

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM
THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

B E T W E E N :

SYARIKAT BUNGA RAYA-TIMOR
JAUH SENDIRIAN BERHAD Appellants

- and -

UNITED HOLDINGS BERHAD

- and -

TRACTORS MALAYSIA BERHAD Respondent

CASE FOR THE RESPONDENT

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1. This is an appeal from an Order of the Federal Court of Malaysia holden at Kuala Lumpur (Raja Azlan Shah C.J.Malaya, Chang Min Tat F.J. and Syed Othman F.J.) dated 2nd April 1980 pp.45-47
varying an Order of the High Court of Malaya (Harun J.) dated 5th March 1979 allowing an appeal pp.24-25
against the decision of the Senior Assistant Registrar of the High Court at Kuala Lumpur
20 (Che Zura binte Yahya) dated 3rd November 1978 pp.17-19
dismissing an application by the Respondent for liberty to enter summary judgment for (amongst other things) arrears of rental and interest under certain caterpillar tractor Equipment

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Leasing Agreements dated respectively
pp.64-75 2nd September 1975, 25th May 1976 and 5th
June 1976 (there being three Agreements of
each date) and made between the Respondent and
the First above-named Appellant (hereinafter
called "the Lessee"). The Lessee is a
subsidiary of the second above-named Appellant
(hereinafter called "United Holdings") which
guaranteed its obligations under such Agreements.
The Federal Court gave leave to defend in respect 10
of arrears and interest under the three Agreements
dated 2nd September 1975 but confirmed the
judgment of the High Court for arrears and
interest under the other six Agreements in the
sums of \$273,333.99 arrears and \$17,322.51
interest up to the date of repossession or return
of tractors with further interest at 12 per
centum per annum on the sum of \$84,773.28 from
27th November 1977 to the date of payment and
on the sum of \$188,560.98 from 6th December 1977 20
to the date of payment and in the sum of
\$19,900.00 repossession expenses.

2. The issue in this appeal is whether leave
to defend ought to have been given in respect
of the arrears and interest under the six
Agreements dated respectively 25th May 1976 and
5th June 1976.

pp.62-63 3. By a letter dated 21st August 1975 the

Respondent wrote to the Lessee in the following terms:-

"Lease Agreements for Caterpillar Equipment.

"Further to your discussion with the writer and our General Manager Sales, we wish to confirm the following arrangement:-

10 "1. We attach herewith our Equipment Lease Agreements for two (2) units Cat. D8C DD and one (1) unit Cat. D7F DD all complete with Carco Winches. The details and terms of the lease are as per the agreements attached. We will deliver the above units by the 27th/28th August, 1975.

20 "2. As agreed we will allow yourselves thirty (30) days after delivery of the units to decide on your machine model preference, which will then determine our replacement unit to yourselves. Should you decide to retain both models after thirty days, the given lease agreements will be maintained.

"3. We will allow yourselves two to three months' grace towards the payment of your lease instalments during the monsoon period only on condition that your project is seriously affected by weather conditions.

30 " However, as agreed, you will pay your overdue interest promptly when due during this period. Also, after this period of grace, you will keep your accounts current after a few months, and it has also been agreed that your accounts should not be left for more than three months at any time.

"4. We will hold the price of either of the Cat. D8C or the Cat. D7F whichever you decide to purchase up till March, 1976 in consideration of your desire to purchase another seven or eight units by then.

40 "5. As agreed, the option to purchase for the machines will be exercisable by Syarikat Bunga Raya-Timor Jauh Sendirian Berhad or its assignee.

"We trust that the arrangements confirm our discussions and we wish to assure you of our best services and attention at all times."

4. All nine Agreements were in the Respondent's printed standard form of Equipment Leasing Agreement and are in common form for leases of plant.

5. Particulars of the goods comprised in each of the nine Agreements, the period of the lease, rent, and other matters were set out in the schedules to them respectively. In each case the period was 30 calendar months, and the rent expressed as a total payable by equal monthly instalments. A residual value of \$1.00 was shown in each case.

