

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

B E T W E E N :-

ZAIBUN SA BINTI SYED AHMAD Appellant  
(Defendant)

- AND -

1. LOH KOON MOY (F)  
2. LAM WAI LEE Respondents  
(Plaintiffs)

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CASE FOR THE APPELLANT

RECORD

1. This is an appeal from a judgment dated the 18th February 1980 of the Federal Court of Malaysia (H.S. Ong, Raja Azlan Shah and Chang Min Tat F.JJ) allowing an appeal from a judgment dated the 31st March 1976 of the High Court of Malaya (Syed Agil Barakbah J.) refusing the first respondent Loh Koon Moy an order for specific performance of a contract for sale of land. p.43ff. p.29ff.

20 2. The issue in this appeal is whether or not the first respondent ought to have been granted specific performance of the said contract. The appellant does not dispute the existence and validity of the contract or her liability to make compensation in money as ordered by the learned judge at first instance. p.39

3. On the 11th December 1973 the appellant entered into a written agreement (hereinafter called "the contract") to sell to the first respondent certain land in the Mukim of Serdang in the district of Bandar Bharu at a price of \$11,000 per relong totalling \$74,711.36. The contract was signed by the second respondent on behalf of the first respondent. At the trial the appellant took a point relating to the authority of the second respondent to contract on the first respondent's behalf but that point was determined by the learned judge against the appellant and is no longer an issue. p.53 p.54

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4. The appellant subsequently refused to complete the sale under the contract and on the 13th May 1974 the respondents

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- p.1 commenced an action against the appellant by writ claiming specific performance of the contract, an injunction, further or alternatively damages for breach of contract, further or other relief and costs. The claim for an injunction was abandoned in the course of the trial. A statement of claim was served dated the 21st June 1974 and a defence served dated the 5th September 1974.
- p.3
- p.5
5. The action came on for trial before the learned judge on the 14th May 1975 and was heard on that day and on the 27th May 1975, the 23rd July 1975 and the 11th August 1975. Two issues arose at the trial: (i) whether the agreement between the first respondent and the appellant was valid; and (ii) whether specific performance ought to be granted in all the circumstances. It is only the latter which is still a live issue. 10
6. Before the learned judge the appellant's case on the issue of specific performance was that there had been an oral agreement made on the same occasion as the contract and between the same parties, but not recorded in the written contract, which oral agreement expressly provided that in the event of the appellant's failure to complete the sale to the first respondent the appellant should make monetary compensation to the first respondent. The appellant contended that the existence of that oral agreement precluded the making of an order for specific performance. 20
- pp.18-28 7. Evidence for the appellant was given by the appellant herself, her husband Gohar Iman Bin Abdul Rahim Moghal (DW1) and Abdul Rashid Bin Syed Ahmed (DW2). DW1 gave evidence in chief, immediately after dealing with the signing of the contract, that there had been an understanding that should the second respondent fail to abide by the contract the deposit of \$5,000 (which was specified in clause 2 of the contract) would be forfeited, plus damages, and if the appellant refused to sell she had to refund the \$5,000 deposit plus an additional \$5,000. The record does not show that he was ever cross-examined on the point. The appellant's own evidence, immediately after she had dealt with the signing of the contract, was that apart from what was written in the contract there had been a verbal agreement to the effect that should the purchaser not wish to buy the property in question the amount deposited, i.e. \$5,000, would be forfeited; and that should she the vendor not sell the property then she would have to repay double that amount, comprising return of the \$5,000 deposit and another \$5,000. The record does not show that the appellant was ever cross-examined on the point. DW2 did not, according to the record, give evidence in chief on this point, but in cross-examination his evidence was to precisely the same effect as the appellant's own evidence in chief. 30 40 50
- p.19, 11.23-28
- p.53
- pp.21-25
- p.25, 11.30-37
- pp.26-27
- p.27
- p.27 11.33-37
- pp.7-18 8. The evidence for the respondents had been given by the

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two respondents themselves. The second respondent was the first witness at the trial. He gave no evidence in chief on the question of the said oral agreement. In cross-examination he said there had been no undertaking that the appellant had to pay double the amount of the deposit if she failed to abide by the agreement, but she had to pay all the damages; he said that she would also have to refund the \$5,000 deposit. The first respondent did not give evidence on the point, whether in chief or in cross-examination; she had not been present on the occasion when the contract was signed on the 11th December 1973.

