GM 4-62



63591 37/1961

IN THE PRIVY COUNCIL

No. 6 of 1960

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

BETWEEN

YEOW KIM PONG REALTY LIMITED ... ... Appellants

and

10 NG KIM PONG ... Respondent

CASE FOR THE APPELLANTS

RECORD

1. This is an appeal from a judgment of the Court of Appeal of the Supreme Court of the Federation of Malaya (Sir James Thomson C.J., Smith J. and Ong J.) dated the 23rd day of April, 1959, allowing the appeal of the Respondent from a judgment of the Trial Judge (Sutherland J.) dated the 1st day of May, 1958, 20 whereby he dismissed the Respondent's claim against the Appellants for the return of two sums of money paid by him to the Appellants and for damages for breach of contract for the sale and purchase of land. Final leave to appeal to His Majesty The Yang di - Pertuan Agong in Council was granted to the Appellants by the said Court of Appeal by Order dated the 2nd day of November, 1959.

2. The question in this appeal is whether, as the Court of Appeal held, the Respondent is 30 entitled to the return of the money and to damages for breach of contract, or whether, as the Trial Judge held, the Appellants are entitled to retain the money and have themselves committed no breach of contract.

3. The Respondent's claim, as stated in his Statement of Plaint, delivered on the 16th November 1956, can be summarised thus:-

(i) On the 24th March 1956, he had made a written Agreement with the Appellants to buy from them 22 lots of building land pp.1-3

in the town of Klang for the price of $66,000 and had on the same day paid to the Appellants the sum of $15,000.00 by was of deposit and part payment. (He also alleged a further agreement of the same date under which he had agreed to re-sell one of these plots to the Appellants and to build a house upon it for $8,600. Nothing turns upon this agreement.)

(ii) It was a term of the written agreement that the Respondent was to pay to the Appellants on or before the 23rd June 1956, a further instalment of $24,000.00 and that upon the payment of this sum the Appellants were to transfer to the Respondent 8 of the said lots.

(iii) He had been unable to pay this further sum of $24,000.00.

(iv) On or about the 7th July 1956, at a meeting between him and an officer of the Appellants, it was mutually agreed that he should be allowed to pay this sum by two instalments, the first of $5,000.00 on the 7th July 1956, and the second of $19,000.00 on the 31st July 1956.

(v) On the 7th July 1956, he had paid the sum of $5,000.00 to the Appellants.

(vi) He had duly tendered the sum of $19,000.00 but the Appellants had refused to transfer to him any of the titles of the 22 lots of land despite many demands.

pp. 4-6 4. The Agreement of the 24th March 1956, was annexed to the Statement of Plaint. This Agreement recited that the Appellants were the owners of the 22 lots of land, that they had caused building plans to be prepared for the erection of terrace houses on the land, and that the Respondent, as purchaser, intended to erect these houses for sale and agreed to give priority for such sale to 36 tenants of the Appellants occupying houses in Meru Road, Klang, and that the Appellants had agreed to sell the

land to the Respondent for $66,000.00

Clause 1 of the Agreement stated that in consideration of the premises and of the sum of $15,000.00 paid by the Respondent to the Appellants, as part payment towards this price, it was "mutually agreed as follows".

Clause 2 provided that the Respondent should pay to the Appellants a further $24,000.00 on or before the 23rd June 1956, and the balance of $27,000.00 on or before the 23rd December 1956.

Clause 3 provided that as and when the Respondent paid to the Appellants each sum of $3,000.00 forming part of the payments mentioned in Clause 2, the Appellants would transfer to the Respondent any one lot of the property "provided the above-mentioned sum of $24,000.00 shall be paid in full by the Purchaser to the Vendor on or before the 23rd day of June, 1956, and the balance of the purchase money in the sum of $27,000.00 shall be paid in full by the Purchaser to the Vendor on or before the 23rd day of December, 1956".

Clauses 4 and 5 are immaterial.

Clause 6 provided that the Appellants should produce for the purpose of inspection, where necessary, any or all of the titles in respect of the property to the Respondent or his nominees or assigns.

Clause 7 provided that upon the signing of the Agreement the Appellants should give notice to their 36 tenants regarding the priority given to them to purchase any of the terrace houses.

Clause 8 is immaterial.

Clause 9 provided that within one week from the date of the Agreement the Appellants should give access to the Respondent to the whole property so that work might be commenced on any of the building lots as the Respondent might think fit.

