

Yau Fook Hong Company Limited

Appellant

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 21ST DECEMBER 1987

Present at the Hearing:

LORD BRIDGE OF HARWICH

LORD TEMPLEMAN

LORD GRIFFITHS

LORD ACKNER

SIR JOHN STEPHENSON

[Delivered by Lord Templeman]

The trial judge, Deputy Judge Downey and the Court of Appeal (Sir Alan Huggins V.-P., Silke J.A. and Power J.) decided that an application made on 18th May 1984 by the appellant company, Yau Fook Hong Company Limited, and a response dated 26th May 1984 from the Sha Tin District Land Registry on behalf of the Government of Hong Kong created a binding contract for the sale by the appellant company to the Government of certain Letters B at the price and upon the terms set forth in the application. The appellant company now appeals and contends that no binding contract came into existence.

By the New Grant 11107 dated 19th May 1976 the Government of Hong Kong agreed to lease the land known as Sha Tin Town Lot No. 11 to Shui Hing Investment Company Limited and Yick Fung Estates Limited ("the Tenants") for the term, at the rent and upon the conditions therein set forth for a premium of \$66,500,000.00 payable by nine equal annual instalments of principal and interest. Clause 10 of the conditions of sale incorporated in the Grant provided that upon the breach of any of the conditions of the Grant (including the payment of any instalment of premium) the Government would be

entitled to re-enter the land agreed to be demised and to forfeit the term agreed to be granted.

By a letter dated 5th May 1984 enclosing demand notes the District Lands Office, representing the Government, required payment of instalments of premium due from the Tenants on 19th May 1984 amounting to \$10,744,667.68. The letter offered to allow the Tenants to settle the demand notes wholly or partially by the surrender of Letters B. A Letter B is a written promise by the Government known as a land exchange entitlement made upon the compulsory acquisition of land and entitling the owner of the land acquired to the future grant of building land, when available, at a price calculated by reference to values prevailing at the date of the compulsory acquisition and otherwise upon the terms set forth in the Letter B.

The letter dated 5th May 1984 stated *inter alia* that:-

"Payment of the attached demand note will be accepted in part or in full by way of the surrender of land exchange entitlements (Letters A and B) in lieu of cash. The monetised value of such entitlements should be calculated in accordance with the attached list of currency values ... If you therefore intend to settle the demand note wholly in cash, payment of the attached demand note should be made to Treasury on or before the due date stated thereon. ... If you intend to settle the amount due partly in cash and partly by way of surrender of land exchange entitlements, the attached demand note should be returned to this Office for cancellation before the due date for payment stated thereon together with a cheque for the amount which you wish to pay in cash. You should also at the same time return the attached Application Form, duly completed with details of the entitlements you propose to surrender.

Should any discrepancy or deficiency be discovered in you title to or the monetised value of the entitlements specified on such Application Form, you will be required to make good on demand the amount of the deficiency in cash ... In addition, interest equivalent to 2 per centum per annum above the Best Lending Rate of the Hongkong and Shanghai Banking Corporation for the time being will be payable on the amount of such deficiency for the period from the due date for payment shown on the attached demand note up to and including the date of payment of the deficiency."

It is not disputed that this letter was a formal offer intended to create a contract if and as soon as the Tenants applied to settle the demand note wholly or partly by the surrender of Letters B. In that event the Tenants would be bound to sell and the Government would be bound to purchase the specified Letters B at the price calculated in accordance with the terms of the offer. The Government's right to enforce the contract would supersede and displace any right to re-enter for non-payment of the instalments of premium in question.

By a letter dated 18th May 1984 the Chinachem Group responded to the letter dated 5th May 1984 from the Government to the Tenants in the following terms:-

"Re: S.T.T.L. 11

We refer to our payment of the 7th and 8th instalments of the land premium in the amount of HK\$10,744,667.68 for the above-mentioned lot by monetised Letters B and enclose the relevant application form for the purpose.

We also enclose a cheque for \$35.68 in settlement of the balance."

The accompanying application form was made out by the appellant company Yau Fook Hong Company Limited. By the application, which was duly signed, the appellant company offered to surrender the land exchange entitlements set forth in the schedule in partial settlement of the demand note in respect of S.T.T.L. 11 for \$10,744,667.68 and agreed "to abide by the terms contained in the final paragraph to the letter attached to the demand note ...". The appellant company certified that the land exchange entitlements listed were registered in the name of the appellant company and were free from encumbrances and continued:-

"We further undertake to surrender our entitlements and, if so required, to deliver up to the Government the original letters in respect of the lots specified in such land exchange entitlements and to execute a Memorandum of Release in such form as may be required by the Government releasing the Government from all costs, claims and demands whatsoever arising out of or in connection with the surrender of the said lots."

There then followed details of the land exchange entitlements "offered for surrender at the monetised values stated in the appropriate column below" and those details set out the date of each relevant Letter B, the area in square feet of the entitlement and the value in accordance with the terms of the

Government's letter dated 5th May 1984. The aggregate value was \$10,744,632 which with the accompanying cheque for \$35.68 made up the total amount specified in the demands made on the Tenants.

