

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 :

ZAIBUN SA BINTI SYED AHMAD Appellant  
(Defendant)

- and -

- 10 1. LOH KOON MOY (F) Respondents  
(Plaintiffs)
- 2. LAM WAI KEE

CASE FOR THE RESPONDENTS

Record

1. In this case the following definitions are adopted:-

- "the first plaintiff" Loh Koon Moy, the first plaintiff in the action and the first respondent to this appeal
- 20 "the second plaintiff" Lam Wai Kee, the second plaintiff in the action and second respondent to this appeal
- "the defendant" Zaibun Sa Binti Syed Ahmad, the defendant in the action and appellant in this appeal
- 30 "the property" six parcels of land comprising about 68 acres in area and situate in the Mukim of Serdang, District of Bandar Bahru, sub-division Sungei Trap, Kedah and more specifically described in a written agreement between the defendant and the first plaintiff dated 11th December 1973
- 40 "the agreement" the written agreement dated 11th December 1973 and made between the

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defendant and the first plaintiff (by her agent the second plaintiff on her behalf) for the sale by the defendant to the first plaintiff of the property

pp. 43-47

2. This is an appeal by the defendant from a judgment dated 18th February 1978 of the Federal Court of Malaysia (Appellate Jurisdiction) (Ong Hock Sim, Raja Azlan Shah, and Chang Min Tat FJJ) allowing the appeal of the first plaintiff from the judgment of Syed Agil Barakbah J dated 31st March 1976 whereby he refused an order for specific performance of the agreement, and, instead, awarded compensation and damages to the first plaintiff for breach of contract in the sum of Malaysian Dollars ("\$") 10,700, and ordered that the defendant do pay the plaintiffs the costs of the proceedings. The appeal is made pursuant to an order of the Federal Court of Malaysia dated 9th July 1979 granting final leave to the defendant to appeal to His Majesty the Yang di - Pertuan Agong.

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pp. 29-38

pp. 50-51

3. The facts

(A) For the purposes of this appeal it is common ground that:-

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(1) the defendant is, and was at all material times, the administratrix of her father's estate, which said estate included the property, and she is sued in her capacity as such;

(2) the first plaintiff owns, and at all material times owned, lands adjoining the property, which were being mined by her, and she wished to acquire the property for the continuation and extension of her existing mining activities, and in particular for the dumping of tailings;

pp. 51-52

(3) the second plaintiff (as agent for the first plaintiff) obtained an option from the defendant dated 1st November 1973 to purchase the property at a price of \$1,100 per relong, such option to be exercisable during the period 3rd November to 10th December 1973;

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(4) by the agreement (which was entered into after the option period had expired) the defendant agreed to sell, and the first plaintiff agreed to purchase the property at the price of \$1,100 per relong (being a total price of \$74,525), completion to take place within 1 month of 11th December 1973;

pp. 54-55  
p. 54

(5) pursuant to the provisions of clause 2 of the agreement, a deposit of \$5,000 was paid by the first plaintiff (by means of a cheque dated 11th December 1973 drawn by the second plaintiff in favour of the defendant); this cheque was not cashed;

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pp. 57-60

(6) the defendant wrongfully failed to complete the agreement on 13th January 1974 (the agreed completion date) or at any time thereafter (notwithstanding notices to complete sent by the first plaintiff's solicitors to the defendant dated respectively 14th January 1974, and 22nd February 1974) and wrongfully maintained that the agreement was null and void;

(7) the reason for the defendant's refusal to complete the agreement was that she wished to obtain a higher price for the

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property than that which had been agreed;

(8) the market value of the property as at 13th January 1974 was \$1,200 per relong and as at the date of the hearing before Syed Agil Barakbah J between \$1,500 and \$1,600 per relong; p. 38  
11.19-20

(9) the first plaintiff has always been and is now able and willing to perform her obligations under the agreement.