Clause 10 was in these terms:-

"10. In the event the Purchaser fails to pay the sums of money on the respective dates afore-mentioned the said advance money of $15,000.00 paid by the Purchaser to the Vendor shall be forfeited to the Vendor as liquidated damages and this agreement shall be treated as null and void in so far as the untransferred lot or lots in the Property are concerned. All constructions made on the untransferred lots shall become the property of the Vendor."

Clauses 11 and 12 are immaterial.

pp.11-12 5. The Appellants' Defence admitted the Agreement and the Respondent's failure to pay the sum of $24,000.00 on or before the 23rd June, 1956. Paragraphs 10 and 11 of the Defence were in these terms:-

"10. The plaintiff having failed to pay the sum of $24,000 due under the said Agreement on or before the 23rd day of June, 1956, the defendant agreed to extend the time for such payment upon the terms and conditions appearing in the Letter a copy of which is attached hereto and marked 'A'.

"11. The plaintiff failed to observe the conditions upon which an extension of time for payment of the said sum of $24,000 was granted and therefore by notice in writing dated the 1st day of September, 1956 (a copy whereof is attached hereto and marked 'B') the defendant rescinded the said Agreement."

p. 13 6. The letter marked 'A' was dated the 7th July, 1956, and was addressed by the Appellants to the Respondent. It was headed "without prejudice" and it stated that the Appellants were prepared to permit to the Respondent an extension of time with which to pay the sum of $24,000.00 on the following conditions:-

"1. To pay us a sum of $5,000.00 forthwith and the balance of $19,000.00

to be paid on or before the 31st July, 1956.

2. Construction work on the above land must be commenced within one week of the date hereof.

3. Construction must have been begun on any land that is sought to be transferred.

4. Should there be any breach of the above conditions, the $5,000.00 abovementioned, if paid, will be forfeited and the extension of time withdrawn."

After the signature to this letter of the Appellants' Managing Director, there appeared the following words:-

"I, Ng Kim Pong" (the Respondent), "acknowledge the receipt of the original copy of this letter and agree to the terms as stated.

Signed NG KIM PONG

5 p.m. 24/7/56."

7. The Defence further alleged that the Respondent had on the 10th May 1956, transferred the Agreement of the 24th March, 1956, to one Liew Thean Siew ("Siew") for $10,000, that the Appellants had on the 8th April, 1957, given notice to the Respondent that they accepted Siew as assignee of the Agreement, that the Respondent had no rights under the Agreement sued upon at the date of the institution of the suit, and that on the 8th April, 1957, Siew had assigned to the Appellants the Agreement of the 24th March, 1956, for the sum of $1,500. p.12

8. The Respondent delivered a Reply in which, after joining issue upon the matters pleaded in the Defence, he denied the transfer of the Agreement to Siew and alleged that the Agreement had been deposited with Siew as security for a loan repaid prior to the institution of the suit, and that on the 8th April, 1957, Siew to the knowledge of the p.16

Appellants had no rights under the Agreement.

9. Upon these pleadings there were the following issues:-

(1) Was the agreement to extend the Respondent's time for payment made upon the conditions stated in the letter dated the 7th July, 1956?

(2) If so, had these conditions been fulfilled?

(3) Did the Respondent duly tender to the Appellants the sum of $19,000?

(4) Were the Appellants entitled to rescind the Agreement by the notice dated the 1st September, 1956, either because the conditions referred to in (1) had not been fulfilled, or because the Respondent had not duly tendered the sum of $19,000, or for both these reasons?

(5) What effect, if any, had the Respondent's transaction with Siew upon his right of recovery against the Appellants?

The Trial Judge decided all these issues in favour of the Appellants.

