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No. 12 of 1982

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 :

PANG CHOON KONG

Appellant
(Defendant)

- and -

CHEW TENG CHEONG
LOH KIAN TEE

Respondents
(Plaintiffs)

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CASE FOR THE APPELLANT

RECORD

1. This is an appeal by leave of the Federal Court of Malaysia from an order dated the 8th February 1981 of the said Federal Court (Raja Azlan Shah C.J., Abdul Hamid F.J., and Mohd. Yusoff J.) allowing an appeal by the Respondents from an order dated 31st December 1979 of the High Court in Malaya sitting at Johore Bahru (Syed Othman J.) dismissing the Respondents' claim.

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2. By an agreement in writing made the 31st March 1973 between the Appellant of the one part (referred to therein as the First Party) and Lin Wyen Pang, the First Respondent and the Second Respondent (therein referred to as the Second, Third and Fourth Parties) it was inter alia recited :-

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"WHEREAS the First Party has entered into an agreement with AU AH WAH... on the 20th day of March 1973 (hereinafter referred to as the 'said contract')

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AND WHEREAS the Second Third and Fourth Parties were responsible for the securing

of the subject matter of the Agreement as entered between Au Ah Wah and the First Party that is: \$1.2 million contract on the 18,000 acres of timber land...."

It was inter alia expressly agreed in the said agreement :-

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"1. In consideration of the Second, Third and Fourth Parties relinquishing the rights to the 18,000 acres of forest land the subject matter of the said contract between the First Party and Au Ah Wah dated 20th day of March, 1973 the First Party hereby covenants with the Second, Third and Fourth Parties as follows :- 10

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(a) to pay the sum of Dollars Fifty (\$50.00) per acre on the said forest land of 18,000 acres....to the Second, Third and Fourth Parties in equal shares upon the performance of the said contract between Au Ah Wah and the Appellant that is to say upon payment of the entire consideration of the \$1.2 million to Au Ah Wah subject to the following terms; 20

(b) to pay the Second, Third and Fourth Parties the sum of..... (\$540,000)....as aforesaid within two (2) weeks on the performance of the contract with Au Ah Wah...; 30

(c) to pay the Second, Third and Fourth Parties the sum of..... (\$360,000)....within six(6) months after the first payment of the.... (\$540,000.00) as aforesaid

2. The Second, Third and Fourth Parties covenants with the First Party as follows:

(a) to receive the sum of (\$900,000.00) upon the performance of the contract entered between the First Party and Au Ah Wah in terms as stipulated." 40

3. The Appellant did not pay the said sum of \$900,000 or any part thereof to the Second, Third or Fourth Parties.

4. On 4th December 1974 the Respondents and the aforesaid Lin Wyen Pang as Plaintiffs commenced

an action by specially endorsed writ and Statement of Claim against the Appellant as Defendant for payment of the aforesaid sum of \$540,000 and \$360,000 and consequential relief upon the grounds that the terms and conditions of the aforesaid agreement dated 20th March 1973 entered into between the said Au Ah Wah and the Appellant had been fully performed and that the Appellant had failed or neglected to pay the aforesaid sums or any part thereof. By his Defence to the said action the Appellant denied that the Plaintiffs were entitled to the said sums or any part thereof upon the ground inter alia that the terms in the said contract of 31st March 1973 upon which payment of the said sums or any part thereof was to become due and payable had not been fulfilled.

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5. The facts and matters more particularly relied on by the Appellant in support of his said Defence were and are as follows :-

(i) Liability on the part of the Appellant to pay the aforesaid or any sums under the said contract of 31st March 1973 was expressly agreed to be dependent "upon the performance of" the contract dated 20th March 1973 between Au Ah Wah and the Appellant. The Appellant relied inter alia on the express terms of Clause 1 sub-clauses (a), (b) and (c) and Clause 2(a) of the said contract.

