

4/85

No.6 of 1983

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

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 as Representatives of
the Estate of YAP KON FAH,
deceased

First
Respondents
(Appellants)

- and -

C. M. BOYD (as Arbitrator)

Second
Respondent
(Respondent)

RECORD OF PROCEEDINGS

MASONS,
10 Fleet Street,
London, EC4Y 1BA

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

Solicitors for the
Appellant

Solicitors for the
First Respondents

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

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 as Representatives of the
Estate of YAP KON FAH,
deceased

Respondents
(Appellants)

- and -

C. M. BOYD (as Arbitrator)

Respondent
(Respondent)

RECORD OF PROCEEDINGS

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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

GOH ENG WAH Appellant
(Respondent)

- and -

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

- and -

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

RECORD OF PROCEEDINGS

No. 1

In the High
Court

SPECIAL CASE

No. 1
Special
Case
17th
December
1977

20 This is a Special Case stated for the
decision of the Honourable Court in accordance
with Section 22(1)(a) of the Arbitration Act, 1952
(Revised - 1972).

1. I am the sole Arbitrator in a dispute between
the Claimant and the Respondent both abovenamed
over the proper rental payable under the terms of
a Memorandum of Lease dated 16th August, 1957
(annexed hereto and marked "CMB-1").

30 2. One of the conditions of the Memorandum of
Lease (hereinafter referred to as "the said Lease")
was that any dispute that might arise between the
parties should be referred to Arbitration; a
dispute did arise and it was referred to me as
sole Arbitrator. I was appointed sole Arbitrator
by letter dated 16th March 1977 from M/s Skrine
& Co. acting for the Claimant abovenamed and by
letter dated 28th May 1977 from M/s Shearn Delamore
& Co. acting for the Respondent abovenamed (both
annexed hereto and marked "CMB-2" and "CMB-3"
respectively).

40 3. The said Lease was executed on 16th August,
1957 between Yap Kon Fah and M/s Makhanlall
(Properties) Pte. Ltd. and is a lease for a period
of thirty (30) years of the land held under C.T.
No. 15741 for Lot No. 573, Section 62, Town of
Kuala Lumpur together with the building erected
thereon. The said building is used as a Theatre
and is known as the "Star Theatre".

In the
High Court

No.1
Special
Case
17th
December
1977

(continued)

The Claimants are the legal personal representatives of the said Yap Kon Fah, now deceased. The Respondent is lessee by way of an assignment from the said Makhanlall (Properties) Pte. Ltd. and operates and manages the said theatre.

4. The dispute for Arbitration is over the interpretation of Clause 1(iv) of the said Lease which reads as follows :

"From the beginning of the 21st year to the end of the 25th year such sum exceeding \$700/- as shall be agreed to by the parties hereto or failing agreement as shall be fixed by an Arbitrator" 10

The dispute is over the proper rental payable under the above Clause.

5. I commenced arbitration proceedings in respect of the above dispute. The parties were represented before me with the assistance of their respective Counsel. At the outset Counsel had filed before me their respective Statements of Claim. A copy each of the Statements of Claim of the Claimant and Respondent is annexed hereto and marked "CMB-4" and "CMB-5" respectively. 20

6. At the arbitration proceedings Counsel for both parties basically reiterated the several points put forth in their respective Statements of Claim. 30

7. The issue is whether the fair rental payable under Clause 1(iv) of the said Lease should relate to the value of the land only or whether it should relate to the land and buildings erected thereon.

8. For the Claimants it was contended that the fair rental should relate to the value of the land and the buildings erected thereon. The Respondent in turn contended that the fair rental payable under Clause 1(iv) should be assessed on the value of the land only. 40

9. My task as the Arbitrator was :

- (a) to decide on an interpretation of Clause 1(iv) as to which of the 2 bases is the applicable base for assessment of the fair rental payable thereunder;

(b) assess the fair rental payable under either of the 2 bases whichever is the proper and applicable base.

In the
High Court

No.1
Special
Case
17th
December
1977

10. At the arbitration it was mutually agreed by both parties that the question of interpretation of Clause 1(iv) of the said Lease be referred as a question of law for decision of the High Court on a Special Case stated under Section 22(1)(a) of the Arbitration Act, 1952.

(continued)

11. Pending the decision of the High Court on the question of law abovestated, by consent it was agreed by both parties that I hand down my Award by assessing the fair rental payable under either of the 2 bases, whichever may be applicable base.

12. I have accordingly handed down my Award on the 30th day of July, 1977 (annexed hereto and marked "CMB-6") wherein I have assessed the fair rental payable under both the bases abovestated. Thus upon the decision of the High Court as to whichever is the applicable base, my assessment in the Award of the rental payable therein would become the fair rental due under Clause 1(iv) of the said Lease.

13. There only now remains the decision of the Court on the question of the applicable base under Clause 1(iv) of the said Lease.

14. I therefore beg to state that the question for the decision of the Honourable Court is :

Whether on an interpretation of Clause 1(iv) of the said Memorandum of Lease the correct base for assessment of the fair rental payable therein should be the value of the land only or whether it should relate to the land and buildings erected thereon.

Sd: C.M. BOYD
Arbitrator

Dated this 17th day of December, 1977.

This Special Case stated for decision by the Honourable Court pursuant to Section 22(1)(a) of the Arbitration Act, 1952 is filed by M/s Shook Lin & Bok, Solicitors for the Arbitrator abovenamed.

AFFIDAVIT OF C.M. BOYD

No.2
Affidavit
of C.M.Boyd
17th
December
1977

I, C.M. BOYD, ARICS, MIS(M), a British national of full age and care and c/o No.4, Jalan Ampang, Kuala Lumpur do hereby affirm and state as follows :-

1. I am the Applicant herein and am a registered Surveyor and Valuer under the laws of Malaysia practising with Messrs. Jones Lang Wootton, Wicks & Partners of No.4, Jalan Ampang, Kuala Lumpur. 10

2. I make this application under Section 22(1)(a) of the Arbitration Act, 1952 in my capacity as the sole Arbitrator of a dispute between the Claimant and the Respondent herein over the proper rental payable to the Claimant by the Respondent for the lease of the land on which the Star Theatre in Kuala Lumpur is situate. The land is held under Title No. 15471 for Lot No.573, Section 62 in the Town of Kuala Lumpur. By a Memorandum of Lease dated 16th August, 1957, one Yap Kon Fah, Deceased being the predecessor in title to the Claimant herein (who are his legal personal representative) leased the said land together with the buildings erected thereon to M/s Makhanlall (Properties) Pte.Ltd. for a period of thirty (30) years on a progressive rental scheme. The present Respondent enjoys the benefit of the said lease by way of an assignment from M/s Makhanlall (Properties) Pte.Ltd. dated the 29th June, 1971. 20 30

3. Dispute has arisen between the Claimant and the Respondent over the proper rental payable under Clause 1(iv) of the Memorandum of Lease which reads as follows :-

"From the beginning of the 21st year to 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". 40

The parties being unable to agree on the rental as aforesaid agreed to refer the matter to arbitration as provided for in Clause 7 of the Memorandum of Lease. A copy of the Memorandum of Lease is annexed as exhibit "CMB-1" to the Special Case filed herein.

4. The terms of my appointment as sole

Arbitrator, the exact question for decision in arbitration and the arguments of parties are more particularly set out in the Case stated.

In the
High Court

No.2
Affidavit
of C.M.Boyd
17th
December
1977

5. An Arbitration was held and it concerned itself with only 2 issues:

10 1. Whether by an interpretation of Clause 1 (iv) of the Memorandum of Lease the proper rental payable thereunder should relate to the value of the land only or whether it should relate to the land and buildings erected thereon.

2. Whether there was in existence a verbal understanding between Yap Kon Fah and Makhanlall (Properties) Pte.Ltd. that the rental after the 21st year shall be based on the land value only.

(continued)

20 The parties requested that both issues be referred to the High Court as a point of law under Section 22(1)(a) of the Arbitration Act, as a Special Case. I have agreed to refer the first issue but declined to refer the second issue for the reasons stated in my Award.

