

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :-

ENG MEE YONG (f);
NG YEE HONG and NG YUE HONG;
NG YEE FOO and NG YUE FOO;
NG YEE DENG and WOO YEE LING;
NG YEE CHEEN and NG YUE CHUAN;
NG YEE THONG

Appellants

- and -

V. LETCHUMANAN s/o VELAYUTHAM

Respondent

C A S E
A P P E A L

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- 1. This an appeal from a decision of the Federal Court of Malaysia (Gill, Ag: Lord President; Ong Hock Sim, F.J. and Raja Azlan Shah F.J.) given on 7th September 1976 setting aside the order of the High Court at Seremban (Ajaib Singh J.) made on 10th November 1975, which had ordered the removal of a caveat presented by the Respondent and registered against the land held under Grant No. 2457 for Lot 593 in the Mukim of Ampangan District of Seremban (hereinafter called "the land").
p.44
p.40
- Final leave to appeal from the said decision of the Federal Court of Malaysia to His Majesty the Yang di-Pertuan Agong was given by the said Court on 23rd May 1977.
p.54
- 2. The Appellants are, and at all material times were, the registered proprietors of the land. By an agreement in writing dated 28th June 1974 the Appellants agreed to sell the land to the Respondent for a price of \$827,656.25.
p.7-10
- 3. This agreement expressly provided that

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- p.8 L.4-13 (a) the parties had agreed to determine a former agreement made between them for the sale of the land dated 16th December 1973 (Recital);
- p.8 L.22-32 (b) the Respondent should pay to the Appellants two sums totalling £127,765.62 by way of deposit and on account of the purchase price (Clauses 1 and 2);
- p.8 L.43
p.9 L.6 (c) the purchase should be completed on or before 28th September 1974 when the Respondent should pay to the Appellants the balance of the purchase price (Clause 3); 10
- p.8 L.40
p.9 L.6 (d) both in relation to completion and throughout the contract time should be of the essence (Clauses 3 and 10);
- p.9 L.19-25 (e) if the Respondent failed to pay the balance of the purchase price in accordance with Clause 3 the sums paid pursuant to Clauses 1 and 2 should be irrecoverably forfeited to the Appellants as agreed and liquidated damages for breach of contract (Clause 5). 20
- p.5 L.22
p.4 L.16 4. The Respondent paid the two sums referred to in 3 (b) above, but did not pay the balance of the purchase price on or before 28th September 1974, or indeed at any time thereafter.
- p.11 & p.12 5. On 30th September 1974 the Appellants' solicitors wrote two letters, one to the Respondent and the other to his Solicitors. In the former they notified the Respondent that as a result of his breach of Clause 3 the Appellants had forfeited the said two sums. In the latter they requested the Respondent's Solicitors to return the Appellants' documents of title to the land as the agreement had been terminated. 30
- p.13-14
p.13 L.2
p.5 L.26 6. By a letter dated 25th October 1974 from his Solicitors the Respondent denied the breach of Clause 3 and alleged that the parties had orally agreed an extension of 2 months beyond 28th September 1974 for completion. The Respondent did not pay, or tender, the balance of the purchase price on or before 28th November 1974 or at all. 40

7. The Respondent applied to the Registrar of Titles for the entry of a private caveat against the land; the Registrar entered such a caveat, and by notice dated 9th November 1974 notified the Appellants thereof.

p.7-8

8. Section 323 (1) of the National Land Code provides, inter alia, that

"The persons and bodies at whose instance a private caveat may be entered are

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(a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;"

9. On 6th January 1975 the Appellants applied to the Registrar for the removal of the caveat, but notice of intended removal could not be served on the Respondent.

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10. Section 327 (1) of the National Land Code provides that

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"Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, ex parte) may make such order on the application as it may think just".

11. By notice of motion dated 26th August 1975 the Appellants pursuant to this section applies to the High Court in Seremban for an order for the removal of the caveat. This application was supported by the affidavit of the Appellants affirmed on 7th August 1975. This affidavit deposed to the facts set out above and stated that the Appellants had never agreed to the extension of time for completion alleged by the Respondent or to any extension of such time.

