

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN :

HARRY TONG LEE HWA (Defendant) Appellant

- and -

YONG KAH CHIN (Plaintiff) Respondent

CASE FOR THE APPELLANT

RECORD

- 10 1. This is an Appeal from the Judgment and Order of the Federal Court of Malaysia (Lee Hun Hoe, C.J., Wan Suleiman, F.J., Chang Min Tat, F.J.) dated the 27th day of November, 1978, which dismissed the Appeal of the Appellant from the Judgment of the High Court of Malaya in Kuala Lumpur (Vohrah J.) dated the 19th day of May, 1978. The Appellant had appealed to the High Court from an Order of the Senior Assistant Registrar of the High Court, dated the 14th day of October, 1977, wherein the Respondent was granted final judgment under Order 14 Rule 1 of the Rules of the Supreme Court, 1957 in the sum of \$95,062.50 with interest and costs. Pp. 68-79 Pp. 61-63 P. 50
- 20 2. The sole question in this Appeal is whether the Appellant had raised triable issues in his Defence which were worthy of being heard in full and ought not to have been resolved under summary procedure.
- 3. The facts giving rise to this Appeal concern brokerage commission alleged to be payable by the Appellant to the Respondent following the sale of certain pieces of land.
- 30 The Respondent claimed he held an option to sell the said lands at \$65,000 per acre, that on the 6th November 1975 he gave the Appellant a sub-option to Pp. 10-11 p. 15

RECORD

p. 16

purchase the said lands at \$65,000 per acre, and that on the same day by a written agreement the Appellant undertook to pay the Respondent 6½% commission of the total sale price of the said lands in the event of the sale of the said lands to the Appellant or his nominee.

Upon the sale of the said lands to the Appellant's wife for \$1,462,500, the Respondent sought summary judgment for the sum of \$95,062.50 commission with interest, which remained unpaid.

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Pp. 5-6  
P. 16

4. The Appellant in his Defence admitted purchasing the said sub-option and entering into the said written agreement but claimed that it was based on the Respondent being the option-holder of the said land, and on the validity of the sub-option given by the Respondent to the Appellant. The Appellant claimed that both option and sub-option were defective and that the Solicitors of the vendors refused to act on the strength of the said option and that the sale of the said lands was completed without the assistance of the said option or sub-option

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5. At the hearing before the Senior Assistant Registrar three Affidavits were filed on behalf of the Respondent, affirmed respectively by the Respondent, his Solicitor, and by one Ooi Lay Lee who was mentioned in the said option as being entitled, as was the Respondent, to receive one per cent of the total sale price of the said lands.

Pp. 8-10

The Respondent in his Affidavit contended that he had an option dated the 4th November, 1975 to sell the said lands at \$65,000 per acre. Two of the registered owners of the said lands were signatories to the said option, and these signatories had the authority of the surviving Trustees of the estates of the other registered owners of the said lands to dispose of the said lands.

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Pp. 21-22 and  
Pp. 44-45

The Solicitor for the Respondent and the said Ooi Lay Lee claimed in their Affidavits that the sale of the said lands was effected as a result of the exercise of the said option.

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6. The Appellant claimed in his Affidavit that the Respondent's Affidavit contained matters which were perverted and not true. The option was not given by all the owners of the said lands and was therefore ineffective, nor was the sub-option given with the consent of the said Ooi Lay Lee. The Appellant was misled by the Respondent to believe that the Appellant held a genuine option and the Solicitors for the vendors refused to accept the said option saying it was not genuine. The sale of the said lands thereafter took place as the result of fresh negotiations and not as a result of the option or sub-option. Thinking he was relieved of his obligation to pay the Respondent's commission of 6½%, the Appellant was prepared to accept the price per acre of \$65,000 for the said lands, whereas at all material times previously he had only been prepared to accept a price per acre of \$55,000 exclusive of commission.
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- Pp. 35-37  
P. 36, 11. 15ff.
- 20 The Appellant referred in his Affidavit to a letter from the Solicitors of the vendors dated 29th June, 1977 (exhibit D5) which read (in part) as follows :
- P. 43, 11. 27-29
- "Our Mr. Yong was not happy about the option because it was not signed by all the proprietors of the land but only by 2 of them. "
7. On the 14th day of October, 1977 the Senior Assistant Registrar ordered the Appellant to pay \$95,062.50 with interest at 6% per annum until date of payment and costs.
- 30 P. 49
8. In his Decision, the Senior Assistant Registrar commented on the lack of an Affidavit from the Solicitors for the Appellant :
- P. 47, 11. 30-35
- "If there is any merit in the contention by the [Appellant] that the exercise of the option was rejected at first, one wonders why someone from [the Appellant's Solicitors] did not have the courage to say so on affidavit. "

