

4/85

IN THE PRIVY COUNCIL NO.6 of 1983

ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA HOLDEN
AT KUALA LUMPUR

IN THE MATTER OF AN ARBITRATION
BETWEEN YAP PHOOI YIN AND YAP FOOK
SAM AS REPRESENTATIVES OF THE ESTATE OF
YAP KON FAH, DECEASED AND GOH ENG WAH;

- and -

IN THE MATTER OF THE ARBITRATION ACT
1952 (REVISED -1972)

BETWEEN

GOH ENG WAH

APPELLANT

-and-

YAP PHOOI YIN AND YAP FOOK SAM AS
REPRESENTATIVES OF THE ESTATE OF YAP
KON FAH, DECEASED RESPONDENTS

-and-

C.M. BOYD (AS ARBITRATOR) RESPONDENT

CASE FOR THE RESPONDENTS

Record

1. This is an appeal from a judgment of the Federal Court of Malaysia (Raja Azlan Shah, Ag. L.P., p 21-24 Malaysia, Lee Hun Hoe, C.J., High Court, Borneo, and Mohd Azmi, J.) dated 13th November 1981

Record

Pages 14-15

Pages 1-3

allowing with costs the appeal of the Respondents Yap Phooi Yin and Yap Fook Sam as representatives of the estate of Yap Kon Fah, deceased (hereinafter referred to as "the Respondents") from a judgment of Harun, J., on 8th August 1978 made on a Special Case stated by the Respondent C.M. Boyd (hereinafter referred to as "the Arbitrator") under section 22 (1) (a) of the Arbitration Act 1952 (Revised-1972) in his capacity as the sole arbitrator of a dispute between the Appellant and the Respondents over the proper and fair rental payable by the Appellant to the Respondents for the lease of the land hereafter mentioned. The Learned Arbitrator is not concerned with this appeal and is therefore not a party to the proceedings.

pp 38-43

2. The issue raised on the Special Case stated and in this appeal is whether on the true construction of the Memorandum of Lease hereafter mentioned the fair rentals payable by the Appellant to the Respondents under clause 1(iv) of the lease should relate to the value of the land only or to the value of the land together with the buildings erected thereon.

3. By a Memorandum of Lease (hereinafter referred to as "the Lease") dated 16th August 1957 one Yap Kon Fah, deceased, after reciting that he was the registered proprietor subject to the charges or other registered interests stated in the documents of title thereto of the land held under Certificate of Title No. 15741 for Lot No. 573 Section 62 in the Town of Kuala Lumpur in the District of Kuala Lumpur in area 0 acres 2 roods 27.9 poles (in the Lease and hereafter referred to as "the said land") thereby leased to Makhanlall (Properties) Limited "the said land together with the buildings erected thereon and known as STAR THEATRE as tenant for the space of thirty (30) years from the first day of July 1957 at a monthly rental as stated hereinafter, subject to the agreements and powers implied under the Land Code and subject to the stipulations, modifications terms and conditions hereinafter contained."

The Lease contained, inter alia, the following terms :

Clause 1

The rent of the said land shall be as follows : -

- (i) \$400.00 (Dollars Four hundred only) per month for the first ten (10) years commencing from the 1st day of July 1957;
- (ii) \$500.00 (Dollars Five hundred only) per month from the beginning of the 11th year to the end of the 16th year thereafter; and
- (iii) \$700.00 (Dollars Seven hundred only) per month from the beginning of the 16th year to the end of the 20th year;
- (iv) From the beginning of the 21st year to the end of the 25th year such sum exceeding \$700.00 as shall be agreed to by the parties hereto or failing agreement as shall be fixed by an arbitrator;
- (v) From the beginning of the 26th year to the end of the 30th year such sum exceeding the

rent fixed for the preceding period of five years as shall be agreed to by the parties hereto or failing agreement as shall be fixed by an arbitrator.

Clause 6

If at any time during the period of this lease the Lessee shall be unable to operate or use the said cinema theatre for the purpose of cinematograph entertainment by reason of war, riot, civil commotion or fire then in every such case the rent hereby reserved shall not be payable in respect of any period after the expiration of one month from the date the Lessee has been deprived of the use of the said cinema theatre PROVIDED that this clause shall in no way affect the liability of the Lessee to pay all rates taxes assessments and other charges including quit rent as stipulated in clause 3(d) herein.

