

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1984] SGCA 5

CA 108/1981

Between

Chiang Hong Pte Ltd

... Appellant

And

Lim Poh Neo trading as Tai
San Plastic Factory

... Respondent

GROUND OF DECISION

Contract — Discharge — Frustration; Landlord and Tenant — Termination of
leases — Surrender

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

**Chiang Hong Pte Ltd v Lim Poh Neo trading as Tai San Plastic
Factory**

[1984] SGCA 5

CA 108/1981

Chua F A J; T Kulasekaram J; Wee Chong Jin CJ

06 March 1984

1 This is an appeal from an order of the High Court whereby judgment was given for the respondent against the appellants for the sum of \$155,142 with interest and costs and the appellants' claim against the respondent in Suit 541 of 1980 was dismissed.

2 The undisputed facts are these.

3 The respondent was trading as Tai San Plastic Factory which manufactured plastic sheets and bags. She was the sole proprietress. She was a tenant or licensee of an area of some 8,500 sq ft of a larger piece of land of 35,572 sq ft and a structure erected thereon and known as No 40-A Tannery Lane. The appellants subsequently became the owners of the larger piece of land.

4 Both the structure and the land occupied by the respondent are hereinafter referred to collectively as 'the premises'. The structure was erected during the Japanese occupation and the Premises was let to the respondent by

the appellants` predecessors-in-title at a rent of \$500 per month. The structure was basically a wooden factory building with zinc roof.

5 In 1977 the appellants commenced legal proceedings against the respondent to recover possession of the premises on the ground that the respondent was a mere licensee and alternatively on the ground that even if the respondent was a tenant, she was not entitled to the protection of the Control of Rent Act (Cap 266). The respondent defended the action which was compromised after negotiations by an agreement dated 13 September 1979 (the compensation agreement).

6 Under the compensation agreement the respondent agreed to vacate and deliver up vacant possession of the premises to the appellants on or before 30 June in consideration of which the appellants agreed to pay her \$200,000 less certain arrears of and future licence fees.

7 The material clauses in the compensation agreement are these:

1 In consideration of a sum of \$200,000 (less the out-standing arrears of licence fee and future licence fees) as compensation to be paid by the Licensors to the Licensee, the Licensee hereby agree to deliver vacant possession of the Licensed Premises to the Licensors on or before the 30 June 1980.

(2) On signing of the Agreement herein, the Licensors shall pay to the Licensee a sum of \$20,000 (receipt whereof the Licensee hereby acknowledges) and the balance of the compensation shall be paid on delivery of vacant possession of the Licensed Premises to the Licensors.

...

(6) The Licensors shall cause the removal from the Licensed Premises of the structure only after payment in full.

(7) For the purpose of better securing the payment of the balance of the compensation as herein agreed the Licensors agree with the Licensee that on the Licensee giving notice that she shall remove her property and deliver vacant possession of the Licensed Premises as herein agreed within a period of three (3) calendar months from the date of giving the notice the Licensors will forthwith place on fixed deposit in a reputable bank the balance of the compensation money payable under the Agreement calculated up to the date of the expiry of the notice in the joint names of Laj Smith, Solicitor for the Licensee and PC TOCK & Co Solicitors for the Licensors such deposit to be for a period of three (3) months from the date of the receipt of the notice together with written irrevocable instructions to Laj Smith and PC TOCK & Co to pay the said sum over to the Licensee on delivery of vacant possession either at the expiry of the said three (3) months or at any time prior thereto in the event that the Licensee delivers vacant possession before the expiration of the period of three (3) months herein referred to. The Licensors shall be solely entitled to any interest earned on the said sum but Laj Smith and PC TOCK & Co shall be under no obligation to ensure that any interest is earned. In the event that the Licensee fails to deliver vacant possession and remove her property either at the expiration of the period of three (3) months or prior thereto the sum placed on fixed deposit shall be returned to the Licensors but otherwise without prejudice to the rights and obligations of the Licensee and Licensors under this Agreement which shall remain in full force and effect. In the event that the Licensors do not place the said sum as stipulated on fixed deposit as herein provided the Licensee shall be at liberty to forfeit the 10% already paid under this Agreement and the Agreement herein shall be treated as null void and of no effect. Save that the Licensee may elect to deliver up vacant possession in accordance with the terms of the Agreement whereupon the compensation money shall be payable by the Licensors and calculated according to the terms hereof with the exception that the \$20,000 already forfeited shall not be taken into account by the Licensors in calculating the payment to the Licensee.