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9. The learned judge gave judgment on the 31st March 1976. He summarised the issues as they then stood and set out facts which were not in dispute. He then dealt with the questions which arose in relation to the validity of the contract and held that it had not been terminated and was valid. There was no challenge by the appellant in the Federal Court to that part of the learned judge's decision and there is none in this appeal. The learned judge then went on to consider whether specific performance should be granted. He held that the presumption under section 11 of the Specific Relief (Malay States) Ordinance 1950 (No.29 of 1950) that breach of a contract to transfer land could not be adequately relieved by compensation in money had been rebutted by the contemporaneous oral agreement between the parties which had not been embodied in the contract itself. The learned judge held that evidence of the said oral agreement was admissible under section 92(b) of the Evidence Ordinance 1950 (No.11 of 1950). His appraisal of the evidence was that the appellant's evidence in this regard had not only been corroborated by her husband DW1 but also substantiated by the second respondent. He held that there had been an oral agreement that in the event of the purchaser failing to abide by the written agreement the \$5,000 deposit would be forfeited, plus damages; and that in the event that the appellant vendor refused to sell she had to refund the \$5,000 deposit plus payment of an additional \$5,000. The learned judge next said that the only difference in the second respondent's version was that in the latter case the appellant had to refund the deposit and pay all the damages.

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10. The learned judge then said that he took into account the alternative prayers of the respondents in their pleadings, and the provisions of section 75 of the Contracts (Malay States) Ordinance 1950 and that he was of the opinion that by virtue of section 18 of the Specific Relief (Malay States) Ordinance 1950 specific performance ought not to be granted.

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11. In awarding monetary relief for the appellant's failure to complete the sale to the first respondent, the learned judge reconciled the differences between the appellant's and the respondents' evidence on the said oral agreement as follows. He held that the appellant

pp.7-10

p.12,11.29-33

pp.15-18

pp.29-38

p.37,11.16,17

p.37,11.18ff.

p.37,11.26-31

p.37,11.32,33

p.37,11.33-36

p.37,11.36-39

p.37,11.39-42

p.37,11.42-45

p.37,11.45-51

p.37,11.51-55

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was liable to pay the first respondent double the amount of the deposit, though since the \$5,000 cheque given for the deposit had never been cashed by the appellant he gave credit for that amount against the \$10,000, leaving only a balance of \$5,000 to be paid by the appellant. That award was in accordance with the appellant's and DWL's evidence as to the said oral agreement. The learned judge also awarded damages for breach of contract, which he assessed at \$5,688.64 rounded to \$5,700. An award of damages was in accordance with the second respondent's evidence. The judgement was for an overall payment by the appellant to the respondents of \$10,700 as damages, being the said sums of \$5,000 and \$5,700. In effect, therefore, the learned judge reached the view that the combined effect of the evidence about the said oral agreement was that if the appellant failed to complete the sale she should pay the purchaser: (i) the \$5,000 deposit (by way of repayment); (ii) a further \$5,000; (iii) damages which would not take into account the said further \$5,000. In so doing he necessarily rejected the evidence of the second respondent that there had been no undertaking that the appellant vendor had to pay double the amount of the deposit if she failed to abide by the contract. He did accept the second respondent's evidence that the appellant was to pay damages as well as repay the deposit, but he held that such obligation was additional to the obligation to pay a further \$5,000 on top of the deposit.

p.27, ll. 33-37  
p.19, ll. 23-28  
p.38, ll. 1-9  
p.38, ll. 9-29  
p.12, ll. 31, 32  
p.38, ll. 32-34

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p.12, ll. 29-31  
p.12, ll. 31, 32

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p.39  
p.40

12. The order of the learned judge, as drawn up, ordered the appellant to pay the respondents the sum of \$5,000 as compensation and the sum of \$5,700 as damages. 30