RECORD

Pp. 52-54

9. The Appellant appealed to the High Court. In the proceedings before the High Court an Affidavit was filed on behalf of the Appellant, affirmed by a member of the Appellant's firm of Solicitors on the 17th November, 1977. The Solicitor was in England at the time the matter came before the Senior Assistant Registrar (see Counsel's argument, page 54, lines 25-28 of the Record). The deponent contended that the vendors' Solicitor informed him that the option was not genuine, and that the sale of the said lands took place as the result of fresh negotiations independent of the option. 10

P. 62, 11.  
26-32

10. In his Judgment Vohrah J. held as follows :

"The consideration moving from the [Respondent] was executory and the [Appellant] was under no obligation to the [Respondent] until that consideration was executed. But on the successful conclusion of the sale through the efforts of the [Respondent] that consideration was executed and the [Appellant's] obligation to pay the [Respondent] the commission immediately arose." 20

It is submitted that the learned Judge was wrong to dismiss the Appeal since there was Affidavit evidence that the sale did not take place as the result of the "efforts of the [Respondent]".

Pp. 66-67

11. The Appellant appealed to the Federal Court on various grounds, inter alia that there were triable issues raised by the Appellant.

P. 71, 11.  
32ff

12. The Federal Court dismissed the Appellant's appeal on the 27th November, 1978. In its Judgment the Court (it is respectfully submitted correctly) held that the said option did not appear to have been validly granted over all the said lands. The Court went on to hold (it is submitted wrongly) that it was "no real concern of the Appellant how or in what circumstances the option was given or exercised". It is submitted that the Respondent was entitled to 1% commission from the vendors for introducing the Appellant to the vendors, but that the commission sought from the purchaser of 6½% depended on the granting of the sole option to purchase to the Appellant. 40

P. 73, 11.  
24-26

With a defective option the Appellant had no more than a hope of being considered among other purchasers. He was not in a position to compel a sale as he would have been had he been in possession of a valid option or sub-option.

10 13. It is submitted that if the Courts below had concluded that there was very little substance in the Appellant's claim the Appellant ought to have been granted Conditional Leave to defend upon paying the full sum claimed into Court and upon an early trial being ordered (see Alliance (Malaya) Engineering Co. Sdn. Bhd. v. San Development Sdn. Bhd. (1974) M. L. J. 94).

14. The Appellant was given Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong on the 19th March, 1979.

20 15. The Appellant respectfully submits that the Appeal should be allowed with costs and the Judgments and Orders of the High Court and the Federal Court quashed and a trial upon the merits ordered for the following amongst other

R E A S O N S

1. BECAUSE the Appellant had raised triable issues in his Defence.
2. BECAUSE conflicts of evidence deposed to in the Affidavits could only be resolved by examination of the witnesses at a trial.
3. BECAUSE a trial should have been ordered upon payment of the sum claimed into Court.
- 30 4. BECAUSE the option and sub-option were invalid and not instrumental in effecting a sale.

CHARLES FLETCHER-COOKE

G. T. RAJAN

No. 23 of 1979

IN THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL

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O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

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B E T W E E N :

HARRY TONG LEE HWA  
(Defendant) Appellant

- and -

YONG KAH CHIN  
(Plaintiff) Respondent

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CASE FOR THE APPELLANT

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Solicitors for the Appellant