The Respondents will refer at the hearing for the full terms and true effect of the Lease.

4. As appears from the Lease there was at the date thereof erected on the land comprised in the Lease a cinema used for the business of showing films for public entertainment known as the Star Theatre.

5. The Respondents as the representatives of the estate of Yap Kon Fah deceased were at all material times and are still the registered proprietors of the said land and the appellants are entitled to the benefit of the lease.

pp 44-46 6. A dispute having arisen between the Appellant and the Respondents as to the proper rental payable under the lease from the beginning of the 21st year of the lease, i.e., from 1st July 1977, to the end of the 25th year, the dispute was referred by the parties to arbitration under clause 7 of the lease. The parties agreed to appoint the Arbitrator to adjudicate the matter. It is common ground that the Arbitrator is a Chartered Surveyor and Registered Surveyor in Malaysia.

7. The hearing before the Arbitrator was held on 15th July 1977. Before the Arbitrator the Respondents put forward the following arguments :

pp 56-63

p 2

pp 46-9

pp 59-60

(i) The lease has the effect of conferring upon the lessee the right to use the Star Theatre for the showing of films and giving to the lessee all the profits capable of being derived in the ordinary course of business from the business of showing films for public entertainment, the lessee paying for this privilege a rental for the premises. The Respondents' contention is that the rent to be paid should be such as to give a fair return to the Respondents while still affording a reasonable margin of profit to the lessee. It should be a proper economic rent and not a rent merely notional or nominal;

(ii) By virtue of the definition of land contained in section 5 of the National Land Code the building falls within the term "land" and there is therefore no question of the rent being fixed so as only to cover the right to use the land without there being taken into account

the right to use and occupy the building erected thereon. Only those trade fixtures and fittings specified in clause 3(h) of the said lease should be excluded when assessing a fair rent. Section 5 defines "land" as including -

"(d) all things attached to the earth or permanently fastened to anything attached to the earth, whether on or below the surface"; and

(iii) Sums paid by way of rental under sub-leases and licences of the property granted by the lessee were put forward as being a guide to the amount of rental which should be fixed under Clause 1(iv) of the lease.

p 2 8. The Appellant argued as follows :

pp 50-53 (i) There was a verbal understanding between
pp 59-60 Yap Kon Fah, deceased and Makhanlall (Properties) Ltd. being the parties to the lease that the rental should relate only to the value of the land; and

(ii) This was evidenced by the fact that whilst the recital of the lease states

"the said land together with the buildings erected thereon and known as STAR THEATRE" Clause 1 states "the rent of the said land shall be as follows ..."

9. At the arbitration it was mutually agreed between the Appellant and the Respondents that the question as to whether on the true construction of the Lease the rental to be fixed by the Arbitrator under Clause 1(iv) of the Lease should be a rental which took into account both the land and buildings erected thereon or only the land without any buildings thereon should be referred to the High Court for decision as a question of law.

10. On the 26th July 1977 the Arbitrator sent to the Counsel representing each party a letter asking for their respective consents to the Arbitrator making his award (inter alia) on two alternative bases namely on the basis of a rental attributable to the land and buildings and on the basis of a rental attributable to the land alone. Written consents were duly received from or on behalf of respectively the Appellant and the Respondents.

Record

pp 56-63 11. The Arbitrator handed down his award on 30th July 1977. The award states, inter alia, as follows :

"FINDINGS

In relation to the alleged verbal understanding as aforesaid, I find as follows :-

- (i) One of the parties to this alleged verbal understanding is long deceased and the arbitration therefore does not have the benefit of his evidence.
- (ii) The submission as to the existence of this verbal understanding is based merely on hearsay.
- (iii) The matter was itself not pursued seriously by Goh Eng Wah, i.e., the Appellant, and in the light of insufficient evidence and the absence of any written documents, I am unable to hold that there was any such verbal understanding in existence.

"AWARD

- (i) In the event of the Court deciding that the rental under clause 1(iv) of the

said lease should relate to the land only I award as follows :

That a fair rental under clause 1(iv) of the said lease is \$5,000.00 (Dollars Five thousand only) per month.