8 On 4 December 1979, the respondent gave notice to the appellants under the compensation agreement that she would be delivering up vacant possession of the premises at the end of March 1980, or earlier in the month of March. The notice was to take effect from 1 January 1980. It was suggested that the balance

of the compensation monies be placed in fixed deposit with a bank, as agreed, in the joint names of the solicitors of both parties.

9 On the following day the appellants fixed the balance payable as \$147,142 and suggested that as the respondent's solicitor was going on leave the placement of the balance into a fixed deposit account should await the return of the respondent's solicitor on 6 January 1980. The respondent indicated her agreement on the amount payable and acceded to the request.

10 In the meantime, a fire, which started from a neighbouring site, completely destroyed the structure on 5 January 1980, before the respondent could leave the premises. Despite demands, the appellants refused to place the balance payable into a fixed deposit and, accordingly, the respondent under cl 7 of the compensation agreement forfeited the sum of \$20,000 paid and in these proceedings claimed for the full sum of \$167,142 under the clause.

11 The appellants refused to pay on the ground that the compensation agreement was frustrated in law and in fact commenced legal proceedings in Suit No 541 of 1980 against the respondent claiming (a) a declaration that they are discharged from further or any performance under the compensation agreement; (b) the sum of \$32,142 being arrears of licence fees for the period 1 July 1974 to 5 January 1980; (c) the sum of \$20,000 being the sum paid to the respondent under the compensation agreement and (d) interest. That suit and the present proceedings were heard together.

12 The learned trial judge held that it was `clear that the doctrine of frustration does not apply in this case and the (appellants`) argument in this respect fails`. It was also argued before the learned judge that the court should

make an apportionment and deduct the value of the structure from the compensation monies payable. The structure was insured for \$10,000 and that insurance was maintained up to the time of the fire. The toilet was put up by the respondent at the cost of some \$3,700. The learned judge concluded that the structure was worth \$12,000 and deducting it from the respondent's claim of \$167,142 the balance payable was \$155,142 and he ordered that the appellants pay the respondent the sum of \$155,142 together with interest thereon at 8% per annum from 1 April 1980, up to date of payment and costs. The appellants' claim in Suit No 541 of 1980 was dismissed.

13 The destruction of the structure was not due to the fault of either party. The parties, when framing the compensation agreement, had not present in their minds the possibility of such a disaster and had made no express stipulation with reference to it. So the whole matter arises out of the compensation agreement and its effect. The question that arises is what are the consequences of the total destruction of the structure. The answer to the question must depend upon the general rules of law applicable to such a contract.

14 It is the appellants' contention that the fire of 5 January 1980, destroyed the subject matter of the compensation agreement. Further or alternatively it frustrated the commercial adventure. Thereafter it was impossible for the respondent to fulfil her part of the agreement so that both parties were discharged from all further obligations thereunder. Not only was the agreement frustrated but the respondent's complete inability to perform her obligations after the fire gave rise to a total failure of consideration on her part. In those circumstances the appellants ceased to be liable to make payment.

15 Counsel for the appellants submits that it was not open to the learned judge to use certain letters forming part of the negotiations between the parties as an aid to construction of the compensation agreement and thus reach the conclusion that the appellants were `primarily, if not wholly, interested to recover vacant possession of the land`.

16 The learned judge in his grounds of decision said:

The defendants wanted to recover vacant possession of the premises so that they could redevelop their property. As the correspondence clearly showed, the Defendants were primarily, if not wholly, interested to recover vacant possession of the land. The structure was inconsequential and had to be demolished as soon as possible because it was `premises` within the protection of the Control of Rent Act. In the initial stage of the negotiations, the defendants were quite content to leave it to the plaintiff as the occupier to demolish the structure at the expense and cost of the plaintiff. Eventually, it was agreed that the plaintiff would remove her machinery and installations inside the structure leaving the defendants the task and costs of demolishing the structure.

