

No. 6 of 1983

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

GOH ENG WAH Appellant
(Respondent)

and

YAP PHOOI YIN and YAP FOOK SAM
Representatives of the Estate of
YAP KON FAH, deceased First
Respondents
(Appellants)

and

C.M. BOYD (as Arbitrator) Second
Respondent
(Respondent)

CASE FOR THE APPELLANT#

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Record

20 1. This is an appeal from a judgment of
the Federal Court of Malaysia (Raja Azlan
Shah, AG.Lp Malaysia, Lee Hun Hoe, CJ P.21
Borneo and Mohd. Azmi J) allowing an
appeal from a judgment dated the 8th
August 1978 of the High Court of Malaya
at Kuala Lumpur (Harun J) whereby he P.13, LL30-31
determined that the rent payable pursuant
to Clause 1(iv) of a Memorandum of Lease
dated 16th August 1957 between Yap Kon pp 38-39
Fah, as lessor, and Makhanlall
30 (Properties) Limited as lessee of land
and buildings known as Star Theatre
should be assessed with reference to the
land only. pp 14-15

2. The issue of this appeal depends upon the true construction of the Memorandum of Lease dated 16th August 1957 as aforesaid, which will be referred to herein as "the Lease", in the events that have happened.

10 3. Before the grant of the Lease, the lessee thereunder had erected at his own expense the building on the premises demised by the Lease and known as "Star Theatre". After the construction of the Star Theatre (hereinafter referred to as "the Building"), the Lease was executed on the 16th August 1957. The Lease, having referred initially to the land included in the demise by reference to its Certificate of Title, then sets out the parcels clause as being a demise of "the said land together with the building erected thereon and known as STAR THEATRE". The term of the Lease is 30 years from the 1st July 1957. The rent payable throughout the term is contained in Clause 1. By Clause 1(i) to (iii) the rent is fixed for the first 20 years of the term. The rent for the last 10 years of the term is to be determined by agreement, or failing agreement by arbitration, the initial agreement or arbitration being for the penultimate period of 5 years of the term, and there being further provision for agreement or arbitration for the last 5 year period of the term.

p 22 LL53 ff
p 38
p 38 LL16-20
p 38 LL28-29
p 38 LL30-31
pp 38-39
p 38 L38-p39
L2
p 39 LL4-16

40 4. The original lessor to the Lease, Yap Kon Fah, has died and the First Respondents are his representatives and in such capacity are the lessors under the Lease. The Appellant is now the lessee under the Lease.

5. The parties were unable to reach agreement as to the rent payable under the Lease from the beginning of the twenty-first year in accordance with Clause 1(iv) - i.e. from the 1st July 1978 until the 20th June 1983 - and accordingly they agreed to refer the matter to arbitration. The Second Respondent was appointed Arbitrator by agreement between the parties. The issue in the arbitration was whether the arbitration should fix the rent by valuing the land alone, or whether he should fix the rent upon the basis of the land with the building erected thereon. In due course the Second Respondent made his Award. Although the issue before the Arbitrator was the same as that before the Courts and before your Lordships, the Appellant lessee put his case not only on the basis simply of constructions of the Lease in circumstances where the original lessee had constructed the building before the grant of the Lease, but also sought to rely upon an alleged verbal understanding. Having heard the evidence, the Second Respondent Arbitrator dismissed the argument based upon this alleged verbal understanding. No appeal has been, or is being, pursued by the Appellant against that limb of his decision. The Arbitrator then made alternative Awards as to the monthly rent payable under Clause 1(iv) of the Lease, namely \$5000 if the rent is to be determined by reference to the land alone, and \$21,000 if the rent is to be determined by reference to the land and the building.

p 39 LL3-8

p 56 LL30-36

pp 56-63

p 57 LL16-27

p 62 LL14-28

p 62 LL30-43

6. Accordingly, the Second Respondent Arbitrator stated a special case to the High Court. As he stated in paragraph 14 of the special case, the issue to be determined, and to be determined by your Lordships, is whether on a true interpretation of Clause 1(iv) of the Lease the correct basis for assessment of the rent payable should by reference to the value of the land only or whether it should be by reference to the land and the building. The matter was heard by Harun J. in the High Court of Malaya at Kuala Lumpur on the 8th August 1978. and he decided the matter in favour of the Appellant lessee. The First Respondent lessors then appealed to the Federal Court of Malaysia (Appellate Jurisdiction). This latter Court heard the First Respondent landlords' appeal on the 13th November 1981 and allowed the appeal. On 11th January 1982, conditional leave was given to the Appellant lessees to appeal to the Yang De-Pertuan Agong, and final leave was given on the 24th August 1982.

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pp1-3

p 3 LL34-40

pp 9-13

pp 19-20

pp 21-24

pp 32-34

pp 36-37

7. The Appellant lessees' contention is that, on a true construction of Clause 1(iv) of the Lease, the Arbitrator should have fixed the rent by reference to the value of the land alone. This contention is put in two alternative ways:

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p 39 LL3-8

(i) on a true construction of Clause 1(iv), the Second Respondent Arbitrator should have determined the rent for the land alone because of the reference to "the said land" at the commencement of Clause 1 of the Lease;

p 38 L36

(ii) further or in the alternative, on a true construction of Clause 1(iv) of the Lease the Second Respondent as Arbitrator had to determine the rent which it would have been reasonable for the lessor and the lessee to agree, and that such a rent would have been agreed on the basis of disregarding the building on the grounds that this had been constructed by and at the expense of the lessee.

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p 39 LL3-8

These two arguments will be developed in turn.