10 (B) For the purposes of this appeal the only question of fact that is in dispute relates to an allegation which was not raised at all in the pleadings, but was brought up for the first time at the trial by counsel for the defence in cross-examination of the second plaintiff. The defendant's contention (as put by counsel for the defendant in his written submissions to the Court) was that there was an express oral agreement, outside the terms of the agreement to the effect that, in the event of the defendant, as vendor, refusing to complete the sale of the property, her obligation was to refund the \$5,000 deposit and to pay an additional \$5,000 by way of damages, and that in the event of the first plaintiff refusing to complete the purchase, the \$5,000 deposit was to be forfeited. The first plaintiff denies that there was ever any such oral agreement as alleged or at all, or that the same constituted any binding agreement between the parties, and her submissions on this point are to be found at paragraph 8 below.

30 4. (1) The Writ was issued by the Plaintiffs on 13th May 1974. In their statement of claim dated 21st June 1974 the plaintiffs claimed (a) specific performance of the agreement (b) an injunction restraining the disposition of the property by the defendant (c) further or alternatively damages for breach of contract and (d) further or other relief. pp. 1-3  
pp. 3-5

(2) The defence dated 5th September 1974 denied (for various reasons not relevant to this appeal) that there was any valid agreement between the plaintiffs and the defendant. pp. 5-6

(3) The action came on for trial before Syed Agil Barakbah J on 14th May 1975 at Alor Star and occupied 4 days. The evidence adduced before the learned judge which is relevant for the purposes of this appeal is referred to in paragraph 8 below.

40 (4) Syed Agil Barakbah J gave judgment on 31st March 1976. He took the view that the case involved two issues, namely pp. 29-38

(i) whether the agreement between the first plaintiff and the defendant was valid, and

(ii) whether, if the agreement was valid, specific performance thereof ought, in the circumstances, to be granted.

50 For reasons not relevant to this appeal the learned judge held in favour of the plaintiffs on the first issue that the agreement was valid. On the second issue, however, the learned judge held in favour of the defendant that compensation and damages, and not an order for specific performance, was the appropriate remedy for the defendant's breach of contract. The

Record

reasons for the learned judge's decision appear to have been as follows:-

p. 37  
1.32

(a) that evidence of the alleged oral agreement was admissible under section 92(b) of the Malaysian Evidence Ordinance 1950;

(b) that there was an alleged oral agreement which constituted a collateral contract between the plaintiffs and the defendant; what the learned judge found to be the precise terms of that oral agreement is not, it is respectfully submitted, clear from his judgment;

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he said at p. 37:-

"The defendant's evidence in this regard is not only corroborated by her husband (D.W.I.) but is also substantiated by the second plaintiff. The oral agreement was that in the event of the purchaser failing to abide by the written agreement, the \$5,000/- deposit would be forfeited, plus damages. In the event the vendor refused to sell, she has to refund the \$5,000/- deposit plus payment of an additional \$5,000/-. The only difference in the second plaintiff's version is that in the latter case the Vendor had to refund the deposit and pay all the damages.";

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(The first plaintiff deals with the findings of the learned judge in paragraphs 8 and 9 below).

p. 37  
11.27-31

(c) That the presumption in section 11 of the Specific Relief (Malay States) Ordinance 1950 that "unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money ...." was displaced by the existence of the alleged oral agreement;

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(d) that taking into consideration the alternative prayer of the plaintiffs for damages and the provisions of section 75 of the Contracts (Malay States) Ordinance 1950 he was of the opinion that he should exercise his discretion in accordance with the provisions of section 18 of the Specific Relief (Malay States) Ordinance 1950 not to grant specific performance.

pp. 37, 38,  
& 39

(5) In the circumstances the learned judge refused the plaintiffs' claim for specific performance, but held the defendant liable to pay the plaintiffs the sum of \$10,000 under the alleged oral agreement by way of "compensation" (but as the deposit cheque for \$5,000 had never been cashed by the defendant, he ordered her to pay merely the balance of \$5,000), and in addition he ordered the defendant to pay the sum of \$5,700 by way of damages for loss of bargain (calculated by reference to the value of the property as at 13th January 1974 which was the agreed date for completion of the agreement).