From the letter dated 18th May 1984 and its enclosures it appears, and it is not disputed, that the Tenants and the appellant company are part of the Chinachem Group. The Tenants held the land comprised in S.T.T.L. 11 and the Tenants owed the premium specified in the demand notes payable on 19th May 1984. The appellant company owned the Letters B which by the application form they offered to surrender in part payment of the amount due from the Tenants.

The letter dated 5th May 1984 from the Government was a formal offer to the Tenants and nobody else and could not therefore be accepted by anybody else. The application form signed by the appellant company and forwarded by Chinachem Group with their letter dated 18th May 1984 was an offer made by the appellant company to the Government. It was an offer to surrender the Letters B held by the appellant company in partial settlement of the debt owed by the Tenants. In the opinion of the Board the application form in those circumstances was a formal offer by the appellant company capable of creating a binding contract if and as soon as the offer was accepted by the Government. The Chinachem Group and the appellant company were asking the Government to deal with the appellant company as though the appellant company were the Tenants for the purpose of discharging the demand note for \$10,744,667.68. Of course the Government were not bound to accept. But the Government must either accept the offer of the appellant company, or reject the offer or seek time for consideration. The Government's response was contained in a letter dated 26th May 1984 and entitled Sha Tin Town Lot No. 11 from the Registrar General's Department to the appellant company in these terms:-

" I refer to your application made to the District Lands Officer, Sha Tin offering to surrender ... [the specified] ... land exchange entitlements ... in partial settlement of the Demand Notes ... for the 7th and 8th instalments of the land premium of the above lot.

I have been requested by District Lands Officer, Sha Tin to prepare the relevant Memorandum of Release for your execution. However, prior to execution of the same, your title to the abovementioned land exchange entitlements has to be verified. In this respect I shall be grateful if you would at your earliest convenience forward all relevant title deeds ...

for the purpose of title checking. You may be required to make Statutory Declaration in case you fail to submit any or all of the title deeds.

Upon receipt of confirmation as to your title from District Lands Officer, North, I will arrange for execution of the Memorandum of Release by you."

In a forceful argument Mr. Alexander on behalf of the appellant company submitted that the letter dated 26th May 1984 did not constitute an acceptance by the Government of the offer made by the appellant company by the application form dated 18th May 1984. Mr. Alexander pointed out that the letter dated 26th May 1984 did not say expressly that the Government "accepted" the offer to which they refer in their letter of 26th May 1984. But it is clear that the Government were neither rejecting nor postponing consideration of the offer. It is also clear that the Government were not seeking to impose any new terms or to suggest any new terms to the appellant company nor were they asking the appellant company to do anything inconsistent with the creation of a contract in accordance with the offer constituted by the application form. If the application form had been signed by the Tenants, the letter dated 26th May 1984 would have been written to the Tenants in exactly the same form. Mr. Feenstra on behalf of the Government cogently submitted, and their Lordships agree, that the request for the title deeds and the reference to preparation of the Memorandum of Release are only consistent with the acceptance by the Government of the offer made by the appellant company in the application form. In conformity with time honoured conveyancing practice and in conformity with the terms of the application form the preparation and execution of a Memorandum of Release followed upon the creation of a binding agreement and the checking of title followed and did not precede the constitution of a contract. That contract supplanted the rights and remedies against the Tenants for non-payment of the demand note.

Mr. Alexander argued that it was unlikely that the Government would commit themselves to a binding contract to accept a surrender from the appellant company if, before the title of the appellant company had been verified, the Government by accepting the offer of the appellant company released the Tenants from payment of their debt and released the land comprised in Sha Tin Town Lot No. 11 from the right of re-entry for non-payment of premium contained in the Grant. But whether or not the Government intended to release the Tenants from their obligations and whether or not the Government realised that there was any danger in accepting the offer from the appellant company, there is certainly

nothing in the correspondence which discloses anything but a firm offer from the appellant company constituted by the application form dated 18th May 1984 and a firm acceptance by the Government in their letter dated 26th May 1984. In the event no-one disputes that the appellant company is entitled to the Letters B which it offered to surrender although for reasons unexplained the appellant company have been unable to produce the original Letters B.

Mr. Alexander argued in the alternative that if a contract was brought into existence by the Government's letter dated 26th May 1984 that agreement became impossible of performance because the appellant company were unable to produce the original Letters B. Further in the alternative the demand made later by the Government for the provision of an insurance policy supporting an indemnity for the failure of the appellant company to produce the original Letters B amounted to an attempt by the Government to alter the terms of the original contract and amounted to a repudiation of the agreement by the Government. Their Lordships are unable to accept these arguments. It was for the Government to decide whether to accept the title offered or to negotiate for further safeguards or to proceed on the footing that title had not been proved. In the event after considerable correspondence the Government chose to accept the title without any further insurance or other safeguards. The appellant company is not entitled to profit from its own unexplained contractual failure to produce the original Letters B. The trial judge and the Court of Appeal carefully considered and comprehensively rejected the contentions put forward on behalf of the appellant company. Their Lordships agree and will humbly advise Her Majesty that this appeal ought to be dismissed with costs.