30 6. Pending the decision of the High Court on a Special Case, the parties have agreed that I should hand down my Award on the assessed rental using the two alternative bases i.e. land value only and land building value, so that upon the decision of the High Court the assessed rental would be binding and the parties would know the proper rental payable upon the High Court deciding which of the 2 bases is applicable. A copy each of the consent of the respective Solicitors for the parties is annexed hereto and marked "A" and "B" respectively.

40 7. Accordingly I have on the 30th July, 1977 handed down my Award assessing the fair rental payable under either of the bases if employed. A copy of my Award is annexed to the Special Case as exhibit "CMB-6".

8. I now humbly submit as a Special Case for decision by this Honourable Court the point of law as set forth in the Special Case filed herein.

50 Affirmed at Kuala Lumpur by the said)
C.M.Boyd this 17th day of December,) Sd: Boyd
1977 at 10.30 a.m.)

In the
High Court

No.2
Affidavit
of C.M.Boyd
17th
December
1977

(continued)

Before me,

Sd: Tneh Liang Peng
Commissioner for Oaths

This Affidavit is filed by Messrs.
Shook Lin & Bok, Solicitors for the Applicant
herein and whose address for service is
Wisma MPI, 21st Floor, Jalan Raja Chulan,
Kuala Lumpur.

(CB/11137/JLW).

No.3
Summons in
Chambers
21st
December
1977

No. 3

10

SUMMONS IN CHAMBERS

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
ORIGINATING SUMMONS NO.757 OF 1977

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)

20

Between

C.M.Boyd (as Arbitrator)

Applicant

And

Yap Phooi Yin and Yap Fook
Sam as Representatives of
the Estate of Yap Kon Fah,
deceased.

Claimant

And

Goh Eng Wah

Respondent

30

SUMMONS IN CHAMBERS

LET ALL PARTIES concerned appear before
the Honourable Judge in Chambers on Tuesday,
the 10th day of January 1978, at 9.30 o'clock
in the forenoon on the hearing of an
application on the part of the Applicant herein
pursuant to Section 22(1)(a) of the Arbitration

Act, 1952 that the Claimant and the Respondent do by this Summons appear and state the nature and particulars of their respective claims to the subject matter referred for decision of this Honourable Court as a Special Case and abide by such Order as may be made hereon.

In the
High Court

No.3
Summons in
Chambers
21st December
1977

10 And that the costs of this application be borne by both the Claimant and the Respondent equally.

(continued)

Dated this 21st day of December, 1977.

Sgd: Zura binti Yahya
Senior Assistant Registrar,
High Court, Kuala Lumpur.

This Summons was taken out by Messrs. Shook Lin & Bok, Solicitors for the Applicant herein and whose address for service is Wisma MPI, 21st Floor, Jalan Raja Chulan, Kuala Lumpur.

20 This Summons will be supported by the Affidavit of C.M.Boyd affirmed on the 17th day of December 1977 and filed herein.

- To:-
1. The Claimant and/or his Solicitors, M/s Skrine & Co., Straits Trading Building, Leboh Pasar Besar, Kuala Lumpur.
 2. The Respondent and/or his Solicitors, M/s. Shearn, Delamore & Co.,
30 No.2 Benteng,
Kuala Lumpur.

APPLICATION FOR ADJOURNMENT

No.4
Application
for an
Adjournment
27th
December
1977

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING SUMMONS NO.757 OF 1977

Between

C.M.Boyd (as Arbitrator)

Applicant

And

Yap Phooi Yin and Yap
Fook Sam as Representatives
of the Estate of Yap Kon Fah,
Deceased

Claimant

10

And

Goh Eng Wah

Respondent

Mr. Das for Applicant (Arbitrator)
Mr. S.D.K.Peddie for Claimant
Mr. C.Abraham for Respondent

IN OPEN COURT BEFORE
HARUN J. ON 27.6.1978

NOTES OF EVIDENCE

Abraham:

20

Applies for adjournment on the grounds that the matter is in the charge of Mr. V.L.Kandan and is at present a candidate in the General Elections.

Peddie:

Objects. Matter was first heard in Chambers on 10 Jan. 1978. Adjourned to Open Court to 21 February 1978.

The Respondent asked for adjournment to 23 March 1978 which at Respondent's request was adjourned sine die.

On 28 April 1978 - claimant asked for reinstatement, hence fixed for hearing to-day.

Only matter to be argued is the point of law referred by Arbitrator - as set out in para.14 of the Special Case.

30

Abraham:

Not ready to argue the case himself.

Das: Nothing to say.

Court:

Adjournment allowed but with costs
thrown away today to Arbitrator and
Claimant in any event.

To 8 August 1978.

Sgd. Harun

27 June 1978.

In the
High Court

No.4
Application
for an
Adjournment
27th
December
1977

(continued)

No. 5

ORAL SUBMISSIONS

No.5
Oral
Submissions
8th August
1978

10 IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING SUMMONS NO.757 OF 1977

Between

C.M.Boyd (as Arbitrator) Applicant

And

Yap Phooi Yin and Yap
Fook Same as Representatives
of the Estate of Yap Kon Fan,
Deceased Claimant

And

20 Goh Eng Wah Respondent

Miss Stanley for Applicant
Mr. Wong Chong Wah for Claimant
Mr. V.L.Kandan for Respondent.

IN OPEN COURT BEFORE
HARUN J. ON 8.8.1978

NOTES OF EVIDENCE

Stanley:

Applies to amend the Summons - section 22(1)(a)
to under section 22(1)(b) Arbitration Act.

30 Wong: No objection to amendment.

In the
High Court

No.5
Oral
Submissions
8th August
1978

(continued)

Kandan: No objection to amendment.

Court:

So amended.

Kandan:

On procedure -

O.54A r.1 - here application is for interpretation of the lease -

Refers to Mallal's S.C.765 -

but here submits wrong procedure used as Applicant is asking "appear and state nature of your claim" -

10

Also O.54 r.11A - confined to sections 5, 6, 12 and 20 of Arbitration Ordinance - no mention of 22(1)(b).

Also O.54 r.4F - appearance not required but here asked to appear and state your case.

Appears Applicants have followed the English procedure -

Atkin Court form - but cannot be reconciled with our procedure.

20

See O.54 r.1 - Construction of Will - p.766 Mallal's.

Wong:

Here not for Court to construe documents but Case stated.

Then O.54A r.1 does not apply.

The correct procedure is O.54 - i.e. the English procedure is applicable - see also O.72 r.2

Substance important than form - O.70.

30

Refers Temple Steamship Co.Ltd. v. V/O

Sovgracht (1943) 76 Lloyd's L.R.35 - application to court for extension of time to set aside award.

Here only issue is for Court on Case stated to decide which of the two alternatives should apply.

Submits correct procedure used here.

Stanley:

O.54 r.1. does not apply here.

40

The application is under O.34 r.1 - see also Mallal's 422. Atkin Vol.29 p.234.

Atkin Vol. 6 p.64.

Submits correct form used.

Court:

I hold correct procedure used here.

Sgd. Harun

Hearing adjourned to 2 p.m.

In the
High Court

Sgd. Harun

No.5

Court as before.
Hearing resumed.

Oral
Submissions
8th August
1978

Sgd. Harun

Wong:

(continued)

10 Special Case stated - only question of law
formulated can be argued before the Court -
Russell on Arbitration (18th Edition) 253 -
footnote 44.

Point of law is at para.14.

Court cannot alter question of law - p.254
(Russell)

Award of Arbitrator set out (CMB6) - in the form
of an alternative -

Clause 1(iv) - \$5,000 on land only OR
20,000 land and buildings.

20 Russell p.254 - Court to decide question of law
- one of two alternative decisions of arbitrator
will come into operation.

Russell p.258 - judgment final.

Memorandum of Lease

Preamble - "said land together with the
buildings erected thereon".

Clause 1: The rent of the said "land" shall be
as follows :

NLO section 5 - land includes all things attached
to the earth etc.

30 Cap.138 - section 2 same definition.

Submits if the rent does not include buildings
then it would have to be in very clear terms
stated in the lease - failing which legal
definition will apply.

Preamble - monthly rental.

Clause 1 - "the said land" intention not clear
enough to exclude buildings.

The words not clear enough to override other
provisions in the lease that these words exclude
the buildings.

40 Submits parties here intend to demise the land
together with the buildings.

Clause 3(b) - covenant to keep building in repair.

