33/85

Appeal No 40 of 1983

IN THE PRIVY COUNCIL

O N   A P P E A L

FROM THE COURT OF APPEAL OF

THE REPUBLIC OF SINGAPORE

B E T W E E N :

MOH SENG REALTY (PRIVATE) LIMITED

(CHIN CHENG REALTY (PRIVATE) LIMITED)

Appellant

(Respondent)

- and -

HIRENDRA LAL BANNERJEE

Respondent

(Appellant)

APPELLANT'S CASE

The Issues

1. There are two issues in this appeal. The first is the construction of the word "proportionately" in the following proviso in a lease:

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> "PROVIDED however that if the assessment on the said premises shall at any time within the said period be increased or decreased then and in such event the said rent shall also be proportionately increased or decreased accordingly."

The Appellant contends that if the assessment is increased or decreased, the rent must be increased or decreased by the same proportion as the increase or decrease in the assessment. The Respondent contends that if the assessment is increased or decreased, the amount of the increase or decrease must be added to or subtracted from the rent.

2. The second issue concerns the rule in Walsh v Lonsdale (1882) 21 ChD.9. By the exercise of an option in a lease the Respondent became entitled to the grant of a new lease including a similar option. No lease was in fact executed and by the time

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the Respondent purported to exercise the second option for renewal, his right to the grant of the lease had become statute-barred. While the Respondent was entitled to claim specific performance of the contract for the grant of a new lease created by the exercise of the first option, the Appellant accepts that under the rule in Walsh v Lonsdale he would be treated in equity as if such a lease had been granted and would accordingly have the benefit of the second option for renewal. But the Appellant contends that once the right to specific performance had become statute-barred, the foundation of the rule in Walsh v Lonsdale disappeared and the Respondent was no longer entitled to the benefit of the second option.

(1882) 21 Ch D 9

The Facts

3. The appeal is from the judgment dated 15th April 1983 of the Court of Appeal of the Republic of Singapore (Wee C.J., Sinnathuray J. and A P

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Rajah J.) allowing the appeal of the Respondent (in this appeal) from the judgment of the High Court (Chua J.) dated 3rd August 1982 dismissing the Respondent's claim for an order for specific performance of a contract created by the exercise of an option for the renewal of a lease.

Record, p.68

4. The lease in question was dated 23rd July 1957 and was granted by Chin Cheng Realty (Private) Limited ("Chin Cheng") to the Respondent. The demised premises were a shop house with back room and yard known as No. 322-F Changi Road, Singapore. The initial term was ten years from the 1st August 1957 and the rent reserved for the entire term was $110 per month, subject to the proviso quoted above, payable between the 1st and 7th days of every English calendar month. There was a covenant by the tenant to pay the reserved rents on the days and in the manner provided.

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5. The lease contained an option for renewal in the following terms:

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> "3 (c) ...the Landlords will on the written request of the Tenant made three calendar months before the expiration of the term hereby created and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the Tenant hereinbefore contained at the expense of the Tenant grant to him a lease of the demised premises for a further term of TEN years from the expiration of the said term at the same rent and containing the like covenants and provisos as are herein contained including the present covenant for renewal."

The effect of this provision was to make the lease perpetually renewable but there are no provisions in the law of Singapore corresponding to section 145 of and the Fifteenth Schedule to the English Law of Property Act 1922.

Record, p.158
Record, p.160
Record, p.165

6. By letters dated 3rd January 1967 and 1st June 1967 the Respondent purported to exercise the first option to extend the lease. By a letter dated 22nd December 1967 Chin Cheng through its solicitors contended that the purported exercise of the option was invalid because it had not taken place on the proper date. No new lease was granted pursuant to the purported exercise of the option but

the Respondent remained in possession of the premises. The Appellant has not in these proceedings maintained the contention that the 1967 exercise of the option was invalid and accepts that the Respondent became contractually entitled to the grant of a new lease on a date before the expiry of the old one on 31st July 1967.

7. At the time of the grant of the lease in 1957 the "assessment" on the premises was the amount of a local tax, then called "rates", calculated by multiplying the annual value of the premises as defined in section 3 of the Municipal Ordinance (Cap. 133, 1936 Ed.) by the rate fixed pursuant to section 59 of the same Ordinance. By the Property Tax Act (Cap. 144, 1970 Ed.) "property tax" was substituted for rates but the method of calculating the amount payable by multiplying an assessed annual value by a prescribed rate remained the same.

Annex A

Annex A

8. With effect from 11th March 1974 the annual value of the premises was increased from $1320 to $2880 (an increase in the proportion of 11:24 or of 118.18%). The rate of tax remained unchanged at 36% and the assessment was accordingly increased in the proportion of 11:24 or by 118.18%, i.e. from $475.20 a year to $1036.80 a year. The equivalent monthly figures are $37.60 (old monthly assessment) and $86.40 (new monthly assessment).

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9. On 15th March 1974 Chin Cheng wrote to the Respondent notifying him of the increase in annual value and contending that by virtue of the proviso in the lease the monthly rent due should also be increased in the proportion of 11:24, i.e. from $110 to $240. On 23rd March 1974 the Respondent's solicitor wrote to Chin Cheng contending that the rent should be increased only by the increase in the assessment, i.e. by $46.80, being the difference between $37.60 and $86.40.