8. The Lease distinguishes between the land on the one hand and the Building on the other hand. The demise itself is of "the said land" with the Building on it. On the other hand, the rent which is payable is expressly stated to be "the rent of the said land", and this is the phrase which governs Clause 1(iv). The distinction that the parties had in their minds when entering into the Lease between the building on the one hand and the land on the other hand is emphasised in various provisions thereof. In Clause 3(b) the obligation to repair is in respect of the Building: this subclause clearly acknowledges a distinction in the parties' minds between the Building and the land. This is also clear from Clause 3(c), and even more clearly in the subsequent clause, Clause 3(d) which in the same phrase refers to "the said land and ... the said cinema theatre". It is fair to say that the parties to the Lease have sometimes referred to "the said cinema theatre" in a way which suggests that they are thereby referring to the

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p 38 L28

p 38 L36

p 39 LL24-34

p 39 LL35-44

p 39 LL49-50

land as well. Clause 3(f) (g) and (h) are examples of this. However, this is not by any means inconsistent with the Appellants' contention that when the parties refer in the Lease to "the land" or "the said land" they are referring to the land alone and not to the land with the Building thereon. The distinction between the land and the Building is also apparent from Clause 4(a) and (b), one of which refers to "the said land and the said cinema theatre" and the other of which refers to "the said area and the said cinema theatre". (It is suggested that the reference to "area" is an obvious mistake for "land").

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p40 L33-p41
L24

P41 L28-p42
L9

9. The Federal Court appears to have decided the question on the basis that the demise contained in the Lease was of the land and Building and not merely of the land alone. That is not in dispute, as it is quite clear from the demise. However, what has to be decided, from the Lease itself, is how the rent is to be determined. It is respectfully submitted by the Appellants that, on a true construction of the Lease, the rent to be determined under Clause 1(iv) is in respect of the land alone.

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p 24 L17-30

p 38 LL28-30

10. If necessary, the Appellant will also rely upon the fact that it was known to the parties to the Lease that the lessee had just constructed the building at his own expense, and indeed this had been recorded in the Lease itself. In construing the Lease, this should be taken into account as part of the matrix of facts in which the Lease was conceived. That is a factor to which the Federal

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p 39 LL27-28

Court, it is respectfully submitted, gave insufficient or no weight.

11. As to the alternative argument: the Appellant respectfully submits that even if the first six words of Clause 1 of the Lease mean that the rent is to be determined for the land and Building, the rent that is to be determined is not merely an objective figure being the rent at which the land and Building as the Arbitrator find them (or would have found them as at the review date) would be let on the open market. On a true construction of Clause 1(iv) of the Lease what the Arbitrator has to determine is the rent which it would have been reasonable for the particular lessors and the particular lessees, namely the First Respondents and the Appellants, to have agreed. The Appellant respectfully adopts the observations of Buckley L.J. in Thomas Bates & Son Limited v. Wyndham's Lingerie Limited (1981) 1 WLR 505 at 517g to 519h. The Appellants would respectfully refer also to the observations of Eveleigh L.J. in that case at 521d-e. The Appellants also respectfully refer and adopt the observations of Tudor Evans J. in Lear & Anor. v. Blizzard (1983) 3 AER 662 at 666b-669e.

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p 38 L6

p 39 LL3-8

12. It is respectfully submitted that the provisions of Clause 1(iv) of the Lease direct the Arbitrator to fix a rent in what Tudor Evans J. called the "subjective" rather than the "objective" sense for these reasons :

p 39 LL3-8

- (i) The Arbitrator has to fix a rent which should have been "agreed to by the parties";
- (ii) The rent to be fixed is not for "the demised premises" or for "the land and building" but simply "such sum exceeding \$700";
- (iii) The rent is to be fixed by an Arbitrator who is empowered, indeed effectively obliged, to hear evidence, and not by an expert who is free not to hear evidence.

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13. If this is right the Appellant's primary case is that he stands in the same position as the original lessee, being an assignee of the Lease, and, as the original lessee admittedly erected and paid for the building, the Second Respondent Arbitrator should fix the rent on the basis of the value of the land alone. If, as Tudor Evans J. in Lear v. Blizzard (cited above) suggests, the Appellant would have to show that he had in effect paid for the construction of the building when he took the assignment (see at 670 f-h) and 672 f), then the Appellant's pending case relies upon the Assignment of the 29th June 1971 referred to in the Statement of Claim of the Appellant to the arbitration, which the Appellant is seeking leave to adduce in evidence before your Lordships.

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p 50 LL39-45

The Appellant would refer particularly to the substantial consideration for the Assignment, \$570,000 and also Clause 6, which clearly shows that the parties thereto assumed that the building was not to be "rentalised" on the rent review,

and accordingly must be assumed to have been paid for by the Appellant.

14. If necessary, if there was insufficient evidence to determine this point, then in accordance with the submissions made in the High Court the Appellant will ask this matter be remitted to the Second Respondent Arbitrator.

p 12 LL21-24

10 15. The Appellant respectfully submits that the judgment of the Federal Court of Malaysia was wrong and ought to be reversed and this appeal ought to be allowed with costs, for the following (amongst other).

REASONS

20 (1) Because on a true construction of the Lease, and in particular Clause 1(iv) thereof, in the light of surrounding circumstances, and in particular the fact that the parties to the Lease knew and acknowledged therein that the lessee had constructed the Building on the land himself at his own expense, the rent to be fixed by the Arbitrator is to be determined by reference to the land alone, disregarding the building thereon.

30 (2) In the alternative, because the rent to be fixed by the Arbitrator is to be such as would have been agreed by the parties acting reasonably, and that would, in all the circumstances, have been a rent which would have been fixed by reference to the value of the land alone.

(3) In the further alternative, because there was insufficient evidence before the Courts and before the Arbitrator to enable him to decide whether, and if so

to what extent, the value of the building should be disregarded when assessing the rent, the matter should accordingly be remitted to him.

DAVID NEUBERGER