3(c) - decorate the cinema every 5 years and
on all concern the building.

Clause 6 - abatement of rent if cinema cannot be
used.

Submits to consider rent - land and buildings
should be taken together.

50 In the event that it is alleged that Evidence
before Arbitrator not available to Court - should
not be used:

In the
High Court

No.5
Oral
Submissions
8th August
1978

(continued)

1. Evidence need not be before the Court - because it is Case stated.
2. Nothing on face of award which enable this argument to be advanced.
3. Arbitrator specially chosen by the parties for his knowledge of property values and letting values and was consequently entitled to form his own opinion and not required to act upon evidence - 10

Refers to CMB2 - 16 March 1977.

CMB3 - 28 May 1977 - reply.

Affidavit (2) - Arbitrator qualified -
Mediterranean & Eastern Export Co.Ltd. v.
Fortress Fabrica (Manchester) Ltd. (1948)
2 All E.R. 186.

Kandan:

20

Has the Court sufficient facts to determine the question of law.

If Court holds there is not sufficient facts - remit back the case - Russell p.254.

Both signatories to the lease are dead.

Submits contracting parties on 16 Aug.1957 - clearly intended that only the land be rented out.

2. That the Lessee should build the cinema and because the Lessee spent a large sum of money to put up the theatre and because the reversing value of the land to the landlord would be so enhanced because of the land and building - rental was intended by the parties to be nominal. 30

That is why progressive rental is \$400 (10 yrs.) \$500 (5 years) \$700 (5 yrs.).

If parties intended land and cinema - it should have described "premises".

Submits inconceivable that the cinema could be rented out at \$400 p.m.

Clause 3(b) lessee built the cinema - subsequent clauses merely to protect interest of land owner so that he has a building at the end of the lease.

Clause 3(d) lessee undertaking lessor's taxes and rates - including Quit Rent - section 320 NLO.

Clause 3(h) Deliver up not only the land but also the building. 50

Clause 5 - specially worded to show that rent is only for the land not the building.
Clause 6 - waiver of rental if cinema is destroyed by fire etc.

Submits that the fact that the theatre which was built by lessee at his expense will belong to the lessor without any compensation to the lessee amply proves that the rental collected or envisaged was only for the land and intended to be nominal.

Clause 3(e) 1957 building to be insured for \$320,000 - can be assumed that this was cost of building at that date.

Shown rent receipt - Wong objects - this is going into the evidence.

Jowitts Dictionary of English Law (2nd Edition) 1544 - "rent" includes "ground rent" when land leased to another person to build upon.

Submits it was intended by the parties that Clause 1(iv) was rent for land and not the theatre.

Wong:

Refers Universal Cargo Carriers Corporation vs. Citati (1957) 2 QB @ 450.

O.64 r.4 - power of Court to remit - under section 22 of Arbitration Act.

Court:

Answer - Clause 1(iv) of Memorandum of Lease is based on the land ONLY.

With costs to Respondent.

In the
High Court

No.5
Oral
Submissions
8th August
1978

(continued)

10

20

30

In the
High Court

No. 6

ORDER

No.6
Order
8th August
1978

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

ORIGINATING SUMMONS NO.757 OF 1977

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)

10

Between

C.M.Boyd (as Arbitrator)

Applicant

And

Yap Phooi Yin and Yap Fook
Sam as Representatives of
the Estate of Yap Kon Fah,
deceased

Claimant

And

Goh Eng Wah

Respondent

20

BEFORE THE HONOURABLE MR. JUSTICE HARUN HASHIM
THIS 8TH DAY OF AUGUST 1978

IN OPEN COURT

O R D E R

The Summons in Chambers dated the 21st
day of December 1977 came up for hearing
on the 10th day of January 1978 in Chambers
and on the 27th day of June 1978 in open
court in the presence of Mr. Cyrus Das of
Counsel for the Applicant, Mr. S.D.K.Peddie
of Counsel for the Claimant and Mr. Cecil
Abraham of Counsel for the Respondent
IT WAS ORDERED that the said Summons in
Chambers be adjourned to the 8th day of
August, 1978 with costs thrown away to the
Arbitrator and Claimant in any event AND
UPON HEARING the said Summons in Chambers
coming up for hearing this day in the
presence of Miss Elizabeth Stanley of Counsel
for the Applicant, Mr. Wong Chong Wah of
Counsel for the Claimant and Mr. V.L.Kandan
of Counsel for the Respondent IT IS ORDERED

30

40

that the fair rental payable under Clause 1(iv) of the Memorandum of Lease dated the 16th day of August, 1957 be assessed with reference to the land only AND IT IS FURTHER ORDERED that the costs be taxed by a proper Officer of the Court and be paid by the Claimant to the Respondent.

In the
High Court

No.6
Order
8th August
1978

(continued)

Dated the 8th day of August 1978.

Sd: Illegible

10

SENIOR ASSISTANT REGISTRAR
HIGH COURT, KUALA LUMPUR.

No. 7

SUMMONS

No.7
Summons
17th August
1978

SUMMONS IN CHAMBERS

20

LET ALL PARTIES concerned attend the Judge in Chambers at the High Court, Kuala Lumpur on the 19th day of September, 1978 at 9.30 o'clock in the forenoon on the hearing of an application on the part of the Claimant abovenamed for an Order that the Claimant be given leave to appeal against the Order of this Court made on the 9th day of August, 1978 in respect of the application made by way of Summons in Chambers dated the 21st day of December, 1977 and that the costs of this application be costs in the cause.

Dated this 17th day of August, 1978.

30

Sd: H.P.Singam
Assistant Registrar
High Court, Kuala Lumpur

This Summons was taken out by Messrs. SKRINE & CO., Straits Trading Building, No.4, Leboh Pasar Besar, Kuala Lumpur, Solicitors for the Claimant abovenamed.

This Summons is taken out ex-parte.

In the
High Court

No. 8

ORDER GIVING LEAVE TO
APPEAL TO FEDERAL COURT

No.8
Order giving
Leave to
Appeal to
Federal
Court
25th
September
1978

BEFORE THE HONOURABLE MR. JUSTICE HARUN
THIS 25TH DAY OF SEPTEMBER, 1978

IN CHAMBERS

O R D E R

THIS SUMMONS coming on for hearing on the 19th day of September 1978 in Chambers in the presence of Mr. Anantham Kasinather of Counsel for the Claimant abovenamed and Mr. P.Royan of Counsel for the Respondent abovenamed IT WAS ORDERED that this application be adjourned AND the same coming on for hearing this 25th day of September 1978 in the presence of Mr. Lee Tatt Boon of Counsel for the Claimant abovenamed AND UPON READING the Summons in Chambers dated the 17th day of August 1978 filed herein IT IS ORDERED that the Claimant be and is hereby given leave to appeal against the Order of this Court made on the 8th day of August 1978 in respect of this application made by way of Summons in Chambers dated the 21st day of December 1977 AND IT IS ORDERED that the costs of this application be costs in the cause.

Given under my hand and the seal of the Court this 25th day of September 1978.

Sgd: Illegible
Senior Assistant Registrar,
High Court, Kuala Lumpur.

NOTICE OF APPEAL

IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

No.9
Notice of
Appeal
17th August
1978

CIVIL APPEAL NO. 135 OF 1978

10 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

Yap Phooi Yin and Yap Fook
Same as Representatives of
the Estate of Yap Kon Fah,
deceased

Appellant

And

20 C.M. Boyd (as Arbitrator)

Respondent

(In the Matter of Summons in Chambers
dated the 21st day of December 1977
in Originating Summons No.757 of 1977
in the High Court of Malaya at Kuala
Lumpur

Between

C.M.Boyd (as Arbitrator)

Applicant

And

30 Yap Phooi Yin and Yap Fook
Sam as Representatives of
the Estate of Yap Kon Fah,
deceased

Claimant

And

Goh Eng Wah

Respondent)

NOTICE OF APPEAL

40 TAKE NOTICE that Yap Phooi Yin and Yap
Fook Sam as Representatives of the Estate of
Yap Kon Fah, deceased, the Appellant abovenamed,
being dissatisfied with the decision of the
Honourable Mr. Justice Datuk Harun Hashim given
at Kuala Lumpur, on the 8th day of August, 1978
appeals to the Federal Court against the whole

In the
Federal Court

No.9
Notice of
Appeal
17th August
1978

(continued)

of the said decision.

