Privy Council Appeal No. 23 of 1979

Harry Tong Lee Hwa – – – – – – *Appellant*

v.

Yong Kah Chin – – – – – – – *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD MARCH 1981

Present at the Hearing:

LORD EDMUND-DAVIES
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL
LORD BRIDGE OF HARWICH
SIR JOHN MEGAW

[*Delivered by* SIR JOHN MEGAW]

This is an appeal from a judgment of the Federal Court of Malaysia (Lee Hun Hoe C.J., Wan Suleiman F.J., and Chang Min Tat F.J.) dismissing the appellant's appeal from a judgment of the High Court in Malaya at Kuala Lumpur (Vohrah J.). By that Judgment Vohrah J. had confirmed the order made by the Senior Assistant Registrar of the High Court giving leave to the respondent, under Order 14, Rule 1, of the Rules of the Supreme Court 1957, to sign final judgment against the appellant in the sum of $95,062·50 with interest and costs.

The sole question at each stage of these proceedings was: does the appellant, the defendant in the action, show a triable issue by way of defence to the claim of the respondent, the plaintiff in the action?

The appellant wished to buy certain lands and had been trying to do so through the respondent. The appellant had offered $55,000 per acre, but his offer had not been accepted on behalf of the owners of the land. On 4th November 1975, Mr. Yong Yoke Lin and Madam Chong You, who were owners of a part of the lands in question, gave to the respondent what was described as an "option to sell" the land at $65,000 per acre. The respondent and another were each to be entitled to a commission of 1 per cent. on the sale price. The option was expressed to be valid for five days from 4th to 8th November 1975. The appellant has contended throughout the proceedings that the option was "invalid" for a number of reasons. By "invalid" is presumably meant that, if the respondent had made a purported sale of the lands in reliance on the right apparently given to him by the option to act as agent for the owners of the land in respect of the sale thereof, the owners could lawfully have refused to recognise any liability as principals in respect of the purported sale.

On 6th November 1975, the respondent executed and gave to the appellant what was described as a "sub-option" for the sale of the lands for $65,000 per acre. In the sub-option, the respondent was

described as " holder of an option . . . . from the legal owners of the above lands ". Although it is described as a " sub-option for the sale of the lands ", its intended effect was in relation to a prospective purchase of the lands by the appellant. The appellant has contended throughout the proceedings that, the option being invalid, the sub-option was also invalid.

On the same day, 6th November, the appellant signed and gave to the respondent a " commission undertaking ". That document did not, on its face, refer to the option or to the sub-option. It said that the appellant gives " an undertaking to Mr. Yong Kah Chin [the respondent] . . . that upon the sale of the properties [being the land in question] . . . . and upon execution of a formal agreement and upon the sale being successful . . . . to me or my nominees, a commission of 6½ per cent. of the total consideration of the sale price will be paid accordingly ".

What happened next can be summarised, in the most favourable light to the appellant, by quoting the words used in the first paragraph of a letter dated 10th November 1975, from the legal representatives of the appellant to the appellant's wife, whom the appellant had nominated to be the purchaser of the lands:

> " We . . . . enclose herewith a copy of the letter exercising the option which was sent to the Vendors' Solicitors, Messrs. S. M. Yong & Co. Mr. Edmund Yong of Messrs. S. M. Yong & Co., upon receipt of this letter refused to acknowledge receipt and spoke to our Mr. Tharu informing him that the purported option given to Mr. Yong [the respondent] was not a genuine option.
>
> " In any event, in view of the fact that he had the proper parties with him at the time, he was able to seek their confirmation that they are prepared to sell the said properties at the purchase price of $65,000 per acre. He has, therefore, requested us to let him have the terms of payment and other terms of the agreement so that he could get firm instructions from his clients.
>
> " We await your early instructions to proceed further in this matter."