10. The correspondence between the parties bearing upon these issues can be summarised as follows:-

p. 162 (i) On the 25th June, 1956, the Appellants wrote to the Respondent informing him that as he had failed to pay the sum of $24,000 the above payment of $15,000 had been forfeited to them and the Agreement had now become null and void.

p. 163 (ii) On the same day the Respondent wrote to the Appellants asking for a month's extension of time for payment of the $24,000, offering to accept a reduction on the agreed price for the erection of the house referred to in paragraph 3(i) above and adding that he would also "welcome any other suggestion from you on this matter",

(iii) There was the letter of the 7th July, 1956, bearing the note signed by the Respondent on the 24th July, 1956. p. 13

(iv) On the 28th July, 1956, solicitors for the Respondent wrote to the Appellants stating that the Respondent had secured purchasers for 8 of the lots and that the purchasers had deposited the purchase price with their solicitor. The letter asked the Appellants to let the Respondent's solicitors have the titles to the 8 lots to enable them to be examined by the solicitor for the purchasers. The letter stated that the Respondent would thereafter be able to make payment of the balance of $19,000 "before the 31st July as agreed". p. 165

(v) On the 31st July, 1956, the Appellants' solicitors replied to the Respondent's solicitors stating that according to their instructions no building operations had commenced upon the land mentioned in their letter of the 28th July, and that "in accordance with paragraph 3 of our client's letter of the 27th instant (sc. the 7th instant) and to which your client concurred, there can consequently be no transfer of the land as at present advised". The letter stated that upon information that building operations had commenced the Appellants would be happy to comply with the Respondent's request. p. 166

(vi) On the 3rd August, 1956, the Respondent's solicitors replied stating that the question of building operations being commenced had no relevance to the Respondent's obligations. It was pointed out that the letter of the 7th July was headed without prejudice "to which apparently you did not pay sufficient attention". The letter asked for a direct answer to the request in respect of the 8 titles and stated that building operations would not be commenced by the purchasers until the purchasers were satisfied about the titles. p. 167

(vii) On the 10th August, 1956, the Appellants' solicitors replied that the Appellants were prepared to permit the Respondent to inspect the titles at any time in their office, but that until building operations were commenced they could not see their way to transfer the p. 168

lots in question.

p. 169 (viii) On the 1st September, 1956, the Appellants' solicitors wrote to the Respondent stating that, as no action had been taken by him to fulfil his obligations under the contract or to pay the sum due to the Appellants, they were instructed to give him notice that the contract was terminated by reason of his breaches, and that all monies paid to them were forfeit.

11. Oral evidence was given at the trial on both sides. The Trial Judge preferred the evidence for the Appellants which is summarised in this paragraph:-

p.52 l.15 (i) Appellants' Witness 1 was Yeow Kim Pong ("Pong"), the Governing Director of the Company. He said that in June 1956 one Quai Pin Seong("Seong") had come to him on the Respondent's behalf to persuade him to give the Respondent more time. The witness's reply had been that there must be conditions attached, one of which was that the houses must be erected at once. He had taken no part in the agreement of the 7th July: "it
p.53 l.23 was my son and my Secretary". In cross-examination it was apparently put to this witness that he had told Seong that it would be a term of the extension of time that work should be commenced on the house to be erected by the Respondent for the Appellants, for this answer is recorded:-

> "I did not tell plaintiff that it was a term of the extension that work on my brother's house should be commenced".

p.106 l.42 The Trial Judge said that this witness had impressed him favourably and that he accepted his evidence.

p.54 l.20 (ii) Appellants' Witness 2 was Yeow Kim Joo ("Joo"), the Managing Director of the Company. He said that the Appellants had the 22 lots of land behind the houses occupied by their 36 tenants. In 1955 the Company had intended to demolish the 36 houses and build houses for the tenants on the land behind. They had prepared plans and had invited tenders from builders. The Respondent came and offered to buy the 22 lots. The Agreement was signed.

The Respondent did not pay the $24,000 due on the 23rd June, 1956. The witness wrote to him the letter of the 25th June, 1956 (paragraph 10(i) above). After Seong had spoken to Pong, Pong told the witness to give the Respondent one month's grace on payment of $5,000 "and three other new conditions to which plaintiff agreed". The conditions were those stated in the letter of the 7th July, 1956. These terms were offered to the Respondent at an interview at which the Respondent, the witness and the secretary Tham were present. The Respondent understood the terms and accepted them. He accepted them on the 7th. The witness reduced them to writing and the Respondent read the writing. The Respondent said he would come back with the money and sign the document. Seong came with the $5,000. The witness did not send the Respondent a receipt. He was going to keep the receipt until the Respondent signed the letter. The Appellants looked for the Respondent several times but did not find him. On the 24th July, 1956, the Respondent came to the Appellants' office and signed the letter. The witness did not know on the 24th July whether the Respondent had built anything there. Prior to the 7th July he had made inquiries: the Respondent had not made any erection. In July 1956 no work had commenced at all - no levelling and no digging of holes. "These conditions were composed because I had to give priority to the 36 tenants. ..... Unless the houses were being built, the tenants of my 36 houses could not know when they would get a house".

