

No. 24 of 1979

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 :

DAIMAN DEVELOPMENT SDN. BHD. Appellants
(Defendants)

- and -

10 MATHEW LUI CHIN TECK Respondent
(Plaintiff)

A N D B E T W E E N :

DAIMAN DEVELOPMENT SDN. BHD. Appellants
(Defendants)

- and -

LOH SEW WEE Respondent
(Plaintiff)

(Consolidated by Order dated 4 February 1979)

CASE FOR THE APPELLANTS

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1. This is a consolidated appeal against a judgment on appeal of the Federal Court of Malaysia (Appellate jurisdiction Suffian L.P., Gill C.J. and Ibrahim Manan J.) given on 31 July 1978 in the two actions named in the heading to this appeal. Prior to that judgment the parties had agreed that the result in one appeal should determine the result of the other. The appeals were not at the date of that judgment consolidated, but were subsequently consolidated by order of the Federal Court of Malaysia (Appellate juris-

Record

pp. 53 to 58

p. 53; L35

Record

p. 60; L20	diction) (Raja Azlan Shah, Acting C.J., Wan Suleiman J. and Salleh Abas J.), dated 4 February 1979. The appeals to the Federal Court of Malaysia (Appellate Jurisdiction) were from the orders of the High Court in Malaya at Jahore Bahru dated 15 August 1977 in each of the actions ordering in the case of the action <u>Mathew Lui Chin Teck v. Daiman Development Sdn. Bhd.</u> ("the Mathew case") specific performance of an agreement made on 1 October 1972 in respect of land known as Lot 949 Taman Sri Tebrau, Johore Bahru, Johore at the price of \$26,000 and in the case of the action <u>Loh Sew Wee v. Daiman Development Sdn. Bhd.</u> ("the Loh case") specific performance of an agreement made on 12 December 1972 in respect of land known as Lot 1314 Taman Sri Tebrau aforesaid at the price of \$26,000. The orders in each action implemented the judgment of Syed Othman J. given on 15 August 1977 in the Mathew case, the parties having agreed that the decision in the Mathew case would also be binding in the Loh case.	10
pp. 38 to 40		
p. 38		
p. 39		
pp. 30 to 37		
p. 22; L26		
p. 62, 63 p. 79, 80	2. The issue in the consolidated appeal is whether the 'booking proforma' executed by the Respondent (Plaintiff) in the Mathew case on 1 October 1972 and in the Loh case on 12 December 1972 constituted a binding agreement in each case, or whether in each case that document constituted an agreement to agree not binding on the parties.	20
p. 32; L23-25 p. 32; L30-33	3. The Appellants were at all material times property developers and the owners of a building site at Taman Sri Tebrau, Johore Bahru, Johore on which they intended to build 1720 dwellinghouses. The Appellants envisaged that there would be a delay of one to two years before construction began because they required official approval for the sub-division of the land and for the construction before work started. They envisaged that an agreement for sale would be signed when construction work was about to start.	30
p. 32; L34, 35	4. On 1 October 1972 the Respondent in the Mathew case and on 12 December 1972 the Respondent in the Loh case executed a 'booking proforma', a standard form of document the terms of which are set out in full at p. 62, 63 (in the Mathew case) and p. 79, 80 (in the Loh case). The 'booking proforma', in the contention of the Appellants, operated as a booking or reservation by an intending purchaser of a particular lot (with the dwellinghouse to be constructed on it) without final agreement on the terms of	40

the contract of purchase, rather than as a concluded contract of purchase settled in its terms; and the Appellants respectfully refer the Board at this stage to the 'booking proforma' for a consideration of its full terms. Each Respondent paid at the date of execution a 'booking fee' of \$700. In 1975 the Appellants wrote to each Respondent to the effect (inter alia) that the price for each dwellinghouse was to be increased from \$26,000 to \$35,100. Both the Respondents disputed the right of the Appellants to increase the price specified in the relevant booking proforma as executed and on 16 October 1975 (in the Mathew case) and 29 September 1975 (in the Loh case) specially endorsed writs were issued claiming specific performance (with ancillary relief) of the agreement alleged to have been entered into by the 'booking proforma' in each case.

