Privy Council Appeal No. 24 of 1979

Daiman Development Sdn. Bhd. – – – – – *Appellant*

v.

Mathew Lui Chin Teck – – – – – – *Respondent*

and

Daiman Development Sdn. Bhd. – – – – – *Appellant*

v.

Loh Sew Wee – – – – – – – – *Respondent*

(Consolidated by Order dated 4th February 1979)

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH OCTOBER 1980

Present at the Hearing:

LORD EDMUND-DAVIES
LORD FRASER OF TULLYBELTON
LORD SCARMAN
LORD ROSKILL
SIR GARFIELD BARWICK

[*Delivered by* SIR GARFIELD BARWICK]

These appeals consolidated by Order of the Federal Court of Malaysia of 4th February 1979 were heard together. There is no significant difference between them either in point of fact or in the applicable law. Also the parties are agreed that the result of the first-named appeal will determine the fate of the second. Their Lordships accordingly recite only the facts of the first appeal but the advice which they will tender to His Majesty the Yang di-Pertuan Agong will apply equally to both appeals.

The appellant was at all material times a licensed housing developer under the Housing Developers (Control and Licensing) Act, 1966 ("the Act") and the Housing Developers Control and Licensing Rules, 1970 ("the Rules"), made pursuant to section 24 of the Act.

In 1972 the appellant owned a large area of land situated at Taman Sri Tebrau, Johore Bahru, Johore, which it proposed to develop as a housing estate, erecting thereon some 1,720 houses of various types, making provision for roads and services for various community purposes. Late in 1972, with a view to attracting the attention of persons seeking to obtain by purchase residential accommodation, the appellant placed

on view at its office in the O.C.B.C. Building, Johore Bahru, its plan of sub-division of the land and plans of the various types of dwelling houses proposed to be erected thereon. Neither the plan of sub-division of the land nor the plans for the dwelling houses had then been approved by the local authorities. The appellant expected that it would take one or two years to obtain these approvals. Construction of the housing could not begin until those approvals were in hand.

On 1st October 1972 the respondent, desiring to purchase a house, attended at the office of the appellant and there inspected the sub-division plan and the plans and a model of a semi-detached house which suited his purpose. He was satisfied with the location and dimensions of Lot 949 and with the plans of the semi-detached house. He was told that neither the sub-division nor the building plan had been approved and that it would be some time before construction of the house could begin. The respondent was prepared to wait for the necessary period and decided to purchase the land and building.

Having so decided he paid to the appellant on that day the sum of $700 and received therefor the appellant's receipt for that sum as "the Booking Fee for Lot No. 949—Single storey, semi-detached". He also signed that day two copies of a document bearing the appellant's name and headed "Booking Proforma". This was a document prepared by the appellant and apparently was in general use by it in connection with the disposal of lots in the estate. As the question in these appeals turns exclusively in their Lordships' view upon the true construction of this document read against the background of the Rules it should be set out in full.

"BOOKING PROFORMA

NAME OF INTENDING PURCHASER: Mr. Mathew Lui Chin Teck

(NRIC 0690161)

ADDRESS: Post Office, Kota Tinggi, Johore.

LOT No. BOOKED (*as per Company's layout*): 949

APPROXIMATE BASIC AREA: 2,800 sq. ft.

TYPE OF HOUSE: Single-storey Semi-detached.

PURCHASE PRICE DOLLARS: Twenty six thousand only ($26,000.00) only.

I, the above-named Mathew Lui Chin Teck hereby agree to purchase the above Lot together with the house as specified at the above stated price for which a Booking Fee of $700.00 is now paid to the Company subject to the following terms and conditions:

1. That within two (2) weeks from the date of receipt of a notice by the Company, sent to my above address, I shall pay to the Company or its Solicitors, M/s. A. L. Looi of Rooms 401 & 402, 4th Floor, O.C.B.C. Building, Johore Bahru, Johore the sum of $2,600 and sign the Agreement For Sale with the Company which shall be prepared by the Solicitors and subject to the terms and conditions therein.

2. That I have inspected the Company's layout and building plans and specifications and agree to accept whatever alterations

and amendments as may be required by the Authorities. In the event of major alterations and amendments to the layout plan I reserve the right to cancel my booking and the booking fee hereby paid shall be refunded to me by the Company free of interest.

3. That in the event of failure on my part to comply with Clause 1 above after due notice has been given by the Company or its Solicitors, the Booking will be treated as cancelled and the Booking Fee of $700.00 shall be forfeited to the Company and I shall have no further claims against the Company.

