33,1980

No. 7 of 1979

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L
FROM THE COURT OF APPEAL IN SINGAPORE

B E T W E E N

CHIN AH LOY (Plaintiff) — Appellant

- and -

ATTORNEY-GENERAL (Defendant) — Respondent

CASE FOR THE APPELLANT

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1. This is an appeal from a judgment dated 24th November 1978 of the Court of Appeal of the Republic of Singapore (Wee Chong Jin, Chief Justice, Mr. Justice T. Kulasekaram and Mr. Justice D.C. D'Cotta) which allowed the Respondent's appeal from a judgment dated 17th March 1978 of the High Court of the Republic of Singapore (Mr. Justice Choor Singh) whereby it was ordered that the Government of Singapore (hereinafter referred to as "the Government") should pay damages to the Appellant in the sum of Singapore $604,890.00. p.59-60 p.43

2. The questions for decision in this appeal are as follows :

(a) whether, the Appellant having exercised his option to extend or renew his tenancy of shop No. 22 at Singapore International Airport for a further period of three years, upon the proper construction of an agreement made between the Appellant and the Government which the Appellant contends is contained in (i) a tender document reference number DCA/ADM/52/60/Pt.V/V111(G.1.); (ii) an exchange of letters dated 11th January, 24th and 27th June 1972 between the Appellant and the Director of Civil Aviation p.62-69 p.71 p.77-79

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p. 80-88 and (iii) a written tenancy agreement dated 2nd August 1972, or alternatively by a collateral contract made between the Appellant and the Government, the Government bound itself not to exercise or waived any right which it might have to determine the Appellant's tenancy of the said shop, pursuant to Clause 4(1) of the said tenancy agreement, before the end of the extended or new term of the tenancy provided that the Appellant carefully observed the rules and regulations of the said tenancy agreement.

(b) if, contrary to the contentions of the Appellant, the Government was entitled to determine his said tenancy before the end of the extended or new term of the tenancy by reason of the provisions of Clause 4(1) of the said tenancy agreement, whether a notice to quit given to the Appellant

p. 96 on 31st January 1975 the day before the commencement of the extended or new term of his tenancy, and taking effect on 30th April 1975 was a valid notice to quit.

3. In his judgment Mr. Justice Choor Singh found in

p. 40-43 favour of the Appellant and held that the Government had

p. 41 bound itself not to invoke the provisions of Clause 4(1) of the said tenancy agreement so as prematurely to determine the Appellant's tenancy, both during the initial term and also during the extended or renewed term thereof. He

p. 41 further held that the notice to quit was served on 31st January 1975, before the extended or new term of the tenancy had commenced, and at a time when the Government had no valid ground upon which to terminate the Appellant's said tenancy. He further held that the Appellant was

p. 42-43 entitled to recover by way of damages all the loss of profits which would have been made by the partnership between his brother and himself, having due regard to the competition provided by another shop near to the Appellant's shop. He

p. 43 awarded Singapore $604,890.00 damages.

4. The Court of Appeal (Chief Justice Wee Chong Jin, Mr. Justice T. Kulasekaram and Mr. Justice D.C.

p.48-59 D'Cotta) in a single written judgment held that the Government had given to the Appellant a warranty collateral to the

p.54 said tenancy agreement which, upon its proper construction,

p.54 ceased to bind the Government upon the expiry of the initial term of three years of the said tenancy. Accordingly, the Government was entitled pursuant to Clause 4(1) of the

p.55 tenancy agreement to terminate the Appellant's tenancy by three months' written notice. The Court of Appeal further held that the option, contained in a letter dated 11th January

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1972 from the Director of Civil Aviation to the Appellant, formed part of the said tenancy agreement and that, the option having been exercised by the Appellant by letter dated 30th October 1974 the term of the existing tenancy was extended from three years to six years. The exercise of the option did not give rise to a new tenancy commencing upon the expiration of the first three year term. Accordingly, even though the notice to quit was served on the day before the commencement of the period of the extension of the said term, the notice to quit was valid. Alternatively, the Court of Appeal held that, if the effect of the exercise of the option by the Appellant was to give rise to a new tenancy commencing on 1st February 1975, the notice to quit was valid notwithstanding that it was given before the commencement of the new tenancy.

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5. The principal facts giving rise to this appeal are set out in the judgment of the Court of Appeal and may be summarised as follows. On 28th October 1971, the Government invited tenders for three shops in the duty-free area of Singapore Airport. The invitation to tender inter alia provided that the shops would operate for an initial period of 3 years with the option of a further extension of 3 years subject to the Director of Civil Aviation being satisfied with the quality of service provided and the prices charged. The Appellant acting on behalf of his brother and himself submitted a tender in respect of Shop No. 22 on 30th November 1971 which was accepted by letter dated 11th January 1972 from the Director of Civil Aviation which inter alia provided,

p.48 and 62-69

p.48-49 and 70

p.49 and 71

" ...

