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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 21 of 1971

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR
(APPELLATE JURISDICTION)

B E T W E E N :

1. SIEW SOON WAH alias SIEW POOI YOONG
(as trustee)
 2. SIEW SOON WAH alias SIEW POOI YOONG and
 3. SIEW POOI YUEN alias SIEW POOI YUEN
- Appellants
(Plaintiffs)

- and -

YONG TONG HONG (sued as a firm)

Respondent
(Defendant)

CASE FOR THE APPELLANTS

1. This is an appeal by leave of the Federal Court of Malaysia holden at Kuala Lumpur (Appellate Jurisdiction) from an Order of the said Court dated 27th April 1971 allowing an appeal of the above-named Defendant (hereafter termed "the Respondent") from a judgment and order of Mr. Justice Raja Azlan Shah given and made in the High Court of Malaya at Kuala Lumpur on 16th November 1970.

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pp.70/71

pp.61/62

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2. By the said judgment of 16th November 1970 Mr. Justice Raja Azlan Shah had given judgment in favour of the above-named Plaintiffs (hereafter termed "the Appellants") on both the claim and counterclaim in this action and had ordered the Respondent forthwith to vacate the ground floor of premises known as No.61 Jalan Pasar Bharu, Pudu, Kuala Lumpur (hereafter termed "the said ground floor premises") and to pay to the Appellants double rental therefor from 1st December 1966 until vacant possession and had dismissed the Respondent's counterclaim.

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By the aforesaid Order of 27th April 1971 it

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was ordered that the Respondent's appeal be allowed and that they be entitled to remain in possession of the said ground floor premises until 28th February 1988 so long as they paid the rent at the rate reserved by an agreement in writing dated 1st June 1964.

3. No. 61 Jalan Pasar Bharu, Kuala Lumpur, was a building constructed in 1958; it was then owned by Siew Kim Chong (the father of the Appellants and hereafter term "the former owner") who transferred title thereof to the Appellants in September 1967. 10

The Respondent is a firm carrying on the business of a sundry goods shop; it took a tenancy in about February 1958 of the said ground floor premises of the said building from the former owner at a rent of \$150 per month and moved in on the completion of the building and has remained in occupation ever since.

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In 1964 the rent was increased to \$200/- per month, and by a letter dated 4th October 1966 served on the Respondent by the Appellants' Solicitors the Appellants purported by notice to quit to determine the Respondent's tenancy of the said ground floor premises as at 30th November 1966. 20

pp.1-4

4. By their Statement of Claim endorsed on a Writ issued 26th October 1967 the Appellants sought of the Respondent (a) possession of the said ground floor premises on the ground that the Respondent had not complied with the said notice to quit and (b) double rental in respect of the said ground floor premises from the expiry of the said notice (1st December 1966) until vacant possession. 30

pp.5-8

5. By its "Written Statement of Defendant" dated 14th November 1967 the Respondent denied the Appellants' entitlement to the aforesaid relief and raised a counterclaim in which by paragraph 10 thereof it was alleged that the said notice to quit was given in breach of a written agreement (hereafter termed "the alleged agreement") made on or about 1st June 1964 between the Respondent and the former owner, the material terms of which were allegedly set out in paragraph 7 of the counterclaim as follows : 40

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(a) The Defendant (the Respondent) paid to the said Siew Kim Chong (the former owner) a sum of \$8,000/-.

- (b) In consideration of that payment the said Siew Kim Chong rented to the Defendant the whole of the said ground floor premises.
- (c) The duration of the tenancy was expressed to be for so long as the Defendant wished to occupy.
- (d) The monthly rent was fixed at \$200/- per month and the said Siew Kim Chong undertook not to increase it unless an increase was made in assessment.

10 The Respondent went on in Prayer (a) to the Counterclaim to ask for specific performance of the alleged agreement and counterclaimed other relief as there set out. P.7

6. By the Reply and Defence to Counterclaim dated 23rd November 1967 the Appellants in paragraph 6 thereof denied that the former owner had entered into the alleged agreement and averred in paragraph 11 thereof that it was in any event void in law. pp.8-10

20 7. By Further and Better Particulars of the Defence and Counterclaim dated 27th December 1967 the Respondent alleged that the sum of \$80,000/- referred to in paragraph 5 (a) hereof was paid as follows :- pp.10/11

(a) \$500/- in cash.

(b) \$7,500/- by three cheques dated the 4th, 10th and 12th February 1968.

30 8. It appears to have been accepted both at the hearing at first instance and on appeal (i) that the Appellants were entitled to the relief they sought (viz:- possession and double rental) unless the Respondent was entitled to rely on the alleged agreement and (ii) that the Appellants were bound by the alleged agreement to the same extent (if any) as the former owner. Hence there were and are in this case only two questions for consideration :-

(a) Whether the former owner entered into the alleged agreement, and p.73

(b) Whether, if he did, it was void in law.

