



No. 6 of 1973

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT IN MALAYSIA (APPELLATE JURISDICTION)

B E T W E E N :

LAM KEE YING Sdn. Bhd. Appellants (Plaintiffs)

- and -

- 10 1. LAM SHES TONG trading as LIAN JOO CO and
- 2. SHARIKAT LIAN JOO TEXTILES Sdn. Bhd. Respondents (Defendants)

CASE FOR THE RESPONDENTS

RECORD

- 1. This is an appeal from the Judgment of the Federal Court in Malaysia (Appellate Jurisdiction) given on 14th June 1972 allowing an appeal against the Judgment of the Honourable Mr. Justice Mohammed Azmi in the High Court in Malaya at Kuala Lumpur given on 18th January 1972. p.43-51
- 20 2. By the Order of the Honourable Mr. Justice Mohammed Azmi the Respondents were ordered to deliver up vacant possession of the premises known as ground floor (excluding the Mezzanine Floor) No.32 Jalan Silang, Kuala Lumpur to the Appellant within 6 months of the date of the order and to pay mesne profits at the rate of \$1000.00 per month from 15th December 1969 until delivery up of possession and to pay the Appellants' costs of the action. By the Order p.37-8
- 30 p.51

RECORD

of the Federal Court the Order of the Honourable Mr. Justice Mohammed Azmi was set aside and the Appellants were ordered to pay the Respondents' costs of the appeal and in the court below.

3. The First Respondent was (and still is) in possession of the premises above referred to under a Memorandum of Lease made on May 19th 1964 by which the said premises were demised to him by Lam Kee Ying and Lam Yoo Choo for the period of 25 years from May 1st, 1964 at a yearly rental of \$6,000.00 payable monthly in advance.

10

p.53-58

4. The Memorandum of Lease includes (inter alia) the following provisions :

(i) a covenant by the tenant (in clause 1(g)) not to assign underlet or part with the possession of the demised premises or any part thereof without the prior written consent of the lessors such consent not to be unreasonably withheld;

20

(ii) a covenant by the lessors (in clause 2 (d)) that in the event of Mr. Lam Kee Ying or his nominee being desirous of letting out the mezzanine floor of 32, Jalan Silang above-mentioned, the tenant should be given the first option to rent it at an additional monthly rental of \$100.00, failing which the Lessors were to be entitled to let it to others;

(iii) a proviso for re-entry in the event of breach of covenant by the tenant: clause 3 (a).

30

p.22

5. The first Respondent carried on business through a firm known as Liam Joo Co of which, at the date of the Memorandum of Lease, he was the sole proprietor but which subsequently became a partnership. There was no evidence which suggested that the lease created by the Memorandum of Lease became at any time an asset of the partnership.

40

6. On 13th August 1969 the Second Respondent was incorporated with a view to taking over the business of the partnership Liam Joo Co. The First Respondent is and always has been the majority shareholder in the Second Respondent. In the latter part of 1969 the Second Respondent began trading at 32 Jalan Silang in succession to the partnership. RECORD  
p.24  
p.21
- 10 7. The Appellants' claim in this action is based on an allegation that the First Respondent committed a breach of the covenant contained in clause 1(g) of the Memorandum of Lease by assigning, underletting or parting with possession of the demised premises in favour of the Second Respondent. By a letter dated November 13th, 1969 the Appellants' solicitors complained to the First Respondent of an alleged breach of this covenant and by a further letter dated December 10th, 1969 the Appellants' solicitors gave to the First Respondent notice requiring him to remedy the alleged breach of covenant within 5 days and to pay compensation to the Appellants. p.59  
p.126
- 20 8. In the Statement of Claim indorsed on the writ, paragraph 8 alleged a breach of the said covenant on or about August 13th, 1969. In paragraph 8 of the amended Statement of Claim the breach of covenant was alleged to have occurred on or about November 13th, 1969. No other breach of covenant was or has even been alleged against the First Respondent. p.1 to 5  
p.6-7
- 30 9. By paragraph 4 of the Amended Defence, the Respondents denied (inter alia) paragraph 8 of the Statement of Claim. The First Respondent further relied on the fact that the Second Respondent belonged to him and his family and that he held more than 50% of the shares. p.8
- 40 10. The learned trial Judge held "on the balance of probabilities" that the First Respondent had committed a breach of clause 1(g) of the Memorandum of Lease. He relied on six particular points. The first was that the agreement dated 30th June 1969 for the incorporation of the Second Respondent (AB6) provided that a sales p.29  
p.121-2

RECORD

agreement should be entered into for the sale of the partnership to the Company. The incorporation agreement was referred to in the Memorandum of Association of the Second Respondent (clause 3(a)) and in its Articles of Association (clause 4). The learned Judge held that it could reasonably be inferred that the demised premises have been assigned or transferred to the Second Respondent as part of the taking over of the partnership business. There was however no evidence that a "sales agreement" ever came into existence. The First Respondent denied that it did in cross-examination and it is the Respondents' submission that there are no facts in evidence from which it may be inferred that it did come into existence, still less that it contained any assignment or transfer of the premises themselves. 10

11. The sixth point relied on by the learned Judge was that the First Respondent made two general remarks in cross-examination to the following effect : 20

"when one took over business it would include the tenancy of premises".  
"I agree that the change indicates transfer or assignment of tenancy to the 2nd Defendant Company".