(ii) In the event of the Court deciding that the rental under clause 1(iv) of the said lease should relate to the land together with the buildings thereon, I award as follows :

That a fair rental under clause 1(iv) of the said lease is \$21,000.00 (Dollars Twenty One thousand only) per month".

12. Accordingly by a Summons in Chambers dated 21st December 1977 the Arbitrator pursuant to section 22(1) (a) of the Arbitration Act 1952 (Revised-1972) referred for decision of the High Court as a Special Case the question of law referred to in paragraph 2 of the Case for the Respondents.

pp 6-7

13. The said Summons in Chambers was heard by Harun, J. on 8th August 1978. Counsel for the Arbitrator applied to the Learned Judge to amend the said Summons in Chambers as an

pp 9-13

Record

application by the Arbitrator under section 22 (1) (b) of the Arbitration Act 1952 (Revised -1972) instead of section 22(1) (a) of the Act. There being no objection from Counsel for both the Appellant and the Respondents the application was allowed by the Learned Judge. On the same day the Learned Judge delivered his judgment in the following words:

p 13 "ANSWER - Clause 1(iv) of the Memorandum of lease is based on the land ONLY".

pp 17-18 14. By Notice of Appeal dated 17th August 1978 the Respondents appealed to the Federal Court against the decision of Harun, J.

pp 21-25 15. The said appeal was heard by the Federal Court
pp 25-27 on 3rd November 1981 and judgment was delivered by Raja Azlan Shah Ag L.P. on 13th November 1981. After reciting the facts and
pp 21-23 reading the terms of the lease the Learned
p 22 Acting Lord President said that it was common ground that the said cinema was erected by the lessee at his own expense some time before the execution of the said lease and that both the signatories were now dead.

16. The Learned Acting Lord President then went on to consider the question whether the operative part of the said lease, that is clause 1(iv) stood unaffected by the recital or whether the recital governed the terms of clause 1(iv). The Learned Acting Lord President said that the Court would not pretend to speculate whether the parties really intended to include the said cinema building in assessing rent, except so far as the Court could gather their intention from the recital and the operative part of the lease. The Court felt that the lease must be construed as it stood, by what appeared on the face of it, and nothing else. The Court was not concerned with the Ponsford type of situation (see Ponsford & Others v H.M.S. Aerosols Ltd. (1978) 2 All E.R. 837) nor the maxim quicquid plantatur solo, solo cedit (see the definition of "land" as defined under section 5 of the National Land Code). The Learned Acting Lord President thought that the rule to be applied to the construction of the lease had been stated with clarity by Lord Esher, M.R. in Ex Parte Dawes, In Re Moon (1886) 17 Q.B.D. 275, 286, where Lord Esher, M.R. said :

p 23

p 23

p 23-24

"Now there are three rules applicable to the construction of such an instrument. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred".

The Learned Acting Lord President said that the rule was one entirely reasonable in itself, fundamental and long established. He felt that the present case fell within the first rule, i.e., where the recital is clear and the operative part is ambiguous. The Learned Acting Lord President went on to hold that the recital in the lease was clear and particular; it referred to the said land together with the buildings erected thereon known as Star Theatre. However, the Learned Acting Lord President held that the operative part, "the said land" in clause 1(iv) of the

lease was perhaps ambiguous because it did not show whether the basis of the valuation was the land only or the land and the Star Theatre. Accordingly, the Learned Acting Lord President held that the recital being clear must determine the operative part which appeared ambiguous. The appeal was therefore allowed with costs.

17. In the Petition herein the Appellant seeks in the event that it should be decided that the rent payable under Clause 1(iv) of the Lease should relate to the land together with the buildings erected thereon that it should be remitted to the Arbitrator for determination of such rent as being the amount it would be reasonable for the Appellant and the Respondents as lessee and lessors respectively to agree having regard to the fact that the predecessors in title of the Appellant had carried out the construction of the buildings on the said land prior to the grant of the Lease and/or having regard to any other relevant factors which the Arbitrator considers would have effected the parties acting reasonably in reaching such agreement.

