

Ang Peng Chin

... **Appellant**

AND

Perbadanan Tabung Amanah Islam Brunei

... **Respondent**

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 11 of 2010)**

Mortimer, P.; Davies and Leonard, JJ.A.

6th December, 2010.

Deeds of assignment of development agreement and of leasehold rights by way of security – legal effect – assignor retains only equity of redemption – insufficient proprietary right to enable assignor to convey mortgaged property to another.

Contract – covenant not assign without consent – in context construed as permission to assign with prior consent – absence of consent

Ostensible authority of agent – absence of sufficient evidence

Mr. Rudi Lee Kim Boon of Messrs. Fathan Rudi Lee Annie Kon for the Appellant.

Mr Lee Yew Choh of Messrs. YC Lee & Lee for the Respondent.

Case cited in the Judgment:

Campbell v Holyland (1877) 7 Ch. D 166 at 171

Davies, J.A.:

This is an appeal from a judgment of the Chief Justice dismissing an originating summons which sought the following orders:

1. A declaration that the Plaintiff is the beneficial owner of the shop units 32 and 33 forming part of a commercial building being erected on land described as EDR BD 42848, Lot no. 47406 Kampung Jaya Setia, Mukim Berakas Brunei;
2. An order compelling the First and Second Defendants to transfer the said shop units to the Plaintiff upon full payment of the purchase price;
3. Costs and Court fees;
4. Any other relief which this Court deemed just and fit.

By a development agreement dated 7 October 1997, Hj Karim bin Md Salleh, since deceased, the then owner of the above land, appointed Wong Yep Meng, the third respondent, to develop and build a commercial complex on that land. That development agreement was subsequently varied by deeds of variation dated 10 December 1998, 13 May 1999 and 2 June 2002. These may together be described as the development agreement.

The development agreement provided that, in consideration of Wong bearing all the cost of the project and of completing it in accordance with the agreement, Hj Karim would retain subplots delineated on a site development plan and Wong would be entitled to the remaining 30 shophouses delineated on that plan. The deeds of variation were substantially for the purpose of varying the description of the respective shares of the parties in the development.

At about the same time Hj Karim executed an undated lease in favour of Wong over the 30 shophouses and a power of attorney in favour of Wong. The lease was of the property described as Wong's entitlement under the development agreement and was for a term of 60 years.

On 15 April 2002 Wong entered into three agreements with Morsima Sdn Bhd, the second respondent. The first of these was a building agreement by which, in consideration of the assignment by Wong of his share in the project, Morsima undertook at its own cost to build the commercial complex specified in the development agreement and the plans and specifications annexed thereto.

By the second of these agreements, described as a deed of assignment of development agreement, Wong assigned to Morsima Wong's right title and interest in his share of the project. At this point Wong's share in the project, called "the developers share" was described as follows:

"A Lease of SIXTY (60) years commencing on the date of issue of Occupation Permit over the following:

- i) all shophouses erected or to be erected on Blocks A,E,F,G and H;*
- ii) units 10 to 12 inclusive in Block D;*
- iii) three (3) food and beverage stalls*

As shown in coloured "YELLOW" on the site development plan annexed hereto marked 'SDP', being part of the development on land described as EDR No BD 42848 Lot No 47406, Kg. Jaya Setia, Mukim Berakas (A), Brunei-Muara Land District."

The third of these agreements was a deed of assignment of the lease which had been granted by the owner to Wong.

On the same day Wong executed a power of attorney in favour of Morsima.

Morsima then sought finance from Perbadanan, the first respondent, to enable it to complete the project. Perbadanan agreed to advance funds to enable this, by means of the following agreements, all dated 20 April 2002:

A property purchase agreement by which Perbadanan purchased the developers share from Morsima;

A property sale agreement by which Perbadanan sold the developers share back to Morsima;

A deed of assignment of development agreement, by way of security, from Morsima to Perbadanan;

A deed of assignment of leasehold rights, by way of security, from Morsima to Perbadanan;

A deed of assignment of rentals and sale proceeds from Morsima to Perbadanan.