Dated this 17th day of August, 1978.

Sgd: Skrine & Co.
Appellant's Solicitors.

To:-

The Registrar,
The Federal Court,
Kuala Lumpur.

And to -

The Registrar,
The High Court in Malaya,
at Kuala Lumpur.

10

And to -

M/s. Shook Lin & Bok,
Wisma MPI, 21st Floor,
Jalan Raja Chulan,
Kuala Lumpur, Solicitors
for the Respondent/Applicant
abovenamed.

And to -

M/s. Shearn, Delamore & Co.,
No.2, Benteng,
Kuala Lumpur, Solicitors
for the Respondent/Respondent
abovenamed.

20

MEMORANDUM OF APPEAL

No.10
Memorandum
of Appeal
15th April
1981

IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

CIVIL APPEAL NO.135 OF 1978

10

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

20

Yap Phooi Yin and Yap Fook
Sam as Representatives of
the Estate of Yap Kon Fah,
deceased

Appellant

And

C.M. Boyd (as Arbitrator)

Respondent

And

Goh Eng Wah

Respondent

(In the Matter of Summons in Chambers
dated the 21st day of December, 1977
in Originating Summons No.757 of
1977 in the High Court of Malaya at
Kuala Lumpur

30

Between

C.M.Boyd (as Arbitrator)

Applicant

And

Yap Phooi Yin and Yap
Fook Sam as Representatives
of the Estate of Yap Kon
Fah, deceased

Claimant

And

Goh Eng Wah

Respondent)

MEMORANDUM OF APPEAL

40

Yap Phooi Yin and Yap Fook Sam as
Representatives of the Estate of Yap Kon Fah,
deceased the Appellant abovenamed appeals to

In the
Federal Court

No.10
Memorandum
of Appeal
15th April
1981

(continued)

the Federal Court against the whole of the decision of the Honourable Mr. Justice Datuk Harun Hashim given at Kuala Lumpur, on the 8th day of August, 1978, on the following ground :

The learned Judge was wrong in law in holding that the fair rental payable under Clause 1(iv) of the lease should relate to the value of the land only and ought to have held that the arbitrator should base his assessment of the rent payable on the value of the land and the buildings erected thereon.

10

Dated this 15th day of April, 1981.

Sd: Illegible

Solicitors for
the Appellant.

To:-

The Registrar,
The Federal Court,
Kuala Lumpur.

20

And to -

M/s. Shook Lin & Bok,
Wisma MPI, 21st Floor,
Jalan Raja Chulan,
Kuala Lumpur, Solicitors
for the Respondent/Applicant
abovenamed.

And to -

M/s. Shearn, Delamore & Co.,
No.2 Benteng,
Kuala Lumpur, Solicitors
for the Respondent/Respondent
abovenamed.

30

The address for service of the Appellant is Messrs. Skrine & Co., Advocates & Solicitors, Straits Trading Building, No.4 Leboh Pasar Besar, Kuala Lumpur.

GROUNDS OF JUDGMENT

No.11
Grounds of
Judgment
13th November
1981

IN THE FEDERAL COURT OF MALAYSIA HOLDEN
AT KUALA LUMPUR
(APPELLATE JURISDICTION)

CIVIL APPEAL NO.135 OF 1978

10 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

20 Yap Phooi Yin and Yap Fook
Sam as Representatives of
the Estate of Yap Kon Fah,
deceased Appellant

And

C.M. Boyd (as Arbitrator) Respondent

(In the Matter of Summons in Chambers
dated the 21st day of December, 1977
in Originating Summons No.757 of 1977
in the High Court of Malaya at Kuala
Lumpur

Between

30 C.M.Boyd (as Arbitrator) Applicant

And

Yap Phooi Yin and Yap Fook
Sam as Representatives of
the Estate of Yap Kon Fah,
deceased Claimant

And

Goh Eng Wah Respondent)

40 Coram: Raja Azlan Shah, Ag. L.P.Malaysia
Lee Hun Hoe, C.J. Borneo
Mohd. Azmi, J.

JUDGMENT OF THE COURT

In this appeal the question arises as to the

In the
Federal Court

No.11
Grounds of
Judgment
13th November
1981

(continued)

construction of a lease executed on August 16, 1957 and it turns upon the relative importance of a recital and the operative part of the said lease in clause 1(iv) infra. The recital states that the registered proprietor of the land held under C.T.No.15741 for Lot No.573, Section 62, in the town of Kuala Lumpur, in area 0 acres 2 roods 27.9 poles (hereinafter referred to as "the said land") do hereby lease to MAKHANLALL (PROPERTIES) LTD. the said land together with the buildings erected thereon and known as Star Theatre as tenant for 30 years at a monthly rental as stated hereinafter, subject to the agreement and powers implied in the Land Code and subject to the stipulations, modifications, terms and conditions hereinafter contained. Then the lease continues with the operative parts. Clause 1 contains the provisions for rent. It reads :

10

20

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

(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 as shall be fixed by an arbitrator."

Clause 2 says that the rent shall be payable in advance.

30

Clause 3 contains the lessee's usual covenants for the maintenance of the Star Theatre, insurance of the said building in the joint names of the lessor or lessee, entry of the premises to view the state of repairs and provisions against assignment, sub-letting or part with possession without consent, and delivery of vacant possession with all fixtures fittings and additions. Clause 4 contains the lessor's covenants for quiet and peaceful enjoyment and option for renewal. Clause 5 provides for determination of the lease and taking possession of the said cinema and all other buildings erected by the lessee on the said land when rent is unpaid in certain circumstances. Clause 6 provides for the suspension of rent when the lessee is unable to operate or use the said cinema by reason of war, riot, civil commotion or fire. Clause 7 provides for arbitration in case of dispute or difference between the parties.

40

50

It is common ground that the said cinema was erected by the lessee at his own expense some time before the execution of the said

10 lease. Both the signatories are now
dead. There is now a dispute as to the
amount of rent payable in the light of
clause 1(iv). The matter went to
arbitration. The arbitrator gave his
final award (see Larrinaga & Co. v.
Societe France-Americaine (1923) 92 LJ
KB 45, 48). He then referred it to the
High Court in the form of a special case,
which is as follows :

In the
Federal Court

No.11
Grounds of
Judgment
13th November
1981

(continued)

"(1) In the event of the Court
deciding that the rental under
Clause 1(iv) of the said lease
should relate to the land only
the fair rental under Clause
1(iv) of the said lease is
\$5,000.00 per month.

20 (2) 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
erected thereon the fair rental
under Clause 1(iv) of the said
lease is \$21,000.00 per month."

Harun, J. in what must surely be the
shortest judgment on record, answered it
with the words 'on the land only'.

30 The question which we have to decide
is whether the operative part of the said
lease, that is clause 1(iv) stands
unaffected by the recital or whether the
recital governs the terms of clause 1(iv).
We do not pretend to speculate whether the
parties really intended to include the
said cinema building in assessing rent,
except so far as we can gather their
intention from the recital and the operative
40 part of the said lease. We feel that the
said lease must be construed as it stands,
by what appears on the face of it, and
nothing else. We are not now considering
any question of rectification. If that
is so, we should have to admit evidence which
is not admissible on the question of
construction. In the circumstances neither
the Ponsford type of situation (see Ponsford
and Others v. H.M.S. Aerosols Ltd. (1978)
2 All E.R.837) nor the maxim quicquid plantatur
50 solo, solo cedit (see the definition of "land"
as defined under section 5 of the National
Land Code) applies in this case. In our view
the rule to be applied to the construction
of the lease has been stated with clarity by
Lord Esher, M.R. in Ex Parte Dawes v. In Re Moon

In the
Federal Court

No.11
Grounds of
Judgment
13th November
1981

(continued)

(1886) 17 QBD 275 at 286. It is one
entirely reasonable in itself, fundamental
and long established.

"Now there are three rules applicable
to the construction of such an instru-
ment. If the recitals are clear and
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."