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(ii) The said contract dated 20th March 1973 between the Appellant and Au Ah Wah inter alia recited that the said Au Ah Wah had rights over 18,000 acres of forest land in the Mukim of Bera for the purpose of logging and by the terms of the said agreement it was inter alia agreed :-

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1. that the said Au Ah Wah would transfer all his rights in relation to logging on the said land to the Appellant;

2. the Appellant was to make a payment of \$120,000 to be held by stakeholders;

3. the said Au Ah Wah would form a limited company under the Companies Act 1965 for the Appellant;

4. that after the said Company was to have been duly registered, the said Au Ah Wah would endeavour to obtain the approval of the Government of Pahang and the consent of 30 forest licensees (who had licences

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from the said Government to carry out logging on the said land) to enter into an agreement in the name of the said Company and the said Government so that the said Company should itself have the sole right to logging over the said area;

5. that the said 30 forest licensees should each have one share in the said Company.

It was further expressly agreed by the said contract :-

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"11. In the event of /Au/ being unable to obtain the approval of the Government of Pahang and the consent of the 30 forest licensees to enter into the agreement stated above within the time specified above, /Au/ shall return forthwith the sum of \$120,000/- less \$5,000/- as expenses incurred for the formation of the said limited Company."

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The phrase "the time specified above" referred to the "period of three months" from the date of the said agreement as referred to in Clause 10 thereof. The said Au in fact had no rights over the aforesaid 18,000 acres of forest land or any part thereof when the said Au entered into the aforesaid contract dated 20th March 1973 nor when he entered into the aforesaid contract of 31st March 1973.

(iii) In the event the said Au failed to obtain the approval of the said Government or the consent of the said 30 forest licensees within the said period of three months or by 7th September 1973 on which date the Appellant and one Chang Lun Yuan of the first part and the said Au of the second part entered into an agreement in writing rescinding the aforesaid agreement dated 20th March 1973 between the said Au and the Appellant.

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6. Subsequently, on 10th November 1973 the said Government and the said 30 licensees agreed in writing to terminate the licences of the said 30 licensees in relation to the aforesaid 18,000 acres and the said Government agreed to enter into new licences for felling and logging rights over the said area with three new companies namely Syarikat Hayati Sendirian Berhad ("Hayati"), Syarikat Bertapak Sendirian Berhad ("Bertapak") and Syarikat Sastiva Sendirian Berhad ("Sastiva"). 10 of the 30 licensees became shareholders in

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10 Hayati; 8 became shareholders in Bertapak and 12 became shareholders in Sastiva. In due course the said companies were granted rights by the said Government over 6,000, 4,800 and 7,200 acres respectively of the aforesaid 18,000 acres. The felling and logging contractor for Hayati was one Chang; for Bertapak was the Appellant, the said Chang and one Lim Cheng; and for Sastiva was one Tan Seng Eng and another person. The said Chang, his wife and children had shares in Bertapak. The Appellant had shares in Hayati on 28th May 1974 but ceased so to do on 20th July 1974. The Appellant had shares in Bertapak but sold them to his sons on 20th July 1974.

7. In the High Court the said action was tried by Syed Othman F.J. who dismissed the Plaintiffs' claim on 31st December 1979, holding inter alia :-

- 20 (i) that the Plaintiffs had failed to establish that the said Au had any rights over the aforesaid 18,000 acres of forest land in the Mukim of Bera at any material time; p.60
- (ii) that the crucial part of the said agreement of 20th March 1973 was Clause 5 which stipulated that all the 30 licensees should have one share each in the Company to be formed and that the said Au had failed to fulfil such stipulations; p.60
- 30 (iii) that the Appellant and the said Au had rescinded the said agreement of 20th March 1973 by the said agreement of 7th September 1973; p.61
- (iv) that a new situation had arisen and there was therefore a need for a new contract between the Appellant and the said Au; p.61
- 40 (v) that the Plaintiffs had failed to show that the Appellant had been issued with a licence to fell timber by the relevant authorities pursuant to the said agreement of 31st March 1973; p.62
- (vi) although the Defendant received some benefits from an undisclosed indirect interest in the forest concession, this was not in the form of any p.62

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assignment mentioned in the said agreement of 31st March 1973 and the Plaintiffs played no part at all in this.

p.65 8. The Respondents appealed to the Court of Appeal of the Federal Court of Malaysia against the said decision of Syed Othman J., by a notice of appeal dated 11th June 1980 but the First Plaintiff was not a party to the said notice of appeal and has not appealed against the aforesaid decision of Syed Othman J. 10

p.76
p.68 9. (1) On 8th February 1981 the said Federal Court allowed the appeal. Judgment of the Federal Court was delivered by the Chief Justice (Raja Azlan Shah C.J.).

