

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA  
(APPELLATE JURISDICTION)

B E T W E E N :

- 1. LIM YEE TECK
  - 2. LIM YEE BEE
  - 3. LIM YEE HOH
- Appellants  
(Plaintiffs)

- and -

- 10 SHELL MALAYSIA TRADING SDN. BHD.
- Respondents  
(Defendants)

CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal from the decision of the Federal Court of Malaysia (Lee Hun Hoe, C.J.Borneo, Abdul Hamid F.J. and E.Abdoolcader, p.43 J.) given on the 26th day of May 1982 whereby the Court allowed an appeal by the Respondents (Defendants in the action) from the decision of the High Court in Malaya (Wan Hamzah, J.) p.24 given on the 23rd February 1981 granting the Appellants (Plaintiffs in the action) certain orders against the Respondents.

A. THE ISSUE

2. The issue is essentially a question of construction of Clauses 2 and 6 of the Agreement entered into between the Appellants and the Respondents on the 29th December 1972, as to whether the Respondents have complied with Clause 2 and secondly if there is compliance of Clause 2, whether the Respondents can treat the Agreement as null and void, if pursuant to the provision of Clause 6 of the Agreement subdivision of the land is refused for any reason.

B. THE FACTS

3. The Respondents were and are the registered owners of Grant for Land No.9982 Lot No.162 Section 63 District of Kuala Lumpur, with a

title in perpetuity. On 29th December 1972 the Respondents entered into an Agreement with the Appellants to sell a portion of the land (61,050 sq.ft.) to them at the purchase price of \$167,889.98.

4. Clause 2 of the Agreement provided as follows :-

"The Vendor shall (if it has not already done do) make application to the appropriate authority or authorities for the sub-division of the land so as to result in the issue of separate documents of title in continuation in respect of the said portion and in respect of the balance of the said land." 10

5. Clause 6 of the said Agreement provided as follows :-

"If for any reason sub-division is refused or for any other reason sub-division is refused or for any other reason it shall not be legally possible to sub-divide the said land in accordance with the terms of this Agreement then the Vendor shall refund to the Purchasers the earnest money referred to in Clause 1 hereof free from any interest, whereupon this Agreement shall be null and void and cease to have any further force or effect and neither party shall have any claim against the other in respect thereof. " 20 30

6. Pursuant to the Agreement, the Appellants paid to the Respondents a deposit sum of \$16,789.00 by way of earnest money on the 7th August 1972. The balance of the purchase price was to be paid within 30 days of the Respondents notifying the Appellants of obtaining 2 separate titles in continuation for the land.

7. Before the Agreement, and during the negotiations for it, the Respondents had (as envisaged by Clause 2) already applied for sub-division of the land, on 6th June 1972, using Form 9A under Section 137 of the National Land Code 1965. Also before the Agreement, the Respondents had obtained planning permission for a petrol-filling station on the portion of the land to be retained by them, and had built the filling station. The purpose of the Agreement was to sell off the land remaining after development of the filling 40 50

station.

8. By a letter dated 16th October 1973, the Pemungut Hasil Tanah (Collector of Land Revenue) the appropriate authority wrote to the Respondents in reply to their application for sub-division as follows:-

10 "3. You are required to state the written Agreement for the surrender of the portion of the land provided for the petrol and service station and to re-issue a lease title for 30 years. This is a policy of the Government to allocate the area for a petrol and service station.

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4. Upon your due compliance of the conditions herein stated your application shall then be forwarded to the State Authority for their consideration. " (Translation)

20 In other words, it was made a condition for sub-division that the Respondents exchange their title in perpetuity in respect of the portion of land to be retained for a 30 years lease.

30 9. This was not acceptable to the Respondents and on 1st November 1973 (after the execution of the Agreement) they renewed their application for sub-division with title in continuation and requested for reconsideration so that two separate titles in continuation could be issued in respect of the two portions of the land. On 10th November 1973 the Pemungut Hasil Tanah (Collector of the Land Revenue) replied that their request for a title in continuation of the petrol station site could not be considered as it was against the policy of the Government. By paragraph 2 he warned the Respondents thus :-

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40 "(2) I would like to emphasise that if you were to erect, on the said land, of any business buildings, you are said to be in contravention to the conditions of the land and have committed an offence under Section 127 of the National Land Code and you may be prosecuted under Section 129 of the National Land Code. "

50 10. Consequently on 27th November 1973 the Respondents' Solicitors wrote to the Appellants

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informing them that the Respondents were unable to obtain separate titles in continuation pursuant to Clause 2 of the Agreement, and that in accordance with Clause 6 of the Agreement had become null and void. They returned the earnest money.

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11. On 5th December 1973 the Appellants' Solicitors replied that they disagreed with the Respondents' interpretation of Clause 2, and that they considered the Agreement in full force and effect and would hold the Respondents to the strict performance of the said Agreement.

