

19/85

No. 48 of 1984

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)

10

- and -

SHELL MALAYSIA TRADING
SENDIRIAN BERHAD

Respondents
(Defendants)

CASE FOR THE APPELLANTS

RECORD

1. In this Case the following definitions are adopted :

"the Code" means the National Land Code (No.56 of 1965)

20 "the Collector" has the meaning given in section 5 of the Code

"the Contract" means the contract dated 29th December 1972 mentioned in paragraph 5 below

30 "the Retained Land" means the unsold portion of the land mentioned in the recitals in the Contract

"Shell" means the Respondents Shell Malaysia Trading Sendirian Berhad

"Shell's solicitors" means Messrs. Shearn Delamore & Co.

RECORD

"the State Authority" has the meaning given in section 5 of the Code

pp.41-42

2. This is an appeal from a judgment dated 24th March 1982 of the Federal Court of Malaysia (Lee Hun Hoe C.J. Borneo, Abdul Hamid F.J. and E. Abdoolcader J.) allowing an appeal by Shell against an order of Wan Hamzah J. dated 11th July 1980 for specific performance of a contract for sale of land by Shell to the Appellants.

pp.22-23

3. The basic issue in this appeal, as before the Judge and the Federal Court, is whether the contract is still on foot or has come to an end without any breach of contract by Shell. 10

4. There was no oral or affidavit evidence before the Judge or the Federal Court, where the case was dealt with (as on this appeal) entirely on the basis of agreed documents. All the facts set out in this case are common ground between the Appellants and Shell.

pp.61-65

5. The Contract was dated 29th December 1972 and made between (1) Shell as vendor and (2) the Appellants as purchasers. It recited that Shell was registered as the proprietor of the land held under Grant for Land No. 9982 for Lot No.162 Section 63 in the Town of Kuala Lumpur in the District of Kuala Lumpur. The Contract was for the sale at a price of M\$ 167,889.98 of a portion of the said land shown hatched in blue on the plan annexed to the Contract and marked A. By clause 1 Shell was to sell the said portion free from all encumbrances but subject to all conditions of title whether express or implied affecting the same and with vacant possession. Upon the making of the Contract the Appellants paid Shell M\$ 16,789 expressed to be by way of earnest money. 20

6. Clause 2 of the Contract states as follows:

"2. The Vendor shall (if it has not already done so) make application to the appropriate authority or authorities for the subdivision of the said 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." 40

7. The subdivision referred to in clause 2 of the contract was subdivision pursuant to Part Nine, Chapter 1, of the National Land Code (No. 56 of 1965). By section 137 of the Code any

10 application by a proprietor for approval of the subdivision of any land is to be made in writing to the Collector or any Assistant Collector of Land Revenue having jurisdiction in the district or sub-district in which the land is situated: see section 137(1) and definition of "Collector" in section 5. In this particular case, the said land being held under Registry title as opposed to Land Office title, the approval needed for subdivision was that of the State Commissioner (defined in section 5) and not the Collector: section 135(2). Nevertheless, the application for subdivision was still required to be made in the first instance to the Collector under section 137(1), the Collector then being obliged by section 138(1) to refer the application to the State Commissioner together with his recommendations thereon.

20 8. By section 138(2), in any case falling within sub-paragraphs (a) or (b) of that sub-section approval of subdivision in accordance with the proposals in the application is mandatory. By section 138(3) the application must be rejected in any other case.

30 9. Under clause 3 of the Contract the purchase was to be completed within 30 days of Shell's notifying the Appellants that a separate document of title to the sold portion of land had been obtained. Clause 5 provided that wherever mentioned in the Contract time should be deemed to be of the essence thereof.

10. Clause 6 of the Contract is as follows:

40 "If for any reason subdivision is refused or for any other reason it shall not be legal (sic) possible to subdivide 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 of 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. "

50 11. The essential point in this appeal is whether on the proper construction of the Contract and in the events which have happened clause 6 has operated to end the Contract. The Appellants say not, that the Contract is therefore still on foot, and that it ought to be specifically

RECORD

performed.