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p. 40  
pp. 41-42

4. (1) By notice of appeal dated 22nd April 1976 the plaintiffs appealed to the Federal Court of Malaysia (Appellate Jurisdiction). The plaintiffs' grounds of appeal, as set out in their Memorandum

of Appeal dated 3rd January 1977, were shortly stated as follows:-

(i) that, having found that the agreement was valid, the learned judge ought to have ordered specific performance thereof;

(ii) that he ought not to have admitted evidence relating to the alleged oral agreement;

10 (iii) that in any event the evidence relating to the alleged oral agreement did not establish any valid binding agreement between the parties;

(iv) that even if the alleged oral agreement did constitute an agreement between the parties, it was void for uncertainty;

(v) that in any event the evidence relating to the alleged oral agreement was insufficient to rebut the presumption in section 11 of the Specific Relief (Malay States) Ordinance 1950 that a breach of contract to transfer immovable property cannot be adequately relieved by compensation in money;

20 (vi) that the learned judge in exercising his discretion to refuse specific performance had failed to take into account all relevant matters raised in the evidence.

(2) The appeal came on before the Federal Court (Appellate Jurisdiction) (H.S. Ong, Raja Azlan Shah, Chang Min Tat FJJ) at Alor Star on 3rd December 1977 and lasted 1 day. The Court granted the defendant leave to cross-appeal out of time on the ground that the plaintiffs ought to have sued the defendant in her capacity as administratrix. Having reserved its decision, p. 43 the Federal Court delivered its judgment on 18th February 1978. After setting out the facts pleaded and the findings of the learned judge with regard to those facts, the Court went on to consider the alleged oral agreement. The Court left open the question as to whether evidence relating thereto was admissible, but criticised the learned judge's finding that the alleged oral agreement constituted a binding contract on the grounds:-

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(a) that the judge was inconsistent in accepting the evidence of the defendant in relation to the alleged oral agreement having rejected it on all other points; and

40 (b) that in any event the facts found by the learned judge in relation to the alleged oral agreement showed that there were two versions thereof (namely the second plaintiff's and the defendant's), and that, accordingly, on such facts, there could have been no consensus ad idem such as would constitute the alleged oral agreement a binding contract.

The Federal Court also then went on to hold that, in any event, specific performance of the agreement ought to have been ordered on three grounds namely

(i) section 19 of the Specific Relief (Malay States) Ordinance 1950 (set out in paragraph 9 below) provides that, though a sum be named in the contract as liquidated damages and the party in default is willing to pay the same, a contract may be enforced by an order for specific performance; and the Court cited Oxford v. Provan (1868) LR 2 PC 135 as an illustration of the generality of the discretion to grant that remedy;

(ii) the Court held that no evidence had been adduced to rebut the presumption contained in section 11 ibid, namely that a breach of contract to transfer immovable property cannot be adequately relieved by compensation in money;

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and (iii) the Court held that the evidence relating to the first plaintiff's intention to use the property for the purpose of continuing the mining operations already carried on by her on land adjoining the property introduced an element of public policy operating in favour of an order for specific performance.

p. 47 (3) On the defendant's cross-appeal the Federal Court held that the representative capacity of the defendant ought to have been endorsed on the writ in accordance with the Rules of the Supreme Court, but that such omission did not render the proceedings incompetent since in any event the defect could be cured by amendment for which, if necessary, leave would be granted.

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pp. 44, 46 (4) In addition the Federal Court held that since the second plaintiff had only been acting as agent in the transaction, he could not, in accordance with section 183 of the Contracts Ordinance 1950 sue or be sued.