The property purchase agreement by which Perbadanan purchased the developer's share from Morsima, provided in clause 4:

“Beneficial ownership in and/or rights to the property [the developer's share] shall pass to PERBADANAN upon the execution of this Agreement”

Curiously it was then recited in recital 1 of the property sale agreement that Morsima was the beneficial owner of the property. However clause 4 of that agreement provided that:

“Beneficial ownership and/or rights to the Property shall pass to [Morsima] upon the execution of this Agreement”

Clause 5, under the heading “SECURITIES” provided:

“For better securing the payment of the Sale Price or any part thereof as shall be outstanding and all monies whatsoever owing now or hereafter to Perbadanan, [Morsima] shall execute or cause to be executed the security documents stated in the Third Schedule hereto.....and the security documents shall be a continuing security for as long as.....any monies remain payable under the security documents”

Those security documents included the deed of assignment of development agreement, the deed of assignment of leasehold rights and the deed of assignment of rentals and sale proceeds.

The deed of assignment of development agreement recited:

“WHEREAS:

.....

(4) It is a term of the Agreements [the property purchase agreement and the property sale agreement] that the Assignor shall enter into this Deed as continuing security for the repayment of the Facilities.”

Clauses 2 and 3 of that deed were in the following terms:

"2. For the consideration aforesaid the Assignor as beneficial owner and as a continuing security for payment of all amounts drawn and outstanding and all other sums payable in respect of the Facilities and with the consent of the

attorney of the registered owner HEREBY ASSIGNS to Perbadanam ABSOLUTELY all the Assignor's rights title and interest in and under the Deed of Assignment of Development Agreement and the full benefit granted thereby, the right of the Assignor to the full and absolute ownership of the said Properties [the developer's share] and all remedies for enforcing the same. PROVIDED ALWAYS that notwithstanding the assignment herein contained the Assignor shall and hereby undertakes to continue to observe perform and be bound by all whatsoever conditions, covenants, stipulations and terms contained in the Building Contract and to be observed by the Assignor.

3. Provided that if the Assignor shall repay to Perbadanan all amounts drawn and outstanding under the Facilities together with all other moneys hereby secured, Perbadanan shall at the request and cost of the Assignor, reassign the rights title and interest hereby assigned unto the Assignor or as the Assignor may direct."

At law these two clauses provided for an absolute assignment by Morsima of the whole of its developers share to Perbadanan together with a covenant by Perbadanan to reassign it upon payment of all of the monies specified in clause 3. However, as it did with old system mortgages, equity treated such clauses, not as providing for an absolute assignment but as providing security for a debt. As Jessel, M.R. explained in *Campbell v Holyland* (1877) 7 Ch. D 166 at 171:

"The principle in a Court of Equity has always been that, though a mortgage is in form an absolute conveyance when the condition is broken, in equity it is always security; and it must be remembered that the doctrine arose at the time when mortgages were made in the form of conditional conveyance, the condition being that if the money was not paid at the day, the estate should become the estate of the mortgagee; that was the contract between the parties; yet Courts of Equity interfered with actual contract to this extent, by saying that there was a paramount intention that the estate should be security; and that the mortgage money should be a debt; and they gave relief in the shape of redemption on that principle."

Consequently, notwithstanding the absolute terms of clause 2, pursuant to this deed of assignment, Morsima acquired an equitable right or interest commonly described as an equity of redemption. This may be described as a right, enforceable by specific performance or injunction, to the protection of equity against unconscientious forfeiture of its right to redeem pursuant to the covenant by Perbadanan in clause 3. It is unnecessary in the present case to explore the content of that right. It is sufficient to say that it is not a proprietary interest conferring on Morsima the capacity to convey the mortgaged property to another.