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12. Subsequently, the Respondents continued their attempt to obtain sub-division of the land with title in continuation, but without success.

13. The Appellants then filed their Writ on 24th September 1974 claiming for specific performance, damages for breach of Agreement and costs.

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C. MALAYSIAN STATUTE

14. National Land Code 1965

Section 135.

(1) The Proprietor of any alienated land held under Registry or Land Office title may, with the approval under this Chapter of the State Commissioner or Collector, as provided by subsection (2), sub-divide the land into two or more portions (in this Chapter referred to as "sub-divisional portions") to be held by him under separate titles.

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(2) In the absence of any direction to the contrary by the State Authority, the approval required by sub-section (1) shall be given :-

(a) by the State Commissioner in the case of land held under Registry title, and

(b) by the Collector in the case of land held under Land Office title

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Section 136.

(1) No sub-division shall be approved by the State Commissioner or, as the case may be, Collector unless the following conditions are

satisfied :

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- (a) that the sub-division would not contravene any restriction in interest to which the land is for the time being subject;
  - (b) that the sub-division would not be contrary to the provisions of any written law for the time being in force, and that any requirements imposed with respect thereto by or under any such law have been complied with;
  - (c) without prejudice to the generality of paragraph (b) :-
    - (i) that any necessary approval of any planning authority has been obtained, and
    - 20 (ii) that the sub-division would not be contrary to any plan approved by the State Authority for the development of the area in which the land is situated, or to any decision of any planning authority for that area, and
    - 30 (iii) if the case falls within any direction in that behalf given by the State Authority, that the sub-division has the consent of any body or authority specified in, or appointed by, the direction;
  - (d) that no item of land revenue is outstanding in respect of the land;
  - (e) that every person or body who, at the time when the approval was applied for, was entitled to the benefit of :
    - (i) a charge of the land;
    - 40 (ii) a lease of the whole or any part thereof, other than a part corresponding precisely to one of the proposed sub-divisional portions;
    - (iii) a charge of such a lease, or
    - (iv) a lien over the land or any such

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lease, has consented in writing to the making of the application;

(f) that the area of any sub-divisional portion :

(i) in the case of land subject to the category "agriculture", or to any condition requiring its use for an agricultural purpose, will not be less than one acre, and 10

(ii) in any other case, will not be less than the minimum area appropriate for land of the class or description in question, as determined for the purposes of this sub-paragraph by the planning authority for the area in which the land is situated or (if there is no such authority) by the State Authority; 20

(g) that the shape of each sub-divisional portion will, in his opinion, be suitable for the purposes for which it is intended to be used;

(h) that, except in the case of any sub-divisional portion from which there will be direct access thereto, a satisfactory means of access will be available as of right from each such portion either to a road, a river, a part of the foreshore or a railway station, or to a point within the land from which such a means of access will be available or be capable of being obtained by application to the Collector under Part Twenty-eight. 30

(2) The requirements of paragraph (h) of sub-section (1) shall be taken to be satisfied with respect to any sub-divisional portion if, but only if : 40

(a) in the case of land situated in any area designated by the State Authority for the purposes of this sub-section, or any class or description of land in that area specified in the

designation, the proprietor has agreed in his application :

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- (i) that he will provide the necessary means of access by making up a road to a standard specified in the designation, and
  - (ii) that the land occupied by the road shall, as from the issue of title to the sub-divisional portions, be deemed to have been surrendered to the State Authority;
- (b) in any other case, the proprietor has :
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- (i) agreed in his application that land described therein shall be deemed to have been surrendered as aforesaid for the purpose of enabling such a means of access to be established thereover as State land, or
  - (ii) included in his application a proposal for providing such a means of access by means of a private road over land in respect of which a separate title is to be issued to him, or
  - (iii) included in his application his consent to the provision thereof by the creation of a Collector's right of way
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Section 137.

(1) Any application by a proprietor for approval of the sub-division of any land shall be made in writing to the Collector in Form 9A, and shall be accompanied by :-

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- (a) such fee as may be prescribed;
  - (b) a plan of the land on a scale sufficient to satisfy the Collector of all the details of the sub-division, together with such number of copies thereof as may be prescribed, or, in the absence of any such prescription, as the Collector may require;

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- (c) if it is so prescribed, or, in the absence of any such prescription, if the Collector so requires, a copy of any approval or consent required under paragraph (c) of sub-section (1) of Section 136; and
- (d) all such written consents to the making of the application as are required under paragraph (e) of that sub-section;

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Provided that, in a case where paragraphs (c) and (e) of sub-section (1) of Section 136 are not applicable and the land is held under Land Office title, the Collector may if he thinks fit accept an application in any form and dispense with or modify the requirements of paragraph (b) of this sub-section.

