Judgment dated 11, 1974

6 1973

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT IN MALAYSIA (APPELLATE JURISDICTION)

BETWEEN

LAM KEE YING Sdn. Bhd. — Appellants (Plaintiffs)

- and -

1. LAM SHES TONG t/a LIAN JOO CO.
2. SHARIKAT LIAN JOO TEXTILES Sdn. Bhd. — Respondents (Defendants)

CASE FOR THE APPELLANTS

RECORD

1. This is an Appeal, by leave of the Federal Court of Malaysia, from a judgment of that Court dated 14th June 1972, allowing an appeal by the Respondents the Defendants in the Action, and setting aside the Order of the High Court in Malaya (The Honourable Mr. Justice Mohd. Azmi) thereby dismissing the Action with costs. — p.51, p.43, p.37

2. The Action was instituted by the Appellants against the Respondents in the High Court in Malaysia by Specially Indorsed Writ dated 24th December 1969. By the Writ the Appellants claimed possession of premises, being the ground floor (excluding the mezzanine floor) of No.32 Jalan Silang, Kuala Lumpur, demised to the First Respondent, for breach of a covenant not to assign, underlet or part with the possession of the demised premises without the consent of the Appellants first obtained. The Appellants also — p.1

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claimed mesne profits, damages and costs.

3. The demised premises, comprising the entire ground floor of a shophouse No.32 Jalan Silang, Kuala Lumpur, were leased originally by Lam Kee Ying and Lam Yoo Choo, then the registered proprietors, to Lam Shes Tong, trading as Lain Joo Company, for a term of 25 years from May 1, 1964 at a yearly rent of $6,000/- payable monthly in advance at the rate of $500/- per month. The lease contained the following relevant covenants by the lessee in clause (1):-

> "(g) Not to assign underlet or part with the possession of the demised premises or any part thereof without the prior consent of the Lessors such consent not to be unreasonably withheld.
>
> (i) To use the demised premises for carrying on business as general merchants whether trading as a sole-proprietor or in partnership thereof."

The Lessors' covenants including the following under clause (2) :-

> "(d) In the event of MR. LAM KEE YING or his nominee is desirous of letting out the Mezzanine Floor, the Lessee shall be given the first option to rent it at an additional monthly rental of $100/-, failing which the Lessors are entitled to let it to others."

4. Lam Kee Ying became the sole proprietor and lessor of the premises on 4th November 1965. In succession to him the Appellants became the registered proprietors on 18th November 1966.

5. The First Respondent carried on business as a textile merchant from the demised premises in partnership with others under the name or style of Lian Joo Co. By 11th December 1966, some of the parties withdrew, leaving the First Respondent to carry on the business in partnership with his younger brother Lam Sie Gin

and one Low Yeo Foong.

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6. On 13th August 1969, the First Respondent together with his said two partners incorporated the Second Respondents for the purpose of acquiring and taking over as a going concern the partnership business and the properties of that business. The Appellants contended that thereafter the First Respondent assigned, underlet or parted with the possession of the demised premises to the Second Respondents without the consent of the Appellants. p.63

7. By their Defence the Respondents denied that the First Respondent had assigned, underlet or parted with the possession of the demised premises or any part thereof because the Second Respondents belonged to the First Respondent and his family, the First Respondent holding more than 50% of the shares of the Second Respondents. The Respondents also alleged that the Appellants had waived any breach by their acceptance of rent in September and October 1969 with knowledge of the breach. p.8

8. The Respondents made no application for relief from forfeiture under Section 237 of the National Land Code.

9. At the Trial, a Statement of Agreed Facts dated 3rd November 1971, was put before the Court. This recorded that :- p.9

1. In the later part of 1969 Lian Joo Co. applied to the Central Electricity Board and the Selangor Water Works Department to discontinue the supply of electricity and water to the demised premises.

2. At the same time the Second Respondents applied for fresh supply of electricity and water to the said premises to be held in their own name.

3. The respective departments approved the application for discontinuance of supply and the applications for fresh

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supply, and new supply agreements were entered into between the respective departments and the Second Respondents.

4. In the later part of 1969 Lian Joo Textiles Co. applied to the Telecoms Department for the cancellation of its name in respect of the telephone installation at the said premises.

5. At the same time the Second Respondents applied for the telephone installation to be under their own name. A new telephone service agreement was entered into between the Telecoms Department and the Second Respondents.

6. On the coming into effect of the new telephone service agreements the telephone number 24531 became listed in the Telephone Directory against the Second Respondents, 32 Jalan Silang, Kuala Lumpur.

7. In the later part of 1969 the Second Respondents put up a new signboard with its name on it at the front of the said premises.

