Privy Council Appeal No. 6 *of* 1960

Yeow Kim Pong Realty Limited – – – – – – *Appellant*

v.

Ng Kim Pong – – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF THE FEDERATION OF MALAYA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH DECEMBER 1961

Present at the Hearing:
LORD HODSON.
LORD GUEST.
MR. L. M. D. DE SILVA.
[*Delivered by* MR. DE SILVA]

This is an appeal from a judgment and decree of the Court of Appeal at Kuala Lumpur Supreme Court which reversing a judgment of the High Court entered judgment in favour of the plaintiff (the respondent on this appeal) against the defendant (the appellant on this appeal) for the return of a deposit made by the plaintiff on an agreement for the purchase by him from the defendant of 22 lots of land and for damages for the breach thereof by the defendant.

The following recitals and clauses of the agreement are relevant to the matters in dispute between the parties:

" Whereas the Vendor has caused Building Plans prepared by Lee Eng Tong of No. 24, Sultan Street, Klang (hereinafter called the Architect) which have been approved by the Town Council, Klang, under Plans Nos. 185/55, 185A/55, 185B/55, 185C/55 and 185D/55 for the erection of 21 Terrace Houses on the said Property:

And Whereas the Purchaser intends to erect the said 21 Terrace Houses for sale and agrees to give priority for such sale to the 36 Tenants of the Vendor of premises known as Nos. 102, 104, 106, 108, 110, 112, 114, 116, 118, 120, 122, 124, 126, 128, 130, 132, 134, 136, 138, 140, 142, 144, 146, 148, 150, 152, 154, 156, 158, 160, 162, 164, 166, 168, 170 and 172 Meru Road, Klang (hereinafter called the Tenants):

And Whereas the Vendor has agreed to sell and the Purchaser has agreed to purchase the said Property for the sum of Dollars Sixty-six thousand ($66,000.00) only and the Vendor agrees to transfer such lot or lots of the Property described in the said Schedule to the Purchaser or any of his nominees or assigns free from all encumbrances as the Purchaser shall elect subject to the terms and conditions as mentioned hereafter:

NOW THIS AGREEMENT WITNESSETH as follows:—

1. Now in consideration of the above premises and in consideration of the sum of Dollars Fifteen thousand ($15,000.00) only paid by the Purchaser to the Vendor, the receipt whereof the Vendor hereby acknowledges, as part payment towards the said purchase price it is mutually agreed as follows:—

2. The Purchaser shall pay to the Vendor a further portion of the purchase money in the sum of $24,000.00 (Dollars Twenty-four thousand only) on or before the 23rd day of June, 1956, and the balance of the

purchase money in the sum of $27,000.00 (Dollars Twenty-seven thousand only) shall be paid by the Purchaser to the Vendor on or before the 23rd day of December, 1956.

3. As and when the Purchaser pays to the Vendor each sum of $3,000.00 (Dollars Three thousand only) forming part of the payments mentioned in Clause 2 above, the Vendor shall transfer to the Purchaser or any of his nominees or assigns any one lot of the said Property described in the said Schedule provided the above-mentioned sum of $24,000.00 (Dollars Twenty-four thousand only) 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 (Dollars Twenty-seven thousand only) shall be paid in full by the Purchaser to the Vendor on or before the 23rd day of December, 1956. Upon payment of the full amount of the purchase money in the sum of $66,000.00 (Dollars Sixty-six thousand only) the Vendor shall transfer to the Purchaser the balance or all of the Property as described in the said Schedule to the Purchaser or any of his nominees or assigns.

6. The Vendor shall produce for the purpose of inspection, when necessary, any or all of the titles in respect of the said Property to the Purchaser or to any of his nominees or assigns when requested by the Purchaser.

7. Upon signing of this Agreement the Vendor shall inform all his said 36 Tenants regarding the priority given to them to purchase any of the said 21 Terrace Houses according to the normal terms and conditions of sale offered by the Purchaser. This priority shall hold good for a period of fourteen (14) days from the date of this agreement, after which the Purchaser shall reserve his right to sell the said houses to any other prospective buyers.