p. 162
p.56 1.26
p.57 1.12
p.57 1.27
p.58 1. 5
p.61 1. 8
p.62 1.13

(iii) Appellants' Witness 5 was the Company's secretary, Tham. This witness did not recollect an interview on the 7th July, 1956, attended by the Respondent. It was his recollection that Seong had come to the Appellants' office and that he had told Seong that the Appellants were prepared to grant an extension subject to the 4 conditions. The witness discussed the terms of the letter of the 7th July with Seong. When the Respondent asked for the extension, the tenants were interested and that was why the Appellants "made the term that construction should commence. As far as the Company concerned, we urgently required commencement for the purposes of our business".

p.70 1.30
p.73 1. 6
p.77 1.20

RECORD

p.18

12. (i) The Respondent in his evidence stated that he had personally asked Pong to extend his time for a month, that Pong had told him to put his request in writing, that he had sent Seong to Pong with a letter, and that Seong had reported to him Pong's agreement to extend the time up to the 31st July on condition that the Respondent paid $5,000 on or before the 7th July. On the 7th July the Respondent, accompanied by Seong, brought the $5,000 to the Appellants' office where he met Tham and Joo. "Before I handed the money to them I asked them to confirm if what Quay (Siong) told me was correct. They replied that it was. When the Respondent asked for a receipt Joo told him that Pong was out and that in a day or two they would post the receipt to him. For the next two weeks he had repeatedly telephoned and gone to the Appellants' office to get the receipt. On the 24th July he met Tham and Joo at the Appellants' office. They told him that before they gave him the receipt he should acknowledge receipt of a letter. "I read the letter and found the terms and conditions had never been even discussed before or after I paid them the $5,000. ..... Then I decided to sign the letter and told Mr. Tham that I was signing it because I wanted receipt for the $5,000".

p.38 l. 3

(ii) The Respondent's Witness 4 was Seong who spoke of a meeting with Pong:-

> " I told him plaintiff asked for extension of 1 month. Yeow Kim Pong agreed to 1 month's extension provided plaintiff gave another $5,000 deposit. If I am not mistaken Mr. Yeow Kim Pong said he must carry out the old agreement. ..... Yeow Kim Pong spoke of some conditions which plaintiff had not carried out. I can't remember the conditions. After I had seen Yeow, I told plaintiff Yeow had agreed to extend provided plaintiff carried out the terms of the agreement. I told plaintiff to bring the $5,000. I took the money and handed it to Yeow Kim Joo. ... Yeow Kim Pong complained that plaintiff had not started to build. I think Yeow said that if plaintiff paid money and went on with the building, Yeow would extend the option".

13. There was produced at the hearing a Sale Deed dated the 10th May, 1956, under which the Respondent sold and transferred to Siew the Agreement of the 24th March, 1956, between the Respondent and the Appellants. Evidence tendered by the Respondent, objected to by the Appellants, and received by the Trial Judge de bene esse was to the effect that this deed was given to Siew by way of security for a loan. This deed was assigned by Siew to the Appellants. There was still some money due to Siew. The Appellants did not know when they took the assignment that Siew had no rights under the deed.

p.183
p.23 l.28
p.34 l. 4
p.34 l.25
p.60 l. 7
p.190

14. There was also produced at the trial correspondence between the Respondent's solicitors and the Appellants' solicitors after the rescission of the Agreement on the 1st September, 1956 (paragraph 10(viii) above). It can be summarised as follows:-

p.170

(i) On the 8th September, 1956, the Respondent's solicitors wrote stating that they were holding $19,000 in his account and asking whether the Appellants were willing to accept this instalment.

(ii) On the 11th September, 1956, the Appellants' solicitors replied stating that they were unable to obtain instructions.

p.171

(iii) On the 19th September, 1956, the Respondent's solicitors wrote stating that -

p.172

> "our client considers that your clients continued silence can only mean an acceptance on their part of the terms put forward. Our client has therefore asked us to forward you the enclosed cheque for $19,000. ... In exchange would you kindly let us have the Certificates of Titles. ... We would ask you to be good enough to retain the sum of $19,000 in your own clients' account until the documents of title are handed to you with authority to pass them to us for the purpose of preparing the necessary transfers."