(5) Accordingly the Federal Court:-

- pp. 47, 48-49
- allowed the first plaintiff's appeal with costs and ordered the defendant as administratrix specifically to perform the agreement
  - dismissed the cross-appeal with costs
  - ordered that the second plaintiff be struck out from the action without being entitled to any costs.

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(6) The order granting final leave to the defendant to appeal to His Majesty the Yang di-Pertuan Agong against the whole of the said order of the Federal Court was made on 9th July 1979 by the Federal Court (Raja Azlan Shah, Salleh Abas FJJ and Eusoffe Abdoolcader J).

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6. The plaintiffs submit that the matters set forth in the foregoing paragraphs of the Case raise the following six issues for decision in this appeal :-

ISSUE 1 Whether evidence relating to the alleged oral agreement was admissible under the Evidence Ordinance 1950, or otherwise, to establish the existence of terms additional to those contained in the agreement?

ISSUE 2 Whether, on the assumption that such evidence was admissible, it established that the first plaintiff and the defendant reached any legally binding oral agreement in the terms alleged by the defendant or otherwise?

ISSUE 3 Whether, on the assumption that the first plaintiff and the defendant did reach a legally binding agreement in the terms alleged by the defendant or otherwise, the same constituted an absolute defence as a matter of law to a claim for specific performance of the agreement?

ISSUE 4 Whether, on the assumption that the alleged oral agreement did not constitute an absolute defence as a matter of law to a claim for specific performance of the agreement, the learned judge was justified in exercising his discretion so as to refuse to order specific performance of the agreement?

ISSUE 5 Whether, on the assumption that the learned judge was correct in refusing to order specific performance of the agreement, he calculated the amount of "damages" and "compensation" correctly? (If, and to the extent that, the first plaintiff requires leave to raise this point before your Lordships' Board the first plaintiff will seek leave so to do)

ISSUE 6 Whether the second plaintiff was rightly struck out from the action by the Federal Court?

Since, as hereinafter appears, it is the plaintiffs' contention that Issue 6 should be decided in the affirmative, the second plaintiff takes no part in the appeal before Your Lordships' Board in so far as it relates to Issues 1 to 5 and is content to abide by the decision of Your Lordships' Board in relation thereto.

7. Issue 1 Whether evidence relating to the alleged oral agreement was admissible under the Evidence Ordinance 1950, or otherwise, to establish the existence of terms additional to those contained in the agreement?

On Issue 1 the first plaintiff contends that the evidence relating to the alleged oral agreement was inadmissible to prove the existence of terms additional to those contained in the agreement. In support of this contention the first plaintiff submits:-

(1) the relevant statutory provisions are sections 91 and 92 of the Evidence Ordinance 1950 which provide as follows :-

"91. When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document and in all cases in which any matter is required by law to be reduced to the form of a

document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1 - When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

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Exception 2 - Wills admitted to probate in the Federation may be proved by the probate.

Explanation 1 - This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2 - Where there are more originals than one, one original only need be proved.

Explanation 3 - The statement in any document whatever of a fact, other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

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92. 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:

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Provided that -

(a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;

(b) the existence 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;

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(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;



(d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

10 (e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be provided; provided that the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract;

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts";

20 (2) if, and to the extent that, the defendant contends that the alleged oral agreement contained a term to the effect that the only liability of the latter in the event that she failed or did not wish to complete the agreement was to refund the deposit of \$5,000 and pay an additional \$5,000 (or some other sum by way of damages), the defendant is not entitled to rely on proviso (b) to section 92 above since any such term as aforesaid would be inconsistent with the terms of the agreement;

(3) further or alternatively, given the degree of formality of the agreement, proviso (b) to section 92 does not apply thereto;

30 (4) the defendant is not entitled to rely on proviso (d) to section 92 since (i) the learned judge held the alleged oral agreement to be contemporaneous with the agreement itself; and (ii) the contract for the sale of the property was by law required to be in writing;

p. 37 l.30

(5) further, or in the alternative, since the terms of the agreement had been reduced to the form of a document, in accordance with the provisions of section 91 no oral evidence was admissable in proof of the terms of the agreement;