9. The evidence at the trial in relation to the

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alleged agreement can be summarised as follows :-

- p.73 (i) The alleged agreement was written in Chinese and was alleged to bear the signature of the former owner. The learned trial Judge had before him an agreed rough translation thereof into English which appears to have been prepared by the Respondent for the purpose of stamp duty; the material part of that rough translation is as follows :-
- "In consideration of the sum of Dollars eight thousand (₹8,000/-) only paid by the tenant to the House Owner (the receipt of which sum the House Owner hereby acknowledges on the signing of this agreement) the House Owner hereby rents to the tenant the whole of the ground floor of No.61 Jalan Pasar Bharu Pudu Kuala Lumpur from the first day of June 1964 at a monthly rent of Dollars two hundred (₹200/-) as long as the tenant wishes to occupy".
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- p.79 (ii) A photostat copy of the alleged agreement had first been supplied to the Appellants' Solicitors by the Respondent's Solicitors with a letter of 20th December 1966.
- pp.113/114 (iii) Agreed forensic evidence in relation to the signature alleged to be that of the former owner on the alleged agreement and other admitted signatures of the former owner was inconclusive in that the Document Examiner expressed himself as unable to form any opinion as to whether the former owner had signed the alleged agreement.
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- pp.15/16 (iv) (a) Chooi Yong How (called by the Respondent), the father of the proprietor of the Respondent firm, testified to the existence of a tenancy agreement written by the former owner prior to the alleged agreement which first agreement he saw on 1st February 1958; he said his son asked him to write out the alleged agreement based on this agreement which he did but he was not present when it was signed; the former owner he said took back the first agreement.
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- pp.16/17 (b) Chooi Siang Khoon (called by the Respondent) was the proprietor of the Respondent firm and he testified that the firm had been at the premises since February 1958 and that there

was a tenancy agreement executed in 1958 prior to the alleged agreement; that he had paid the former owner \$8,000/- before moving in in 1958 and that the original rent was \$150/- per month; the alleged agreement was executed when the former owners wanted to put the rent up in 1964 and was executed in the Respondent's shop by himself and the former owner and witnessed by Lim Pink Choo. The first agreement was taken back by the former owner. The alleged agreement was then stamped on 9th June 1964, the Respondent paying \$120/- stamp fees.

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(c) Lim Ping Choo (Called by the Respondent) who was the alleged attesting witness testified that he saw the former owner sign the alleged agreement in the said ground floor premises and that he then signed the same as an attesting witness. p.17

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(d) The former owner (called by the Appellants) testified that the premises were bought in 1958 and that the Respondent had occupied the ground floor from the outset; the Respondent paid \$8,000/- in 1958 as a consideration for a monthly tenancy, the original rental being \$150/-. In 1964 after a letter of 9th April 1964 he and Chooi Siang Khoon the proprietor of the Respondent firm agreed that the rent be increased to \$200/- per month: this agreement was however never recorded in writing and indeed the original tenancy agreement had not been in writing: the signature on the alleged agreement appeared to be his but it was not; he had never executed it. pp.12-14

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10. The learned trial Judge in his said judgment of 16th November 1970 in reviewing the evidence described as an important fact "the time at which the sum of \$8,000/- was given "by the Respondent to the former owner. It was common ground that the payment was made in 1958 and the learned Judge described it as a "strange fact" that the Respondent was submitting that the 1958 payment was a payment made in pursuance of the alleged agreement made in 1964. p.74

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The learned Judge therefore held that the alleged agreement was never entered into and that the p.21

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payment of ₹8,000/- in 1958 could only be consistently explained as payment of a premium for the tenancy granted in 1958. The Judge at no stage expressed any overt view of the credibility of the witnesses called before him or indicated which were the witnesses whose testimony he felt able to accept or rely on.

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11. The issue of the effect of the alleged agreement if genuine was then investigated by the learned trial Judge in his said judgment on the basis of the wording 10 of the rough translation and he held the same to be void for uncertainty in that it violated section 30 of the Contracts (Malay States) Ordinance 1950 which provides :-

"Agreements the meaning of which is not certain or capable of being made certain are void".

In reaching that conclusion the learned Judge relied on the decision in Hajara Singh v Muthukaruppan ((1967) 1 M.L.J.1677) where the Federal Court had held 20 void for uncertainty an agreement which had employed the words "for so long as the tenant wished during his lifetime" to determine the duration of the tenancy

p.25-27

12. The Respondent appealed and the ground of appeal set out in the Memorandum of Appeal dated 31st December 1970 were in substance as follows :-

- (a) That the finding that the former owner had not entered into the alleged agreement was contrary to the weight of the evidence.
- (b) That the learned Judge was wrong in holding (if he did so hold) that the notice in the letter 30 of 4th October 1966 was sufficient to determine the Respondent's tenancy.
- (c) That the learned Judge was wrong in law in holding that the nature of the alleged agreement was such that there could not be an order for specific performance thereof or alternatively damages.
- (d) That the learned Judge was wrong in holding the alleged agreement void for uncertainty.