Clause 4 then provided the following covenants by Morsima:

"(iii) The Assignor hereby covenants with Perbadanan that it will not cause or allow any person to be registered as the registered proprietor or owner of the said Properties or any part thereof hereby secured without the consent in writing of Perbadanan....."

“(iv) The Assignor shall not, without the consent in writing of Perbadanan, sell, lease, assign, or otherwise dispose of the said Properties or any part thereof to any person or persons.”

Even without such provisions, Morsima’s interest in the property would not have been sufficient to enable it to convey any interest, legal or equitable, in that property [the developer’s share] or any part of it. So that, notwithstanding that they are expressed in negative terms, these provisions enabled Morsima to sell, lease or assign the properties, or part of them, with the prior consent in writing of Perbadanan.

Clause 11 of that deed then provided:

“11. This Assignment shall constitute and be a continuing security notwithstanding any settlement of account or other matter or thing whatsoever and shall be in addition to and shall not prejudice or be in derogation of any other security, guarantee, right, remedy or lien whatsoever which Perbadanan may now or in the future have for or in respect of the Facilities.”

The deed of assignment of leasehold rights recited Morsima’s agreement to assign the developer’s share to Perbadanan by way of security (recital (3)); and its agreement to assign to Perbadanan the property derived under the lease for the duration that monies remain outstanding to Perbadanan (recital (4)). It then, by clause 1.1, assigned the property and Morsima’s rights under the lease to Perbadanan as security for payment of the amount outstanding. The deed also contained in clause 3 a covenant by Perbadanan to reassign the rights, title and interest thereby assigned upon payment of all monies thereby secured.

It then provided, in clause 3, that, upon registration of the original lease, Morsima would deposit the original with Perbadanan with intent to create a lien or charge in favour of Perbadanan of all of Morsima’s rights title and interest under it. And by clauses 4.4.2 and 4.4.3 Morsima covenanted in terms similar to those in clauses 4(iii) and 4(iv) of the deed of assignment of development agreement.

Finally with respect to this deed it should be said that though, by the terms of the original lease and its assignment to Morsima, it had exclusive possession of the leased property and the assignment by this deed of the whole of Morsima’s rights to Perbadanan would appear to have assigned that exclusive right to Perbadanan, it was plainly the intention of the parties to this deed that exclusive possession of the property would remain in Morsima. That is evidenced by clauses 5.1, 20, 21, 22.1, 22.2, 23 and 33. And it may be inferred that, in fact, Morsima remained in possession at all times.

The deed of assignment of rentals and sale proceeds would, we think, require no discussion except for the apparent reliance on it by the appellant for a contention that, at least by implication, Morsima had Perbadanan’s authority to sell part of the property and to receive the proceeds of sale. Otherwise, the appellant appears to contend, this assignment would be unnecessary because it assumes for its operation the receipt by Morsima of rental and sale proceeds of the property. Specifically, the appellant relies on clause 3(a) and (b) which are in the following terms:

“The Assignor herein promises undertakes and covenants with Perbadanan that, during the continuance of this Assignment, the Assignor shall:

(a) procure that the Assigned Moneys shall be paid over to Perbadanan in such manner as Perbadanan may from time to time direct and will at the request of Perbadanan serve notice to any person or persons in whose hands or control any part of the Assigned Moneys may come informing each of such person or persons of this Assignment and instructing each person to remit promptly to Perbadanan any part of the same which may come into such person’s hands or control;

(b) in the event that the Assignor receives any part of the Assigned Moneys, the Assignor shall forthwith pay the same to Perbadanan and until paid over such moneys shall be held in trust for Perbadanan;”

We will discuss that contention shortly.

It follows from what we have said so far that:

1. Morsima’s equitable interest was not sufficient to enable it to sell and convey any part of the property;
2. Morsima would have been able to do so had it first obtained the written consent of Perbadanan.