p.1-3

p.4-7

p.5 L.45
p.6 L.3

12. The Respondent filed an affidavit in opposition affirmed on 4th November 1975. In this affidavit the Respondent deposed that

p.22-27

(a) the former agreement dated 16th December 1973,

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- p.23 L.8 referred to in paragraph 3 (a) above, had not been specifically cancelled or withdrawn (paragraph 5).
- p.23 L.24 (b) it had been orally agreed that time should not
p.24 L.12 be of the essence of the agreement of 28th June 1974 and that it had been agreed from the beginning that the time mentioned in that agreement was not to be enforced at all (paragraphs 10 and 14).
- p.23 L.28-35 (c) the Appellants had promised that they would grant him all the time needed to arrange for the development of the land in association with a third party, and that the purchase price was to be paid on the completion of such arrangements and on receipt by him of certain payments by such third party (paragraph 11). 10
- p.24 L.17-22 (d) as the Appellants knew, third parties were not interested in the land until an approach road had been built and would not agree to contribute until this had been done (paragraph 16). 20
- p.24 L.40-43 (e) the Respondent had constructed an approach
p.25 L.3-6 road which was completed in May 1975, and
p.26 L.39-42 which had enhanced the value of the property to a great extent; by reason of such enhancement the Appellants were estopped from denying his interest. (Paragraphs 20, 22 and 36).
- p.25 L.16-22 (f) negotiations with the third party were in
p.26 L.17-19 progress when the Appellants purported to terminate the agreement notwithstanding that they had agreed to grant an "extension of time" for a period of two months from 28th September 1974. (Paragraph 25). 30
- p.25 L.23 (g) there was no provision for termination of
L.27 the agreement and it had not been expressly terminated. (Paragraph 26).
- p.25 L.28-47 (h) the Appellants refused to grant an extension
p.26 L.8 on time and failed to honour the agreement to
L.19 grant one; and such refusal was in all the circumstances unreasonable and unlawful. 40
(Paragraphs 27, 28 and 31).

13. In the High Court of Seremban the Learned Judge, Singh J, ordered that the caveat be removed and held that

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- (a) the Respondent had no caveatable interest in the land within the meaning of s.323 (1) of the National Land Code. p.38 L.10-
L.15
 - (b) time was of the essence of the agreement and the Appellants were well within their rights when they forfeited the sum paid by the Respondent upon his failed to complete on or before 28th September 1974. p.38 L.16-24
 - (c) the agreement was a well prepared document which stated in no uncertain terms that time should be of the essence; and extrinsic parol evidence to vary its terms was inadmissible under sections 91 and 92 of the Evidence Act 1950. p.38 L.42
p.39 L.3
 - 20 (d) not everything in the Respondent's affidavit was worthy of consideration, and there was no merit in his allegations of an oral term, which allegation was obviously meant to embarrass the Appellants and to cause delay in the proceedings. p.37 L.15-
L.18
p.38 L.32-
L.38
p.38 L.44-
L.48
 - (e) the Appellants had not agreed to any extension of time for completion, and the Respondent had made no attempt whatsoever to complete the purchase at any time. p.39 L.4-10
14. The Respondent appealed to the Federal Court on the grounds that
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- (a) the Learned Judge erred in law in holding that the Respondent had no caveatable interest. p.42 L.32
 - (b) whilst the Learned Judge was right in holding that the agreement was terminated and right in holding that oral statements were not admissible to vary the agreement, he should have considered the position in the light of the benefit which had accrued by virtue of the money expended on the land. p.43 L.2-10
 - (c) the Learned Judge should have held that p.43 L.11-14

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these monies were recoverable and that the Respondent was thereby entitled to a caveatable interest.

p.43 L.15-24 (d) the Learned Judge should have held that the Appellants were not entitled to forfeit the whole of the sum of \$127,765.62 and that therefore the Respondent had a further caveatable interest in the land.

p.45 L.18-20 During the hearing of the appeal of the Respondent relied only on ground (a) above, and abandoned the other grounds. 10

p.46-49 15. In a judgment delivered by Gill Ag: Lord President, the Federal Court allowed the Respondent's appeal against the order for removal of the caveat. The Court held

p.48 L.15- L.25 (a) that the Appellants had "repudiated the contract" on the ground that the Respondent had failed to complete the purchase on or before the agreed date; that repudiation by one party to the agreement could not preclude the other party from suing on the agreement, and that accordingly the Learned Judge had erred in thinking that the Respondent ceased to have a caveatable interest after such repudiation by the Appellants. 20

p.48 L.26- L.28 (b) that the system of caveat exists for the protection of alleged rights; that the rights of parties under a contract and the question whether or not there has been a breach of contract could only be determined in a proper action and not merely on affidavits, and that therefore the caveat should not be removed. 30

p.48 L.40- L.43

p.49 L.20

16. The Appellants submit that the Federal Court erred in thinking that by their letters of 30th September 1974 the Appellants repudiated, or purported to repudiate, the contract. The Respondent was in breach of the agreement by failing to complete on or before 28th September 1974; as time was of the essence that breach was a repudiation by him, and the Appellants by their letters accepted such repudiation and thereby 40

p.11 & p.12

rescinded the agreement. Therefore the rule that unilateral repudiation is ineffective was not relevant; and the agreement was on 30th September 1974 terminated, as the Respondent in his Memorandum of Appeal admitted.