(iv) On the 28th September, 1956, the

p.173

Respondent's solicitors wrote threatening to commence an action for specific performance.

p.174 (v) On the 2nd October, 1956, the Appellants' solicitors wrote a letter headed "Without Prejudice" stating that upon the terms of a circular to the Appellants' tenants being agreed and upon evidence of posting of the same to the tenants, the Appellants would be happy to conclude the matter.

p.175-6 (vi) On the 3rd October, 1956, the Respondent's solicitors sent to the Appellants' solicitors a draft circular for their approval.

p.178 (vii) On the 25th October, 1956, the Respondent's solicitors wrote threatening proceedings and asking for the return of the $19,000.

p.179 (viii) On the 7th November, 1956, the Respondent's solicitors wrote again, demanding the return of the $19,000 and $64,000 damages for breach of contract.

p.180 (ix) On the 14th November, 1956, the Appellants' solicitors wrote to the Appellants stating that unless they received the titles with blank transfers they would have no option but to return the $19,000 to the Respondent's solicitors.

p.181 (x) On the 19th November, 1956, the Appellants' solicitors returned the $19,000.

15. (i) In the course of his judgment the Trial Judge referred to the evidence of Seong:-

p.105 l.1 "Yeow Kim Pong complained that plaintiff had not started to build. Witness thought that Yeow said that if plaintiff paid money and went on with the building, Yeow would extend the option. This was a significant piece of evidence and this witness impressed as an honest witness of truth, and I accept his evidence."

The significance of this evidence was that it tended to confirm the evidence of Pong summarised in paragraph 11(i) above.

Pong's evidence in its turn tended to confirm the evidence of Joo summarised in paragraph 11(ii) above about the agreement to extend the Respondent's time being upon conditions.

(ii) After pointing to the discrepancy between Joo's evidence and Tham's evidence upon the question whether the Respondent had been present at the meeting of the 7th July, the Judge said:-

"In view of my decisions on other aspects of the case, plaintiff's presence or absence on 7th July is immaterial, but it is desirable, I think, that I should express my finding of fact on the point and, this being so, I am of the view that plaintiff was present....." p.111 l. 6

(iii) Dealing with the work done by the Respondent on the land, the Judge said:-

"....I would however agree that on the evidence of realities and not of superficialities, no genuine construction work as I think the parties understood the meaning of the term had been commenced on the land." p.112 l.13

(iv) Dealing with the terms upon which the Respondent's time had been extended, the Judge said:-

"If Exhibit P.2 (the letter of the 7th July) represents the supplementary agreement the action is at an end because plaintiff had admitted he had done no construction work on the eight lots. p.113 l.13

"It is right for me to say at this stage that I find that Exhibit P.2 does represent the agreement between the parties and that plaintiff did admit that he had done no building operations on the 8 lots. Therefore, in my view, the action must fail on this ground alone.

"Plaintiff's Witness 4 (Siong) says that Defendant's Witness I did raise the

question of express conditions concerned with building. Also, plaintiff has written his acceptance and is bound by it."

And again:-

p.119 l.33 "The fact remains that these were the only conditions on which defendant would consider extension and plaintiff signed these conditions on the 24th July. In my view he is bound by them and fell down on them." 10

(v) Dealing with the contention that evidence was not admissible to vary the terms of the sale deed referred to in paragraph 13 above, the Judge said:-

p.115 l. 8 "On the authority of the above cases, particularly Alang Said's case supra, in my view evidence was not admissible to vary the terms of exhibit P.4." 20

(vi) Dealing with the issue of tender, the Judge said:-

p.115 l.26 "Counsel for plaintiff in closing, conceded that plaintiff cannot argue that tender was made by letter No.6 of exhibit P.1" (letter of the 28th July, 1956, summarised in paragraph 10(iv) above).

And again:- 30

p.118 l.34 "Collecting my views on this lengthy case, I would say that in my view production of titles and completion should be at the vendor - defendant's office. Defendant offered inspection there, and I think that was all he was legally bound to do."