(2) In giving the judgment of the court, the learned Chief Justice said inter alia as follows:-

p.69 (a) The law to be applied was the law of estate agents and that where the agency contract provided that the agent earned his remuneration upon bringing about a certain transaction, he is entitled to such remuneration if he is the effective, not necessarily the immediate cause of the transaction being brought about. Whether there is a sufficient connection between his act and the ultimate transaction must be ascertained from the facts of the case. 20

p.70 (b) It was clear that the claim of the Respondents (the Appellants in the said appeal) depended on the proper construction to be given to the agreement of 31st March 1973. 30

pp.71, 72 (c) The sum to be paid under the said agreement of 31st March 1973 was payable in two stages and dependent on the transfer of Au's rights and the issue of the licence, the licence being absolutely necessary to give validity to the transfer as the original licence was personal to the holder and it was forbidden by law and by the licence itself to transfer, assign or otherwise part with it to third parties. The said agreement was silent as to any other events absolving the Respondent from his obligation to pay the agreed sum for the introduction to Au. 40

(3) After summarising the events leading up to the two agreements dated 20th March 1973 and 31st March 1973 respectively, the learned Chief Justice

said :-

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10 "In the event no Company was formed to which all the 30 licensees transferred these rights. This was because of dissensions amongst them. In the words of Au Ah Wah, 12 ran out on him. And on September 7, 1973, Au Ah Wah and /the Appellant/ executed a short agreement rescinding the March 20 agreement. If the matter had stopped here, there clearly could be no claim by the /Respondents/ against the /Appellant/. But the matter did not stop at this point."

(4) The learned Chief Justice then referred to events subsequent to 7th September 1973 and went on :-

20 "The only conclusion to be reached on this documentary evidence must be that the Respondent has obtained the rights certain to the 10,800 acres given to Hayati and Bertapak. As for the 7,200 acres allotted to Sastiva, the /Appellant/ admitted that he knew that one Tan Seng Eng had obtained the licences issued to Sastiva and the documentary evidence in the three agreements made, two on 30 September 7, and the third on September 12, 1973, is to the effect that whatever benefits were obtained in the matter by Au Ah Wah and Tan Seng Eng, they were all passed over to the Respondent and another through the instrumentality of Au Ah Wah.

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40 "On all this evidence, we can only form one conclusion that Au Ah Wah performed his contract with the Respondent and as provided for in the March 31 Agreement (which is the relevant one for construction in the determination of the rights and obligations between the parties) the rights of the Appellant had accrued 'on the performance of the said contract with Au Ah Wah'. The other requirement in the contract was the issue of the first licence to fell 1,000 acres. The evidence of Harun bin Ismail, the Deputy Director of Forestry (P.W.3) was that at the date of hearing 10,000 of the 18,000 acres had 50 been worked. The obligation of the /Appellant/ to pay the /Respondents/ had therefore crystallised. It is true that

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the negotiations with the original licensees had to negotiate a further channel, but that did not alter the fact that the Appellant came into the picture through the introduction of the Respondents, nor the other fact just as clear, that throughout the weaving of the fabric, the hand of Au Ah Wah was seen."

The appeal was allowed with costs in the Federal Court and below.

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10. It is submitted that as pleaded, entitlement of the Respondents to payment could arise, if at all, only under the terms of the aforesaid agreement of 31st March 1973. The said agreement strictly was not analogous to a contract between an estate agent and the vendor of property for whom an estate agent is acting. However, even if such a proper analogy, the law applicable is of general application and is respectfully submitted to have been correctly expressed by McCardie J. in Howard Houlder & Partners Ltd. v. Manx Isles Steamship Company Limited (1923) 1 K.B. 110 at 113 as follows :-

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"It is a settled rule for the construction of commission notes and the like documents which refer to the remuneration of an agent that a plaintiff cannot recover unless he shows the conditions of the written bargain have been fulfilled. If he proves fulfilment he recovers. If not he fails. There appears to be no halfway house, and it matters not that the plaintiff proves expenditure of time, money and skill."

