VOIDABLE CONTRACTS UNDER THE CONTRACTS (MALAY STATES) ORDINANCE, 1950

Yong Mok Hui v. *United Malay States Sugar Industries Ltd.*[1]

The Federal Court of Appeal has recently handed down a judgment of considerable importance in connection with voidable contracts under the 1950 Ordinance. The case is *Yong Mok Hui* v. *United Malay States Sugar Industries Ltd.*[1]

The judgment of MacIntyre J. (Barakbah L.P. and Aziz CJ. concurring has established:

(1) *That section 65 of the Ordinance applies in cases where contracts have been "put an end to" under section 40.* Section 40 states that a promisee may ". . . put an end to the contract . . ." if the other party has ". . . refused to perform, or disabled himself from performing his promise in its entirety. . . . ." This application of section 65 to section 40 follows the Privy Council decision in *Muralidhar Chatterjee* v. *International Film Co. Ltd.*[2] on sections 39 and 64 of the Indian Contracts Act, 1872 (which correspond to sections 40 and 65 of the Contracts (Malay States) Ordinance).

8. S. 181 (6) — "The declaration shall be made at the first meeting of the directors held —
   (a) after he becomes a director, or
   (b) (if already a director) after he commenced to hold the office or to possess the property — as the case requires."
9. There seems to be little difference between "nature" and "character".
1. [1967] 2 M.L.J. 9.
2. A.I.R. 1943 P.C. 34.

It will be recalled that section 65 of the 1950 Ordinance, dealing with "consequences of rescission of voidable contracts," [3] states:

> When a person at whose option a contract is voidable rescinds it the other party thereto need not perform any promise therein contained in which he is promiser. The party rescinding a voidable contract shall if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received. . . .

At first sight, therefore, it appears that section 65 might only be intended to cover "agreements" voidable *ab initio* as for example in cases of "misrepresentation" under section 18. On this interpretation, section 65 would not apply where a valid contract was subsequently rendered voidable — as under section 40. Several decisions under the Indian Contracts Act[4] prior to *Muralidhar Chatterjee's* case suggested that this narrower interpretation of section 65 was the correct one. But, as is pointed out in Pollock and Mulla's *The Indian Contract Act*.[5]

> The use of the word voidable [in s. 65] is immaterial. Whenever one party to a contract has the option of annulling it the contract is voidable; and when he makes use of that option the agreement becomes void.

This conclusion was referred to with approval by MacIntyre J. in the course of his judgment. (See p. 15, F, left column.)

(2) *That section 66*[5a] *of the Contracts Ordinance applies equally with section 65 to ". . . voidable contracts which became void by rescission . . ." (MacIntyre J. at p. 15, H, left column).* At first sight, this is a somewhat startling conclusion since section 66 ostensibly deals only with *void* agreements and contracts — agreements "discovered to be void" and contracts "becoming void". But the above cited quotation from Pollock and Mulla applies here with equal force. There are also *dicta* which suggest that this is the effect of section 66 in *Satgur Prasad* v. *Har Narain*[6] (Privy Council) while in *Muralidhar Chatterjee's case* a great deal of their Lordships' argument virtually establishes that this is so, although the final *ratio decidendi* was limited to the application of section 64 to section 39. It is worth noting that the Madras High Court in *Transport Co. Ltd.* v. *Tirunelveli Motor Bus Co. Ltd.*[7] has extended the Privy Council decision in *Muralidhar Chatterjee* to cover section 65 of the Indian Contracts Act by arguments almost identical to those employed in MacIntyre J.'s judgment presently under discussion.

(3) *That sections 65 and 66 of the Ordinance operate irrespective of any oblition contained in the contract.*

This requires no comment being sufficiently obvious from the wording of the sections.

Facts of the Case:

Briefly the findings of fact by the Court relevant for the purposes of this note are:

The Appellant entered into two building contracts with the Respondent. Contract A for the construction of two stores; contract B for the construction of an office building It was agreed that the Appellant should receive progress payments at the Respondent's discretion under both contracts. (Thus, the Appellant was not entitled to demand progress payments under either contract).

3. The marginal note thereof.

4. Act IX of 1872.

5. 8th Ed., at p. 353.

5a. Section 66 states. "When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person (from whom he received it".

6. A.I.R. 1932 P.C. 89.

7. [1955] M.A.D. 528.

However at a later stage the parties came to a fresh agreement (A 1) in respect of contract A whereby the work to be done was substantially altered and the cost increased. (See comment 6, (i) and (ii) below).

