50,1.3 - Ibrahim Manan J.). On the 16th day of July 1978,
p.51,1.6. the Federal Court gave judgment dismissing the
Appellant company's appeal with costs delivering
their grounds of judgment on the 31st day of July
1978. The judgment of the Court was delivered by
Suffian L.P., who said that the proforma was a 40
p .57,1.25. firm contract. He added :
- p.57,11.27-39. "True, the Plaintiff was required to sign an
agreement of sale to be prepared by the
developers' solicitors and subject to the
terms and conditions therein, but in fact
the developers never showed the Plaintiff the
draft of any agreement. All the developers

did was to announce unilaterally an increase in price for reasons which could not in our view, affect the price to be paid by the Plaintiff. The developers are bound by the Housing Developers (Control and Licensing) Rules 1970, and only details may be inserted into the further agreement."

p.57,1.39

10 The Court held that the proforma allowed the price to be varied in two ways, first, under condition 2, if the price was changed because of alterations and amendments to the developers' layout and building plans and specifications required "by the authorities". In such an event it gave the right to the Respondent to withdraw from the contract but "it did not give the developers (Appellant company) the right to increase unilaterally the price of the house as a result of these alterations and amendment." Secondly, under condition 4 the Appellant company had the right to increase the price should the land area turn out to be bigger than the basic agreed area of 2,800 sq. ft. Apart from the afore-mentioned, their Lordship held the view that the Appellant company could not in any way change the price stated in the proforma.

p.57,1.46 -
p.58,1.10

p.58,11.12-15

p.58,11.16-18

15. On the 4th day of February 1979, the Federal Court of Malaysia made an order granting leave to appeal to His Majesty the Yang di Pertuan Agong.

p.60,11.1-32

16. The Respondent submits that this appeal should be dismissed with costs for the following amongst other

R E A S O N S

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- 40
- (1) BECAUSE, as the Courts below have rightly held, upon a true construction of the proforma there is a binding contract between the parties.
 - (2) BECAUSE evidence have been adduced that both parties were at consensus as to the terms and binding effect of the proforma.
 - (3) BECAUSE the evidence adduced by the Appellant company does not support the defences pleaded by it.
 - (4) BECAUSE, on a true construction of Rules 10, 12,(1) (g) and 12 (1) (i) of the Housing Developers (Control and Licensing) Rules 1970, the Appellant company is bound to sell the

said property to the Respondent at the agreed original price of \$26,000.00 and save for the allowance of a price adjustment as a result of the land area being different, is not entitled to adjust the price at all.

- (5) BECAUSE, to hold that the Appellant company cannot unilaterally adjust the price would give full effect to the Housing Developers (Control & Licensing) Rules 1970, (particularly rules 10 & 12 (1) (i) rules made under the Housing Developers (Control & Licensing) Act, 1966) an Act with the objective of controlling developers like the Appellant company and protecting bona fide purchasers like the Respondent and a decision for the Appellant Company would defeat the object and be contrary to public policy. 10
- (6) BECAUSE the judgments of both the learned trial judge and the learned judges of the Federal Court were right. 20

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High Court in Malaya

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