

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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O N A P P E A L

FROM THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

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B E T W E E N :

KAOLIM PRIVATE LIMITED

Appellant  
(Defendant)

- and -

10 UNITED OVERSEAS LAND LIMITED

Respondent  
(Plaintiff)

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CASE FOR THE APPELLANT

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1. This is an appeal, by leave of the Court of Appeal of the Republic of Singapore, from an order of that Court (Kulasekaram, Sinnathuray and D'Cotta J.J.) made on 15th January 1981 dismissing an appeal by the Appellant against the judgment of the High Court of the Republic of Singapore (Wee Chong Jin C.J.) given on 28th April 1980.

20 2. The Respondent (Plaintiff in the proceedings) was the purchaser of certain land under a contract under which the vendor was Far Eastern Bank Limited ("the Bank"), the First Defendant in the proceedings in the High Court. The Bank sold as mortgagee, the Appellant (Second Defendant) being the mortgagor. The Bank has not been a party to the successive appeals and is not affected by them.

30 3. The issue in the appeal is whether the Respondent can recover from the Appellant's share of the net proceeds of sale the sum of S\$521,242.53 in respect of property tax due on the land which the Respondent paid to the Inland Revenue Department on or about the time of completion of the sale. The learned Chief Justice and the Court of Appeal did not uphold the Respondent's first contention, that payment of the tax was the responsibility of the Bank as vendor under the

terms of the contract so that the Respondent could deduct it from the purchase price on completion, but they did accept the Respondent's alternative contention that it was entitled to recover the money so paid, by way of subrogation from the balance of the proceeds of sale held on trust for the Appellant. They considered that the terms of the contract for sale were irrelevant to that argument. The Appellant respectfully contends that the contract was highly relevant and, in the circumstances of the case, precludes recovery by the Respondent. 10

4. The relevant facts are simple. The Bank offered the land for sale by tender on particular Conditions. The Respondent's tender of \$8 million was accepted on 20th March 1980. At the beginning of April 1980 the Comptroller of Property Tax wrote to the solicitors for the Respondents and to the Bank seeking payment of the arrears of property tax. The Bank and the Appellant disagreed as to which of them was bound to bear the payment under the terms of the contract. On 9th April 1980 the Respondent commenced these proceedings, initially against the Bank alone. On 18th April 1980 the originating summons was ordered to be amended to add the Appellant as a Defendant and to alter the relief sought accordingly. Affidavits were filed on behalf of all parties but the several deponents were not cross-examined. On 28th April 1980 the case came before the learned Chief Justice for its effective hearing and he made the order appealed against. No note or transcript of any judgment of his is available. It appears that the Respondent thereafter paid the property tax in order to facilitate completion of the sale. The Appellant appealed to the Court of Appeal which dismissed the appeal on 15th January 1981, delivering its reasons on 15th September 1981. The amount owing to the Bank on the security of the land was such that the surplus due to the Appellant is more than sufficient to cover the arrears of the property tax, though the Appellant submits that that fact is entirely irrelevant. 20 30 40

5. The Conditions of Tender upon which the contract was made include several provisions material to this appeal, but one of them is of paramount importance, namely condition 16, as follows:

"The property is sold subject to: 50

(a) .....

(b) .....

10 (c) all notices, charges, Orders of Court, charging orders, caveats and court or other claims affecting the property made or served whether before on or after the date of Sale. The Purchaser shall be deemed to have purchased with full knowledge and notice of all such schemes or proposed schemes, layouts, notices, demands, charges, Orders of Court, charging orders, caveats and court or other claims which shall be complied with and discharged by and at the expense of the Purchaser who shall not be entitled to make or raise any objection or requisition whatsoever in respect thereof."

20 6. The Conditions of Tender also included a condition (No. 29) whereby the (Revised) Singapore Conditions of Sale were incorporated in the contract. These conditions include one (No. 6) on which reliance was placed by the Respondent, whereby the discharge of "outgoings" up to the date fixed for completion was the responsibility of the vendor. However this cannot override condition 16 of the Conditions of Tender for, by general condition 34, the Conditions of Tender prevail in case of any conflict or repugnancy between them and the general conditions.

30 7. Property tax is due by virtue of the provisions of the Property Tax Act (c.144 of the Revised Edition) and in particular of section 6 thereof. The material parts of that section are as follows:

40 "(1)... a property tax shall, subject to the provisions of this Act, be payable at the rate or rates specified hereinafter for each year upon the annual value of all houses, buildings, lands and tenements whatsoever included in the Valuation List authenticated under section 13 of the Act and amended from time to time in accordance with the provisions of this Act.

(2) The tax shall be payable half-yearly in advance, without demand, by the owner of such property ...

(3) The tax shall be a first charge on the property concerned and, if not paid within the prescribed time, shall be recoverable in the manner hereinafter provided."

The word "owner" for this purpose is defined in

section 2. Among the remedies provided by the Act for non-payment is a power to sell the relevant land: sections 35 and 37.

8. Thus the amount of property tax due at the time of sale was an incumbrance or charge on the land itself and therefore within the category of items subject to which the land was sold by virtue of condition 16, which it was the Respondent's responsibility, as purchaser, to discharge.