4. That the area of the Lot above stated is only approximate and in the event that the area thereof differs upon the issue of the Qualified Title in respect of the said Lot, I shall abide to the same and agree to pay $2.00 per sq. ft. for any excess above the basic and in the event of shortage in the basic area above stated the Company shall refund to me the difference calculated at the rate of $2.00 per sq. ft.

Dated this 1st day of October, 1972.

Sd. (Illegible) Sd. (Illegible)
WITNESS SIGNATURE OF INTENDING PURCHASER "

Their Lordships will refer to this document as the " proforma ". According to the Statement of Claim subsequently filed in the proceedings out of which this appeal arises, the proforma was signed by both parties. In the appellant's Statement of Defence it is not denied that the appellant did agree with the respondent in terms of the proforma, though subject to conditions asserted by the appellant.

On the 30th May 1975 the appellant informed the respondent in writing that the plan of sub-division and amended building plans had been duly approved and that the appellant would soon be commencing construction. It said that

> "In view of the amendments and additions to the building plans and the increase of material and construction costs, the adjusted price for the above lot together with a single storey semi-detached house is $35,100."

The appellant then required payment of a further sum of $2,810 which, together with the sum of $700 already paid, would provide a deposit of 10 per cent. of the purchase price. The appellant proceeded to inform the respondent that if he failed to pay the further sum of $2,810 and to sign an agreement of sale, i.e. at the increased price, within fourteen days the booking would be regarded as having been cancelled by him.

The respondent was not prepared to agree to the increase in the price of the lot and building. He tendered to the appellant the sum of $1,900 which, together with the said sum of $700 would provide the requisite deposit on a purchase at $26,000. The appellant rejected this tender and insisted that it was not bound to sell the land and building to the respondent for the sum of $26,000, though it was prepared to effect a sale at the price of $35,100.

Following inconclusive correspondence between the parties the respondent commenced civil proceedings in the High Court in Malaya at Johore Bahru against the appellant seeking specific performance of an agreement made on 1st October 1972 for the sale by the appellant

to him of Lot 949 together with a single-storey semi-detached house thereon for the sum of $26,000. By its Statement of Defence the appellant, while admitting having agreed to sell to the respondent the described property at the price of $26,000 alleged that it was understood between the parties that the booking made by the respondent was " subject to contract" and that no contract had subsequently been signed. The appellant also alleged the existence of other understandings as to the cost of alterations of the building which were not supported by evidence at the hearing of the proceedings and with which this appeal is not presently concerned.

The learned Judge (Syed Othman J.) who heard the case in the High Court gave judgment of specific performance in favour of the respondent, subject to payment of the agreed purchase price of $26,000. The Judge seemed to take the view that the Rules furnished the only material which could be included in the formal agreement of sale other than the description of the property and the price as stated in the proforma. He pointed out that in any case no evidence had been produced that the amendments, required by the authorities, either to the sub-division or to the building plans had resulted in diminishing the number of units of houses which could be built on the land or the surrender of more land than was proposed in the original sub-division plan or in increasing the cost of the building on Lot 949. He thought that the increase in price sought by the appellant was due to no other reason than that there had been a general increase in the price of property in the Johore Bahru area.

The appellant appealed against this judgment to the Federal Court of Malaysia. That Court (Suffian L.P., Gill C.J., Ibrahim Manan J.) dismissed the appeal. Giving judgment the Court stated the issue to be whether the booking proforma was a mere agreement to agree or a firm contract of sale. The Court concluded that the proforma was a firm contract. With reference to the provision that the respondent was required to sign an Agreement of Sale to be prepared by the appellant's solicitors and " subject to the terms and conditions therein ", the Court said that the appellant was bound by the Rules and " only details may be inserted into the further agreement ". The Court pointed out that the proforma allowed the price of the property to be varied only in two specified ways. First, under Clause 2, because of alterations and amendments to the appellant's sub-division plans required by the authorities. These provisions did not allow the appellant to increase unilaterally the price of the house as a result of other factors. Secondly, under Clause 4, should the area of the land comprised in the Lot turn out to be larger or smaller than originally provided for in the plan of sub-division.

Before their Lordships' Board the appellant's Counsel made three submissions.

First: that upon its proper construction the proforma was " subject to contract " in the sense that until a further document was mutually agreed and signed no contractual obligation arose from the proforma itself.