Under A 1 no price was fixed by the parties for the alterations and no stipulations were made as to the method of payment. The Court on this point was prepared to find that ". . . it would be reasonable to presume in the absence of any evidence to the contrary that the mode of payment was by instalments on the basis of *quantum meruit."* (Under the new contract A 1, the Appellant was therefore now entitled to progress payments).

The Appellant ran short of money during the construction work and asked for a 5th progress payment in respect of both contracts A1 and B, but was refused by the Respondent. Subsequently the Appellant abandoned work on both contracts Al and B. The Respondent was forced to get another builder to complete the construction.

The Court's conclusions based upon the above facts can be set out as follows:

(1) That under Contract A1 the Appellant had correctly asked for a progress payment. Refusal to pay by the Respondent entitled the Appellant to put an end to the contract under section 40. Contract B was not a "lump sum" contract since progress payments were at the discretion of the Respondent. In this case therefore the Appellant had no right to stop work upon refusal of a progress payment and it was the Respondent who had rightly rescinded contract B.

(2) Under Contract A1 the Appellant was bound to restore any "benefit received" by virtue of section 65 but under the wider terms of section 66 could receive compensation if the Respondant had gained any "advantage". Section 66 was applicable to both the contracts irrespective of who had rescinded (unlike section 65) and further section 66 operated quite apart from any contractual provision. Therefore, the Appellant was entitled to the fifth progress payment under both contracts A1 and B. Under A1 because of the Court's presumption and because section 66 applied. Under B because the Respondent had gained advantage through the work performed on the site after the 4th progress payment and section 66 applied.

(3) The Respondent company on its counterclaim could not receive any damages under sections 75 and 76 in respect of A1 since it had not "rightly rescinded." It could however claim damages under contract B which it had rightly rescinded.

Comments:

The following points should be noted in connection with this decision:

(1) In the judgment section 66 is only applied where the contract is terminated under section 40 — a situation where the contract is not voidable *ab initio.* But equally there seems no reason why section 66 cannot be applied to contracts voidable *ab initio* (sections 17-20). Here, too, a contract "becomes void" by one party exercising an option to annul — "whenever one party to a contract has the option of annulling it the contract is voidable: and when he makes use of that option the agreement becomes void."

(2) The present case only considered sections 65 and 66 with section 40. But by the same logic, sections 65 and 66 can also be applied to contracts which the Ordinance describes as "becoming voidable." This occurs under section 54 ("liability of party preventing event on which contract to take effect") and section 56(1) ("effect of failure to perform at fixed time, in contract in which time is essential.")[8]

To adapt the approved commentary of Pollock and Mulla referred to by MacIntyre J.: Whenever a contract is declared to become voidable and a party makes use of the option so given, the agreement becomes void.

8. See Pollock and Mulla, (8th Ed.) at p. 383

(3) There is provision in sections 54 and 56 for compensation for loss to the injured party sustained in consequence of the non-performance of the contract, though in section 56 this is subject to due notice having been given (s. 56(3)). This should be contrasted with the provisions of section 65 for restoring "any benefit" receive under the voidable contract by the *rescinding* party only and the much wider scope of section 66 requiring ". . . any person who has received any advantage . . ." to restore it or to make compensation for it.

Sections 54 and 66 give the remedy of compensation; sections 65 and 66 allow restitution where a party would otherwise gain unfairly.

(4) Sections 17-20 (contracts voidable *ab initio)*; sections 40, 54, 56 (contracts voidable through subsequent default of one party); sections 65 and 66 (restitution) are supplemented by section 76 which reads:

> A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

These words are probably no different in application from the provisions for compensation in sections 54 and 56 except that section 56(3) requires prior notice.

In this connection it should be noted that MacIntyre J.'s judgment cites section 75 (compensation where penalty stipulated for) and not section 76 (see p. 16, para. B, left hand column). From the reported facts of the case it would appear that reference was probably intended to section 76 rather than section 75. It is possible confusion arose owing to the fact that section 76 of the Malay States Ordinance corresponds to section 75 of the Indian Act.