3. Your tenancy will commence on the 1st February 1972 for a period of 3 years with an option for extension of 3 years subject to the (Director of Civil Aviation) being satisfied with the quality of the services provided and prices charged ...

6. Would you please let me have your written confirmation by the 20th January 1972 that you accept appointment as the operator and that you will operate the duty free shop for 3 years effective from 1st February 1972 ... "

6. By letter dated 19th January 1972, the Appellant

p.49 and 71-72

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confirmed his acceptance of the appointment, subject to two matters (he sought to postpone the date of commencement of the tenancy and he requested sole selling rights within the arrival hall of the airport), but by letter dated
p. 49 and 75 8th February 1972 the Government rejected the Appellant's requests and the Appellant in partnership with his brother entered into possession of the said shop upon the basis of
p. 49 a tenancy commencing on 1st February 1972 and commenced to trade.

7. On 3rd May 1972 the Director of Civil Aviation sent to the Appellant copies of a tenancy agreement for his signa-
p. 49 and 76 ture and return. The term therein expressed was for a period of 3 years from 1st February 1972 "determinable as hereinafter provided" and by Clause 4 thereof it was inter alia provided :

> "4. Provided always and it is hereby agreed as follows :-
>
> (i) Notwithstanding anything herein contained either party may terminate the tenancy at any time by giving to the other three (3) months' previous notice in writing".

p. 50 and 77-78 On 24th June 1972, the Appellant on behalf of the said partnership replied inter alia as follows :

> " ... we have to invite your attention to the following observations :
>
> (1) Clause 4(1) of the tenancy agreement : The effect of the clause is that we will only have a three months tenancy agreement although on the face of it, it is stated three years. With such a clause, we will not have the confidence to lavish money in promoting this business to our mutual benefits, and beautifying our shop, the object being to turn it into an airport show piece. We have the apprehension that we will not be able to enjoy a secured term of 3 years, and that others may reap the fruit of our labour.
>
> On this clause, we hope that you would reconsider it.
>
> What we want is to have a secured term of 3 years

provided we have not committed any serious breach of the tenancy agreement ...

(2) In your letter DCA/1/72 dated 11.1.72, you have given us an option for extension of 3 years subject to certain conditions at the expiry of the present term. We do not, however, find this in the tenancy agreement. Would it be an oversight? Please advise ... "

8. The Director of Civil Aviation replied by letter dated 27th June 1972 which inter alia provided as follows : p. 51 and 79

" ...
We regret to advise that we are unable to reconsider Clause 4(1) of the Tenancy Agreement. Please note that this clause is a standard one applicable and inserted into all our Agreements. However, you may be re-assured that, if you observe carefully the rules and regulations of the Tenancy Agreement, your tenancy may be considered as secure for the period in question. The option for the extension of your tenancy as contained in my letter DCA/1/72 dated 11.1.72 is not repeated in the Agreement as this letter may be taken as a part of your Tenancy Agreement with us ... "

It was uncontested that, in reliance upon the assurances given in that letter, the tenancy agreement was signed on behalf of the Appellant and returned to the Director of Civil Aviation. p. 28 and 31-32

9. By letter dated 30th October 1974, the Appellant on behalf of the partnership exercised the said option. However, by letter dated 18th January 1975, the Director of Civil Aviation purported to ignore the exercise of that option and notified the Appellant that his tenancy would expire on 31st January 1975. By letter dated 25th January 1975, Messrs. Lee and Co., the solicitors of the Appellant complained to the Director of Civil Aviation and drew his attention to the option and to the fact that it had been exercised by the Appellant. p. 52 and 89-90 p. 93 p. 94-95

10. In reply to that letter the Permanent Secretary to the Ministry of Communications, by letter dated 31st January 1975 and delivered by hand to the Appellant, confirmed that the Government had granted to the Appellant an extension p. 52 and 107

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of the tenancy agreement with effect from 1st February 1975 on the same terms and conditions as the tenancy agreement, but in the same letter gave the Appellant three months' notice pursuant to Clause 4(1) of the tenancy agreement to terminate the tenancy on 30th April 1975.

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11. Before that date, another shop, operated by a trade competitor, Singapore Airport Duty-Free Emporium (Private) Limited, had been constructed in the same part of Singapore Airport and in front of the Appellant's shop. At

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midnight on 30th April 1975, the Government took possession of the Appellant's shop and evicted him, his brother and their employees therefrom.

