

ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN :

HARRY TONG HWA (Defendant) .. Appellant

- AND -

YONG KAH CHIN (Plaintiff) .. Respondent

CASE FOR THE RESPONDENT

Record

- 10 1. This is an appeal from a unanimous decision of the Federal Court of Malaysia (Lee Hun Hoe C.J. (Borneo) Wan Suleiman F.J. and Chang Min Tat F.J.) dated 27th November 1978 disallowing the Appellant's appeal from a decision of L.C. Vohrah J. given in High Court of Kuala Lumpur on 19th May 1978. By his decision L.C. Vohrah J. confirmed the decision of the Senior Assistant Registrar made on 14th October 1977 allowing the Respondent's application for Final Judgment under Order 14, Rule 1 of the Rules of Supreme Court 1957 and made the following Orders:-
 - 20 (a) that final Judgment against the Appellant be entered for the sum of \$95,062.50 together with interest thereon at the rate of 6% per annum from the 18th of April 1977 to the date of payment. p.49
 - (b) that the Appellant do pay to the Respondent a sum of \$200/- by way of costs.

Record

The Federal Court by a unanimous decision confirmed the said decision.

2. The principal issues in this appeal are:-

- p.7 (a) whether there are any triable issues which prevent the Respondent from entering final Judgment in the sum of \$95,062.50 being the sum agreed to be paid to him by the Appellant under agreement dated 6th November 1975 and interest thereon at the rate of 6% per annum from 18th April 1977 up to the date of payment.
- (b) whether the sale of the said lands to the Appellant's nominee was as a result of the Respondent's efforts and brokerage. 10

3. The primary facts are as follows:-

- p.10 (a) the Appellant had long desired to purchase lands held under EMR 8292, 4367, 4365, 4369, 6851 and 1230 for Lots 737, 738, 742, 741, 745, 5927 and 746 respectively all in the Mukim of Klang (hereinafter referred to as "the said lands") and had been attempting to do so through the Respondent. The Appellant's attempt to purchase the said lands at the price of \$55,000/- per acre was unsuccessful. 20
- p.10-11 (b) the surviving trustees of the Estate of the deceased registered owners of the said lands on the 4th of November 1975 authorised one Mr. Yong Yoke Lin and one Madam Chong You to sell the said lands at the price of \$65,000/- per acre.
- p.10 (c) on the 4th of November 1975, the said Mr. Yong Yoke Lin and Madam Chong You gave an option to the Respondent to purchase the said lands at \$65,000/- per acre. 30
- p.16 (d) on the 6th of November 1975, the Appellant executed an agreement undertaking to pay to the Respondent a commission of 6 $\frac{1}{2}$ % of the total purchase price in the event of the Appellant or his nominee successfully purchasing the said lands at the price of \$65,000/- per acre. On the same day the Respondent executed a sub-option in favour of the Appellant for the purchase of the said lands by the Appellant or his nominee at the price of \$65,000/- per acre. 40
- p.15 (e) on the 7th of November 1975, the solicitors for the Appellant's wife, Madam Chong Mui Lan, who was also the Appellant's nominee, wrote to the Vendors' solicitors exercising the option granted to the Respondent.
- p.25-33 (f) on the 3rd of March 1976 an Agreement was entered into between the registered owners of the said lands

and the Appellant's nominee for the purchase of the said lands at the price of \$65,000/- per acre. The Respondent was the witness for some of the registered owners.

(g) the Appellant's wife and nominee is now registered as the owner of the said lands.

10

(h) the Respondent called on the Appellant to pay the sum of \$95,062.50 being 6 $\frac{1}{2}$ % of the total purchase paid by the Appellant's wife and nominee to purchase the said lands and the Appellant failed to do so.

(i) the Respondent commenced Kuala Lumpur High Court Civil Suit No. 2131 of 1977 on the 25th of July 1977 to recover the sum of \$95,062.50 and interest thereon at the rate of 6% per annum from the 18th of April 1977 to the date of payment and costs from the Appellant.

p.1-4

(j) on the 25th of August 1977, the Respondent filed a Summons in Chambers under Order 14, Rule 1 of the Rules of the Supreme Court for liberty to enter final Judgment against the Appellant.

20

p.7

4. At the hearing of the Respondent's application for final Judgment, the Appellant relied on the following grounds to contend that there were triable issues:-

(a) that the option held by the Respondent was defective as it was not given by all the registered owners of the said lands;

p.35

(b) that the sub-option given to the Appellant by the Respondent was invalid as the option was in the name of both the Respondent and another Madam Ooi Lay Lee;

30

(c) that although the Appellant exercised the option, it was not accepted by the Vendors' solicitors;

p.36

(d) that the sale of the said lands was a result of subsequent negotiations between the Appellant and the registered owners of the said lands;

(e) that the registered owners of the said lands had no authority to give the said option.