8. All re eipts, bills invoices from the later part of 1969 were issued in the name of the Second Respondents.

10. The First Respondent, who was both the Managing Partner of Lian Joo Co. and the Managing Director of the Second Respondents, admitted in cross-examination that "when one took over the business it would include the tenancy of the premises", and that the change of name in respect of water, electricity and telephone "indicated transfer or assignment of the tenancy" to the Second Respondents. In November 1969 the Second Respondent tendered payment of rent to the Appellants with their own cheque.

p.24

p.25

p.125

11. The cumulative effect of the evidence left the Trial Judge in no doubt, and he found as a fact, that the First Respondent had assigned

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underlet or parted with the possession of the demised premises to the Second Respondents. The Trial Judge accepted the evidence of Lam Kee Ying, the Chairman of the Directors of the Appellants, that he only knew of the breach of covenant in November 1969, and accordingly rejected the Respondents' allegations that the breach had been waived by the Appellants. p.34

12. The Respondents claimed to invoke the intervention of equity on the ground that the Appellants did not come to Court with clean hands, having themselves committed a breach of covenant in 1966 by not giving a first option to the First Respondent to rent the mezzanine floor in accordance with the provisions of Clause 2(d) of the Lease. In evidence, however, the First Respondent had stated that he had known of this breach in 1966, and had taken no action in respect thereof, The Trial Judge found that he had waived his rights under the clause, and that the Appellants' breach thereof was therefore irrelevant. pp.23,24

13. The Trial Judge rejected various other technical defences raised by the Respondents, and ordered that the Respondents and all persons claiming under them should deliver up vacant possession of the demised premises to the Appellants within 6 months from the date of the Order, that the First Respondent should pay to the Appellants mesne profits at the rate of $1,000.00 per month from the 15th December 1969 until possession be delivered up, and that the Respondents should pay the Appellants their costs of the Action. p.37

14. The Respondents appealed to the Federal Court of Malaysia (Appellate Jurisdiction) by Memorandum of Appeal dated 25th February 1972. By their said Memorandum of Appeal, the Respondents did not challenge the Trial Judge's finding that the Appellants' breach of Clause 2(d) of the Lease had been waived by the Respondents, and did not base any ground of appeal upon such breach. Again, the Respondents claimed that they were not in breach of covenant, or alternatively that the Appellants were not p.40

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entitled to enforce the covenant, but made no application for relief from forfeiture for breach.

15. The Federal Court allowed the appeal on two grounds. First, the Court held that the Trial Judge was in error in finding as a fact that there had been any assignment or underletting by the First Respondent. The Federal Court, however, did not refer to the prohibition against parting with possession, and did not deal with this aspect of the matter at all, despite the fact that it was clearly present to the mind of the Trial Judge.

16. Secondly, the Federal Court appeared to treat the Respondents as claiming relief from forfeiture as provided by Section 237 of the National Land Code, despite the absence of any application for relief, either to the High Court or to the Federal Court, and the consequential absence of any evidence or argument on either side directed to the question whether such relief should be granted.

17. The Federal Court were greatly influenced by the fact that in 1966, in breach of Clause 2 (d) of the Lease, Lam Kee Ying had let the mezzanine floor to a limited company controlled by himself, thereby "by precept and example, /demonstrating/ that treating a limited company as the alter ego of its members was not, in the case of this particular lease, a breach of covenant." This contention had never been pleaded by the Respondents, or put to the Appellant's witness Lam Kee Ying in cross-examination; nor had it been advanced in argument by Counsel for the Respondents, who had relied upon the Appellants' breach of Clause 2(d) solely as a ground for the invocation of the "clean hands" doctrine. Moreover, there was no evidence that Lam Kee Ying had thereby waived, or held himself out as having waived, compliance by the First Respondent or his successors in title with the provisions of Clauses 1(g) or 1(i) of the Lease; or that in subsequently parting with the

possession of the demised premises the First Respondent had relied upon any such waiver.

18. The Appellants humbly submit that the whole of the judgment of the Federal Court dated 14th June 1972 was wrong and ought to be set aside, and that in lieu thereof the judgment and Order of the High Court ought to be restored, for the following, among other

R E A S O N S

(1) BECAUSE there was evidence upon which the High Court was entitled to find as a fact, as it did, that the First Appellant had parted with the possession of the demised premises to the Second Respondents, and the Federal Court ought not to have disturbed that finding.

(2) BECAUSE the Federal Court were wrong in granting the First Respondent relief from forfeiture in the absence of any application made by the First Respondent under Section 237 of the National Land Code for such relief, and in the absence of any evidence directed to the question whether such relief should be granted or not.

(3) BECAUSE in the absence of any such contention in the pleadings, and in the state of the evidence, the Federal Court ought not to have held that the breach of Clause 2(d) of the Lease by Lam Kee Ying afforded any defence to the First Respondent against a claim for breach of the provisions of Clauses 1(g) or (i) thereof.

(4) BECAUSE the judgment of the Federal Court was wrong and ought to be set aside.

GERALD GODFREY

P.J. MILLETT

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