13. By a notice of appeal dated the 22nd April 1976 the respondents appealed to the Federal Court of Malaysia.

p.43ff.  
pp.43,44

14. The appeal was heard on the 3rd December 1977 and the judgment of the Federal Court was delivered as a judgment of the court on the 18th February 1978. The judgment began by summarising the facts relating to the making of the contract and the findings of the learned trial judge as to its validity, on which there was no dispute on the appeal before the Federal Court. The Federal Court then referred to the learned judge's finding on the evidence that there had been a separate oral agreement, not incorporated in the contract, for the payment of damages in the event of failure to complete by either party. They next referred to the learned judge's having held that evidence admissible under section 92(b) of the Evidence Ordinance 1950 and his finding that the presumption under section 11(2) of the Specific Relief (Malay States) Ordinance 1950 had been displaced. They then referred to the learned judge's conclusions on the evidence as summarised in paragraph 9 above. 40

p.43, ll. 2-6  
p.45, ll. 7-15  
p.45, ll. 16-20

15(1) The Federal Court, having drawn attention to the differences between the appellant's and the respondents' evidence relating to the said oral agreement, said that the short answer to the learned judge's point was that if there had been no consensus there had been no agreement. 50

p.45, ll. 20-21  
p.45, l. 26

10 (2) The appellant submits that this short answer was based on a misunderstanding of the learned judge's interpretation of the evidence. The learned judge did not conclude that according to the objective test the vendor alone had purport to agree one thing (repayment of the deposit plus damages). His finding, consistently with the substance of the order mentioned in paragraph 12 above, was that both parties had agreed both those things, which were therefore cumulative and not alternative: see paragraph 11 above. p.39,11.23-25

20 16(1) The Federal Court next raised another objection to the learned judge's finding. They said that from the order to pay an additional \$5,700 the learned judge appeared to have accepted the evidence of the plaintiff (mistakenly described at p.45, line 33, of the record as "the defence"). They said that the learned judge had all along the line clearly disbelieved the respondent (i.e. the appellant in this appeal), but that under a mistaken belief of substantiation, of which the Federal Court said there was in fact none, the learned judge had accepted her evidence. p.45,11.28-39  
p.45,11.33-39

30 (2) The appellant submits in answer to these points that for the reasons mentioned in paragraph 15(2) above the order to pay an additional \$5,700, while it necessarily involved acceptance of the second respondent's evidence that the vendor should pay damages as well as repay the \$5,000 deposit, was also entirely consistent with the learned judge's acceptance of the evidence for the appellant that there had been an agreement to pay an additional \$5,000 in the event of her failure to complete the sale. p.12,11.32,32  
p.27,11.33-37  
p.19,11.23-28

40 (3) The learned judge had not been mistaken in treating the second respondent's evidence as substantiation of the evidence for the appellant. Whatever the differences between the evidence for the respondents and the evidence for the appellant on the terms of the oral agreement, the learned judge was entitled to treat, and did treat, the second respondent's evidence as substantiation of the evidence that there was indeed a contemporaneous oral agreement. It was the question of the precise content of that oral agreement, not its existence, which required the learned judge to resolve a conflict of evidence.

50 (4) The learned judge admittedly rejected the bulk of the evidence for the appellant where it differed from the evidence of the respondents. Nevertheless, on a crucial point where the evidence of the second respondent was in direct contradiction of the evidence for the appellant, the learned judge preferred the evidence for the appellant: the second respondent specifically denied in cross-examination that there had been an undertaking that the vendor had to pay double the amount of the deposit if she failed to abide by the agreement. The p.12,11.29-31

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learned judge did not accept that denial, since he could not otherwise have made the order he did for payment of \$5,000 compensation.

(4) The utmost weight should be attached to the finding of the trial judge, who had seen and heard the witnesses, on a point on which there was a direct conflict of evidence. Such weight should be increased rather than diminished where the judge had accepted a specific point in the evidence of witnesses whose word he has otherwise rejected when in conflict with the other parties' witnesses. In such circumstances it can safely be inferred that the learned judge gave particular consideration to the point.

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p.45, l.40ff.

17. The Federal Court next turned to the exercise of the learned judge's discretion to refuse specific performance because of the said oral agreement.

p.45, ll.44-46

18. The Federal Court's first objection to the learned judge's approach was that it had not been the stand taken by the appellant (i.e. the respondent before the Federal Court) in her pleadings that she would pay damages. That is true, but the point was raised at an early stage of the trial, in cross-examination of DWL. There was no apparent objection taken to the fact that it had not been pleaded and in those circumstances the learned judge was fully entitled to consider it on its merits.