12. When the Contract was made Shell had already made application to the appropriate authority for the subdivision of the said land. Although it was contended by the Appellants before the Judge and the Federal Court that no application had been made in accordance with clause 2, the Appellants do not now contend that no initial application had been made as contemplated by that clause. 10
 It is now accepted by the Appellants that by the letter dated 6th June 1972 from Shell's solicitors to the Collector of Land Revenue Shell had at the date of the Contract already made an application as mentioned in clause 2 of the Contract.

p.58

13. Correspondence ensued as a result of that application. The most material letters are as follows :

pp.67-68

(1) By letter dated 16th October 1973 from the Collector of Land Revenue to Shell, the Collector stated in paragraph 3 that Shell were required to state their written agreement for the surrender of the retained portion provided for the petrol and service station and to re-issue a lease title for 30 years. It was stated that that was a policy of the Government to allocate the area for a petrol and service station. Paragraph 4 of the letter stated that upon Shell's due compliance with the conditions in the letter their application (meaning the application for subdivision) would then be forwarded to the state authority for their consideration. 20 30

pp.69-70

(2) By letter dated 1st November 1973 from Shell to the Collector, Shell acknowledged that letter and asked for reconsideration of the requirement that before the application for subdivision could be considered by the State Authority they should agree to surrender the retained portion and accept a 30 year lease. 40

pp.72-73

14. By letter dated 27th November 1983 from Shell's solicitors to the Appellants, Shell referred to the requirement in paragraph 3 of the said letter dated 16th October 1973 and to clauses 2 and 6 of the Contract. Shell's solicitors' letter contended that it had become legally impossible to subdivide the land in accordance with the Contract and that on the instructions of Shell a cheque was enclosed for \$16,789 being the refund of the earnest money 50

- paid by the Appellants. The Appellants' then solicitors Messrs. Allen & Gledhill, by letter to Shell's solicitors dated 5th December 1973, rejected that contention, returned the cheque and said that the Appellants would hold Shell to the strict performance of the terms and conditions of the Contract, which the Appellants contended was subsisting and in full force and effect. p. 74
- 10 15. By letter dated 22nd February 1974 from the Collector to Shell's solicitors, the Collector advised that in accordance with the regulations currently in force, the land would be subdivided into two and consequently two titles in continuation would be issued. Thereafter, the retained land should be surrendered to the Government and a 30 year leasehold title would be issued. It was stated that that was in accordance with Government policy on the issue of title for petrol pump sites. A carbon copy of that letter was sent by the Collector to the Appellants' solicitors, who wrote to Shell's solicitors on 28th February 1974 saying that they reiterated the contents of their letter dated 5th December 1973 and requested Shell forthwith to proceed with the subdivision of the property. pp.76-77
- 20
- 30 16. By letter dated 11th March 1974 from Shell to the Collector, Shell stated that they were not prepared to surrender the subdivided title as suggested in the Collector's letter of 22nd February 1974. pp. 79-80
- 40 17. On 2nd October 1974, by which time the Appellants had changed their solicitors, Shell's solicitors wrote to the Appellant's new solicitors Messrs. Ng & Ng enclosing a cheque for \$16,789 in purported refund of the earnest money pursuant to clause 6 of the Contract. That cheque was returned to Shell's solicitors by Messrs. Ng & Ng under cover of a letter dated 3rd October 1974 which stated that the Appellants did not accept Shell's purported exercise of clause 6 of the Contract. p. 84
- 50 18. As a result of a letter to Shell dated 12th November 1975 from the Director of Lands and Mines for the Federal Territory of Kuala Lumpur, indicating that subdivision would be approved if Shell were willing to surrender their title and accept a 99 year lease (not a pp.90-92

30 year lease), and further correspondence and meetings, Shell's solicitors wrote to the Director of Lands and Mines on 10th June 1976 saying that Shell would not like to continue with the subdivision of the land based on the conditions mentioned in the said letter of 12th November 1975 and had their client's instructions to withdraw the application for subdivision. That letter accordingly constituted a withdrawal of the application.

10

Summary

19. Leaving aside the possibility of a challenge to the validity of the conditions sought to be imposed on Shell in respect of the granting of its application for subdivision, there were two ways in which Shell could have achieved a subdivision so as to result in the issue of separate documents of title (in accordance with Part Ten, Chapter 3, of the Code). Those two ways were :

20

(1) by agreeing to surrender the retained portion and accept a leasehold title of that portion;

(2) by electing not to use the retained land for a petrol station.

20. The Appellants do not contend that a subdivision resulting in Shell's having only a leasehold title to the retained land would have been a subdivision in accordance with the terms of the Contract. If, therefore, it had been legally impossible to obtain a subdivision otherwise than on that basis, it is accepted that clause 6 of the Contract would have come into operation.

30

21. The Appellants' case is that within the meaning of clause 6 of the Contract :

(1) subdivision has never been refused;

(2) subdivision has never become for any other reason legally impossible;

and that in the face of the express provisions of clause 6 there is no room to imply any other circumstance (such as the offer of subdivision only on terms unacceptable to Shell) giving Shell a right to rescind the Contract.