10

It seems to us that the present case
falls within the first rule, i.e. where
the recital is clear and the operative part
is ambiguous. In the present case the
recital is clear and particular; it refers
to the said land together with the buildings
erected thereon and known as Star Theatre.
But the operative part, "The said land" in
clause 1(iv) is perhaps ambiguous because
it does not show whether the basis of the
valuation is the land only or the land and
the Star Theatre. Therefore it seems to us
that the recital which is clear must
determine the operative part which appears
ambiguous.

20

30

The appeal is allowed with costs here
and below.

RAJA AZLAN SHAH
(RAJA AZLAN SHAH)
ACTING LORD PRESIDENT,
MALAYSIA.

Kuala Lumpur
13th November 1981

Notes: (1) Hearing in Kuala Lumpur on
Tuesday , 3rd November, 1981. 40
(2) Counsel: Mr.Wong Chong Wah for
Appellant
Solicitors: Messrs.
Skrine & Co.,
Kuala Lumpur

Mr.Shankar for Respondent
Goh Eng Wah.

Solicitors: Messrs.
Shearn, Delamore & Co.,
Kuala Lumpur

50

Mr. C.Das for Arbitrator
Solicitors: Messrs. Shook Lin
& Bok, Kuala Lumpur.

In the
Federal Court

No.11
Grounds of
Judgment
13th November
1981

(continued)

No.12

ORDER

No.12
Order
13th November
1981

IN THE FEDERAL COURT OF MALAYSIA HOLDEN
AT KUALA LUMPUR
(APPELLATE JURISDICTION)

CIVIL APPEAL NO. 135 OF 1978

10

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)

20

Between

Yap Phooi Yin and Yap Fook
Sam as Representatives of
the Estate of Yap Kon Fah,
deceased

Appellant

And

C.M.Boyd (as Arbitrator)

Respondent

And

Goh Eng Wah

Respondent

30

(In the Matter of Summons in Chambers
dated the 21st day of December, 1977
in Originating Summons No.757 of 1977
in the High Court of Malaya at Kuala
Lumpur

Between

C.M.Boyd (as Arbitrator)

Applicant

In the
Federal Court

No.12
Order
13th November
1981

And

Yap Phooi Yin and Yap Fook
Sam as Representatives of
the Estate of Yap Kon Fah,
deceased Claimant

And

(continued)

Goh Eng Wah Respondent

CORAM:

RAJA AZLAN SHAH, ACTING LORD PRESIDENT,
MALAYSIA; 10
LEE HUN HOE, CHIEF JUSTICE, HIGH COURT, BORNEO;
MOHD. AZMI, JUDGE, HIGH COURT, MALAYA.

IN OPEN COURT
THIS 13TH DAY OF NOVEMBER, 1981

O R D E R

THIS APPEAL coming on for hearing this
3rd day of November, 1981, in the presence
of Mr. Wong Chong Wah of Counsel for the
Appellant, Mr. M.Shankar of Counsel for the
Respondent, Goh Eng Wah, and Mr. C.Das of
Counsel for the Respondent (Arbitrator) 20
AND UPON READING the Record of Appeal filed
herein AND UPON HEARING Counsel as aforesaid
IT WAS ORDERED that this Appeal do stand
adjourned for Judgment and the same coming
on for Judgment this day at Kuala Lumpur in
the presence of Mr. M.Shankar of Counsel for
the Respondent, Goh Eng Wah and mentioning
on behalf of Messrs. Skrine & Co., Solicitors 30
for the Appellant and Miss P.H.Teo of Counsel
for the Respondent (Arbitrator) IT IS ORDERED
that the Appeal be and is hereby allowed
AND IT IS ORDERED that the rental under
Clause 1(iv) of the Lease executed on August
16th, 1957 between the predecessor in title
of the Appellant and Makhanlall (Properties)
Ltd., the predecessor in title of the
Respondent, Goh Eng Wah, should relate to
the land together with the buildings erected
thereon AND IT IS FURTHER ORDERED that the 40
Respondent, Goh Eng Wah do pay to the
Appellant the costs of this Appeal and in
the Court below as taxed by the proper
officer of the Court AND IT IS LASTLY ORDERED
that the sum of \$500.00 (Ringgit Five Hundred
only) lodged in Court by the Appellant as
security for costs of the Appeal be refunded
to the Appellant.

Given under my hand and Seal of the Court this 13th day of November, 1981.

In the Federal Court

Sgd. Illegible

SENIOR ASSISTANT REGISTRAR
FEDERAL COURT, MALAYSIA
KUALA LUMPUR

No.12
Order
13th November
1981

(continued)

10 This Order is taken out by Messrs.
Skrine & Co. Straits Trading Building, No.4
Leboh Pasar Besar, Kuala Lumpur, Solicitors
for the Appellant abovenamed.

No.13

NOTICE OF MOTION FOR
CONDITIONAL LEAVE TO
APPEAL

No.13
Notice of
Motion for
Conditional
Leave to
Appeal
16th
December
1981

IN THE FEDERAL COURT OF MALAYSIA HOLDEN
AT KUALA LUMPUR
(APPELLATE JURISDICTION)

CIVIL APPEAL NO.135 OF 1978

20 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

30 Yap Phooi Yin and Yap Fook
Sam as Representatives of
the Estate of Yap Kon Fah,
deceased

Appellant

And

C.M.Boyd (as Arbitrator)

Respondent

And

Goh Eng Wah

Respondent

In the
Federal Court

No.13
Notice of
Motion for
Conditional
Leave to
Appeal
16th
December
1981

(In the Matter of Summons in
Chambers dated the 21st day of
December, 1977 in Originating
Summons No.757 of 1977 in the
High Court of Malaya at Kuala
Lumpur

Between

C.M.Boyd (as Arbitrator) Applicant

And

(continued)

Yap Phooi Yin and Yap Fook
Sam as Representatives of
the Estate of Yap Kon Fah,
deceased

10

Claimant

And

Goh Eng Wah

Respondent)

NOTICE OF MOTION

TAKE NOTICE that on the 11th day of
January 1981 at 9.30 o'clock in the forenoon
or so soon thereafter as counsel can be
heard, Counsel for the above Respondent
Goh Eng Wah will move the Court for the
following orders namely :-

20

- (i) That conditional leave be granted
to the above Respondent Goh Eng
Wah to appeal to His Majesty The
Yang Di-Pertuan Agong against the
whole of the decision of this
Honourable Court given on the
13th day of November 1981 wherein
this Honourable Court allowed the
Appellant's appeal against the
Order of the High Court of Malaya
at Kuala Lumpur given on the 8th
day of August 1978. 30
- (ii) That there be a stay of execution
in respect of the costs of the
appeal as well as the costs of the
High Court.
- (iii) Such further or other orders and
directions. 40
- (iv) The costs of this application be
provided for.

Dated this 16th day of December 1981.

Sd: Shearn Delamore & Co.
SOLICITORS FOR THE RESPONDENT
GOH ENG WAH

In the
Federal Court

No.13
Notice of
Motion of
Conditional
Leave to
Appeal
16th December
1981

Sd: W.S.Tan
Senior Assistant Registrar
Federal Court
Malaysia
Kuala Lumpur

10 To:- The Appellant
and/or his solicitors
Messrs. Skrine & Co.,
4 Straits Trading Building
Leboh Pasar Besar
KUALA LUMPUR

(continued)

This Notice of Motion is filed by Messrs.
Shearn Delamore & Co. and Drew & Napier,
Solicitors for the Respondent Goh Eng Wah
whose address for service is No.2 Benteng
Kuala Lumpur.

20 This Notice of Motion will be supported
by the Affidavit of Mr. Mahadev Shankar
affirmed on the 16th day of December 1981.