9. Within one (1) week from date hereof the Vendor shall give access to the Purchaser to the whole property described in the said Schedule so that work may be commenced on any of the said 21 building lots as the Purchaser may think fit.

10. In the event the Purchaser fails to pay the sums of money on the respective dates aforementioned the said advance money of $15,000.00 (Dollars Fifteen thousand only) 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."

The plaintiff failed to pay the stipulated 24,000 dollars by the 23rd June, 1956. The defendant by letter of the 25th June pointed this out and said that in consequence the deposit of 15,000 dollars was forfeited and the contract, as agreed therein, was at an end. They went on to say *inter alia*

" We are now instructing our Architect to proceed with the erection of the houses and you are hereby requested to return to us the building plans and specifications which we have loaned to you."

The plaintiff on the same day wrote to the defendant a letter which contained the following passages:—

" I admit that it is my fault for not fulfilling my part of the agreement to pay you $24,000.00 which fell due on 23rd June, 1956. This is because I was unable to collect my money in time due to most unexpected circumstances."

" I humbly beg of you to grant me extension of time for one month to pay you the said $24,000.00 otherwise I am afraid I shall get into serious trouble and lose my reputation as a contractor in Klang and Port Swettenham. I shall be very grateful, therefore, if you would be good enough to grant me my request and give me a chance to make good. My future career in Klang depends solely on your sympathetic decision."

The defendant, which is a limited liability company, says through its managing director Yeow Kim Joe that the defendant agreed to give time but only on the conditions appearing in the document P.2 of the 7th July, 1956, which is in the following terms: —

" With reference to your letter of the 25th June, 1956, we are prepared to permit you an extension of time within 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 begun on any land that is sought to be transferred.
4. Should there be any breach of the above conditions, the $5,000.00 above mentioned, if paid, will be forfeited and the extension of time withdrawn.

Further, full payment of the balance of $27,000.00 must be made on or before the 23rd December, 1956.

Yours faithfully,

Yeow Kim Pong Realty Ltd.

(Sd.) Yeow Kim Joe.

Managing Director.

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

Ng Kim Pong

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

Kim Joe's version of what happened is that on the 7th July the terms on which further time would be granted were explained to the plaintiff, that the plaintiff agreed to them and said that as he did not have the money he would come back with some and sign the document. Kim Joe continued that the plaintiff did not do so but sent one Quai Pin Siong (one of plaintiff's witnesses) with the money. Kim Joe says he withheld a receipt until plaintiff had signed the document and that eventually plaintiff came into his office and signed the document on the 24th July.

The plaintiff's version is that an extension was agreed to on condition that 5,000 dollars were paid at once and a further 19,000 by the 31st July and that there was then no stipulation as to construction work on the land. He says that after the 5,000 dollars were paid the defendant insisted on the terms as to construction work and refused to give a receipt for the money already paid until the plaintiff signed the document in the form in which it now appears (v. above).

Much of the contest between the parties in the Courts in Malaya appears to have been on the question whether the terms in P.2 were binding on the plaintiff or not. The trial Judge said:—

" If Exhibit P.2 represents the supplementary agreement the action is at an end because plaintiff had admitted he had done no construction work on the eight lots."

He went on to say:—

" 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."

The Court of Appeal took the view that the terms of P.2 were not binding on the plaintiff. The reasons for that view need not be discussed at this stage as counsel for the plaintiff respondent did not seek to sustain the view of the Court of Appeal. He said he could not resist the conclusion that the terms

of P.2 were binding on the plaintiff. He argued that time was not of the essence of the contract in the performance of the terms stipulated in P.2 and that therefore the defendant was not entitled on the 1st September to rescind the contract as he did by a letter in the following terms:—

" Ng Kim Pong Esq.,
37 Ceylon Lane,
Kuala Lumpur.

Dear Sir,

Lots 382 & 403, Section 24 Town of Klang

We have been instructed by our clients Messrs. Yeow Kim Pong Realty Ltd. that no action has been taken by you to fulfil your obligations under the contract, or to pay the sum due to our clients.

We are therefore instructed to give you notice that the contract is terminated by reason of your breaches, and that all monies paid to our clients are forfeit.

In consequence you are requested to vacate the land forthwith since you are now a trespasser thereon.