These general remarks are, in the Respondents' submission, to be viewed in the light of the First Respondent's specific denial that there was any sub-letting or assignment and are not inconsistent with the truth of that denial. 30

12. The learned Judge relied, for his other 4 points, on the fact that the Second Respondent put up a signboard outside the premises, tendered its own cheque for the rent, issued receipts, bills and invoices in respect of the business at the premises and arranged for services to be supplied to the premises in its name. It is the Respondents' submission that whereas those facts may be indications that the Second Respondent is carrying on business at 40

10 the premises, just as the partnership did, they cannot justify an inference that the First Respondent has committed a breach of covenant by assigning, underletting or parting with possession of the premises. The First Respondent explained in evidence that the purpose of these matters was to let clients know that "this is a limited company". It is submitted that the inclination of the courts is to demand clear evidence before holding that an event has occurred giving rise to a forfeiture and that the evidence in this case is, at best, insufficient to support a holding that a forfeiture has been incurred. On all ~~these~~ points the Respondents rely on and adopt the reasoning in the judgment of the Federal Court.

p.25

p.48-50

20 13. In the Respondents' submission, the Appellants cannot succeed unless they establish not merely that the Second Respondent is in the premises but that the First Respondent has excluded himself from the premises, whether by assignment, underletting or parting with possession. Allowing the Second Respondent into the premises does not of itself constitute a parting with possession: see Peebles v. Crosthwaite (1897) 13 T.L.R. 37 and 198; Jackson v. Simons [1923] 1 Ch. 373; Chaplin v. Smith [1926] 1 KB 198. It is submitted that there was no evidence from which any assignment, underletting or parting with possession could be deduced or inferred and no direct evidence of any such act.

40 14. The Federal Court decided in favour of the Respondents on the appeal on one other point not specifically considered by the learned trial Judge, namely relief against forfeiture under section 237 of the National Land Code (which is set out in the judgment of the Federal Court at p.46 of the Record). Material facts on this issue were that in November 1964, notwithstanding the covenant contained in clause 2(d) of the Memorandum of Lease above referred to, Lam Kee Ying let the mezzanine floor of 32, Jalan Silang to Tyna Co. Limited for 25 years from 1st November 1964 at \$50 per month without giving the First Respondent the opportunity to take a

RECORD

tenancy. Tyma Co. Limited subsequently changed its name and is the Appellant in these proceedings, the freehold having been transferred to it in November 1966. The First Respondent asked Lam Kee Ying why he had not been given the first option and the reply was that Tyma Company belonged to Lam Kee Ying, that there was no difference between him and the company. In response to this the First Respondent said he would follow what Lam Kee Ying had done. As was observed by the Federal Court on the appeal a comparison of the two companies is revealing: Lam Kee Ying owned \$3,000 shares out of a paid-up capital of \$500,000 in Tyma Co. Limited whereas the First Respondent owns \$100,000 out of the \$180,000 issued share capital in the Second Respondent.

p.16  
pp.23,24  
p.47  
p.19  
p.21

10

15. In the Respondents' submission it is inequitable for the Appellants to seek to forfeit the First Respondents' lease on the ground of the breach alleged, even if the breach were established. Lam Kee Ying was guilty of a more serious breach of his covenants in the lease, and the Appellants took the benefit of that breach in relation to the mezzanine floor and, in relation to the whole premises, they cannot stand in a better position than Lam Kee Ying himself would. Moreover after the breach, Lam Kee Ying attempted to explain it away in terms that were likely to lead, and did lead, the First Respondent to believe that acting in this particular manner was not a breach of covenant or at least would not be attended by serious consequences. The Respondents therefore submit that this is a case in which it is entirely appropriate on established principles of equity to grant relief against forfeiture. Again on this point the Respondents respectfully adopt and rely on the observations of the Federal Court.

20  
30  
40

p.46-8

AND the Respondents humbly submit that the appeal should be dismissed with costs for the following among other

R E A S O N S

RECORD

1. THAT the First Respondent had not assigned, underlet or parted with possession of the premises to or in favour of the Second Respondent;
2. THAT there was no evidence on which it could be held that the First Respondent had assigned, underlet or parted with possession of the premises to or in favour of the Second Respondent;
3. THAT if a breach of covenant was established the conduct of the Appellants and their predecessor in title Lam Kee Ying was such that the First Respondent should be granted relief against forfeiture;
4. THAT the judgment appealed from was right.

JOHN MILLS

TIMOTHY LLOYD

No. 6 of 1973

IN THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL

---

---

O N A P P E A L

FROM THE FEDERAL COURT IN MALAYSIA  
(APPELLATE JURISDICTION)

---

---

B E T W E E N :

LAM KEE YING  
Sdn. Bhd.

Appellants

- and -

1. LAM SHES TONG  
trading as  
LIAN JOO CO and
2. SHARIKAT LIAN  
JOO TEXTILES  
Sdn. Bhd.

Respondents

---

---

CASE FOR THE RESPONDENTS

---

---

SOLE SAWBRIDGE & CO.,  
9 Gray's Inn Square,  
London, WC1R 5JD.

Respondents Solicitors