In the
Federal Court

No. 14

AFFIDAVIT OF MAHADEV
SHANKAR

No.14
Affidavit of
Mahadev
Shankar
16th December
1981

IN THE FEDERAL COURT OF MALAYSIA HOLDEN
AT KUALA LUMPUR
(APPELLATE JURISDICTION)

CIVIL APPEAL NO.135 OF 1978

In the Matter of an Arbitration
between Yap Phooi Yin and Yap
Fook Sam as Representatives of 10
the Estate of Yap Kon Fah,
deceased and Goh Eng Wah

And

In the Matter of the
Arbitration Act, 1952
(Revised - 1972)

Between

Yap Phooi Yin and Yap Fook
Sam as Representatives of
the Estate of Yap Kon Fah,
deceased Appellant 20

And

C.M.Boyd (as Arbitrator) Respondent

And

Goh Eng Wah Respondent

(In the Matter of Summons in Chambers
dated the 21st day of December, 1977
in Originating Summons No.757 of
1977 in the High Court of Malaya at
Kuala Lumpur 30

Between

C.M.Boyd (as Arbitrator) Applicant

And

Yap Phooi Yin and Yap Fook
Sam as Representatives of
the Estate of Yap Kon Fah,
deceased Claimant

And

Goh Eng Wah Respondent)

A F F I D A V I T

In the
Federal Court

I, MAHADEV SHANKAR of full age and a Malaysian citizen residing at 11A Gerbang Ampang Hilir, Kuala Lumpur affirm and say as follows:

No.14
Affidavit of
Mahadev
Shankar
16th
December
1981

10 1. I am the solicitor in charge and have conduct of this matter and am duly authorised to affirm this Affidavit. The facts deposed herein are within my personal knowledge save where the contrary appears. (continued)

20 2. On the 13th day of November 1981 this Honourable Court allowed the Appellant's appeal against the judgment of the High Court dated the 8th day of August 1978 wherein the High Court ruled that the fair rental under Clause 1(iv) of the Memorandum of Lease dated the 16th day of August 1957 should be assessed with reference to the land only as opposed to the land together with the buildings erected thereon.

3. The matter in dispute in this appeal is the fair rental under Clause 1(iv) of the Memorandum of Lease for the period of 5 years from the 21st to the 25th year thereof.

30 4. The value of the matter in dispute is upwards of twenty-five thousand dollars in that the rental for the aforesaid period of five years calculated in accordance with the construction placed upon the said lease by the Federal Court would amount to \$1,260,000 and if calculated in accordance with the construction placed by the High Court is \$300,000.

40 5. The Respondent Goh Eng Wah is desirous of appealing to His Majesty The Yang Di-Pertuan Agong against the said judgment made by this Honourable Court on the 13th day of November 1981 which judgment is a final judgment of this Honourable Court.

6. As the amount involved is in excess of \$25,000 I verily believe that the Respondent Goh Eng Wah is entitled to conditional leave to appeal to His Majesty The Yang Di-Pertuan Agong.

7. I therefore pray for an order in terms of this Motion.

In the
Federal Court

No.14
Affidavit of
Mahadev
Shankar
16th December
1981

AFFIRMED by the said)
MAHADEV SHANKAR at)
Kuala Lumpur this) Sd: M.Shankar
16th day of December)
1981 at 10.20 a.m.)

Before me,
Sd: Yee Soon Kwong
Commissioner for Oaths
Kuala Lumpur

(continued)

(YEE SOON KWONG)

10

COMMISSIONER FOR OATHS

This Affidavit is filed by Messrs. Shearn
Delamore & Co. Solicitors for the above
Respondent Goh Eng Wah whose address for
service is No.2 Benteng, Kuala Lumpur.

No.15
Order giving
Conditional
Leave to
Appeal to
The Yang
Di-Pertuan
Agong
11th January
1982

No.15

ORDER GIVING CONDITIONAL
LEAVE TO APPEAL TO THE
YANG DI-PERTUAN AGONG

20

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

Yap Phooi Yin and Yap Fook
Sam as Representatives of
the Estate of Yap Kon Fah,
deceased

30

Appellant

And

C.M.Boyd (as Arbitrator)

Respondent

And

Goh Eng Wah

Respondent

(In the Matter of Summons in Chambers
dated the 21st day of December, 1977
in Originating Summons No.757 of 1977
in the High Court of Malaya at Kuala
Lumpur

40

Between
C.M.Boyd (as Arbitrator) Applicant
And
Yap Phooi Yin and Yap
Fook Sam as Representatives
of the Estate of Yap Kon
Fah, deceased Claimant
And
Goh Eng Wah Respondent

In the
Federal Court

No.15
Order giving
Conditional
Leave to
Appeal to
The Yang
Di-Pertuan
Agong
11th January
1982

(continued)

10 CORAM:- SUFFIAN, LORD PRESIDENT, FEDERAL COURT, MALAYSIA
SALLEH ABAS, JUDGE, FEDERAL COURT, MALAYSIA
ABDUL HAMID, JUDGE, FEDERAL COURT, MALAYSIA

IN OPEN COURT
THIS 11TH DAY OF JANUARY 1982

O R D E R

20 UPON MOTION made unto Court this day in the presence of Mr. M.Shankar of Counsel for the Respondent and Mr. Vinayak P.Pradhan of Counsel for the Appellant AND UPON READING the Notice of Motion dated the 16th day of December 1981 and the Affidavit of Mahadev Shankar affirmed on the 16th day of December 1981 both filed herein AND UPON HEARING Counsel as aforesaid IT IS ORDERED that leave be and is hereby granted to the Respondent abovenamed to appeal to His Majesty the Yang Di-Pertuan
30 Agong against the whole of the decision of this Honourable Court given on the 13th day of November 1981 wherein this Honourable Court allowed the Appellant's appeal against the Order of the High Court of Malaya at Kuala Lumpur given on the 8th day of August 1978 upon the following conditions :-

40 (a) That the Respondent abovenamed do within three (3) months from the date hereof enter into good and sufficient security to the satisfaction of the Senior Assistant Registrar Federal Court, Malaysia in the sum of \$5,000/- (Ringgit Five thousand only) for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the Appellant abovenamed in the event of the Respondent abovenamed not obtaining an

In the
Federal Court

No.15
Order giving
Conditional
Leave to
Appeal to
The Yang
Di-Pertuan
Agong
11th January
1982

(continued)

Order granting him final leave
to appeal or of the Appeal being
dismissed for non-prosecution,
or of His Majesty the Yang Di-
Pertuan Agong ordering the
Respondent to pay the Appellant
costs of the Appeal, as the
case may be; and

- (b) That the Respondent abovenamed
do within three (3) months from 10
the date hereof take the
necessary steps for the purpose
of procuring the preparation of
the Record and despatch thereof to
England
- (c) That there be a stay of execution
in respect of the costs of the
Appeal as well as the costs of
the High Court
- (d) That the costs of this application 20
be provided for.

GIVEN under my hand and the seal of
the Court this 11th day of January 1982

Sd: W.S.Tan

SENIOR ASSISTANT REGISTRAR
FEDERAL COURT
KUALA LUMPUR

This Order is filed by Messrs. Shearn
Delamore & Co. and Drew & Napier whose
address for service is Chartered Bank Building, 30
No.2 Benteng, Kuala Lumpur, Solicitors for
the Respondent.

No. 16
NOTICE OF MOTION FOR
EXTENSION OF TIME

Not reproduced

In the
Federal Court

No.16
Notice of
Motion for
Extension
of Time
17th April
1982

Not reproduced

No.17
AFFIDAVIT OF YEOH JIN
AIK

Not reproduced

No.17
Affidavit of
Yeoh Jin Aik
17th April
1982

Not reproduced

No.18
ORDER EXTENDING TIME

Not reproduced

No.18
Order extend-
ing time
17th May 1982

Not reproduced

In the
Federal Court

No.19

No.19
Order giving
Final Leave
to Appeal to
H.M. The Yang
Di-Pertuan
Agong
24th August
1982

ORDER GIVING FINAL LEAVE
TO APPEAL TO H.M. THE YANG
DI-PERTUAN AGONG

IN THE FEDERAL COURT OF MALAYSIA HOLDEN
AT KUALA LUMPUR
(APPELLATE JURISDICTION)

CIVIL APPEAL NO.135 OF 1978

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

10

And

In the Matter of the
Arbitration Act 1952
(Revised - 1972)

Between

Yap Phooi Yin and Yap Fook
Sam as Representatives of
the Estate of Yap Kon Fah,
deceased Appellant

20

And

C.M.Boyd (as Arbitrator) Respondent

And

Goh Eng Wah Respondent

(In the Matter of Summons in Chambers
dated the 21st day of December, 1977
in Originating Summons No.757 of
1977 in the High Court of Malaya at
Kuala Lumpur

30

Between

C.M.Boyd (as Arbitrator) Applicant

And

Yap Phooi Yin and Yap Fook
Sam as Representatives of
the Estate of Yap Kon
Fah, deceased Claimant