9. It is submitted that the learned Chief Justice must have accepted this submission, for otherwise he would have made the declaration sought by the Respondent in paragraph (1) of the Amended Originating Summons. With the benefit of such a declaration the Respondent would have been entitled simply to deduct the amount of the property tax from the balance of the purchase price due on completion. The Court of Appeal on the other hand did not express any view as to the true construction of condition 16, holding that the Appellant, not being a party to the contract, could not rely on it and, secondly, that the condition did not apply to a sale by a mortgagee. 10 20

10. The Appellant submits that the latter point is clearly wrong. A clause such as condition 16 is designed to throw on to the purchaser the risk in relation to liabilities of the kind described in the condition, so that the sale price will not be depleted by the necessity to discharge claims to which the contract is not expressly made subject. Such a clause is just as apt and necessary for the protection of a mortgagee selling as such as it is when a beneficial owner is selling. Indeed in the case of a sale by a mortgagee, the vendor has the added concern that he is under a duty to the mortgagor to take reasonable care to sell at a proper price (see Cuckmere Brick Co. Ltd. v Mutual Finance Ltd. [1971] Ch 949). 30

11. Moreover, although the Appellant was not a party to the contract for sale, it is misleading to regard the Appellant as a stranger to the contract. It was the Appellant's property that was being sold. The Bank as mortgagee was under the duty of care to the Appellant mentioned above in relation to the price to be obtained and was accountable as trustee to the Appellant for the proceeds of sale: see the Conveyancing and Law of Property Act (c.268 of the Revised Edition) s. 26(3), and the Land Titles Act (c.276) s.64(1) under which the mortgagee is bound to account for the net proceeds of sale after discharge (inter 40 50

alia) of "prior incumbrances to which the sale is not made subject Here the property tax was a prior incumbrance to which the sale was made subject, so that the Bank could not lawfully, as against the Appellant, have discharged the tax out of the proceeds of sale (contrary to what the Court of Appeal said, at p.98 lines 44-6).

12. Accordingly the Appellant respectfully submits:

- 10 (i) that as between the Respondent and the Bank, the Respondent was liable to discharge the property tax and could not, for example, have deducted it from the balance of the purchase price payable on completion;
- (ii) that as between the Appellant and the Bank, the Bank was bound to account to the Appellant for the whole of the net proceeds of sale after deducting the amounts due to the Bank but without any deduction in respect of the  
20 property tax;
- (iii) that the Respondent is not entitled to intervene as between the Appellant and the Bank to claim moneys that are held on trust by the Bank for the Appellant and in relation to which the Respondent cannot assert any proprietary claim.

13. The Respondent placed more reliance on an alternative argument which it labelled "subrogation". The learned Chief Justice (apparently) and the  
30 Court of Appeal accepted this argument, by giving judgment for the Respondent in the terms of paragraph 4 of the Respondent's Amended Originating Summons (though excluding the reference to the rights of the Bank).

14. The essence of the argument seems to be that the Respondent made a payment, under compulsion, in discharge of a liability which was primarily that of the Appellant, and is therefore entitled to be reimbursed by the Appellant for the amount  
40 so paid. It is wrong to describe that argument, in these circumstances, as a claim by way of subrogation: it is in truth no more than a personal claim to recoupment, by way of an action for money had and received. However, apart from the fact that it does not give rise to a proprietary claim to the surplus proceeds of sale (in this respect the order of the learned Chief Justice must be wrong), if the Respondent could establish every element stated in the first  
50 sentence of this paragraph its claim might well be

justified as a personal claim against the Appellant. (The Appellant does not assert that a restitutionary claim of this kind cannot in principle be available in a case of this type.)

15. The fallacy in this argument of the Respondent is that the Respondent is not properly to be regarded as having made the payment under compulsion. The reason why the Respondent made the payment was that it had become the purchaser of the land under a contract the terms of which precluded it from requiring the vendor to discharge the tax. By entering into the contract in those terms, the Respondent voluntarily or officiously accepted and undertook the risk of liability and disentitled itself from claiming recoupment. But for condition 16(c) the Respondent could have been entitled to make such a claim but, given the effect of that condition as submitted above, the Respondent's argument amounts to a claim to be entitled to take back with one hand that which it had agreed to give up with the other. 10 20

16. Accordingly the Appellant respectfully submits that this appeal ought to be allowed with costs and the orders of the learned Chief Justice and the Court of Appeal ought to be discharged, for the following (among other)

#### R E A S O N S

1. Because the Respondent's only claim against the Appellant is a restitutionary claim which cannot properly be considered without reference to all the circumstances including in particular the terms of the contract for sale of the land; 30
2. Because the Respondent was responsible for the payment of the property tax by virtue of the terms of the contract;
3. Because the Respondent, by agreeing to purchase the land on those terms, voluntarily and officiously exposed itself to and undertook the risk of liability to pay the property tax and is therefore not entitled to recover the tax which it then paid; 40
4. Because, even if (contrary to the Appellant's primary submissions) the Respondent has a valid claim against the Appellant, it would be at best personal and unsecured, not a proprietary claim;

5. Because the decision of the learned Chief Justice on the Respondent's restitutionary claim and the decision and reasons of the Court of Appeal in dismissing the appeal were wrong and ought to be reversed.

TIMOTHY LLOYD