Yours faithfully,

(Sd.) Shearn Delamore & Co."

The question whether time is the essence of a contract is one to be determined by ascertaining the real intention of the parties. This is to be gathered by the examination amongst other things of attendant circumstances. The argument mentioned in the last paragraph was not raised at the trial and the defendant could not therefore have felt any necessity for placing before the court all the material relating to attendant circumstances (for example conversations) as could have helped him. The question arises whether the plaintiff should be allowed to raise this point on appeal. Their Lordships do not find it necessary to decide this question as in their opinion the material already in evidence satisfies them that time was of the essence. It is evident from the agreement of the 24th of March that the purchase by the plaintiff was complementary to a plan whereby the plaintiff was to put up 21 terrace houses on the land purchased. Building plans had already been prepared at the instance of the defendant. Priority for the purchase of the 21 houses was to be given to tenants of the defendant whose houses were to be demolished. They were so informed by letter on the very day the agreement was signed. All this suggests that the times fixed for carrying out the steps undertaken were of importance. Further the plaintiff having made default unreservedly admitted his default and " begged " for time. It is difficult to imagine that he did not contemplate having to observe faithfully any provision as to time which his request might induce. It is difficult also to imagine that he could have contemplated anything but a strict observance of the condition that " construction work on the above land must be commenced within one week of the date hereof ". Giving evidence in March 1958, referring to his failure to pay 24,000 dollars on the 23rd June, he said that " On 25.6 defendant could have taken my 15,000 dollars and that would have been the end of the matter ". He had therefore contemplated a strict observance of the times agreed on with regard to the original agreement and that view persisted in his mind up to, at any rate, March 1958. It is not possible that when he became a party to P.2 in July, 1956, he had anything other than the necessity for the strict observance of times stipulated in his mind. These reasons suffice to convince their Lordships that time was of the essence in the performance of the agreement contained in P.2.

Their Lordships will now examine to what extent if any the plaintiff has performed or was excused from performing the conditions agreed on in P.2.

With regard to the payment of 19,000 dollars on the 31st July solicitors for the plaintiff wrote the following letter to the defendant on the 28th July, 1956:—

> " Our client has now secured purchasers for 8 of these lots and the purchasers have deposited with Mr. Yong Kung Lin, their Solicitor, the purchase price, and our client has been so notified.
>
> We are therefore to request you to let us have the titles to the 8 lots Nos. 382–389 inclusive, in the course of the day, so as to enable their being examined by the Solicitor for the purchasers. Our client will thereafter be able to make payment of the balance due to you in the sum of $19,000/– before the 31st July, as agreed.
>
> Please treat this letter as urgent and let us have the titles, by return."

Solicitors for the defendant replied on the 31st July:—

> " Our clients instruct us that no building operations have commenced upon the land mentioned in your letter aforesaid, and in accordance with Paragraph 3 of our client's letter of the 27th instant addressed to your client, and to which your client concurred, there can consequently be no transfer of the land as at present advised.
>
> Upon information that building operations have commenced upon the lots in question, our client will be happy to comply with your clients request."

On further pressure the solicitors for defendant wrote on the 10th August that the defendant was prepared to permit inspection of the titles at any time in their offices. This in the opinion of the trial Judge with which their Lordships agree was the full extent of the obligation of the defendant. The offer was not availed of. It appears from the letter that has been quoted above that in their reply of the 31st July the defendant's solicitor may have understood the word " titles " in the request " let us have the titles " as meaning transfers executed by the defendant. The Court of Appeal appears to have understood it in the same way because it says " the defendants were in default from the 28th July in refusing to transfer the eight lots upon request made to them by the plaintiff to do so ". If the plaintiff's request meant what the Court of Appeal thought it did then the defendant's resistance was well-founded and sound.

It is to be observed that according to the plaintiff:—

> " I did not intend to pay with my own money. The money was tendered—I mean the letter from Yong Kung Lin. I told defendant I had the money. My proposition was that I would pay defendant when the titles were transferred to Yong Kung Lin's clients. The money was only to be transferred to me when I transferred the titles to Yong Kung Lin's clients."