Secondly: that even if the proforma were not " subject to contract " the purported agreement in the proforma remained inchoate for want of agreement between the parties as to the terms and conditions to which the agreement of sale prepared by the solicitors was to be subject.

Thirdly: that if upon its proper construction the proforma did give rise to legal obligation it did no more than give the respondent a right to receive an offer to purchase the lot and house thereon, (presumably at the stipulated price) if the appellant at its option should decide to offer the property for sale.

Their Lordships will deal with these submissions in the order in which they have been stated and in which, indeed, they were argued by Counsel.

Without making any decision in that respect their Lordships, having regard to the views they have formed and are about to express, will assume that all three submissions fall within the scope of the pleadings and of the manner of the conduct of the case itself in the Malaysian Courts.

The appellant in making his first submission virtually interpolated the words " subject to contract " between the words " hereby " and " agree " or after the word " agree " in the opening paragraph of the proforma. The words are notably not there. The appellant however relied upon the employment of the expression " subject to " in the opening paragraph of the proforma and perhaps more particularly upon its use in the latter part of Clause 1. The appellant claimed that the employment of these expressions attracted to the proforma the full effect given to the words " subject to contract " in the decided cases.

The question whether parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other considered against the background of the circumstances in which they have been negotiating, including in those circumstances the provisions of any applicable law. Where they have expressed themselves in writing the proper construction of the writing against that background will answer the question. The purpose of the construction is to determine whether the parties intend presently to be bound to each other or whether, no matter how complete their arrangements might appear to be, they do not so intend until the occurrence of some further event, including the signature of some further document or the making of some further arrangement. The question is one as to expressed intention and is not to be answered by the presence or absence of any particular form of words. But, in general, employment of the formula " subject to contract " as a condition of their arrangement will preclude the present assumption by the parties of contractual obligations.

The High Court of Australia (Dixon C.J., McTiernan and Kitto JJ.) had before it in *Masters v. Cameron* (1954) 91 C.L.R. 353 the terms of a written arrangement signed by parties which contained the following : —

> " This agreement is made subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors on the above terms and conditions and to the giving of possession on or about the 15th March 1952."

Although the terms of the arrangement as set out in the writing might be said to include all the requisite terms of the transaction into which the parties proposed to enter, the subjection of their arrangements to the approval of their solicitors was held in the circumstances to preclude contractual obligations from presently arising. The distinction between a condition, which precludes the present existence of contractual obligations, and a condition or qualification of the contractual obligations themselves, is clearly indicated in those Reasons which are expressed with clarity. An accurate analysis of the relevant case law and of the fundamental principles to be observed in resolving a question such as arises on the appellant's first submission is to be found in those Reasons. Their Lordships are content to adopt them as accurately expressing the relevant principles and the result of the relevant authorities. Their Lordships find no need themselves to discuss them.

Before entering upon the construction of the proforma it is necessary to refer to some of the details of the Rules because they form a necessary

part of the background against which the construction is to be made. The Rules treat the description " booking fee " as an expression in common use in the area of housing development and sale. They limit the amount of money which a purchaser of housing accommodation, including land, may be required to pay as a booking fee (Rule 10(1) and (2)). It may be that the amount paid by the respondent to the appellant ($700) as a booking fee marginally exceeded this limit. But nothing turns in this appeal on that circumstance.

Rule 10(3) provides that the term " booking fee " includes " any payment by whatever name called which payment gives the purchaser an option or right to purchase the housing accommodation including the land ".

Rule 12 requires every contract of sale of housing accommodation, including the land, to provide within its terms and conditions for a number of specified matters. A brief abstract of these matters is necessary to indicate their nature and extent.

1. warranties of title and absence of encumbrances.
(12(1) (*a*), (*b*) and (*c*))

2. A statement of price and the manner of its payment.
(12(1) (*d*) *and* (*e*))

3. A description of the land, its sub-divisional location and provision for adjustment of price if there be a divergence between the description of the contract of sale and the description in the instrument of title.
(12(1) (*f*) and (*g*))

4. Date of delivery of vacant possession with indemnity to the purchaser in the event of delay in such delivery.
(12(1) (*o*) and (*r*))

5. Warranty that the sub-division plan has been approved, alteration thereto being allowed only to conform with the requirements of the appropriate authority or as may be certified by the architect to be expedient or necessary. Otherwise no alteration without the purchaser's consent. Cost of these alterations to be borne by developer. Alterations within these provisions not to annul the contract or to be subject to any claim for damages or compensation for breach.
(12(1) (*h*) and (*i*))

