

(1) Yau Fook Hong Company Limited and
(2) Ying Ho Company Limited

Appellants

v.

The Attorney General

Respondent

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 3RD NOVEMBER 1986

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD ACKNER
LORD OLIVER OF AYLERTON
SIR IVOR RICHARDSON

[Delivered by Lord Templeman]

When the Government of Hong Kong acquires land the owner of the land may agree to accept compensation in cash or to accept land to be offered by the Government at a price calculated by reference to land values prevailing at the date of the acquisition of the owner's land. The agreement is embodied in a Letter issued by the Government. If the owner surrenders his land voluntarily he is issued with a Letter known as Letter A. If the Government compulsorily acquires the owner's land he is issued with a Letter known as Letter B. This litigation concerns Letter B.

The effect of the issue of a Letter A or Letter B is described in Bramwell's "Conveyancing in Hong Kong" at page 229 in the following terms:-

"A 'Letter A' or 'Letter B' offers to the land-owner ... the choice of either a cash payment at a stated rate, or a straight exchange of agricultural land or an entitlement to a future grant of land in any urban development area ... on certain terms. These terms are (1) that two square feet of new building land will be allocated for every five square feet of

agricultural land surrendered, or one square foot of new building land for every one square foot of old building land surrendered, (2) that the location of the new building land is to be in the area of the applicant's choice if available; and (3) that the premium for the new building land is to be the value of the new land assessed as at the date of surrender of the old land, less a credit representing the value of the old land surrendered which is expressly stated in the Letter A or B.

Letters A and B are therefore in effect acknowledgments by the Government of a debt caused by taking away land from an owner ... Letters A and B are legally choses in action and are freely transferable, are not subject to stamp duty and are not registerable either. They are an offer to a landowner of a choice of (a) taking a stated amount of cash in full and final settlement of the surrender of his land, or (b) an exchange of agricultural land in the New Territories on a foot for foot basis without any premium, or (c) the right to a future grant of building land in one of the New Territories urban development areas on terms such as those already mentioned."

Since the chose in action, Letter B in the present case, holds out the prospect of acquiring land in 1986 for a price calculated by reference to land values prevailing at the date of the Letter B, it follows that Letter B is a valuable chose in action and that in times of inflation its value increases with the passage of time. Letters A and B are known as land exchange entitlements. The Government established a Commitment Transfer Register in the New Territories district offices "for the purpose of recording unredeemed land exchange entitlements, and sale and purchase agreements, changes in ownership and mortgages". The evidence appears to disclose that there were separate entries in the Register in respect of each parcel of land comprised in Letter B. The entries were divided into two parts. In the first part there were recorded the names of the legal owners for the time being of the chose in action constituted by the Letter B relating to a particular piece of land, the date but not description of the deed (of assignment) whereby the legal owner for the time being acquired ownership and the date of the registration of the deed of assignment. The second part recorded descriptions of documents such as declarations of trust and agreements for sale which created equitable and other interests in the chose in action constituted by the Letter B and to which the legal owner was subject, the names of the persons entitled to those interests and the date of registration.

On 12th April 1977 a Letter B was issued on the compulsory acquisition of Lot 1430 and the name of the legal owner of the chose in action constituted by the Letter B was duly registered.

On 22nd April 1977 a Letter B was issued on the compulsory acquisition of Lots 197 and 436 and the name of the legal owner of the chose in action constituted by the Letter B was duly registered.

On 12th November 1980 an assignment of the Letter B to File (Nominees) Limited in respect of a portion of Lot 1430 was executed. That assignment was duly registered in part 1 of the Register. Also on 12th November 1980 File (Nominees) Limited executed a declaration of trust whereby they declared that they held the Letter B in trust for the appellant, Yau Fook Hong Company Limited, absolutely but that declaration of trust was not registered.

By an assignment dated 23rd June 1983 the Letter B in respect of Lots 197 and 436 was assigned to Stornaway Lines S.A. and that assignment was duly registered in part 1 of the Register on 3rd August 1983. By an agreement dated 14th December 1983 Stornaway agreed to sell the Letter B in respect of Lots 197 and 436, together with other Letters B to the appellant, Ying Ho Company Limited, for \$31,334,520 which was acknowledged to have been paid prior to the date of the agreement. The agreement provided as usual for the vendor to deduce title and for the vendor or the purchaser to rescind the contract in certain circumstances and for completion to take place within seven days upon written demand made by the purchaser to the vendor. Clause 5 was in these terms:-

"On completion at the time and in manner aforesaid the Vendor and all other necessary parties (if any) shall execute to the Purchaser or its nominee or sub-purchaser a proper assignment of the said premises subject as hereinafter mentioned but otherwise free from incumbrances."

Thus Stornaway remained the registered legal owner of the Letter B subject to the interests in equity of the appellant, Ying Ho Company.

On 24th February 1984 the Government published an Application Notice inviting tenders for the grant by the Government of an area of land known as Sha Tin Town Lot No. 244 comprising 5,588 square metres. The invitation was extended to "registered owners of land exchange entitlements giving the owner the right to a grant of building land" i.e. the owners registered in part 1 of the Register. The Notice required each applicant to specify the Letters A and B entitlements which he was prepared to surrender and clause 3 provided that:-

"The lot will be awarded to the applicant who submits entitlements producing the highest aggregate age of entitlement which will be calculated by multiplying the area of the entitlement (in the case of agricultural land at the ratio of five square feet for every two square feet of site area and in the case of building land at the ratio of one square foot for every one square foot of site area) by the age of the entitlement calculated in days from the date on which the offer of the land exchange entitlements was made or the operative date as the case may be to the 23rd day of March, 1984."