p.43 L.2-L3

10 17. The Appellants further submit that the evidence of the Respondent to the effect that it was orally agreed that time should not be of the essence; that the time mentioned in the agreement should not be enforced; that the Appellants would grant him all the time needed or an extension of two months from 28th September 1974; and that completion was only to take place when he had received monies from third parties, contradicted, varied, added to and/or subtracted from the terms of the written agreement. Accordingly such evidence was, by virtue of sections 91 and 92 of the Evidence Act 1950, inadmissible in these proceedings or in proceedings brought by the Respondent for the specific enforcement of the agreement to sell the land.

p.24 L.11-13

p.23 L.28

p.25 L.16

p.23 L.36

20 18. If contrary to the Appellants' contention such evidence or any of it was and would be admissible, the Appellants will further contend that such evidence was, as the Learned Judge found, not worthy of credence, and that the Respondent had not disclosed any sufficient prima facie case that he had, either on 9th November 1974 or at the time of the hearing of the motion, any enforceable right to title to, or any interest in, the land.

p.38 L.37

p.38 L.10-

L.15

30 The Appellants will rely, inter alia, on the following matters

(a) the alleged oral agreements contradict the clear express terms of a formal contract signed by the Respondent in the presence of his solicitors.

40 (b) the alleged oral agreements are themselves mutually inconsistent. If it had been agreed that time was not of the essence; that the time limits should not be enforced at all, and that the Respondent

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would not complete until the access road was built and he had received monies from a third party, it would have been wholly unnecessary, and indeed contradictory, to agree an extension of two months.

- (c) the alleged oral agreements are wholly unparticularised and are supported by no evidence other than the bare assertion of the Respondent.
- (d) to have made any such agreements would have been inconsistent with the other conduct of the Appellants and extremely imprudent. If the Appellants could not require completion until a road had been built and monies received from a third party an indefinite period might elapse before they either received the purchase money or were free to sell elsewhere. 10
- (e) the Respondent's statement that the former agreement of 16th December 1973 had not been cancelled or withdrawn contradicted the words of the agreement of 28th June 1974. 20
- (f) the Respondent had made no attempt to complete either by 28th November 1974 or at all.

19. The Appellants accept that the system of caveat exists for the protection of alleged, as well as proved, interests. But they submit that it does not follow that a caveat must, or should, remain on the register of titles whenever an interest is alleged and without regard for the strength or weakness of the case for such alleged interest. The Appellants therefore submit that, in all the circumstances, the Learned Judge was right in considering that it was just that an order should be made for the removal of the caveat. Further the Federal Court erred in that it 30

- (a) set aside the order which the Learned Judge, in the exercise of his discretion, thought just;
- (b) gave no, or no sufficient, weight to that 40

opinion of the Learned Judge and to his view as to the credibility of the Respondent's evidence.

- (c) did not itself consider the weight of the evidence or whether or not the caution should, in justice, be removed.

The Appellants will further submit that in all the circumstances of this case it is just that the caveat should be removed.

- 10 20. The Appellants therefore submit that this Appeal should be allowed, and the order of the High Court at Seremban restored, for the following among other

R E A S O N S

(1) BECAUSE the Appellants did not, and did not purport to, repudiate the agreement of 28th June 1974, but accepted the Respondent's repudiation of that agreement and thereby terminated the same.

- 20 (2) BECAUSE on the terms of the agreement of 28th June 1974 the Appellants were entitled so to terminate that agreement.

(3) BECAUSE evidence of the oral agreements alleged in the Respondent's affidavit was not, or would not be, admissible.

- 30 (4) BECAUSE, even if such evidence was and would be admissible, the Respondent's affidavit did not raise a prima facie case sufficiently strong to justify the continuance of the caveat.

(5) BECAUSE it was just, and the Learned Judge was right in thinking that it was just, that the caveat should be removed.

(6) BECAUSE the Federal Court should not have set aside the decision, or disregarded the opinion, of the Learned Judge that it was just that the caveat should be removed.

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(7) BECAUSE the decision of the Learned Judge was right.

CHRISTOPHER BATHURST.

No. 25 of 1977

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