(2) Upon receiving any application under sub-section (1), the Collector shall endorse, or cause to be endorsed, a note thereof on the register document of title to the land to which it relates.

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Section 138.

(1) Where any application under sub-section (1) of section 137 relates to land the sub-division of which is required to be approved by the State Commissioner, the Collector shall refer the application to the State Commissioner together with his recommendations thereon.

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(2) If on any application under the said sub-section (1) it appears to the Collector or, in a case referred to him as aforesaid, the State Commissioner :

- (a) that the conditions for approval of the sub-division specified in sub-section (1) of Section 136 are satisfied, or
- (b) that those conditions would be satisfied if the proposals in the application were modified in one or more minor respects,

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the Collector or, as the case may be, State Commissioner shall approve the sub-division in accordance with the said proposals, modified where necessary as mentioned in paragraph (b).

(3) In any other case, the Collector or, as the case may be, State Commissioner shall reject the application.

10 (4) On approving, or being informed by the State Commissioner that he has approved, the sub-division of any land, the Collector shall notify the proprietor of the approval, and of any modifications subject to which it is given, and shall by such notification call upon the proprietor to pay to him:

(a) in a case where the sub-divisional portions are to be surveyed by a Survey Officer, the amount, or estimated amount of the fees chargeable in respect of the survey, and

20 (b) in every case, the fees chargeable in connection with the preparation and registration of final documents of title to the several sub-divisional portions.

(5) On rejecting, or being informed by the State Commissioner that he has rejected, any application, the Collector shall notify the proprietor, and shall cancel, or cause to be cancelled, the note endorsed on the register document of title pursuant to sub-section (2) of section 137.

30 D. JUDGMENTS BELOW

15. On 23rd September 1974 the Appellants issued a specially endorsed writ claiming specific performance of the Agreement, and damages. The Respondents duly issued a Defence and Counter-claim, and the Appellants issued a Reply and Defence to the Counter-claim. p.1 p.5 p.9

40 16. The action was heard on 8th and 9th July 1980 and Judgment was given on 11th July 1980. The Learned Judge (Wan Hamzah J) held that in order to comply with Clause 2 of the Agreement, the Respondents should have ceased the use of the site for a petrol filling station, and thus obtained a title in continuation of their title in perpetuity. He held that the Respondents had not complied with Clause 2 in that they had not applied for sub-division within the meaning of and pursuant to that Clause. He further held that as it had been decided in 50

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Pengarah Tanah Galian v Sri Lempah Enterprise Sdn.Bhd. (1979) 1 MLJ 135 that it was unlawful for the approving authority to require the substitution of a lease for a title in perpetuity as a condition of sub-division approval, the Respondents should have pursued the matter to Court by way of appeal if its application for sub-division was refused. He ordered the Respondents to apply for sub-division in accordance with the Agreement, dismissed the counter-claim and adjourned the question of damages. He ordered the Respondents to pay the costs of the Appellants. 10

p.38 17. The Respondents appealed to the Federal Court of Malaysia, which heard the appeal on 24th March 1982. The Court (Lee Hun Hoe, CJ Borneo, Abdul Hamid FJ, and E.Abdoolcader J) allowed the appeal, reserving its reasons which were given on 26th May 1982. The 20

p.43 Court held that there had been no breach of Clause 2 by the Respondent. The Clause contemplated sub-division by the issues of titles in continuation (i.e. in perpetuity) in respect of both portions of the land. The Court disagreed with the learned High Court Judge that the Respondents should have appealed to Court on the grounds that the imposition of the condition for sub-division was illegal. The situation under consideration was in 1973. The ruling that such condition was unlawful was in 1978. The Court referred to the decision of the Court of Appeal in England in Hargreaves Transport Ltd. v. Lynch (1969) 1 All ER 455 and held that the Respondents had done all that could reasonably be expected of them in pursuing their application for sub-division. As stated, the Court allowed the appeal, with costs in both Courts. 30

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p.43 18. In the Federal Court the Respondents abandoned their counter-claim.

p.55 19. The Appellants obtained Final Leave to appeal to the Judicial Committee of the Privy Council on 7th day of February 1983.

E. CONTENTIONS OF THE RESPONDENTS

20. The Respondents submit that the Federal Court were correct in holding that there was no breach by the Respondents of Clause 2 of the Agreement and that the Respondents had done all that could reasonably be expected of 50

them in pursuing their application for sub-division and that the Agreement was consequently null and void.

10 21. It is submitted that the words in brackets in Clause 2 (if it has not already done so) indicate that the Appellants were aware that the application had been made to the appropriate authority. Since the existing title is one of perpetuity, the parties would expect that the titles to be issued after sub-division would be titles of perpetuity. Therefore, the obligation imposed on the Respondents under Clause 2 of the Agreement was to make an application to the appropriate authority, if they had not already done so, for sub-division so as to result in the issue of separate document of title in continuation.