5. The Senior Assistant Registrar before whom the application for final Judgment came held that there were no triable issues for the reasons:-

40

(a) that the Appellant having accepted and exercised the sub-option could not complain about its validity;

(b) that the said lands were registered in the name of the nominee of the Appellant and that there were

p.45-48

Record

sufficient evidence to show that the Appellant purchased the said lands through the efforts of the Respondent.

- (c) that there were no triable issues which merited a full trial.

p.51

p.55-60

6. The Appellant appealed to the High Court in Kuala Lumpur, Malaysia, and before L.C. Vohrah J. relied mainly on the same substantive grounds raised before the Senior Assistant Registrar. L.C. Vohrah J. confirmed the decision of the Senior Assistant Registrar for the reasons:-

10

p.61-63

- (a) that the Senior Assistant Registrar correctly held that there were sufficient documentary evidence before the court that the sale of the said lands was effected through the instrumentality of the Respondent.

- (b) that there was sufficient consideration to support the Appellant's agreement to pay the Respondent $6\frac{1}{2}\%$ of the purchase price.

- (c) that the valid exercise of the option granted to the Appellant was not a condition precedent to the liability of the Appellant under agreement dated 6th November 1975.

20

7. The Appellant appealed to the Federal Court of Malaysia consisting of Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J. and Chang Min Tat F.J. where the Appellant relied on the same grounds raised in the court below.

8. The Respondent's substantive arguments before the Senior Assistant Registrar, L.C. Vohrah J. and the Federal Court were as follows:

- (a) the Appellant being interested in the lands for some time had been negotiating through the Respondent for the purchase.

30

- (b) the Respondent's claim against the Appellant is for commission of $6\frac{1}{2}\%$ of the total purchase price which the Appellant agreed to pay to the Respondent on the completion of the sale of the said lands by agreement dated 6th November 1975.

- (c) consideration for the agreement dated 6th November 1975 was the completion of the sale of the said lands at \$65,000/- per acre to the Appellant and/or any of his nominees: (See Section 2(d) of the Contracts Act, 1950 (Revised - 1974):

40

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or

abstinence or promise is called a consideration for the promise".

(d) It is clear that the sale of the said lands was a result of the Respondent's agency for the reasons:

(i) he granted a sub-option to the Appellant which sub-option was exercised by the Appellant's nominee;

(ii) he was the witness to some of the signatures of the Sale and Purchase Agreement;

p.32

10

(iii) he has been paid a commission of 1% by the vendors;

p.20

(iv) the vendors have through their solicitors admitted that the sale was as a result of the Respondent's agency and was as a result of exercise of sub-option granted to the Appellant. They denied that it was as a result of fresh negotiations between the Appellant and the Respondent.

p.21 & 34
p.40-41

20

(e) The Appellant is not the proper person to challenge the validity of the option that was granted to the Respondent.

(f) There is no evidence to support the allegation that the sale of the said lands to the Appellant's nominee was as a result of fresh negotiations between the Appellant and the Vendors.

30

(g) Even assuming that it was not as a result of the exercise of the sub-option, the Respondent is still entitled to his commission. (See JAMES T. BURCHELL v. GOWRIE AND BLOCKHOUSE COLLIERIES LTD (1910) A.C.614 AND BOW'S EMPORIUM LTD v. A.R. BRETT & CO. LTD. 44 TLR 194.

The Federal Court rejected the Appellant's contention and held that the Respondent was entitled to sign final Judgment, thereby dismissing the appeal and confirming the findings made by L.C. Vohrah J. and the Senior Assistant Registrar.

9. The Respondent submits that the decision of the Federal Court and the arguments of the Respondent are right and that the appeal should be dismissed for the following amongst other:-

R E A S O N S

40

(a) BECAUSE there were sufficient evidence before the court to make a concurrent finding of fact that the sale of the said lands to the Appellant's nominee was a result of the efforts and through the instrumentality of the Respondent's brokerage.

(b) BECAUSE the fact that the said lands were sold to the Appellant at the price of \$65,000/- per acre constituted sufficient consideration to enable the Respondent to require payment of the commission as per the agreement dated 6th November 1975.

Record

- (c) BECAUSE the Respondent is entitled to the agreed commission even if there were fresh negotiations between the Appellant and the Vendors as alleged.
- (d) BECAUSE there were no triable issues as alleged which merited a full hearing.
- (e) BECAUSE the decision of the Federal Court was right and ought to be upheld.

K. THAYALAN

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N

HARRY TONG LEE HWA (Defendant) .. Appellant

- and -

YONG KAH CHIN (Plaintiff) .. Respondent

CASE FOR THE RESPONDENT

RECEIVED

- 7 AUG 1980

STEPHENSON HARWOOD
Saddlers' Hall,
Gutter Lane,
London, EC2V 6BS