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13. The appeal was heard by the Federal Court (Coram: Ong C.J. and Suffian and Gill F.JJ.) who caused a 40 certified translation into English of the alleged

agreement to be made by the Official Interpreter, which translation is set out in full in the judgment of Ong C.J. That translation is materially different from the rough translation (cf. paragraph 9 (i) hereof) and the material parts thereof are here set out for convenience :-

pp.52/53

"The person Siew Kim Chong executing this document has built a shop house.....

10 He desires to lease out the whole of the ground floor to Chop Yong Tong Hong and the tenancy shall be permanent.

It is clearly stated here that the rent per month shall be \$200.00.....

A deposit of \$8,000.00 was received on the 1st day of February 1958 and as it is feared that verbal words are not proof this document is written as evidence".

20 14. In the judgment of the Federal Court dated 27th April 1971 and delivered by Ong C.J. it was indicated that "much needless confusion" would have been avoided at the trial had a proper translation been available and that the "distorted picture" presented by the rough translation forced the learned trial Judge to "certain findings of fact adverse to the Respondent".

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Having so stated the Federal Court without reviewing the evidence or considering the genuineness of the alleged agreement further assumed that the alleged agreement was not a forgery and indeed by their judgment upheld it as valid.

30 15. The Federal Court held in relation to the wording of the certified translation that

(a) the decision in Hajara Singh v Mathukaruppan (supra) was given per incuriam and was not binding on them.

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(b) the alleged agreement was not void for uncertainty.

40 (c) the Respondent paid \$8,000/- and did structural alterations at its own expense as consideration for a "permanent" letting i.e. remaining in undisturbed occupation for as long as he pleased provided rent be paid at the stated rate and that

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hence an equity of the type referred to in Inwards v Baker [(1965) 2 Q.B.297] subsisted in favour of the Respondent.

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(d) The notice to quit was given in breach of the agreement referred to in (c) hereof and should be declared invalid; the Court seem at this point also to have held that it was not repugnant to the nature of a periodic tenancy that the landlord had agreed that the tenancy should be permanent and that the English decision in Re Midland Railway Co's agreement [(1970) Ch.365 and (1971) Ch. 725 C.A.] was in point.

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(e) The alleged agreement should be held to be one for the grant of as long a lease as the law allows.

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(f) Since section 221 (3) (b) of the National Land Code provided the maximum term for a lease of a part only of alienated land should be 30 years, the alleged agreement was to be treated as an agreement for a 30 years lease and accordingly a declaration should issue on the counterclaim that the Respondent be entitled until 28th February 1988 to remain in peaceful possession of the said ground floor premises.

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16. The appeal was therefore allowed and the Respondent was awarded costs of both the action and the appeal.

17. So far as concerns the issue as to whether the former owner entered into the alleged agreement it is submitted that the Federal Court erred in reversing the Judge's decision on this point merely on the wording of the certified translation (a) when they had not had the opportunity and advantage of seeing the relevant witnesses and (b) without a full and proper review of the evidence given on this point at the trial.

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18. So far as concerns the issue as to the effect in law of the alleged agreement it is submitted that

(a) there was no evidence that the Respondent paid \$8000/- and/or did structural alterations at its own expense as consideration of a "permanent" letting.

(b) no equity arose in favour of the Respondent vis-a-vis the provision in the alleged agreement that the letting be permanent

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- (c) the provision that the letting was to be permanent amounted to a lease or an agreement for a lease in perpetuity and hence was and is void.
 - (d) alternatively the said provision was and is void for uncertainty.
 - (e) the provision that the letting be permanent being prima facie void the Court was not entitled to substitute a lease for 30 years under section 221 (3) (b) of the National Land Code or otherwise.
- 10 19. In the premises the Appellants respectfully submit that the judgment and the Order of the Federal Court should be set aside and that the judgment and Order of the learned trial Judge should be restored and that this appeal should be allowed with costs and costs of the appeal to the Federal Court for the following amongst other

R E A S O N S

- 20 (1) That there were no sufficient grounds or material for reversing the learned trial Judge's finding of fact that the alleged agreement had not been executed by the former owner.
- (2) That in any event the alleged agreement in so far as it purported to create a permanent tenancy was void in law and/or void for uncertainty.
- (3) That the Respondent had no equitable or contractual right or privilege entitling him to resist the Appellants' claims in this action.

FRANK WHITWORTH

ROGER ELLIS