20 Such application was in fact made on 6th June 1972 and subsequently and the Courts below have in fact so found.

30 22. The Respondents are a Company whose primary business was in selling petrol and at the date of the Agreement the portion of the site retained by Respondents was in use as a petrol filling station. Whilst conceding that there is nothing in the Agreement which stipulates that the site could continue to be used as a filling station, this is a term that should (if necessary) be implied in any event to give business efficacy to the Agreement and in the given circumstances, was so obviously a stipulation in the Agreement that it was idle to express it by specific words.

40 23. The Respondents submit that on the facts and documents, they had made an application for sub-division and an application for sub-division was a condition precedent to the said Agreement.

50 It is therefore submitted that the completion of the sale and purchase was subject to condition precedent, namely that it should be possible to sub-divide the said land so as to result on the issuing of two (2) separate documents of title in continuation. As the condition precedent cannot be complied with in view of the fact that the Collector of Land Revenue was only prepared to offer a leasehold title in exchange, the Respondents had done all that could reasonably be done in

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the circumstances and the said Agreement was therefore duly terminated on the 27th November 1973 pursuant to Clause 6 of the Agreement.

24. The Respondents submit that if the Appellants were asked to accept the portion of land to be purchased by them but converted into a leasehold, they would no doubt contend that it was a term of the Agreement that they should be given a title in continuation. 10

25. There was nothing in the Agreement which imposed any obligation upon the Respondents to cease using the land as a petrol filling and service station as the price for sub-division. Only the Respondents can decide on the use of their site. It is not open to the Court to impose terms which the Agreement did not contain.

26. It was decided in Tanah Galian v Sri Lempah Enterprise Sdn. Bhd. (1979) 1 MLJ 135 20 that the Court has no power to make a Landowner give up his or her freehold title in exchange for a 99 years lease. After referring to the case the learned Judge stated at page 34 of the Appeal record as follows:-

".....in the present case the Defendant Company should have pursued the matter in the Court by way of appeal if the approving authority refused its application for sub-division on the ground of non-compliance with the condition improperly imposed. " 30

It is submitted that the learned Judge was clearly wrong in attempting to rewrite the contract for the parties by imposing an onerous term which has not been agreed to by the parties and which could not be imported into the Contract. Moreover this decision is subsequent to the present dispute which occurred in 1973. We would rely on the authority of Hargreaves Transport Ltd. v Lynch (1969) 1 All ER 455 - facts of which are very similar to that of the present case. 40  
At page 458, Lord Denning MR remarked that:-

".....once the local planning authority refused approval of the details, the Plaintiffs were entitled to call the deal off. They were not bound to appeal. The Defendant may well be aggrieved by the conduct of the local council, but he 50

can have no complaint against the Plaintiffs. They did everything which would reasonably be expected of them. "

Russell, L.J. expresses his view on this point very clearly at page 459 :-

10 "...I would entirely agree that it is implicit in the contract that the Plaintiffs would take all reasonable steps by way of attempting to get not only the outline planning permission but also the approval of detail under the condition on which that permission was granted and the one question is whether the Plaintiffs failed in that obligation in that they did not appeal to the Minister from a decision of the local planning authority refusing approval. A refusal which it would be flattering to describe as suspect. If one has 20 a case like this where it must have been known to the parties to the contract that an appeal from the local planning authority to the Minister might take for its solution six months or nine months if there were a public inquiry, when one finds that at least the target for 30 completion is 1st April, and the appeal, if successful at all, would be toward the end of the year at best, it seems to me that, bearing in mind the urgency of the matter to the Plaintiffs which I have already mentioned, one cannot include as a reasonable step an appeal to the Minister, however sure it might appear that such an appeal would ultimately succeed.....".

40 27. The Respondents respectfully submit that all the necessary action was taken by them as required under Clause 2 of the Agreement. They also subsequently requested the Collector of Land Revenue to reconsider the application although they were not obliged so to do. As the sub-division as envisaged under the Agreement was not feasible due to subsequent development the Respondents rightfully refunded the deposit 50 whereupon the Agreement became null and void.

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AND THE RESPONDENTS HUMBLY SUBMIT THAT  
THE APPEAL SHOULD BE DISMISSED FOR THE  
FOLLOWING AMONG OTHER

R E A S O N S

- (1) BECAUSE the Federal Court was right.
- (2) BECAUSE the High Court was wrong.
- (3) BECAUSE on its true construction Clause 2 of the Agreement of 19th December 1972 contemplated sub-division by the issue of titles in perpetuity in respect of both portions of the land.
- (4) BECAUSE the Respondents did all that it could reasonably be expected to do in pursuing its application for sub-division.
- (5) BECAUSE the Respondents were not in breach of the Agreement.

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D.G. WIDDICOMBE