40

22. The Appellants say that :

(1) Subdivision was never in terms refused. On the contrary, the application was withdrawn by the letter dated 10th June 1976 from Shell's solicitors to the Director of Lands and Mines.

pp.103-104

10 (2) The fact that subdivision could only be obtained by Shell's ceasing to use the Retained Land as a petrol station was not a refusal, unless on the proper construction of clause 6 of the Contract subdivision was to be treated as refused in circumstances where it could only be obtained on the basis that Shell did cease to use the Retained Land for that purpose.

20 (3) The wording of clause 6, particularly the passage "if for any reason subdivision is refused or for any other reason it shall not be [legally] possible to subdivide the said land" makes it clear that refusal is to be regarded as one form of legal impossibility. Unless there has been a formal refusal (as to which see (1) above) clause 6 cannot operate unless what is alleged to constitute an effective refusal goes so far as to make it legally impossible to obtain subdivision.

30 (4) Even leaving aside the wording in clause 6 of the Contract "or for any other reason it shall not be legal [meaning legally] possible", there is no justification for departing from the plain and ordinary meaning of the word "refused" and for treating it as including both a straight-forward refusal and a grant on terms which were not reasonably acceptable to the applicant: cf. F. Hargreaves Transport Limited v. Lynch (1969) 1 WLR 215, where a qualification, equating a grant on
40 unacceptable terms with a refusal, was expressly incorporated in the Contract.

50 (5) There is no basis for implying in clause 6 a provision that the offer of subdivision on terms not reasonably acceptable to Shell should be treated as a refusal bringing the Contract to an end. However acceptable and reasonable such a provision might have been for Shell, the Appellants could not have been expected to agree to it. There would have been no reason for the Appellants to accept that their right

to acquire the land under the Contract should be dependent on Shell's requirements for the use of the Retained Land.

Subdivision always legally possible

23. Subdivision so as to obtain freehold titles in continuation was always legally possible, for the following two independent reasons:

(1) Shell could have obtained subdivision by ceasing or agreeing to cease to use the Retained Land for a petrol station, a course to which there was no legal obstacle whatever. 10

(2) In any event, Shell could have obtained approval for subdivision without having to cease use of the Retained Land for a petrol station. The term sought to be imposed on Shell, i.e. that they should accept a leasehold title only, was ultra vires and the Court would have held it void: Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn.Bhd. (1979) 1 MLJ 135. There being no suggestion on behalf of Shell that any of the conditions in section 136(1) of the Code were not satisfied, under section 138(2) not only was it not legally impossible for the land to be subdivided, but the only legal possibility, had the application been maintained, was for subdivision to be granted. 20

Appeal against refusal

24. The Appellants contend (see paragraph 22(1) above) that subdivision was never refused within the meaning of clause 6 of the Contract. If that contention is wrong, the Appellants say that it was nevertheless an implied term of the Contract that unless there was clearly no reasonable prospect of success Shell should challenge that refusal. In support of this contention the Appellants say : 30

(1) Where a party to a contract is obliged, as in this case, to apply for some form of licence or clearance on which the transaction is dependent, the general rule is that he is bound to use due diligence and take all reasonable steps to obtain that licence or clearance: Brauer & Co. (Great Britain) v. James Clark (Brush Material) (1952) 2 All ER 497; Hargreaves Transport Limited v. Lynch (1969) 1 WLR 215, per Lord Denning M.R. at page 219D. 40

(2) In the present case, for the reason given in paragraph 22(3) above, on the proper construction of clause 6 a refusal of subdivision was mentioned as a specific instance of something rendering it legally impossible to obtain subdivision.

10 (3) A refusal which left any reasonable prospect of its being successfully challenged could not be said to have created a situation where it was legally impossible to obtain subdivision.

(4) Accordingly, in the circumstances mentioned in sub-paragraph (3) above:

20 (a) it is necessary, in order to give business efficacy to the Contract, to imply the term described above (in this paragraph 24) because otherwise the Contract is left suspended with no means of triggering a completion date under clause 2 but also no means of bringing it to an end under clause 6;

(b) alternatively to (a), a reasonable step at that point is to challenge the refusal by court proceedings: IBM United Kingdom Ltd. v. Rockware Glass Ltd. (1980) FSR 335; and sub-paragraph (1) above.

30 25. The Appellants contend that for similar reasons to those mentioned in paragraph 24 above Shell were obliged not to withdraw their application while it remained legally possible to obtain subdivision by means of the application.