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Such rule is not restricted to commission notes. Lord Russell said in Luxor (Eastbourne) Ltd. v. Cooper (1941) A.C. 108 at 124 :-

"A few preliminary observations occur to me. (i) Commission contracts are subject to no peculiar rules or principles of their own; the law which governs them is the law which governs all contracts and all questions of agency. (ii) No general rule can be laid down by which the rights of the agent on the liability of the principal under commission contracts are to be determined. In each case these must depend upon the exact terms of the contract in question, and upon the true construction of those terms....."

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11. It is submitted that the learned Chief Justice was correct in holding that the claim of the

Respondents depended on the proper construction to be given to the agreement of 31st March 1973. Such agreement expressly provided that the payments were to be made upon the performance of the contract dated 20th March 1973 between the Appellant and Au Ah Wah. Such agreement was not performed by Au Ah Wah in that :-

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10 (i) he had no rights over the 18,000 acres of forest land in the Mukim of Bera to transfer to the Appellants and transferred none;

(ii) the company to be formed under the Companies Act 1965 was not formed by the said Au Ah Wah or at all;

(iii) none of the steps to follow upon the registration of the said company were taken;

20 (iv) Au Ah Wah did not obtain the approval of the Government of Pahang or the consent of the 30 forest licensees to enter into an agreement as stated in Clause 4 of the said agreement within a period of 3 months or at all;

(v) on 7th September 1973 the said contract of 20th March was rescinded.

30 12. It is further submitted that the learned Chief Justice was right in holding that immediately following the entering into of the said agreement dated 7th September 1973, the Respondents had no claim against the Appellant. However, it is respectfully submitted that contrary to the judgment of the Federal Court no event occurred subsequent to the 7th September 1973 which was or could be relied on by the Respondents as a performance of the said agreement of 20th March 1973 nor was there any such event which amounted to a fulfilment of the terms of the said agreement of 31st
40 March 1973. Accordingly the Appellant submits that the conditions of the written agreement upon which remuneration was dependent remained unfulfilled and the Respondents were not entitled in law or in fact to succeed in their appeal.

13. The Appellant will if necessary further submit that the Federal Court were wrong in law in holding that the fact that the Appellant was introduced to Au Ah Wah by the Respondents

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and that he ultimately obtained the benefit of 10,800 acres (part of the original 18,000 acres) as a result of the said introduction entitled the Respondents to remuneration under the said agreement of 31st March 1973.

14. The Appellant will further submit that the Federal Court were wrong in drawing inferences from the fact that several persons in Bertapak and Hayati had the same surname as the Appellant and that the directors of the said companies resided in Pahang and had a Chinese secretary were a matter from which inferences supporting liability were to be drawn.

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15. The Appellant respectfully submits that the judgment of the Federal Court was wrong and ought to be reversed and that this appeal should be allowed with costs including costs in the Federal Court and in the High Court for the following (among other)

REASONS

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1. BECAUSE the circumstances upon which the Respondents were entitled by the contract of 31st March 1973 to payment of the sums claimed or any part thereof were not fulfilled.
2. BECAUSE the contract between the Appellant and Au Ah Wah dated 20th March 1973 was not performed.
3. BECAUSE there were no other circumstances or facts upon which the Respondents were entitled to succeed in their claim.
4. BECAUSE there were no or no sufficient grounds on which the Federal Court were entitled to make the findings of facts upon which they found in favour of the Respondents.
5. BECAUSE the facts upon which the Federal Court held the Appellant to be liable on the Respondents' claim did not found such liability.

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DAVID TURNER-SAMUELS

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LIM KEAN CHYE

No.12 of 1982

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B E T W E E N :

PANG CHOON KONG

Appellant

- and -

CHEW TENG CHEONG
LOH KIAN TEE

Respondents

CASE FOR THE APPELLANT

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