And again:-

p.120 l.21 "..... and indeed my opinion (is) if that were necessary, that Braddel and Ramani's letter of 28th July was not tender and that therefore plaintiff had broken his contract." 40

(vii) Dealing with the negotiations after the rescission, the Judge said:-

> "Witness continued that plaintiff was negotiating for the new opening of a contract and defendant was not obliged to reply. ..... It was plaintiff who was trying to get defendant to give him another chance. In my view this correctly represents the state of affairs between the parties after the termination of the contract by the defendant on 1st September 1956. p.112 l.33

> "In his closing address Counsel for defendant submitted that what happened after the 1st September is irrelevant and as I have just stated I would uphold this submission. Counsel further pointed out that there is no reference in the pleadings to negotiations as to waiver of a breach. ....."

And again:-

> "As to the authorities cited by plaintiff's counsel as to waiver, plaintiff has not pleaded waiver, nor, in my view, did the negotiations amount to waiver." p.120 l.14

16. In the Court of Appeal judgment was given by Ong J., allowing the Respondent's appeal. With this judgment Thomson, C.J. and Smith J. concurred. The Appellants respectfully offer the following comments on the reasoning of the judgment:-

(i) At the outset of the judgment it is stated:- p.142 l. 9

> "The essential facts in this case are not in dispute".

There follows a summary of the Respondent's evidence including the statement that the Respondent had repeatedly tried to obtain a receipt from the Appellants for the sum of $5,000 paid to them on the 7th July and that the conditions mentioned in the letter of the

7th July were never discussed when the payment of the $5,000 was accepted. This allegation had been disputed at the trial. The evidence of Joo had been that the conditions had been explained to the Respondent before the acceptance of the money (see p.57 ll.10-30, p.62 l.35).

(ii) The judgment holds that the Appellants were not entitled to determine the Agreement upon the 1st September, 1956, for the following reasons:-

p.148 l.26 p.180 l.27 (a) In the Appellants' notice of the 1st September 1956, they had claimed the right to rescind on the ground

> "that no action has been taken by you to fulfil your obligations under the contract".

This must have been a reference to Condition 3 of the letter of the 7th July which provided that "Construction must have begun on any land that is sought to be transferred".

(b) Section 56(3) of the Contracts Ordinance provides that if, in case of a contract voidable on account of the promissor's failure to perform his promise at the time agreed, the promisee accepts performance at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of that promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

(c) Section 56(3) was an exhaustive statement of the rights of a promisee upon his reaffirming a contract voidable on account of the promissor's failure to perform at the time agreed. In particular, it does not entitle a promisee to impose penal conditions.

(d) Condition 3 is a penalty. Its performance could be of no benefit to the Appellants. The reason for including

it was that it might serve "as a colourable pretext only to be resorted to for the purpose of enabling the defendants to avoid performance of the contract if and when they should think it profitable to do so".

As to (a), the grounds of the notice were stated to be "that no action has been taken by you to fulfil your obligations under the contract, or to pay the sum due to our clients".

The Respondent's obligations under the contract (apart from the obligation to pay the sum of $19,000 on or before the 31st July) included Condition 2:-

"2. Construction work on the above land must be commenced within one week of the date hereof."

As to (c), nothing in section 56 precluded the Appellants from attaching Conditions 2 and 3 to the consent given to the extension of the Respondent's time. The learned Judge has misconstrued that section if he understands it to limit in any way the right of a promisee to attach conditions to his consent to extend time or to his power to rescind the agreement if those conditions are not fulfilled.

As to (d), neither Condition 2 nor Condition 3 was a penalty or void. In the first place the Appellants had a good business reason for including these stipulations. They desired that alternative accommodation should be provided for their tenants without delay. Even if they had no business reason, and if their reason had been that suggested by the learned Judge (of which there was no evidence), the conditions were not therefore void, and the Appellants were entitled to take advantage of their non-performance.

Finally, under this head, it had not been pleaded in the suit that section 56 imposed any limitation on the Appellants' rights or that Condition 3 was a penalty or void.

(iii) The judgment holds that the Appellants were not entitled to rescind the Agreement p.147 l.17 p.148 l.25

because of the Respondent's failure to pay the sum of $19,000. It does so upon four grounds:-

(a) Payment of this sum by the 31st July was not of the essence of the contract.

(b) If time had ever been of the essence, the stipulation had been waived by the letters of the Appellants' solicitors of the 31st July and of the 10th August (see paragraph 10(v) and (vii) above).

(c) Section 68 of the Contracts Ordinance provides that if any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisee is excused by such neglect or refusal as to any non-performance caused thereby. There was clear evidence of such a refusal in the letters which passed between the solicitors between the 28th July and the 10th August.