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6. United Holdings entered into a Guarantee and Indemnity also in the Respondent's printed standard form in respect of each Equipment Lease Agreement. Four of the Guarantees and Indemnities were undated.

pp.80-81

7. By Agreements dated 23rd June 1977 made between the Respondent, United Holdings and the Lessee, the amounts and mode of payments under the Equipment Leasing Agreements were varied. In each case a substantial residual value was now shown.

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8. The Lessee failed to pay the rentals due in April 1977 and subsequent months. The Respondent therefore retook possession of eight of the tractors and terminated the Agreements relating to them, in two cases on 27th November 1977

and in the other six cases on 6th December 1977. The Lessee voluntarily returned the ninth tractor on or about 29th January 1978.

9. By letters dated 31st January 1978 and 9th March 1978 respectively Messrs, Skrine & Co., the Solicitors for the Respondent, requested payment of the sums due under Clause 19 of the Agreements, including in addition to the arrears of rental and interest and repossession costs the balance of the rental for the remainder of the Leases and the costs of repairs to the tractors. No payment was received. pp.116-120

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10. Accordingly by specially endorsed Writ dated 8th May 1978 and amended on 5th June 1978 the Respondent brought this action against the Appellants claiming the sums demanded by such letters and by Summons in Chambers dated 29th July 1978 made an application for liberty to sign summary judgments against the Defendants in the aggregate sum of \$1,567,300.62 together with interest as therein specified. pp.1-10 pp.11-12

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11. The evidence on this application consisted of an Affidavit affirmed on 29th July 1978 by the Respondent's credit control manager Wan Chee Chuan and an Affidavit in answer affirmed on 11th September 1978 by a director of the Appellant companies, Koh Kim Chai. pp.12-13 pp.14-16

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12. The Affidavit of Wan Chee Chuan verified the Statement of Claim and exhibited the Equipment Lease Agreements and Variation Agreements and the letters from Messrs. Skrine & Co. referred to above and stated that he believed there was no defence to the action.

13. The Affidavit of Koh Kim Chai put forward the following defences:-

(a) That the Equipment Lease Agreements were in fact hire purchase agreements within the meaning of Section 2 of the Hire Purchase Act 1967 and unenforceable and void for violation of the provisions of that Act. Reliance was placed on paragraph 5 of the Respondent's letter dated 21st August 1975 as set out above, and on the fact that the residual value shown in the Agreements was \$1.

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(b) That four of the Guarantee and Indemnity Agreements were undated.

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(c) That the provision for payment of rentals for the balance of the periods of the leases was in the nature of a penalty.

(d) With regard to the arrears that

the sum claimed was not recoverable, as a grace period of two to three months was given for monsoon periods by paragraph 3 of the Respondent's letter dated 21st August 1975.

10 14. The application came before the Senior Assistant Registrar on 27th October 1978, and she delivered judgment on 3rd November 1978. During the hearing before her the Respondent agreed to abandon the claim for summary judgment in respect of matters other than arrears of rentals and interest and costs. The Senior Assistant Registrar concluded that there were several triable issues that could better be dealt with during a full hearing and gave unconditional leave to defend.

pp.17-19

20 15. By Notice of Appeal dated 4th November 1978 the Respondent appealed to the Judge in Chambers and the appeal came before Harun J. on 5th March 1979 when he granted leave to sign final judgment in the sum of \$432,663.41 arrears of rental and \$27,887.45 being interest due on unpaid rentals up to the date of repossession or return and the costs of the application. Judgment in such sums was entered on the same day.

p.20

pp.24-25

16. By Notice of Appeal dated 4th April 1979

pp.26-27

the Appellants appealed to the Federal Court against the whole of the Order of the High Court. By Notice of Motion dated 21st February 1980 they applied for a stay of execution pending appeal, at the hearing of which Motion the Federal Court, noting that written grounds for the Judgment below had not yet been delivered and with the consent of the parties, of its own motion directed the Appellants to file appeal documents and proceed with the appeal and fixed the hearing thereof for 13th March 1980. Accordingly the Appellants lodged a Memorandum of Appeal dated 10th March 1980.

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pp.33-36

17. The appeal duly came on before the Federal Court on 13th March 1980 and was heard by Raja Azlan Shah, C.J. Malaya, Chang Min Tat, F.J. and Syed Othman, F.J. By consent of Counsel for both the Appellants and the Respondent it was agreed that interest on unpaid rentals should include interest from the date of repossession or return of tractors to date of payment.