6. Undertaking by the housing developer to erect the housing accommodation for the purchaser in good and workmanlike manner in accordance with the agreed plans and specifications.
(12(1) (*i*))

7. Warranty that the housing accommodation conforms with all relevant laws in force with indemnity to the purchaser against fines, penalties or losses incurred under any such law: Licensed housing developer at his own expense to construct in accordance with requirements of the appropriate authority roads, driveways, etc., serving the housing accommodation the subject of the purchase.
(12(1) (*j*) and (*k*))

8. Licensed housing developer at his own cost and expense to fix connections to the housing accommodation with electricity, water and sewerage mains.
(12(1) (*l*))

9. Licensed developer to procure the issue of the relevant Certificate of Fitness for Occupation from the appropriate authority and at his own

cost and expense to comply with the requirements of the appropriate authority in the procurement of such certificate which is to be produced to the purchaser.

(12(1) (*n*))

10. Licensed developer to take all necessary steps to obtain issue of separate document title to the land upon which the housing accommodation is erected for the purchaser and, subject to payment of the purchase moneys and observation of the terms and conditions of the contract of sale, forthwith execute a valid and registrable transfer of the land together with housing accommodation to the purchaser or his nominee.

(12(1) (*p*))

11. Licensed developer at his own cost and expense to undertake to remedy any defect, shrinkage or other fault in the housing accommodation which may become apparent within six months from the date of delivery of vacant possession.

(12(1) (*q*))

12. Statement of the party responsible for the payment of outgoings and of the manner of making such payments.

(12(1) (*s*))

13. Specification of the penalties to be levied against the purchaser in the event of his committing any breach of the terms and conditions of the contract of sale and the manner of levying such penalties.

(12(1) (*t*))

14. Purchaser to have quiet enjoyment of the land for use in common with all other persons having similar rights and of all roads serving the land in the housing development; to have the right to make all necessary connections and the use of drains, pipes, cables and wire, laid or constructed by the developer for the purpose of the supply of water, electricity and telephone services to and for drainage of water from the land.

(12(1) (*u*))

Rule 17 provides that contravention by a licensed housing developer of any of the Rules shall be an offence and render the developer liable on conviction to a fine or, for a second or subsequent offence, a fine or imprisonment or both. Nothing in the Rules expressly purports to invalidate a contract which does not comply with the provisions of the Rules.

The Rules impose no penalties on a purchaser who enters into a contract which does not conform to the requirements of the Rules. Clearly Rule 12 does not exclude the possibility of the contract of sale containing terms and conditions other than such as are designed to effectuate the requirements of the Rules. Rule 12 requires a contract to contain *within* its terms the stipulated provisions. It is observable that Rule 12 does cover much of the relationship of vendor and purchaser in relation to the purchase and is mandatory so far as the appellant is concerned.

It is now necessary to construe the proforma against the background of the Rules and of the circumstances in which it came into existence. It is expressed in the language of contract—" I hereby agree to purchase " —though this may not be conclusive. The land is identified by Lot Number in relation to a known plan of sub-division. The semi-detached dwelling is specified by a reference to plans and specifications which have been inspected; the full amount of the price is stated. The implication

of payment of the balance of the price in cash on completion is not in any respect displaced. Clause 2 purports to bind the respondent to accept alterations and amendments required by the authorities though a right of cancellation of the booking is reserved to him in the event of a major alteration or amendment to the lay-out plan to which he is not prepared to agree. Clause 4 provides for the increase or abatement of the price in the event of the Lot as defined in the Certificate of Title diverging in area from the plan of sub-division. Most important, Clause 3 visits a failure to comply with Clause 1 with consequences including the forfeiture of money.

It is at once apparent that the express terms of purchase contained in the proforma are not directly made " subject to contract ". Indeed the terms of Clauses 2, 3 and 4 point rather strongly towards obligations presently accepted rather than to a suspension of obligations until some further event or agreement has occurred or been made.

The appellant however insists that the use of the expression " subject to " in the two places in the proforma warrants the inclusion by construction of the words " subject to contract " immediately after the words " I hereby promise " or between those words. But, so far from precluding contractual obligations from arising the expression " subject to " where firstly appearing would appear to mark out the extent of an obligation presently assumed. Under those terms and conditions money is to be paid on notice being given and a document is to be signed (Clause 1). It is quite impossible in their Lordships' view to treat the words " subject to the following terms and conditions " in the first paragraph of the proforma as words indicating a mutual intention to defer the assumption of legal obligation until further agreement has been reached.