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p.19, ll.21-28

p.45, l.52ff.

19. The Federal Court's second objection was that an alternative prayer for damages, per se, did not absolve the party in breach from having to perform or the court from its duty to consider the circumstances of the case before it decided whether it would order specific performance or not. That is also not disputed by the appellant, but the emphasis should be on the words per se. The proper interpretation of the learned judge's judgment in relation to specific performance is that: (i) he regarded the rebuttal of the presumption in section 11 of the Specific Relief (Malay States) Ordinance 1950 as sufficient in itself to justify refusal of specific performance; (ii) he relied on the alternative prayer for damages under section 75 of the Contracts (Malay States) Ordinance 1950 merely as indicating that there was no obstacle to an award of monetary relief in the terms of the order which he in fact made. The lack of any such obstacle was a necessary ingredient of the learned judge's finding that the said presumption had been rebutted. But such rebuttal was correctly regarded by the learned judge as being on its own a sufficient reason for refusing specific performance. The equitable jurisdiction to grant specific performance of a contract for the sale of land is founded on the simple ground that damages will not afford an adequate remedy: Hutton v. Watling (1948) Ch.26 per Jenkins J. at p.36.

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p.39

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20. The appellant submits that the Federal Court was wrong in treating the learned judge as having exercised his discretion whether or not to grant specific performance. The correct analysis of the learned judge's judgment is that because of his finding as to the rebuttal of the presumption in section 11 of the Specific Relief (Malay States) Ordinance 1950 he did not even have jurisdiction to grant specific performance. Whether or not the learned judge in his own mind analysed the matter in that way, that is the legal result of the said finding. The learned judge said that the discretion of the court to order specific performance was governed by section 11 of the Specific Relief Ordinance 1950. As a matter of law that is correct in the sense that the discretion to order specific performance is taken away by rebuttal of the said presumption.

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p.37,11.20-25

21. The appellant submits therefore that:

(a) If the learned judge correctly found that the said presumption had been rebutted, neither he nor the Federal Court had jurisdiction to order specific performance. Alternatively, the learned judge exercised his discretion reasonably and on proper principles and the Federal Court ought not to have interfered with such exercise.

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(b) If the Judge was wrong in that finding, then the Federal Court were entitled to exercise their own discretion whether or not to order specific performance. In that case the appellant would not challenge the Federal Court's exercise of their discretion.

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22. The appellant therefore submits that the crucial point in the judgment of the learned judge on the question of specific performance was the rebuttal of the presumption that a breach of contract to transfer immovable property cannot be adequately relieved by compensation in money. The learned judge held that the presumption was rebutted by the contemporaneous oral agreement. The Federal Court held that the appellant had not in any way rebutted the presumption and had not even sought to rebut it. They held therefore that there had existed no grounds for the exercise by the learned judge of his discretion (to refuse specific performance). Further, they gave as a positive reason in favour of specific performance the fact that the first respondent owned adjoining lands which were being mined for tin and that she needed the lands under the contract for the continuation of her mining operations.

p.37,11.26-31

p.46,11.25-30

p.46,11.31-39

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23. The appellant submits that on the basis of the learned judge's finding as to the contemporaneous oral agreement the presumption mentioned in section 11 of the Specific Relief (Malay States) Ordinance 1950 was rebutted by the appellant. The learned judge plainly viewed the oral agreement as an agreement whereby neither party was to be compelled to proceed to completion the parties