(5) With one possible exception, the logical developments resulting from the case could make it much easier for the court to deal justly with the position of parties after a voidable contract has been rescinded, *e.g.,* in fact situations similar to those in *Choo Yin Boon* v. *Visuvalingham Ptilay.*[9] In this case both parties claimed that the other was in breach of an excavation contract. Elphinstone C.J. proceeded by the somewhat dubious method of holding that both parties had rightfully "put an end" to the contract under section 39 of the Selangor Contracts Enactment, 1899 (equivalent to s. 40 of the 1950 Ordinance). He then went on to consider the measure of damages to be awarded each party under a liquidated damages clause in the contract. He applied section 74 of the Enactment (equivalent to section 75 of the 1950 Ordinance — compensation for breach where penalty stipulated for). No doubt this Solomon-like judgment was motivated by a desire to do justice between the parties but it is difficult to see how both parties could be equally in breach. It should be added that the Court was apparently not averted to the possible application of the Enactment's equivalent to sections 65 and 66 of the 1950 Ordinance.

The one possible exception is that old *bete noire of* the English Common Law — misrepresentation. A party induced to enter into a contract by a misrepresentation under section 18 of the 1950 Ordinance has been in a better position that he would have been at Common Law prior to the Misrepresentation Act, 1967.[10] A plaintiff has the choice of:

(a) Affirmation and being "put in the position in which he would have been if the representation made had been true." (s. 19 of the 1950 Ordinance)

(b) Rescission in which case section 65 and now probably section 66 provide for restitution and section 76 allows a claim for damages.

But what happens to a plaintiff who seeks rescission and is refused by the Court owing to one of the equitable bars against relief? He has neither "insisted that the contract shall be performed" as required by s. 19 nor "rightfully rescinded" as stipulated in s. 76. The relevant sections of the

9. [1930-7] F.M.S.L.R. 135.

10. Eliz., C. 7.

Specific Relief Ordinance are of no assistance. Unless possibly the plaintiff can show the misrepresentation has become a term of the contract and claim in breach, he will be without the remedy for damages. In doubtful cases, it would seem best to affirm and take the remedy provided under section 19.[11]

(6) *Yong Mok Hui's Case* is also noteworthy for the following additional points:

(i) The application of the Privy Council decision in *Sahu Ram Kumar* v. *Muhammad Yakub.*[12] In this case, it was held that a substantial increase of costs owing to additional work performed under a building contract resulted in a new arrangement between the parties (see p. 14, F, left column).

(ii) Section 63 of the Ordinance — This section states: "If the parties to a contract agree to substitute a new contract for it or rescind or alter it the original contract need not be performed." The Court quoted with approval from the judgment of Din Mohamed J. in *Balak Ram* v. *Telu*[13] in which the learned judge pointed out that novation is not always necessary for the section to apply — "It is enough if an alteration in the original contracts is proved . . ." (see p. 16, A, B, C, D, left column).

(iii) The question of when the Appeal Court can decide on a point of law not argued in the Court below. Cases considered were: *A.G. v. Pang Ah Yey;*[14] *Banbury* v. *Bank of Montreal;*[15] *"The Tasmania".*[16] (See from p. 16, H, right column to p. 17, C, right column).

Conclusion:

The application of *Yong Mok Hui's* case and the logical developments stemming from it could result in a simpler and more rational approach to voidable contracts under the Ordinance. It must be stressed however that the "logical developments" are not necessarily those which future decisions will follow. The suggested position can be summed up as follows:

(1) There are two categories of voidable contract:

(a) *Voidable "ab initio"* — coercion, fraud, misrepresntation, undue influence (ss. 17-20).

(b) *Voidable owing to the subsequent actions of one* party — (ss. 40, 54 and 56).

(2) In both categories where the contract is rescinded, sections 65 *and* 66 will apply for the restitution of "benefits" (s. 65) or advantages (s. 66) received by a party.

(3) In both categories where the contract is rescinded, section 76 of the Ordinance entitles the party rightfully rescinding to "compensation" for "any damage . . . sustained through the non-fulfilment of the contract."

(4) However, at least one irrational result would remain. In the case of misrepresentation under section 18, a party seeking rescission but refused by the Court on the grounds of an equitable bar will quite probably be unable to claim compensation for any damage unless, perhaps, the misrepresen-

11. Here it should be noted that if the plaintiff is actually claiming specific performance of the contract he can also claim rescission in the alternative under s.37 of the Specific Relief Ordinance. This is subject to the limitation that s.37 only applies to written contracts.

12. A.I.R. 1924 P.C. 123.

13. A.I.R. 1935 Lahore 897.

14. (1934) M.L.J. 184 at p. 187.

15. [1918] A.C. 626.

16. 15 App. Cas. 233.

tation has become a term of the contract when he can claim damages fox breach.

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