It is clear that in any event the plaintiff could not have satisfied condition I as to payment of the 19,000 dollars because the defendant was under no obligation to part with their titles in the expectation of receiving payment after transfer.

Condition 2 of P.2 was " construction work on the above land must be commenced within one week of the date hereof ". This condition was not observed. In a letter from the defendant's solicitors to the plaintiff of the 31st July, 1956, this fact was mentioned, though in another connection, when they said " our clients instruct us that no building operations have commenced upon the land ". The learned trial judge after a careful consideration of the evidence held that " no genuine construction work as I think the parties understood the meaning of the term had been commenced on the land ". Their Lordships are of opinion that this view is correct and should be upheld. The Court of Appeal did not consider the matter as it had held that P.2 was not binding on the plaintiff.

Condition 3 provided that " construction must have begun on any land that is sought to be transferred ". The learned trial judge has held that the

plaintiff committed a breach of this condition. Clause 3 of the original agreement provided:—

> " As and when the Purchaser pays to the Vendor each sum of $3,000.00 (Dollars Three thousand only) forming part of the payments mentioned in Clause 2 above, the Vendor shall transfer to the Purchaser or any of his nominees or assigns any one lot of the said Property ".

There is much force in the argument that condition 3 made provision that the plaintiff would not be entitled to ask for a transfer of a block under clause 3 unless he had begun construction work on it and that condition 3 did nothing more. Their Lordships do not feel they need pursue the matter further as they have, as stated above, formed the view that conditions 1 and 2 have been broken. It follows that the defendant was entitled to rescind the contract on the 1st September as he has done.

It has been argued that the correspondence between the parties after the 1st September constituted a waiver of whatever rights the defendant may have had on that date. Their Lordships are unable to find a waiver in what happened. There were negotiations between the parties but nothing that was binding came out of them because they never reached final agreement. The learned trial judge held:—

> " In my view the negotiations in this case after the rescission were only approaches with a view to settlement and I would certainly say that nothing concrete emerged from them."

Their Lordships agree. They are of opinion that the plaintiff's action fails.

The Court of Appeal held that P.2 was not binding on the plaintiff. Counsel for the respondent did not seek to sustain this view and for the purposes of the conclusion arrived at by their Lordships that the plaintiff's action fails nothing more need be said. Their Lordships however feel that there is an error of law in the judgment of the Court of Appeal which it is desirable to correct. The Court of Appeal said:—

> " I think it cannot seriously be denied that Clause 10 did make time for payment of the essence of the contract, so that on 25th June the defendants could have lawfully rescinded the contract once for all and forfeited the $15,000 already paid to them. However, in the events that happened, the defendants did reaffirm the contract by acceptance of the part payment of $5,000, and by so doing it seems to me that the case thereafter comes within the provisions of sub-section 3 of section 56 of the Contracts Ordinance (supra). Under that sub-section, ' If . . . 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 the promise at the time agreed, unless at the time of such acceptance he gives notice to the promisor of his intention to do so. '
>
> All that this sub-section gave to the defendants upon their reaffirming the contract was a right to compensation for any loss occasioned by the non-performance of the promise at the time agreed, and nothing more."

It went on to say that in consequence the conditions in P.2 were contrary to law. This in their Lordships' opinion is a wrong view of sub-section 3 of section 56. The sub-section does not place a limitation upon the freedom of parties to contract when one of them has failed to perform his promise at the time agreed. The contract could be reaffirmed in its original or a varied form and subject to such conditions as may be agreed upon by the parties acting with complete freedom to contract. All the sub-section says is that where a party accepts performance without such agreement that party may not in a subsequent action claim compensation for non-performance at the time agreed unless at the time of accepting performance he has given notice of his intention to do so.

For the reasons which they have given their Lordships will report to the Head of the Federation of Malaya as their opinion that the appeal should be allowed, the judgment of the Court of Appeal set aside and the judgment of the High Court restored and that the plaintiff should pay the appellant's costs in the Court of Appeal and on the appeal before the Board.

(84363) Wt. 8233/71 100 1/62 Hw.

In the Privy Council

YEOW KIM PONG REALTY LIMITED

v.

NG KIM PONG

DELIVERED BY
L. M. D. DE SILVA

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
HARROW
1961