12. The Appellant commenced these proceedings against

p. 1-6

the Government on 2nd May 1975. It is material to note at the trial the Respondent did not pursue its allegations that

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the Appellant was in breach of any of the provisions of the said tenancy agreement so as to be entitled to terminate the said tenancy otherwise than by a notice given under Clause 4(1) of the said tenancy agreement.

p. 40-41

13. Mr. Justice Choor Singh held that the evidence clearly showed that the Government had committed a breach of the tenancy agreement when it terminated the Appellant's tenancy. He accepted the Appellant's evidence that, but for the assurance given by the Director of Civil Aviation in his letter dated 27th June 1975 that so long as the Appellant carefully observed the rules and regulations of the tenancy agreement he could consider his tenancy as secure for the period in question, he would not have entered into the agreement. He further held that, the option having been exercised by the Appellant on 30th October 1974, the Government could terminate the new or extended term of the tenancy only when they found that the Appellant had committed a breach of the provisions of the tenancy agreement. Since the Appellant was not, upon the

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undisputed evidence, in breach of the tenancy agreement, the Government had no valid reason to terminate the tenancy and dispossess the Appellant.

14. Mr. Justice Choor Singh further held that the Appel-

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lant had brought his claim as lessee and that the arrangements which he had made with regard to the sharing of his profits with his brother by operating in partnership together were irrelevant to the question of liability to pay damages. The learned Judge then assessed damages on the basis of

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the projected profits which the Appellant's shop would have made if the tenancy had continued until January 1978, taking into account the competition from the other said shop. The learned Judge awarded damages of Singapore $604,890.00. p.43

15. Upon appeal, after reviewing the correspondence between the parties, the Court of Appeal held that upon its proper construction the phrase "period in question" in the Director of Civil Aviation's letter dated 27th June 1972 meant and must have been understood by the parties to mean only the initial term of the tenancy. Further, the Court of Appeal held that the assurance given by the Director of Aviation in his letter dated 27th June 1972 was a collateral warranty, not a term of the tenancy agreement itself, which ceased to be binding upon the Government after the expiry of the initial three-year term of the tenancy. The Court of Appeal further held that the proper construction of the correspondence prior to the signing of the tenancy agreement was that the Appellant was seeking to have a secured term of three years and that he obtained from the Director of Civil Aviation a binding promise that his tenancy would be considered as secure for that period only. p.48-53 p.53-54 p.54 p.54

16. The Court of Appeal further held that there was a clear agreement that the Appellant should have the option to extend the term of his tenancy for a period of three years and that, upon the exercise of that option by the Appellant by his letter dated 30th October 1974, the tenancy was extended from a term of three years to a term of six years; no new tenancy was created. Accordingly, the notice to quit contained in the Government's letter dated 31st January 1975 was a valid and effective notice terminating the tenancy on 30th April 1975. p.54-55 p.55

17. In the alternative, the Court of Appeal held that if the effect of the exercise of the Appellant's option was to create a new or second tenancy commencing on 1st February 1975, the notice to quit was valid notwithstanding that it was given before the commencement of the tenancy. In so doing, the Court of Appeal distinguished Lower v Sorrell (1963) 1 Q.B. 959, a decision of the Court of Appeal (Lord Justice Ormrod, Lord Justice Donovan and Lord Justice Pearson), on the ground that : p.55-59 p.55-57 and p.58

(1) the decision applied only to tenancies which

were subject to the provisions of the Agricultural Holdings Act 1948 and it could not be applied to the Appellant's tenancy, and

(2) it was to be implied from section 23(1) of the Agricultural Holdings Act 1948 that in the case of agricultural tenancies a notice to quit had to be given in a year of the tenancy. Further, the Court
p. 57-58 of Appeal held, the Appellant had been given the enjoyment of all his rights under the contract between the parties in substance and in fact and that the validity of the notice to quit should not, in the words of Lindley L.J. in Sidebotham v Holland (1895) 1 Q.B. 378, "turn upon the splitting of a straw". 10

Accordingly, the notice to quit was valid.

18. The Appellant respectfully submits that this appeal should be allowed and that the judgment of Mr. Justice Choor Singh should be upheld. It is firstly respectfully submitted that upon a proper construction of the principal contract between the Appellant and the Government, the said contract was contained in (i) the said tender document, 20 (ii) the exchange of letters and in particular the letters dated 11th January, 24th and 27th June 1972 passing between the Director of Civil Aviation and the Appellant and (iii) the said tenancy agreement. Accordingly, it is submitted that the assurance contained in the Director of Civil Aviation's letter dated 27th June 1972 was a term of that contract (as the learned Judge held). Alternatively, it is submitted that the assurance contained in the said letter was a contractual warranty collateral to the principal contract between the Appellant and the Government 30 (as the Court of Appeal held).