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pp.36-45

Judgment was reserved until 2nd April 1980 when the judgment of the Court was delivered by Chang Min Tat, F.J.

After summarising the facts and the course of proceedings the learned Federal Judge quoted from the passage in the Affidavit of

Koh Kim Chai relying on paragraph 5 of the Respondent's letter dated 21st August 1975 and on the residual values of \$1. He disposed of the latter point shortly, on the ground that it could not be true that the residual value at the end of the Leases was \$1 in the light of the recalculation in the Variation Agreements and that there was no provision for purchase or an option to purchase at this nominal or any other stated sum, and stated that Counsel had not pursued the point.

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The learned Federal Judge said that the objection based on the letter was more substantial and raised two issues as to the admissibility of the letter and as to whether the provision of an option granted to the Appellants to purchase the machines converted the Equipment Lease Agreements, or at least the three of them referred to in the letter dated 21st August 1975, into agreements attracting the protection of the Hire Purchase Act. A related problem was the proper construction of the letter.

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After referring to the principles applicable to an application under Order 14 set out in the Annual Practice and reading from the letter, the learned Federal Judge proceeded to consider the admissibility of the letter under Section 92

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of the Evidence Act 1950. He rejected the contention that it was admissible under Section 92 (a), on the ground that there was a distinction between unenforceability and invalidity or illegality, and held that there was no latent ambiguity in the "residual value" so as to make the letter admissible under Section 92 (f) and Section 95. The Court was in doubt whether the letter was admissible under Section 92 (b) to prove a separate agreement on a matter on which the Agreements were silent, since that sub-section referred to a separate oral agreement, unless of course the letter was evidence of an oral agreement. But the Court was of the opinion that it was at least arguable that the entire agreement between the parties consisted of two sets of documents, the leasing agreements as varied and the letter, and on this view they had to be read together.

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The Court was not to be taken as expressing a firm opinion but there was a possibility of an arguable case and a triable issue which gave the Appellants a right to unconditional leave to defend in those cases to which the letter referred.

The learned Federal Judge went on to say that on a proper construction of the letter in question, it seemed to the Court that the obvious reference to and enclosure of the three Equipment

Leasing Agreements, the fixing of the price of the equipment if the Appellants should decide to purchase any in consideration of their intention to purchase other units and the ordinary grammatical meaning to be given to the word "purchase" must mean that the option to purchase which was given, referred, if at all, to the three vehicles in these three leasing agreements and could not refer to the subsequent leasings. No similar offer had been shown by the Appellants to have been made in any other document or letter. These later leasings were therefore not qualified by any offer to purchase.

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The Court therefore allowed the appeal to the extent that unconditional leave to defend was given in respect of the three Agreements referred to in the letter dated 21st August 1975 but leave to sign final judgment against both Appellants in respect of the equipment in the remaining Leasing Agreements was upheld.

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18. The Respondent respectfully submits that the Federal Court was correct in the view it took of the letter dated 21st August 1975, and, there being no other evidence to support the contention that the six later Agreements were in truth hire purchase agreements, that it was right to give leave to sign final

judgment in respect of the arrears, interest and costs thereunder. With regard to the other contentions advanced by the Appellants below, the Respondent says that it is no defence to an action on the undated Guarantees and Indemnity Agreements that they were undated and as to the alleged grace period for monsoons, that even if the letter dated 21st August 1975 had referred to the six Agreements to which this appeal relates, there was no evidence that the project was seriously affected by weather conditions.

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19. Accordingly, the Respondent respectfully submits that the appeal should be dismissed with costs for the following (amongst other)

REASONS

(A) BECAUSE the letter dated 21st August 1975 did not refer to the six agreements to which this appeal relates.

(B) BECAUSE there was therefore no evidence that such six Agreements were in truth hire purchase agreements.

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(C) BECAUSE in relation to such six Agreements the High Court and the Federal Court were correct.

ROBERT HAM.

No. 11 of 1981.

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- v -

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CASE FOR THE RESPONDENT

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REF: L56
(Mr. Parkes).
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RESPONDENT'S SOLICITOR .