Breach of Contract by Shell

40 26. The Appellants therefore say that the Contract has never come to an end, because the circumstances in clause 6 of the Contract have never arisen. Furthermore, completion of the Contract has been delayed by Shell's breach of Contract in failing to take all necessary steps to obtain subdivision of the land at a time when it remained legally possible to do so and in withdrawing their application. Shell should have maintained the application and taken one or both of the following steps:

(1) cease to use the Retained Land for a petrol station; or

RECORD

(2) challenge the attempt to impose the condition of surrender of the freehold title and acceptance of a leasehold title.

The proceedings in the Courts below

pp. 1-4	27. The Appellants commenced proceedings by Writ indorsed with statement of claim on 24th September 1974, seeking specific performance of the Contract and damages. Shell in their defence and counterclaim relied on the contention that as it had been impossible to subdivide the land so as to result in the issue of separate titles in continuation to the subdivided portions, as required by clause 2 of the Contract, Shell were entitled to refund the earnest money to the Appellants pursuant to clause 6 of the Contract and that thereupon the Contract had become null and void. By their counterclaim Shell sought a declaration that the Contract was null and void.	10
pp. 22-23	28. The case came on for trial before the Judge on 8th July 1980 and on 11th July 1980 the Judge ordered Shell to apply for and obtain the subdivision of the land and to complete the sale in accordance with the Contract. The hearing on the question of damages (if any) was ordered to be adjourned to a date to be fixed. Shell were ordered to pay the costs of the claim to the Appellants.	30
pp. 24-29	In his grounds of decision the Judge inferred from the correspondence between Shell and its solicitors and the Collector of Land Revenue that the condition of surrender of the freehold title and acceptance of the Lease would not have been imposed if Shell had not used the retained land for the purpose of a filling station. He held that there was nothing in the Contract which stipulated that the retained land should be used as a filling station site. He accepted the submission of the Appellants that Shell had not complied with clause 2 of the Contract in that it had not applied for subdivision within the meaning and pursuant to that clause. He gave as a further reason for his decision that if the approving authority had refused Shell's application for subdivision on the ground of non-compliance with a condition improperly imposed, Shell should have pursued the matter in court by way of appeal.	40
pp. 30-32	29. By notice of appeal dated 4th August 1980	50

Shell appealed against the whole of the Judge's decision. The grounds of appeal were set out in a memorandum of appeal dated 4th April 1981. The appeal came before the Federal Court on 24th March 1982 and on the same day the Federal Court allowed the appeal and dismissed the claim of the Appellants (who were the Respondents before the Federal Court). The counter-claim was abandoned. The Federal Court further ordered that the Appellants should pay Shell's costs of the appeal and also the costs of the proceedings in the Court below.

RECORD
pp.33-40

pp.41-42

10

20

30. In their grounds of judgment dated 26th May 1982 the Federal Court held that there was nothing in the Contract which imposed any specific obligation upon Shell to cease using the retained land as a petrol filling and service station as a price for subdivision and that it was not open to the Court to impose terms which the Contract did not contain. They held on the authority of Hargreaves Transport Limited v. Lynch (above) that Shell's obligation was to take reasonable steps to obtain subdivision and that they had done everything reasonably required of them.

pp.43-52

30

31. On 21st June 1982 the Federal Court granted the Appellants conditional leave and on 7th February 1983 granted final leave to appeal to His Majesty The Yang Di-Pertuan Agong against the whole of the decision of the Federal Court given on 24th March 1982.

pp.53-54

pp.55-56

40

32. The Appellants respectfully submit that the judgment of the Federal Court of Malaysia was wrong and ought to be reversed, that this appeal ought to be allowed with costs of this appeal and the appeal to the Federal Court and that the learned Judge's order should be restored for the following (among other)

R E A S O N S

50

- (1) BECAUSE the Federal Court failed properly to construe the Contract, and in particular clauses 2 and 6.
- (2) BECAUSE the application for subdivision was neither refused nor became legally impossible.

RECORD

- (3) BECAUSE in breach of contract Shell failed to do what was necessary to achieve subdivision when it was legally possible to do so.
- (4) BECAUSE there was no basis for implying a term that Shell should be entitled to continue to use the Retained Land for a filling station, if to cease to do so was necessary to obtain subdivision.
- (5) BECAUSE in any event the contract has never come to an end under clause 6 or otherwise and it is now clearly possible on the authority of the Sri Lempah case (above) to obtain subdivision in accordance with clause 2 by restoring or renewing Shell's application for subdivision under section 135 of the National Land Code. 10
- (6) BECAUSE the Federal Court misapplied, alternatively gave unwarranted significance to, the decision in Hargreaves Transport Limited v. Lynch, failing to appreciate that there were important differences between the contracts in that case and in the present case. 20

P.J. MILLETT Q.C.

NICHOLAS STEWART