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10. Thereafter the Respondent tendered rent in accordance with his own construction of the proviso until 13th July 1977 when he sent under protest a cheque for the arrears of rent due in accordance with the Appellant's construction, which Chin Cheng rejected.

Record, p.198

11. By a letter dated 22nd April 1977 the Respondent purported to exercise for the second time the option to renew the lease. No other "written request" is relied upon as an exercise of the option. If the Appellant's construction of the proviso is correct, the Respondent had at the time of the request not paid or tendered all the rent due under the lease and was therefore in breach of the covenant for payment of rent. If the Respondent's construction is correct, he was not in breach of any covenant.

Record, p.192

Contentions

12. The Appellant contends that:

12.1. By 31st July 1973 (at the latest) the Respondent's right to specific performance of the contract created by the exercise of the first option in 1967 had become statute-barred: see section 6(1)(a) and 6(8) of the Limitation Act (Cap.10, 1971 Ed.) Singapore law, by contrast to section 2(7) of the English Limitation Act 1939 and section 36(1) of the English Limitation Act 1980, expressly applies the contractual limitation period to actions for specific performance and other equitable relief. Consequently, by 1977 the Respondent had no right to the second option in law or in equity.

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Annex A

12.2. By virtue of the Respondent's subsisting breach of covenant at the time of his request for a renewal of the lease the option was not validly exercised and the lease terminated by effluxion of time on 31st July 1977.

The Judgments Below

13. On 28th July 1977 the Respondent commenced proceedings in the High Court of Singapore for specific performance of the alleged contract created by the exercise of the option on 22nd April 1977. On 29th September 1977 Chin Cheng commenced proceedings for possession of the premises in the District and Magistrates' Court of Singapore. The two actions were consolidated by order of the High Court dated 23rd January 1978. On 4th August 1978 Chin Cheng assigned its interest in the premises to the Appellant, which was substituted as a party by order of the Court of Appeal dated 9th April 1984.

Record, p. 1
Record, p. 17
Record, p. 26
Record, p. 223
Record, p. 129

14. Chua J. held that the effect of the proviso was, in the events which had happened, to increase the rent in the same proportion as the increase in the annual value. The Respondent does not contend that this would have been the case if there had also been a change in the rate of tax, but the

Record, p. 70

judgment of Chua J. must be read in the light of the fact, accepted by both parties, that there had been no change in the rate of tax and that the tax payable had therefore increased in exactly the same proportion as the annual value.

Record, p.76

15. Chua J. also held that for the purposes of limitation time had begun to run from 1st August 1967 and that the Respondent's contractual rights had become statute-barred by the time he purported to exercise the second option.

Record, p.121

16. The Court of Appeal held that the word "assessment" in the proviso meant the amount of tax payable, i.e. the product of the annual value and the rate of tax, rather than the annual value alone. The Appellant does not challenge this finding but submits that for the reasons stated in paragraph 14 above, it should have made no difference to the result.

17. The Court of Appeal also held that the proviso was "in the nature of an indemnity clause...to reimburse [Chin Cheng] for any increased assessment [it] might...have been called upon to pay." The Appellant submits that as a matter of plain English the words of the proviso will not bear this meaning, which gives no effect to the word "proportionately". If the Court of Appeal's meaning had been intended, the proviso would instead have said "the said rent shall be increased or decreased by the same amount".

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18. There is nothing in the nature of the transaction or its surrounding circumstances which makes the ordinary meaning of the proviso absurd or even improbable. The lease was perpetually renewable but the rent, subject only to the proviso, was to remain the same. It is therefore not unlikely that the parties intended to adopt some form of index or yardstick for review of the rent and that they should have adopted the amount of the assessment from time to time as an appropriate index.

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19. The Court of Appeal also held that the Appellant could not rely upon the Limitation Act because

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> "the [Respondent] always had an equitable right to have granted to him a written lease for successive terms of fixed ten years each and occupied the same position, vis-a-vis the [Appellant] as regards both rights and liabilities, as he would have occupied had a formal lease under seal been executed - see Walsh v Lonsdale (1882) 21 ChD.9."

The Appellant contends that the rule in Walsh v Lonsdale is predicated upon the power of the court to order specific performance. If there is for any reason no right to specific performance, the agreement to grant a lease cannot be treated as equivalent to a lease: see Cornish v Brook Green Laundry Limited, [1959] 1 Q.B. 394. The Respondent's equitable right to the second option under Walsh v Lonsdale therefore disappeared when his right to specific performance of the contract created by the exercise of the first option became statute-barred.

20. The Appellant respectfully submits that the judgment of the Court of

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Appeal ought to be reversed and the judgment of Chua J. restored for the following among other reasons.

R E A S O N S

(1) Because on the true construction of the proviso the rent due under the lease with effect from 11th March 1974 was $240 a month;

(2) Because at the time of the Respondent's written request for the grant of a further term there was an existing breach of covenant on his part, namely, the covenant for payment of rent;

(3) Because the Respondent was therefore not entitled to the grant of a new term and the existing term ended by effluxion of time on 31st July 1977;

(4) Because the Respondent's right to specific performance of the contract created by the exercise of the first option

(including the provision for the grant to him of the second option) had become statute-barred by the time he purported to exercise the second option.

(5) Because Chua J. was right and the Court of Appeal were wrong.

LEONARD HOFFMANN

DANIEL HOCHBERG

Lincoln's Inn

Appeal No.40 of 1983

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Respondent

(Appellant)

APPELLANT'S CASE

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