The area of entitlement was required to be equal to the area of the site applied for.

Clause 5 of the Application Notice required applications to be placed in the Public Works Tender Box before twelve noon on 23rd March 1984 and stipulated that late applications would not be considered. By clause 5(d) applications must be:-

"From persons who are the registered owners of land exchange entitlements. Applications from any other person or persons will not be considered. A beneficial title by way of a sale and purchase agreement or such other document that does not give an absolute title will not be acceptable as a tender."

The persons who fulfilled those qualifications between 24th February 1984 when the Application Notice was issued and twelve noon on 23rd March 1984 when the tendering process was completed were File (Nominees) Limited in respect of Lot 1430 and Stornaway Lines S.A. in respect of Lots 197 and 436.

On 19th March 1984 the contract dated 14th December 1983 for the assignment of Lots 197 and 436 from Stornaway to Ying Ho Company Limited was sent to the Registry for registration. It was registered in part 2 of the Register on 22nd March 1984. Also on 22nd March 1984 Stornaway executed an assignment of the Letter B in respect of Lots 197 and 436 to Ying Ho, but this assignment was not registered until after 23rd March 1984.

Also on 22nd March 1984 the appellants submitted an application in respect of Sha Tin Town Lot No. 244 pursuant to the Application Notice. That application specified a number of land exchange entitlements amounting in area to 150,371 square feet. It is common ground that if the appellants were entitled to apply in respect of all the Letters B specified in their application, then their application produced the highest aggregate age of entitlement defined by condition 3 of the Application Notice. The land

exchange entitlements put forward by the appellants however included the Letter B in respect of Lot 1430 of an area of 1,137 square feet and Lots 197 and 436 amounting to 4,356 square feet. It is also common ground that if the appellants were not entitled to put forward an application based on Lot 1430 and Lots 197 and 436 their application was not successful.

On 7th May 1984 Ying Ho applied to register the assignment dated 22nd March 1984 of the Letter B in respect of Lots 197 and 436 and registration was effected on the following day namely 8th May 1984. On 23rd May 1984 File (Nominees) Limited applied to the Director of Land to be joined with the appellants as co-applicant for Town Lot No. 244. On 24th May 1984 the appellants were informed that their application had been unsuccessful.

The appellants now contend that they were entitled to include Lot 1430 and Lots 197 and 436 in their application in response to the Application Notice.

The only relevant registered owner of Lot 1430 down to 23rd May 1984 was File (Nominees) Limited and they did not join in any application until after 23rd March 1984. The declaration of trust in favour of the appellant, Yau Fook Hong Company Limited, did not constitute them the owner of the Letter B and in any event was not registered until after 23rd March 1984. It follows that the appellants were not entitled to tender for Lot 1430.

The registered owner of Lots 197 and 436 was Stornaway. The contract to sell to the appellant Ying Ho did not make Ying Ho an owner within the meaning of the Application Notice even though Ying Ho had paid the purchase price and registered the contract before 23rd March 1984.

Mr. Kentridge, who appeared for the appellants, strove with his customary urbanity and ingenuity to persuade the Board otherwise. As to Lot 1430 he urged that no argument had been advanced in the courts below relating to Lot 1430. However the point was taken by the Court of Appeal and their Lordships can only decide this appeal on the basis of the admitted and uncontradicted facts. Mr. Kentridge then urged that any defect with regard to the original application so far as Lot 1430 is concerned was remedied when in May 1984 File (Nominees) Limited, the relevant registered owners, applied to be joined as co-applicants for the purposes of the Application Notice. This argument found favour with the trial judge Jackson-Lipkin J. but is inconsistent with the plain words of condition 5 of the Application Notice which says that late applications, namely applications after twelve noon on 23rd March 1984, will not be considered. In fairness to all

applicants, the validity of an application must be judged as at the date when pursuant to the Application Notice the time and date for making applications expired.

As to Lots 197 and 436, Mr. Kentridge submitted, that on the true construction of condition 5(d) of the Application Notice Ying Ho were registered, as indeed they were, in respect of their contract and that they had an "absolute title" because they had paid the purchase price in full. Clause 5(d) however draws a distinction between a registered owner and a person who has a beneficial title by way of a sale and purchase agreement. Stornaway were the registered owners and Ying Ho only had a beneficial title by way of a sale and purchase agreement.

The object of clause 5(d) was no doubt to relieve the Commissioner of Lands from the task of considering the title of every applicant and the effect of the documents recording equitable and other interests in part 2 of the Register. The only persons entitled to apply were registered owners legally entitled to the land exchange entitlement Letters A and B and registered in part 1 of the Register. From these applicants there could be ascertained the applicant who was submitting entitlements producing the highest aggregate age of entitlement within condition 3 of the Application Notice. Before the successful applicant completed the transaction he would, of course, be obliged to satisfy the Commissioner of Lands of the concurrence of any person registered by part 2 of the Register as having an equitable or other interest but the effect of the Application Notice was to ensure that the Commissioner of Lands would only be concerned with equitable or other subordinate interests registered in part 2 of the Register affecting the successful applicant. The Court of Appeal in Hong Kong came to the same conclusion for similar reasons and their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the respondent's costs.