And

Goh Eng Wah Respondent)

40

CORAM:- M. SUFFIAN, LORD PRESIDENT,
FEDERAL COURT, MALAYSIA
SALLEH ABAS, JUDGE, FEDERAL COURT,
MALAYSIA
ABDUL HAMID, JUDGE, FEDERAL COURT,
MALAYSIA

In the
Federal Court

No.19
Order giving
Final Leave
to Appeal to
H.M. The Yang
Di-Pertuan
Agong
24th August
1982

IN OPEN COURT
THIS 24TH DAY OF AUGUST 1982

O R D E R

10 UPON MOTION made unto Court this day
by Encik M. Shankar of Counsel for Mr. Goh
Eng Wah aforesaid in the presence of Mr.
Charles C.H.Koh of Counsel for M/s. Yap
Phooi Yin and Yap Fook Sam AND UPON READING
the Notice of Motion dated the 3rd day of
August, 1982 and the Affidavit of Yeoh Jin
Aik affirmed on the 8th day of July, 1982
all filed herein AND UPON HEARING Counsel
as aforesaid IT IS HEREBY ORDERED that
20 final leave be granted to the Respondent
Goh Eng Wah to appeal to His Majesty The
Yang DiPertuan Agong against the whole of
the decision of this Honourable Court given
on the 13th day of November 1981 and that
the costs of this Application be costs in
the Appeal.

(continued)

GIVEN under my hand and the seal of
the Court this 24th day of August 1982.

Sd: W.S.Tan

30 SENIOR ASSISTANT REGISTRAR
FEDERAL COURT
KUALA LUMPUR

This Order is taken out by Messrs. Shearn
Delamore & Co. and Drew & Napier, Solicitors
for Mr. Goh Eng Wah whose address for service
is at No.2 Benteng, Kuala Lumpur.

EXHIBITS

CMB-1
Memorandum
of Lease
16th August
1957

EXHIBITS
CMB-1

MEMORANDUM OF LEASE

297 STAMP OFFICE
KUALA LUMPUR

SCHEDULE XXII
(Section 116)

MEMORANDUM OF LEASE

VII
115

Presentation No. 55033

I, Yap Kon Fah of No.92 Pudu Road, Kuala Lumpur (hereinafter called "the Lessor" which expression shall where the context so permits include his assigns and successors in title) being 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 (hereinafter referred to as "the said land") do hereby lease to MAKHANLALL (PROPERTIES) LTD. a Company incorporated in Singapore having its registered office at No.20, Malacca Street, Singapore (hereinafter called "the Lessee" which expression shall where the context so permits include their assigns and successors in title) 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 agreement and powers implied under the Land Code and subject to the stipulations, modifications, terms and conditions hereinafter contained.

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; 40
 - (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;

EXHIBITS

CMB-1
Memorandum
of Lease
16th August
1957

(continued)

- (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;
- 10 (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.
2. The rent shall be payable in advance on the 1st day of each month.
- 20 3. The Lessee hereby covenants with the Lessor as follows :-
- (a) To pay the rent on the day and in manner aforesaid without any deductions whatsoever.
- (b) To keep every part of the cinema at present known as Star Theatre and erected by the Lessee at his own cost and expense on the said land both internal and external and all other erections on the land with the fixtures and additions thereto in good and substantial repair (fair wear and tear excepted) and in such repair to yield up at the determination of the term hereby created
- 30 (c) At least once in every five years of the said term and also in the last year thereof (whether determined by effluxion of time or otherwise) to whitewash in a good and workmanlike manner the external walls of the said cinema theatre and to paint, grain, varnish, distemper, wash, stop, whiten or colour all such internal parts of the said cinema as ought to be so treated
- 40 (d) To pay and discharge all rates, taxes, assessments on improved or unimproved value of the said land and other charges payable by law in respect of the said land and of the said cinema theatre including quit rent from 1st
- 50 January 1956.

EXHIBITS

CMB-1
Memorandum
of Lease
16th August
1957

(continued)

- (e) To insure and keep insured in the joint names of the Lessor and Lessee the said cinema theatre from loss or damage by fire in some reputable insurance office or with underwriters in the sum of \$320,000.00 or in a sum equal to the full amount required to rebuild the same in case of total destruction, whichever sum shall be greater, 10
and to make all payments necessary for the above purposes after the same shall respectively become due and to produce to the Lessor or his agent on demand the policy of such insurance and the receipt for each such payment and to cause all moneys received by virtue of any such insurance to be laid out forthwith in rebuilding and reinstating the 20
said cinema theatre and to make up any deficiency out of his own moneys Provided always that if the Lessee shall at any time fail to keep insured the said cinema theatre as aforesaid the Lessor may do all things necessary to effect or maintain such insurance and any moneys expended by him for such purpose shall be repayable by the Lessee on demand 30
and may be recovered by action forthwith
- (f) To permit the Lessor and his agent with or without workmen and others at all reasonable times and upon reasonable notice to enter upon and into the said cinema theatre and view the state of repair thereof and upon notice given by the Lessor in writing to carry out any necessary repairs or amend in accordance therewith Provided 40
always that in case the Lessee shall not within 21 days after the notice commence and proceed diligently with the execution of the repairs mentioned in the notice it shall be lawful for the Lessor to enter upon and into the said cinema theatre and execute such repairs, and the costs thereof shall be a debt due from the Lessee to the 50
Lessor and forthwith recoverable by action
- (g) Not to assign, sub-let or part with possession of the said cinema theatre or any part thereof, without the consent in writing of the Lessor first

EXHIBITS

CMB-1
Memorandum
of Lease
16th August
1957

(continued)

had and obtained such consent not to be withheld in the case of a respectable and responsible assignee or sub-tenant

10 (h) Upon the determination of this lease to deliver up to the Lessor in such state of repair condition order and preservation as shall be in strict accordance with the Lessee's covenants the said cinema theatre with all fixtures fittings and additions thereto and any other erections on the said land together with all fixtures fittings and additions thereto except trade fixtures and fittings such as furniture, cinema projectors, auditorium chairs, engines, air conditioning unit, display boards, 20 screens and fans which may be removed by the Lessee provided any damage caused by such removal is made good by the Lessee at his own expense

4. The Lessor hereby covenants with the Lessee that :-

30 (a) the Lessee paying the rents and performing the several covenants stipulations and conditions herein contained on his part shall peaceably hold and enjoy the said land and the said cinema theatre during the term of this Lease without any interruption by the Lessor or any person rightfully claiming under or in trust for him;

40 (b) the Lessor will on written request of the Lessee made one (1) year before the expiration of the term hereby created at the expense of the Lessee grant to the Lessee a lease of the said area and the said cinema theatre and all other buildings with their fixtures and fittings for a further term of five (5) years from the expiration of the said term and containing the like covenants, conditions and provisions as are 50 herein contained with the exception of:

(1) This covenant to give an option to renew; and

(2) the condition as to renewal which

EXHIBITS

CMB-1
Memorandum
of Lease
16th August
1957

(continued)

shall be fixed by mutual agreement of the parties herein or failing agreement which shall be fixed by an arbitrator but which in either case shall exceed the amount of rental payable for the last five years of the term hereby created

5. If the rent hereby reserved or any part thereof shall remain unpaid for 28 (twenty-eight) days after becoming payable (whether formally demanded or not) it shall be lawful for the Lessor to determine this lease and take possession of the said cinema theatre and all other buildings erected by the Lessee on the said land and thereupon this demise shall absolutely determine but without prejudice to any right of action according to the Lessor against the Lessee for any antecedent breach of covenant 10 20
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 30
7. If any dispute or difference shall arise between the parties hereto touching any clause, matter or thing whatsoever herein contained or the construction thereof or any matter or thing in any way connected with this lease or the rights, duties or liabilities of either party under or in connection with this lease then and in every such case the dispute or difference shall be referred to arbitration in accordance with the provisions of the Arbitration Ordinance, 1950 or any Statutory modifications thereof for the time being in force 40 50

We, MAKHANLALL (PROPERTIES) LIMITED of No.20 Malacca Street, Singapore, do hereby accept this Lease subject to the stipulations modifications terms and conditions herein-before contained.