p. 64; L10-20
p. 81; L10-20
p. 65; L31
p. 82; L33
p. 66; L33-39
p. 83; L30-36
p. 1; L18
p. 12; L7

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5. The Mathew case was heard by Syed Othman J. in the High Court in Malaya at Johore Bahru on 17 November 1976, and 7 March 1977. Judgment was reserved and was delivered on 15 August 1977. The parties agreed that judgment in the Mathew case should also be binding in the Loh case, and orders were consequently made in each case on 15 August 1977 ordering specific performance of the agreement in the booking proforma. A notice of appeal was issued in each case on 20 August 1977.

p. 22; L15
p. 27; L2
p. 29; L16
p. 30; L2
p. 29; L29, 30
pp. 38, 39

pp. 40, 42

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6. In his judgment Syed Othman J. held :

(1) that the effect of Rule 10(3) of the Housing Developers (Control and Licensing) Rules 1970 ('the 1970 Rules') was that the booking fee was to be treated as granting to the purchaser an option or right to purchase the property at the price stated in the booking proforma;

p. 33; L30-50

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(2) that paragraph 1 of the booking proforma bound the Appellants to sell the plot for the price specified in the booking proforma (of \$26,000).

p. 36; L24-53

7. The appeal from the judgment came on for hearing before the Federal Court of Malaysia on 16 July 1978. The Court dismissed both appeals. Having, in the Appellants' respectful submission correctly, specified the issue as whether the booking proforma was a mere agreement to agree or a firm contract of sale, the Court held

p. 50, 51

p. 57; L21-24

p. 57; L25

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Record

that the proforma was a firm contract. That, in the Appellants' respectful submission, was the wrong conclusion. In reaching that conclusion the Court, in the Appellants' respectful submission :

- p. 62; L31-35
p. 79; L31-35
- (1) wrongly failed to hold that the effect of the words "and sign the Agreement for Sale with the Company which shall be prepared by the Solicitors and subject to the terms and conditions therein" in paragraph 1 of the booking proforma made the booking proforma an agreement to agree and prevented it from being a binding contract; 10
- p. 57; L37-39
- (2) wrongly held that by reason of the 1970 Rules "only details may be inserted into the further agreement". The Appellants respectfully contend that the 1970 Rules do not have that effect;
- p. 57; L37-39
- (3) wrongly concluded (if it did so conclude) that if the 1970 Rules do have that effect the booking proforma creates a binding agreement. The Appellants respectfully submit that if details of importance are left to be agreed there is no binding contract until these details have been agreed; 20
- p. 57; L26, 27
- (4) wrongly relied on the fact that the booking proforma identified the parties and specified the property to be bought, and its price. The Appellants respectfully agree that those facts were specified in the booking proforma but respectfully submit that so long as other terms and conditions remained to be agreed by the Agreement for Sale there was in law no binding contract; 30
- p. 62; L31-35
p. 79; L31-35
- (5) wrongly relied on the fact that the Appellants had not shown the Respondent any draft Agreement for Sale with the result that the Respondent had had no opportunity to consider the detail which the Court held could alone be inserted into an Agreement for Sale by reason of the 1970 Rules. In the Appellants respectful submission those facts are irrelevant and the reasoning of the Court based upon them fallacious. The 40
- p. 57; L32

Appellants respectfully submit that there was either ab initio a complete contract or no contract at all and that the existence of a contract does not depend on any subsequent act or omission of the Appellants.

The Court did not adopt the reasoning of Syed Othman J. concerning Rules 10(3) of the 1970 Rules, referred to in paragraph 6(1) above, and in not doing so were in the Appellants' respectful submission correct.

10 8. By the Order dated 4 February 1979 referred to in paragraph 1 above the Court granted final leave to appeal to His Majesty the Yang di-Pertuan Agong.

p. 60; L10-32

9. The Appellants respectfully submit that the judgment of the Federal Court of Malaysia was wrong and ought to be reversed and this appeal allowed with costs for the following (amongst other) :

R E A S O N S

20 THAT the booking proforma (in both the Mathew case and the Loh case) on its true construction did not create a binding contract between the parties.

GERALD GODFREY

HYWEL MOSELEY

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