The orders sought by the appellant were in reliance on a contract of sale between Morsima as vendor and the appellant as purchaser dated 22 October, 2003. It was for the sale of a 60 year lease of two shophouses, part of the developer’s share referred to above. It recited, amongst other documents, the deeds of assignment of, respectively, development agreement, leasehold rights and rental and sale proceeds all executed 20 April, 2002 between Morsima and Perbadanan. The appellant therefore had notice of the fact that Morsima had no authority to sell the property the subject of the contract without the prior written consent of Perbadanan.

Moreover the appellant’s solicitor also acted in this transaction for Morsima and had also acted for Perbadanan in the transaction evidenced by the documents executed on 20 April, 2002 and had, presumably, drafted those documents. He should have advised his client, the appellant, not to enter into the contract, or at least not to pay any money pursuant to it without that written consent having been obtained. There was no evidence before the Court that any such consent was obtained in respect of this sale.

The appellant’s contention was that Morsima had the right or authority to sell to the appellant. Accepting that Morsima had no express such authority, Mr Rudi Lee, for the appellant, contends that Morsima had implied or ostensible authority to do so; implied because that may be inferred from the circumstances of the case (Contracts Act, section 140); ostensible because Perbadanan held Morsima out as having that authority.

He relied for implied authority principally on clause 3(a) and (b) of the deed of assignment of rental and sale proceeds which we have set out.

In the first place, it must be said that this deed must be construed in the context of the other documents executed contemporaneously including the deed of assignment of development agreement including clause 4 thereof. So read, the deed of assignment of rental and sale proceeds must be construed as referring to proceeds from sales entered into with the prior approval of Perbadanan pursuant to clause 4; see also clause 4.4.3 of the deed of assignment of leasehold rights.

Moreover, as Mr Y C Lee for the respondent pointed out, clause 3 of the deed of assignment of rentals and sale proceeds is a clause, for the benefit solely of Perbadanan, imposing obligations on Morsima. It cannot be construed as, implicitly, conferring any authority on Morsima.

In support of an argument for ostensible authority it may be said that Perbadanan had allowed Morsima to remain in possession of the property, as indeed it was effectively obliged to do to allow the latter to complete the development. But that alone could not have clothed Morsima with authority to sell part of the property.

Nor is there any evidence that Perbadanan did anything which might be construed as permitting the sale to the appellant or even knew of it at any material time. The fact that the solicitor for the appellant and Morsima in the sale transaction was also, formerly, solicitor for Perbadanan cannot fix the latter with agreement to or even knowledge of the sale transaction.

The appellant also sought to rely, to prove agency, on some documents which came into existence after the sale transaction, presumably to establish a ratification by Perbadanan of that transaction made without authority. In the first place, Mr Rudi Lee referred to two cheques, one dated 22 October, 2003, the date on which the contract of sale was executed, the other dated 26 June, 2004, both from the appellant to Morsima and both paid by Morsima into its account with Perbadanan. However Mr Lee was unable to point to anything relating to these cheques which could be construed as any such ratification by Perbadanan.

Mr Lee also relied on a letter from Perbadanan to the appellant of 26 March, 2009 which plainly acknowledges the existence of this and other transactions of sale which Morsima had entered into in respect of parts of the subject property; and acknowledges also the receipt of the total amount of those cheques. However, far from acknowledging that the sale transaction was entered into with authority or, after the event, ratifying that transaction, it is offering to adopt the transaction if the appellant were prepared to pay a further sum of money, namely the balance of the purchase money under that transaction after making allowance for the total of those two cheques.

It follows that Perbadanan never became a party to the sale transaction nor later ratified it and consequently that the appellant acquired no proprietary interest under the contract of sale with Morsima.

For those reasons we think that the learned Chief Justice was correct in refusing to make the orders sought and that, consequently, this appeal must be dismissed.

Orders

1. Appeal dismissed;
2. Unless application is made on or before 8 December, 2010 for some other order, that the appellant pay the respondent's costs of the appeal.

Mortimer, P.

Davies, J.A.

Leonard, J.A.