The use of the same expression in the last two lines of Clause 1 of the proforma might appear at first sight to create some difficulty. This part of the proforma is awkwardly expressed. Clearly enough however the words " subject to " are related to the content of the document which the appellant's solicitors are to prepare and which the respondent has undertaken to sign. That obligation is part of those terms and conditions which mark out the extent of the promise to purchase, Clause 1 being as a whole part of those terms and conditions. They are directly connected with the promise to sign a contract of sale. Bearing in mind the obligation of the appellant under the Rules to ensure that the contract of sale includes the various provisions stipulated in Rule 12, the inclusion of the words " subject to, etc." is dictated by the need to include in the contract provisions conforming to the Rules and to bind the purchaser to accept them. Their purpose is evidently to provide for the content of the contract of sale and to bind the respondent to accept the terms and conditions which the appellant's solicitors might properly include therein. So far from inviting a further negotiation Clause 1 as a whole requires the respondent's compliance with the obligation to sign. Failure to sign would be a non-compliance with Clause 1 and attract the consequences set out in Clause 3.

The express obligation placed on the respondent to sign the document itself tends to negative any intention to make either the obligation to purchase or the obligation to sign contingent on the outcome of some further negotiation. There is nothing in the proforma which would support the view that the purchaser might refuse to sign what the solicitors had prepared simply because he had not agreed in advance what was in it. It is said however by the appellant that the proforma was inchoate because there is no express specification of the terms and conditions which the solicitors may include in the contract of sale. But

it seems to their Lordships that upon the proper construction of the proforma the solicitors would not be able to include in the contract of sale any term or condition which was not appropriate to effectuate the sale which had been made, including for that purpose, of course, provisions to comply with the requirements of the Rules. In their Lordships' opinion what might properly be included by the solicitors in the agreement for sale is a question which can be judicially resolved by a Court construing the proforma, in the event of any objection by the respondent to any term or condition included by the solicitors in the agreement of sale. Thus upon its proper construction the proforma does not make either the obligation to purchase or the obligation to sign conditional on the making of some agreement as to the terms and conditions to be inserted in the Agreement of Sale.

The Federal Court of Malaysia seems to have decided that the Rules fully governed what might be inserted in the contract of sale as terms and conditions. The Court said:

> " The developers are bound by the Housing Developers (Control and Licensing Rules), 1970, ... and only details may be inserted into the further agreement."

Bearing in mind the extensive nature of those Rules and the detail of proforma itself there may be much to be said for the view that the terms and conditions which the solicitors might properly insert in the contract, apart from repeating the substance of the proforma itself, were limited to the implementation of the obligations imposed upon the developer by the Rules. Once it is decided that the promise to purchase was not subject to contract the obligation of Clause 1 is to sign a contract of sale which implements a sale for which agreement has already been made. But the question of what may properly be included in the contract of sale can be left for judicial decision, if occasion should arise.

In the result, therefore, in their Lordships' view the proforma cannot be construed so as to treat its terms as contractually ineffective until some further agreement had been made by the parties. Nor can it properly be said that the agreement contained in the proforma was inchoate for want of consensual definition of the terms and conditions to be inserted in the contract of sale. Their Lordships are therefore of opinion that both the first and second submissions of the appellant should be rejected.

The dispute between the parties arose before the agreement for sale had been tendered to the respondent for signature. Having regard to what their Lordships have decided it would be proper to order specific performance of the proforma even though that involves the readiness and willingness of the respondent to sign an agreement for sale conforming to the proforma properly understood.

The appellant's third submission is in their Lordships' view unarguable. To treat the proforma as a source of legal obligation and at the same time to deny the contractual force of the express agreement to purchase and its concomitant agreement to sell, treating its terms as doing no more than giving the respondent the right of refusal, leaving with the appellant the option whether or no to offer the property for sale at all, does more than violence to the language of the proforma. If the appellant did not wish to become bound to the respondent from the outset, a document radically different from the proforma would be necessary. Having regard to the terms of the Rules it might indeed be difficult, if not impossible, to devise a document which provided for payment of a booking fee and at the same time left the developer with an option to offer or not offer the

property for purchase to the person who had paid the booking fee. The definition of a " booking fee " in the Rules cannot in this respect be overlooked.

Their Lordships will advise His Majesty The Yang di-Pertuan Agong that for these reasons these appeals should be dismissed with costs.

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In the Privy Council

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