(d) The sum of $19,000 had been paid to the Appellants' solicitors on the 9th September.

As to (a), it is submitted that as time was of the essence for the payment of the sum of $24,000 on the 23rd June, so time was of the essence for the payment of the sum of $19,000, part of that sum, within the period extended to the 31st July. Further, it had not been pleaded that time was not of the essence in this respect.

As to (b), it is submitted that the two letters are no evidence of waiver or at least of any waiver continuing beyond the 1st September and precluding the Appellants from serving the notice of that date. Further, there had been no plea of waiver.

As to (c), if by a refusal to grant reasonable facilities the learned Judge meant the Appellants' refusal to transfer lots on which no building operations had commenced, this was a misconstruction of Section 68. When a promisee has expressly reserved the right to refuse to transfer property in certain circumstances, the

assertion of that right cannot be treated as the refusal of reasonable facilities. If the learned Judge meant to refer to the offer of the Appellants to make the title deeds available for inspection in their office (as distinct from any other place), it is respectfully submitted that this was not a refusal to grant reasonable facilities and that, even if it were, it did not cause the Respondent's non-performance. Further, it had not been pleaded that any conduct of the Appellants amounted to a refusal to grant reasonable facilities within the meaning of section 68, or that the refusal had caused the Respondent's non-performance.

As to (d), the transfer of $19,000 to the Appellants' solicitors on the 19th September must, it is submitted, be irrelevant in determining whether the Appellants were entitled to rescind the Agreement on the 1st September. Further, the Respondent had not founded any claim upon this payment either in his Statement of Plaint or in his Reply.

(iv) The judgment finally held that evidence was rightly admitted to prove that the Sale Deed in favour of Siew operated only as security for a loan, that on the 8th April, 1957, when Siew assigned his rights under this deed to the Appellants he had only a claim to an uncertain amount by way of interest, and that the Appellants had not taken the assignment as bona fide purchasers for value in good faith. The evidence was held to be admissible on two grounds:-

(a) It was said that section 92 of the Evidence Ordinance (which provides that no evidence of any oral agreement shall be admitted as between the parties to any written agreement or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from the terms of the written agreement) could not apply to exclude the evidence either of the Respondent or of Siew because they were the two parties to the written agreement and they were in no way disputing what the real transaction was between them. p.153 l.21

(b) The 6th proviso to section 92 provides that any fact may be proved which shows "in what manner the language of a document is related to existing facts". Here the Respondent's conduct at all times was that of a person having rights and obligations under a contract with the Appellants. This was extrinsic evidence of surrounding circumstances which proved that the language of the document had no relation whatever to existing facts.

As to (a), it is submitted that section 92 applies in litigation between one of two parties to an agreement and an assign of the other, and it applies none the less because the extrinsic oral evidence offered is that of both the original parties. If it had been intended that evidence should be admissible in such a case, the exception would have been made in one of the provisoes to section 92.

As to (b), the proviso does not make admissible the subsequent conduct of the parties to the agreement for the purpose of contradicting, varying, adding to, or subtracting from its terms.

Further, it was not alleged in the pleadings and there was no evidence to prove that the Appellants had taken the assignment otherwise than for value and in good faith.

The Appellants will submit that this appeal should be allowed for the following (among other)

R E A S O N S

(1) BECAUSE the Appellants were entitled to rescind the Agreement of the 24th March, 1956, as varied by the terms of the letter of the 7th July, 1956.

(2) BECAUSE the Appellants did rescind the said Agreement.

(3) BECAUSE the Appellants were entitled to retain the sums paid to them by the Respondent under the said Agreement.

(4) BECAUSE the Appellants had not committed any breach of the said Agreement.

(5) FOR the reasons given by Mr. Justice Sutherland.

(6) BECAUSE the judgment of Mr. Justice Ong was wrong for the reasons given in paragraph 16 of this Case,

(7) BECAUSE the Court of Appeal were wrong and their judgment ought to be reversed.

B. MacKENNA

WILLIAM STABB

No. 6 of 1960

IN THE PRIVY COUNCIL

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ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

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BETWEEN

YEOW KIM PONG REALTY LIMITED

—— v ——

NG KIM PONG

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# CASE FOR THE APPELLANTS

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LAWRANCE, MESSER & CO.,
16, Coleman Street,
LONDON, E.C.2.
Solicitors for the Appellants.