17 This was the background in which the compensation agreement was signed. Although the recitals in the compensation agreement did refer to the structures and improvements which were included in the expression `the Licensed Premises`, the subject matter for vacant possession, it is clear that getting the structure and improvements was a marginal matter. Vacant possession of the land was what the defendants were aiming to get and that was what they had bargained to get.

18 In ***Shore v Wilson*** 8 ER 450, 532 Lord Tindal CJ said:

The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates,

*such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence **dehors** the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself.*

19 In **Prenn v Simmonds** [1971] 1 WLR 1381 it was held that in construing a written agreement evidence of negotiations or of the parties' intentions ought not to be received by the Court and that evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction. Lord Wilberforce after discussing the reasons for not admitting evidence of negotiations or of the parties' intentions in construing a written agreement said:

*In my opinion, then, evidence of negotiations, or of the parties' intentions, and a **fortiori** of Dr Simmonds' intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction.'*

20 In our view the learned judge rightly paid attention to the contents of the negotiations leading to the making of the compensation agreement.

21 The appellants submit that the compensation agreement had been frustrated and consequently they are entitled to recovery of their \$20,000 deposit in quasi-contract on the basis that it was payment for a consideration which has wholly failed.

22 What is the correct legal test for deciding whether a contract has been frustrated? The proper test for frustration is formulated in the House of Lords case of ***Davis Contractors Ltd v Foreham UDC*** [1956] AC 696. The test put forward by Lord Reid and Lord Radcliffe (and Lord Somervell agreed with the conclusion of Lord Reid on What is the proper basis of frustration) is summarised and commented on in paras 1406 and 1407 of Chitty on ***Contracts***, vol 1, 24th Ed:

1406 Construction of the contract. Both Lords Reid and Radcliffe emphasised that the first step was to construe 'the terms which are in the contract read in the light of the nature of the contract, and of the relevant surrounding circumstances when the contract was made'. From this construction the court should reach an impression of the scope of the original obligation, that is, the court should ascertain what the parties would be required to do in order to fulfil their literal promises in the original circumstances. This impression will depend on the court's estimate of what performance would have required in time, labour, money and materials, if there has been no change in the circumstances existing at the time the contract was made. The court should then examine the situation existing after the occurrence of the event alleged to have frustrated the contract, and ascertain what would be the obligation of the parties if the words of the contract were enforced in the new circumstances. Having discovered what was the original 'obligation' and what would be the new 'obligation' if the contract were still binding in the new circumstances, the last step in the process is for the court to compare the two obligations in order to decide whether the new obligation is a 'radical' or 'fundamental', change from the original obligation. It is not simply a question whether there has been a radical change in the circumstances, but whether there has been a radical change in the 'obligation' or the actual effect of the promises of the parties construed in the light of the new circumstances. Was 'performance ... fundamentally different in a commercial sense'?

(1407) Their Lordships also agreed that it is a matter of law for the court to construe the contract in the light of the facts existing at its formation and then 'to determine whether the ultimate situation ... is or is not within the scope of the contract so construed'. It is submitted that the House of Lords has accepted the view that the test for frustration is objective and that frustration is a matter of positive judicial intervention. It is not a subjective inquiry into the actual or presumed intentions

of the parties, as was suggested by the older theory of the implied term, since the discharge of a contract on the ground of frustration occurs automatically upon the happening of the frustrating event, and does not depend upon any repudiation or other act of volition on the part of either party. The fact that the parties, at the time of contracting, actually foresaw the possibility of the event or new circumstances in question does not necessarily prevent the doctrine of frustration from applying. Cases since 1956 have endorsed and applied the test for frustration formulated in the ***Davis Contractors case*** .

23 We are of the view that the doctrine of frustration does not apply in this case.

24 In the result this appeal is dismissed with costs.

25 ***Appeal dismissed***

Chua F A J
T Kulasekaram J
Wee Chong Jin CJ

Arthur Leolin Price, QC and Robert PC Tock (PL Tock & Co) for the
appellants
LAJ Smith (LAJ Smith) for the respondent