40 (6) in any event, the learned judge ought not to have allowed the defendant to rely on such evidence so as to prove the alleged oral agreement, without the defence having been first amended so as formally to plead the same, and the defendant's reliance thereon as a defence to the claim for specific performance; as the alleged oral agreement was not formally raised as an issue on the pleadings, in a fully particularised form, the first plaintiff (through her counsel) was not afforded a proper opportunity of dealing with such issue in  
50 evidence in chief of the plaintiffs' witnesses, or in cross-examination of the defendant's witnesses.

8. Issue 2 Whether, on the assumption that such evidence was admissable, it established that the first plaintiff and the defendant reached any legally binding oral agreement in the terms alleged by the defendant or otherwise?

On Issue 2 the first plaintiff contends that the evidence shows that no legally binding oral agreement in the terms alleged by the defendant or otherwise was ever concluded.

The evidence relating to the alleged oral agreement is to be found at the following passages in the record

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- in the cross-examination of the second plaintiff at page 12, lines 21 to 37;
- in the evidence in chief of the first defence witness, the defendant's husband Gohar Iman Bin Abdul Rahim Mog Hal at page 19, lines 21 to 28;
- in the evidence in cross-examination of the second defence witness, the defendant's brother Abdul Rashid Bin Syed Ahmad, at page 27, lines 33 to 38.

In support of her contention that Issue 2 should be decided in the negative the first plaintiff submits as follows:-

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(1) the learned judge was wrong in holding that there was any oral agreement outside the terms of the agreement itself because

p. 12  
11.21-37

(a) the evidence of the second plaintiff did not, in fact, substantiate or confirm the defendant's evidence as to the existence of any such separate oral agreement to the effect that, in the event of the defendant failing to complete the sale, her obligation, or alternatively her only obligation, was to pay damages (whether of a fixed or indefinite amount) and to refund the deposit; the evidence of the second plaintiff did no more than to assert the necessary implied terms and consequences of any contract for the sale of land, namely that in the event of the vendor failing to complete, one of the consequences of such failure is that the vendor is liable to return the deposit and to pay damages;

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(b) the judge should not have relied upon the evidence of the defendant and her witnesses to find the existence of any such oral agreement since

- he had disbelieved the defendant and her witnesses on every other issue of fact where there had been a conflict with the plaintiff's evidence
- there was in any event a conflict between the defendant and her two witnesses as to the terms of the alleged oral agreement which further demonstrated the unreliability of such evidence;

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(2) even if the learned judge was correct in coming to the conclusion that there was some sort of oral understanding whether in the terms alleged by the defendant or otherwise, since he found

that "the version" put forward by the second plaintiff was different from "the version" put forward by the defendant, and since he did not expressly reject the defendant's evidence as to her "version", there was no basis in law upon which he could hold that there had been any concluded binding oral contract between the first plaintiff and the defendant on the terms alleged by the defendant or otherwise, since the parties were never ad idem as to the terms of such contract and accordingly there was no consensus between them.

The first plaintiff will respectfully rely on the opinion of the Federal Court at page 45 of the record to the extent that it supports the above submissions.

9. Issue 3 Whether, on the assumption that the first plaintiff and the defendant did reach a legally binding agreement in the terms alleged by the defendant or otherwise, the same constituted an absolute defence as a matter of law to a claim for specific performance of the agreement?