18. The Respondents respectfully submit that the Federal Court was correct in the view it took of the construction of the lease.
19. The Respondents further respectfully submit that the decision of the Federal Court was correct by virtue of section 5 of the National Land Code on the definition of "land".
20. The Respondents further respectfully submit that the Reddendum contained in the Lease makes it clear that the rent referred to in Clause 1 of the Lease refers to both the land and buildings and so far as the rent referred to in Clause 1 (iv) is concerned should be determined on that basis.
21. The Respondents further respectively submit that the decision of Federal Court was correct because the rent referred to in Clause 1(iv) of the Lease means the rent payable in respect of the whole of the demised premises that is to say the land and buildings erected thereon.
22. The Respondents further respectively submit that Clause 1(iv) of the Lease must be

construed in the context of the Lease as a whole and in particular having regard to the provisions for the abatement of the rent payable in the event of the Cinema being inoperable for the purposes of entertainment.

23. The Respondents further respectively submit that the Learned Arbitrator in fixing the proper and fair rental payable under Clause 1(iv) of the Lease must take the premises as he found them having regard to the improvements, without considering who had paid for the improvements (see Cuff v. J.F. Stone Property Co. Ltd. (1978) 3 WLR 256 2 All E.R. 833; Ponsford & others v. H.M.S. Aerosols Ltd. (1978) 3 WLR 241; 2 All E.R. 837).

24. So far as the Appellants claim that there should be a remission to the Arbitrator is concerned the Respondents further submit as follows :-

(a) That the Arbitrator's Award dated the 30th July 1977 that in the event of the Court deciding that the rental under Clause 1(iv) of the Lease should relate to the land together with the buildings thereon the rent payable under Clause 1(iv) is \$21,000.00 is final and

binding. The Respondents will rely on Re Knight and the Tabernacle Permanent Building Society (1892) 2 QB 613 at p. 618 and Larrinaga and Co. v Societe Franco-Americaine des Phosphates de Medulla (1923) 92 KB 45.

(b) That no application was made to either the High Court of Malaya or to the Federal Court of Malaysia for such remission.

(c) That there are no grounds under the Arbitration Act 1952 (revised - 1972) upon which such remission could be ordered.

(d) That the time for an application for remission of the award has long since passed. Under the Malaysia Rules of the Supreme Court 1957 (now repealed) Order 64 Rule 14 it was provided that an application for remission should be made within 6 weeks after the Award was made.

25. The Respondents respectfully submit that this appeal should be dismissed with costs for the following amongst other

REASONS

1. BECAUSE, as the Federal Court has rightly held, upon a true construction

of the Lease dated 16th August 1957 the proper and fair rental payable by the Appellant to the Respondents under Clause 1(iv) of the Lease should relate to the value of the land together with the buildings erected thereon.

2. BECAUSE the term "land" as used in the Lease includes buildings erected thereon by virtue of the definition of section 5 of the National Land Code 1965.
3. BECAUSE the proper and fair rental payable under Clause 1(iv) of the Lease should be determined on the value of the land together with the buildings erected thereon, regardless of who provided them or paid for them.
4. BECAUSE the rent referred to in Clause 1(iv) of the Lease means the rent payable in respect of the whole of the demised premises that is to say the land and the buildings erected thereon.

5. BECAUSE, as regards the relief sought in the second sentence of Paragraph 1 of the Petition it is not open for the Appellant on this Appeal so to contend.

C.A.BRODIE

IN THE PRIVY COUNCIL NO.6 of 1983

ON APPEAL FROM THE FEDERAL COURT OF
MALAYSIA HOLDEN AT KUALA LUMPUR

IN THE MATTER OF AN ARBITRATION
BETWEEN YAP PHOOI YIN AND YAP FOOK
SAM AS REPRESENTATIVES OF THE ESTATE OF
YAP KON FAH, DECEASED AND GOH ENG WAH;

- and -

IN THE MATTER OF THE ARBITRATION ACT
1952 (REVISED -1972)

BETWEEN

GOH ENG WAH

APPELLANT

-and-

YAP PHOOI YIN AND YAP FOOK SAM AS
REPRESENTATIVES OF THE ESTATE OF YAP
KON FAH, DECEASED

RESPONDENTS

-and-

C.M. BOYD (AS ARBITRATOR)

RESPONDENT

CASE FOR THE RESPONDENTS

HERBERT SMITH & CO.
Watling House
35-37 Cannon Street
London EC4M 5SD

Tel: 01-236-3070
Ref: 33/L98/421836

Agents for the Respondents