19. It is respectfully submitted that the letters dated 11th January and 27th June 1972 fall to be read together and that, upon a proper construction of the contents of both of them, the Government did not limit the assurance for security which it gave to the Appellant to the first three years only; it was not so understood by the Appellant and his brother. It is submitted that, having regard to the terms in which the option was expressed both in the letter from the Director of Civil Aviation dated 11th January 40 1972 and in the letter dated 27th June 1972, the assurance of security was to have effect during the whole term of the tenancy and, if the Appellant exercised his option, the extended term of the tenancy or the new term of his tenancy.

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20. In so far as the wording of the option and the assurance of security may give rise to difficulties of construction, it is respectfully submitted that the words thereof should be construed contra proferentem.

21. It is further respectfully submitted that the construction adopted by the Court of Appeal fails to pay proper regard to the fact that the option was to be in respect of a period of three years, subject to the Director of Civil Aviation being satisfied with the quality of services provided and prices charged, not an option for such a term, being not more than 3 years and not less than 3 months, as either party might decide upon.

22. With regard to the service of the notice to quit it is respectfully submitted that the effect of the exercise of the option was to bring into being either an extension of the existing term of the tenancy or a new term of the tenancy commencing on 1st February 1975. If the latter contention is correct, it is submitted that the notice to quit was invalid on the ground that it was served before the commencement of the term.

23. The Appellant respectfully submits that Lower v Sorrell opp. cit. was correctly decided and that the Singapore Court of Appeal was wrong to distinguish it from the present case. Whilst Lord Justice Pearson only relied upon the wording of section 23(1) of the Agricultural Holdings Act 1948 (at pages 978-9) to hold that the notice to quit should be given in a year of the tenancy, both Lord Justice Ormrod and (at page 968) and Lord Justice Donovan (at page 975) both held that this principle was generally applicable, since a person cannot give a valid notice to quit before he became a landlord and the recipient of the notice his tenant or (per Donovan L.J.) legal relations exist between them which otherwise permit such a notice. It is respectfully submitted that Lower v Sorrell is not confined to notices to quit periodic agricultural tenancies only.

(1963) 1 Q.B. 959

24. Further in so far as the Appellant expected and believed that by the exercise of his option he would be entitled to a further term of three years, it is respectfully submitted that the Singapore Court of Appeal was wrong to hold that "in substance and in fact the tenant has been given the enjoyment of all his rights under the contract between the parties".

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25. Whilst the Appellant accepts that the validity of a notice to quit should not necessarily be made to "turn on the splitting of a straw", it is respectfully submitted that this dictum of Lord Justice Lindley in Sidebotham v Holland (1895) 1 Q.B. 378 at page 383 should not be taken from its proper context. In that case, the Court of Appeal was dealing with "hypercriticisms" of the wording of a notice to quit. The Respondent sought to assert that, contrary to the authorities, a notice to quit which was expressed to take effect on the anniversary of the commencement of the tenancy was invalid; it was argued that it had to expire on the day before. Having held that such a notice to quit was valid, Lord Justice Lindley held that he had to look at the practicalities and that any attempt to seek to distinguish between the words "at", "on" and "from" in the context of notices to quit was too subtle for practical use. However, it is respectfully submitted, the law relating to notices to quit is technical and technicalities are too deeply rooted in the common law to be ignored. It is significant to notice that in the judgment of Lord Justice A.L. Smith there was no doubt that a notice to quit taking effect on the day after the anniversary of the date of the commencement of a tenancy was a bad notice.

(1895) 1 Q.B. 383

(1895) 1 Q.B. 384

(1895) 1 Q.B. 388-0

26. It is respectfully submitted that the rationes in Lower v Sorrell referred to in paragraph 23 hereof are correct and are not mere "splitting of straws". It is further submitted that it is a matter of substance for the Court to consider whether or not the notice to quit has been served upon a date when it can be validly served and that in each case there may be a time when such notices can and cannot be validly served. It is therefore submitted that, in the absence of some express term of the agreement between the parties, it is right that a notice to quit served before the commencement of the term to which it relates should be held to be invalid.

27. The quantum of damages has been agreed subject to liability.

28. The Appellant respectfully submits that the judgment of the Court of Appeal is wrong and ought to be set aside and this appeal ought to be allowed with costs for the following (among other)

R E A S O N S

1. BECAUSE, on the proper construction of the

contract or collateral contract between the Appellant and the Government, the Government bound itself not to determine the extended or new term of the Appellant's tenancy before the expiration of such term, provided that the Appellant carefully observed the rules and regulations of the tenancy agreement;

2. BECAUSE the notice to quit given on 31st January 1975 was invalid;

3. BECAUSE the judgment of Mr. Justice Choor Singh was correct.

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- and -

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