The first plaintiff contends that this issue should be decided in the negative. In support of this contention the first plaintiff submits as follows:-

(1) even if, contrary to her contentions in Issue 2, the learned judge was correct in coming to the conclusion that there was some sort of separate oral agreement, the learned judge did not hold, or alternatively (if he did so hold) had no evidence upon which he could properly have held, that the true effect of the alleged oral agreement was that in the event of the defendant failing to complete the sale, her only obligation was to pay a sum by way of damages and to refund the deposit, thus giving her (in effect) the option either to complete or to pay a sum by way of damages; any such term as aforesaid would have been repugnant to the agreement; the most that the evidence could have shown was an agreement as to the quantum and payment of damages and the return of the deposit in the event that the first plaintiff sought to enforce her right to damages as opposed to her right to an order for specific performance;

(2) the alleged oral agreement accordingly was not capable of constituting an absolute defence to a claim for specific performance;

In support of the above submissions the first plaintiff will rely upon :-

- (i) section 19 of the Specific Relief (Malay States) Ordinance 1950 which provides as follows :-

"19. A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same."

Liquidation of damages not a bar to specific performance.

(ii) the judgment of Lord Hardwicke LC in Howard v. Hopkins (1742) 2 Atk 371;

(iii) the judgment of Sir John Romilly MR in Long v. Bowring (1864) 33 Beav 585;

(iv) dicta in the judgment of Turner LJ in Coles v. Sims (1854) 5 De GM & G 1 at p.11;

(v) dicta in the judgments of Cotton and Lindley LJ in National Provincial Bank v. Marshall (1888) 40 Ch D 112 at p.117 and at p. 118;

(vi) dicta in the judgment of Sir William Page-Wood VC in Howard v. Woodward (1864) 13 WR 132 at p. 133; 10

(vii) the observations of Andrews J delivering the opinion of the Court of Appeals of the State of New York in Diamond Match Co. v. Roeber (1887) 106 NY 473 at p. 486;

(viii) the judgments of Griffith CJ and Barton J in Hamilton v. Lethbridge /1912/ 14 CLR 236 at p. 246 and at p. 259.

10. Issue 4 Whether, on the assumption that the alleged oral agreement did not constitute an absolute defence as a matter of law to a claim for specific performance of the agreement, the learned judge was justified in exercising his discretion so as to refuse to order specific performance of the agreement? 20

On this issue the first plaintiff contends that the learned judge exercised his discretion wrongly, in disregard of principle, under a mistake of law and without attaching sufficient weight to certain relevant matters.

In support of this contention the first plaintiff submits :-

(1) section 11 of the Specific Relief (Malay States) Ordinance 1950 provides as follows :-

"11. Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced - 30

(a) when the act agreed to be done is in the performance, wholly or partly, of a trust;

(b) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done;

(c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or 40

(d) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

Explanation - Unless and until the contrary is proved, the Court shall presume that the breach of a contract

to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of contract to transfer movable property can be thus relieved."

10 (2) for the reasons given in the first plaintiff's submissions on Issue 3, the existence of the alleged oral agreement did not as a matter of law, or of fact, rebut the presumption that the first plaintiff could not be adequately relieved from the defendant's breach of contract by compensation in money, and the learned judge was wrong in so holding;

(3) the learned judge was wrong as a matter of law to take into consideration the fact that the plaintiffs had included an alternative or additional claim for damages for breach of contract as, in the absence of any election by the first plaintiff to abandon the claim for specific performance and claim damages for breach of contract instead, such fact was wholly irrelevant to the exercise of his discretion;

20 - in support of this submission the first plaintiff will rely on dicta in the speech of Lord Wilberforce in Johnson v. Agnew [1980] AC 367;

(4) there is nothing in the provisions of either section 15 of the Contracts (Malay States) Ordinance 1950, or of section 18 of the Specific Relief Ordinance 1950 (which the judge purportedly took into consideration in exercising his discretion) which could or should have affected the exercise of his discretion as to whether to order specific performance of the agreement;

p. 37

30 (5) the learned judge failed to take into account the evidence that the first plaintiff required the property for the continuation and extension of her mining activities on adjacent land.

The first plaintiff will respectfully rely on the judgment of the Federal Court to the extent that it supports the above submissions.