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p.25,11.30-34 having agreed the specific financial consequences of either party's refusal or failure to do so. That view of the contract was supported by the evidence of the appellant herself that there had been a verbal agreement to the effect that should the purchaser not wish to buy the property in question the amount deposited i.e. \$5,000, would be forfeited. Although forfeiture of the deposit would have been a normal consequence of the purchaser's failure to complete, even in the absence of specific agreement, the expression of the agreement in terms of the purchaser's wish is significant. On the basis of that part of the appellant's evidence the parties had accepted that if the purchaser chose not to complete the purchase she should bear the agreed financial consequences, but should not be bound to complete. Although the corresponding part of the appellant's evidence relating to the consequences of the vendor's not selling is not expressed in terms of a wish, the only reasonable inference from the evidence of the appellant, and in any event the inference the learned judge drew, and was entitled to draw, was that the arrangement whereby the parties had agreed the consequences of a refusal or failure to complete, i.e. that compensation should be made in money, was mutually applicable to a breach by the vendor or the purchaser. The parties having themselves reached an agreement under which either party would be obliged to accept monetary compensation if the other party so wished, the court was bound to treat damages as being an adequate remedy. 10

p.25,11.24-28 20

p.47,11.6-11 24. The Federal Court considered the appeal on the basis that the oral agreement was an issue and on the basis, but without deciding, that it was admissible and admissible in evidence. Since the Federal Court allowed the appeal, the point did not need to be decided by them. The appellant accepts that in order for her to succeed on this appeal the point must be decided in her favour. 40

25(1) Section 92 of the Evidence Ordinance 1950 (No.11 of 1950) states:

"When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91 of this Ordinance, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms" 50

but subject to a proviso that (inter alia):

"(b) the evidence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved,



and in considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document".

10 (2) The learned judge held that the oral agreement was admissible under that proviso (b). The appellant submits that the learned judge was correct in so holding. The requirements of the proviso were satisfied. There was a separate oral agreement and it related to matters on which the document was silent. The oral agreement was not inconsistent with the terms of the written agreement. It left the vendor's obligation to convey the property as the basis of calculation of the damages to be paid to the purchaser if the vendor did not complete. The effect of the oral agreement was to limit the remedies of each party if the other party should be unwilling to complete. Neither party would be entitled in such circumstances to an order of the court specifically enforcing the primary obligation; monetary relief would have to be accepted instead.

20 26. There was a cross-appeal by the appellant (the respondent in the Federal Court), which the Federal Court allowed out of time. It was argued by the appellant that the action was incompetent since the appellant was not shown either in the writ or the statement of claim to have been sued in her representative capacity as administratrix of the estate of her late father Syed Ahmad bin Murasalin. The Federal Court dismissed the cross-appeal and there is no appeal against that dismissal.

p.46,11.40-41  
p.46,11.41-47

30 27. The order of the Federal Court was accordingly for specific performance of the contract. They also ordered the second respondent to be struck out from the action. The appellant was ordered to pay the first respondent's costs both of the appeal and the cross-appeal.

pp.48-50  
p.49,11.37,38

40 28. On the 9th July 1979 the Federal Court of Malaysia granted the appellant final leave to appeal to his Majesty the Yang di-Pertuan Agong against the whole of the judgment and order of the Federal Court given on the 18th day of February 1978 subject to the condition that the order of the Honourable Mr. Justice H.S. Ong dated the 27th day of March 1970 be included in the record of appeal. The said order (which gave the appellant as administratrix of her late father's estate liberty to sell the land with which this action is concerned) has been included in the record, though in the light of paragraph 26 above it is no longer material.

p.50  
p.68ff.

50 29. The appellant respectfully submits that the judgment of the Federal Court of Malaysia was wrong and ought to be reversed, that this appeal ought to be allowed with costs of this appeal and the appeal to the Federal Court and that the learned judge's order should be restored, for the following (among other)

R E A S O N S

1. BECAUSE on the evidence there was an oral agreement in the terms found by the learned judge.
2. BECAUSE the evidence of such oral agreement was admissible by virtue of section 92 proviso (b) of the Evidence Ordinance 1950 (No.11 of 1950).
3. BECAUSE the terms of such oral agreement rebutted the presumption under section 11 of the Specific Relief (Malay States) Ordinance 1950 (No.29 of 1950) that breach of a contract to transfer immovable property could not be adequately relieved by compensation in money. 10
4. BECAUSE the rebuttal of the said presumption excluded the remedy of specific performance.
5. BECAUSE alternatively to 4 the learned judge correctly exercised his discretion in refusing specific performance and the Federal Court ought not to have interfered with such exercise.

GERALD GODFREY

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NICHOLAS STEWART

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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ON APPEAL

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- 
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CASE FOR THE APPELLANT

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