In a letter dated 12th November 1975 from the appellant's legal representatives to the vendors' legal representatives, the agreement to sell the land was recorded thus:

> " We refer to our letter dated 7th November 1975 and to the telephone conversation between your Mr. Edmund Yong and our Mr. T. Tharu of the same date wherein it was confirmed that your clients have agreed to sell the abovementioned properties at the price of $65,000 per acre."

On 3rd March 1976 a formal agreement was executed between the registered owners of the lands and the appellant's nominee, his wife, for the purchase of the lands at $65,000 per acre. The sale was duly completed. The appellant's wife is now registered as the owner of the lands. There is no suggestion that she has not got a good title.

Nevertheless, the appellant, when he was called on by the respondent to pay $95,062·50, being 6½ per cent. of the total purchase price of the land, refused to pay. Hence the action, out of which this appeal arises, was launched by the respondent in the High Court, resulting in the decisions, so far, of the Registrar, the High Court and the Federal Court that there is no arguable defence.

While bearing well in mind that the appellant is not required to show that he has a defence which will probably succeed, but that he must be given leave to defend if there appears to be an arguable issue, their Lordships have no doubt that the decisions of the Malaysian courts are right.

The ground, and the only ground, put forward before their Lordships in support of the appeal is that the commission undertaking, given on 6th November 1975 by the appellant to the respondent, is so closely related, in reality though not in any express words, to the sub-option that the invalidity of the sub-option, stemming from the supposed invalidity of the original option, would, in law, render the commission undertaking in its turn, also invalid. The appellant, it is contended, would not, or might not, have agreed to pay 6½ per cent. commission (being, as was said in the judgment of the Federal Court " considerably more than the customary purchaser's commission of, as we understand it, 2% "), unless the appellant had the certainty that he would be able to purchase the lands. The sub-option, if it had been valid, it was submitted, would have given that certainty. But if the sub-option were to turn out to be invalid, the certainty would have been lacking. The facts that the sale was achieved and that, it would appear, agreement for the sale was reached in the self-same telephone conversation in which the vendors' legal representatives queried the validity of the option, are not, it was submitted, sufficient to make the appellant liable for the commission.

Even if there were an arguable issue as to the invalidity of the option, it would not avail the appellant as a defence. As was said in the judgment of the Federal Court: " This is *res inter alios acta*. It is no real concern of the appellant how or in what circumstances the option was given or exercised. These are matters between the donors and the donee " (*scilicet*, of the option). " The actual question with which he was concerned was whether he had bought the lands through the medium or brokerage of the respondent . . . . The part played by the respondent in effecting the purchase is clear and beyond argument."

The part played by the respondent in effecting the purchase was not disputed in the submissions on behalf of the appellant before the Board. The appellant's argument in substance, based on the supposed close connection between the commission undertaking and the sub-option, was that it was a condition precedent to the appellant's contractual liability for the commission, not merely that the purchase should be effected through the respondent's agency, but, further, that the sub-option should be shown to have been valid and binding upon the owners of the lands, so that they could not lawfully refuse to sell the lands to the holder of the sub-option. This condition precedent was said to arise by implication. Their Lordships see no basis for such an implication, whether from the words used in the commission undertaking or from any relevant surrounding circumstance. No triable issue is raised.

It is therefore not necessary to consider the four grounds put forward on behalf of the appellant in support of the submission that it is arguable that the original option was invalid: that is, that it was not in law binding on the vendors. The legal representatives of the vendors did, indeed, query the validity of the option on 7th November 1975, though they subsequently acknowledged its validity: and, immediately after querying the option, they, through their legal representatives, agreed to sell the lands to the appellant on terms which conformed with the option. In the circumstances, as the courts below have held, the querying of the option by the vendors' representatives, even if it were fully justified, could in no way arguably affect the legal rights of the respondent as against the appellant in respect of the commission payable on the sale.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that this appeal should be dismissed with costs.

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In the Privy Council

HARRY TONG LEE HWA

v.

YONG KAH CHIN

DELIVERED BY
SIR JOHN MEGAW

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