40 11. Issue 5 Whether, on the assumption that the learned judge was correct in refusing to order specific performance of the agreement, he calculated the amount of "damages" and "compensation" correctly? (If, and to the extent that, the first plaintiff requires leave to raise this point before Your Lordships' Board the first plaintiff will seek leave so to do)

50 On this issue the first plaintiff contends that, if the learned judge was correct in deciding that specific performance ought not to have been granted, then he ought to have exercised his discretion to award the first plaintiff compensation in lieu of specific performance, such compensation to be calculated by reference to the market value of the property as at the date of his judgment, and that the judge was wrong in restricting his award to damages for breach of contract calculated by reference

p. 38

to the value of the property at "the fixed time for completion". On the basis that the value of the property as at the date of the hearing was approximately \$1,600 per relog (which the first plaintiff accepts as the market value thereof as at the date of the learned judge's judgment), the judge should have awarded the first plaintiff the sum of \$32,488.64 (as opposed to \$5,700) by way of compensation in addition to the sum of \$5,000 awarded by the judge purportedly in accordance with the terms of the alleged oral agreement.

In support of this contention the first plaintiff will rely on

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(1) section 18 of the Specific Relief (Malay States) Ordinance 1950; in so far as the same is material it provides as follows:-

"18. (1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

(2) If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly".

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(2) the decision of Mr. Justice Megarry (as he then was) in Wroth v. Tyler [1974] Ch 30;

(3) the decision of Mr. Justice Goff (as he then was) in Grant v. Dawkins [1973] 1 WLR 1406;

(4) the decision of the Court of Appeal (Stephenson and Cumming-Bruce LJ), in Malhotra v. Choudhury [1980] Ch 52;

(5) dicta in the speech of Lord Wilberforce in Johnson v. Agnew [1980] AC 367, at page 401 H.L.(E);

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(6) the decision of the Court of Appeal (Buckley, Bridge and Templeman LJ) in Domb v. Isoz [1980] - Ch 548.

12. Issue 6 Whether the second plaintiff was rightly struck out from the action by the Federal Court?

The plaintiffs contend that the second plaintiff was rightly struck out from the action by the Federal Court and will rely on section 183 of the Contracts (Malay States) Ordinance 1950 which, insofar as is material, provides as follows:-

"183. In the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them."

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13. If, and to the extent that, the defendant is still pursuing the point raised on her cross-appeal before the Federal Court, the first plaintiff contends that the cross-appeal was properly dismissed for the reasons given by the Federal Court.

14. Accordingly the plaintiffs respectfully submit that the appeal should be dismissed with costs and the decision of the Federal Court affirmed for the following (among other) reasons.

R E A S O N S

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- (1) BECAUSE the learned judge was wrong to admit evidence of the alleged oral agreement.
- (2) BECUASE the learned judge was wrong in holding that the evidence relating to such oral agreement established that there was any binding oral agreement between the first plaintiff and the defendant in the terms alleged or otherwise
- (3) BECAUSE even if there was such a binding oral agreement as alleged or otherwise it did not constitute an absolute defence to a claim for specific performance.
- (4) BECAUSE the refusal of the learned judge to order specific performance of the agreement was a wrongful exercise of his discretion.
- (5) BECAUSE the second plaintiff was rightly struck out from the action by the Federal Court.
- (6) BECAUSE the cross-appeal was rightly dismissed by the

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ELIZABETH GLOSTER

No. 27 of 1980

IN THE JUDICIAL COMMITTEE OF THE PRIVY  
COUNCIL

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O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA  
(APPELLATE JURISDICTION)

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B E T W E E N:

ZAIBUN SA BINTI SYED AHMAD

Appellant  
(Defendant)

- and -

(1) LOH KOON MOY (F)

(2) LAM WAI KEE

Respondents  
(Plaintiffs)

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CASE FOR THE RESPONDENTS

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MESSRS. PARKER GARRETT & CO.,  
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