EXHIBITS
CMB-1
Memorandum
of Lease
16th August
1957

Sd: MAKHANLALL
Director

(continued)

Sd: L.P.Khandolwala
Secretary

10 Signature of Lessee

Dated this 16th day of August 1957

Memorial made in the register of C.T. Volume CXXII folio 141 this 19th day of August 1957, at 11.10 a.m.

Sd:
Registrar of Titles
State of Selangor

SCHEDULE XXXVIII (a)
Section 178

20 I hereby testify that the signature of the Lessor above written in my presence on this 14th day of August 1957, is to my own personal knowledge the true signature of YAP KON FAH who has acknowledged to me, NORMAN ALEXANDER MARJORIBANKS the Advocate and Solicitor of the Supreme Court, Federation of Malaya, that he is of full age and that he has voluntarily executed this instrument.

Witness my hands

30 Sd: Norman Marjoribanks
Advocate & Solicitor K.Lumpur.

SCHEDULE XXXVIII (b)
Section 178

40 I, Amar Nath Mitra advocate and Solicitor of the Supreme Court of the Colony of Singapore and of the Federation of Malaya, practising at No.20 Malacca Street Singapore hereby certify that on this 16th day of August 1957, the Common Seal of MAKHANLALL (PROPERTIES) LIMITED was duly affixed to the above written instrument in my presence in accordance with the regulations of the said Company.

Witness my hand: Sd: A.N.Mitra
Solicitor, Singapore

EXHIBITS

CMB-2
Letter
Skrine &
Co. to
Jones Lang
Wootton
16th March
1977

EXHIBITS

CBM-2

LETTER SKRINE & CO.
TO JONES LANG WOOTTON

SKRINE & CO.

STRAITS TRADING BUILDING
4 LEBOH PASAR BESAR
KUALA LUMPUR 01-23

March 16, 1977

SURAT KAMI P/CF/43596/77

Messrs. Jones Lang Wootton
Jalan Ampang
KUALA LUMPUR

10

Gentlemen

STAR THEATRE KUALA LUMPUR

We enclose herewith a photocopy of a Memorandum of Lease. Under Clause 1(iv) provision is made whereby rental from the beginning of the 21st year to the end of the 25th year is to be fixed by an arbitrator because the parties cannot agree upon it.

20

A dispute has arisen between the parties as to the proper rent and they have both agreed, subject to your consent, that a member of your office should be appointed as a single arbitrator to adjudicate upon the dispute. If you are prepared to act would you please advise us of the identity of the individual who will accept the appointment.

Yours faithfully,

30

Sd: Skrine & Co.

c.c.: Clients

EXHIBITS
CMB-3

EXHIBITS

LETTER SHEARN DELAMORE
& CO. TO SKRINE & CO.

CMB-3
Letter
Shearn
Delamore
& Co. to
Skrine & Co.
28th May
1977

10 DELAMORE & CO. Advocates, Solicitors
Amalgamated with Notaries Public &
DREW & NAPIER Commissioners for Oaths
(Kuala Lumpur) P.O.Box 138,
Kuala Lumpur 01-02
2 Benteng, Kuala Lumpur
01-19 Malaysia

Cables: "JURES" or
"SHEARDEL"
Talipon: 80732 (Private
Exchange)
Telex: JURES MA30379

Surat Tuan P/CF/43596/77
Surat Kami SD 38490 (BC) 28th May 1977

20 M/s. Skrine & Co.
Straits Trading Building,
4 Leboh Pasar Besar,
KUALA LUMPUR.

Dear Sirs,

re: Arbitration: Star Theatre
Kuala Lumpur

We refer to the above matter and to your
correspondence to M/s. D.G.Ironside on the
same.

30 We act for M/s. Makhanlall (Properties)
Pte.Ltd. of 10th floor, Shenton House, Shenton
Way, Singapore 1.

By an agreement dated the 29th day of June
1971 and executed by our clients of the first
part and Mr. Goh Eng Wah of the second part and
Shashi Kantgupta and Suresh Kant Mahawar (as
guarantors) of the final part our clients
assigned the above premises to Mr. Goh Eng Wah.

40 Under Clause 8 of the said agreement our
clients undertake to negotiate with your clients
in any increase in rent of the aforesaid premises
on Mr. Goh's behalf.

In view of this we would appreciate if you
could direct all matters in respect of this
arbitration to us as solicitors from M/s. Makhanlall
(Properties) Private Ltd.

EXHIBITS

CMB-3
Letter
Shearn
Delamore
& Co.to
Skrine & Co.
28th May
1977

We hereby confirm that our Clients are agreeable to the appointment of Mr.C.M. Boyd as the arbitrator.

Kindly advise of the proposed date set for the hearing of the arbitration.

We look forward to hearing from you in due course.

Yours faithfully,

Sd:

(continued)

c.c. Clients

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CMB-4
Points of
Claim
4th July
1977

EXHIBITS
CMB-4

POINTS OF CLAIM

IN THE MATTER OF AN ARBITRATION
TO DETERMINE A FAIR RENT FOR THE
STAR THEATRE KUALA LUMPUR

Between

Yap Phooi Yin and Yap Fook Sam
as representatives of the Estate
of Yap Kon Fah, deceased

Owners

20

And

Goh Eng Wah

Lessee

Points of Claim for Yap
Phooi Yin and Yap Fook Sam

1. The submission to arbitration arises in consequence of the failure of the parties to agree upon the rent for the Star Theatre, Pudu, Kuala Lumpur which should be paid from the 1st July 1977 for a period of 5 years.

2. The Star Theatre and the land on which it is erected are owned by Yap Phooi Yin and Yap Fook Sam as representatives of the estate of Yap Kon Fah, deceased. They were let originally to Makhanlall (Properties) Limited pursuant to a duly registered lease for a term of 30 years from the 1st day of July 1957. On the 2nd October 1974 the said Makhanlall (Properties) Limited transferred the benefit of the balance of the term of

30

the said lease to Goh Eng Wah who is now the tenant of the Owners.

EXHIBITS

CMB-4
Points of
Claim
4th July
1977

(continued)

10 3. Clause 1 of the lease provided for the payment of specific monthly sums by way of rental for a period of twenty years from the date of commencement of the lease. That period expired on the 30th June 1977. In relation to the next ensuing period of 5 years, the said clause provided that the rent was to be such sum exceeding \$700.00 as should be agreed by the parties or failing agreement as should be fixed by an arbitrator. Clause 7 of the lease contained a submission of any disputes or differences touching any clause, matter or thing whatsoever in the lease contained or the construction thereof or any matter or thing in any way connected with the lease or the rights, duties or liabilities of either party under or in connection with the lease to arbitration.

20 4. 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. 30 The Owners' contention is that the rent to be paid should be such as to give a fair return to the Owners 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.

40 5. The Star Theatre is a two storey building with concrete floors, reinforced concrete frame and brick walls and is attached to the land upon which it stands. 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 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 on the land in conjunction with the land. Only those trade fixtures and fittings specified in clause 3(h) of the Lease should be left out of account 50 in assessing a proper rent since it is only those fittings and fixtures which are and remain the property of the Lessee. A complete list of the fittings and fixtures involved is to be found scheduled to the sub-lease granted by Makhanlall (Properties) Limited to Keng Huat

EXHIBITS

Film Company Limited on the 26th March 1969.

CMB-4
Points of
Claim
4th July
1977

(continued)

6. The Owners contend that, in assessing a fair rent which should be paid to them, account should be taken of sums which have been paid by way of rental to obtain sub-leases and licenses of the property. The original Lessee first sub-leased the property to Ong Keng Huat for a period of 10 years from the 1st July 1957. This sub-lease was duly registered in the Land Registry but its terms and conditions are not known to the Owners. The original Lessee granted a subsequent sub-lease to Keng Huat Film Company Limited for a period of 10 years from the 1st July 1967 and this sub-lease was also duly registered. It provided for a sub-lease of the building at a rent of \$4,512.50 per month and of the land at a rent of \$487.50 per month giving a total of \$5,000.00 per month for the land and building. No separate sum was charged for the effects listed in the schedule to the sub-lease although the right to use these effects was given to the sub-lessee. The sub-lease contained a covenant against assigning, sub-letting or parting with possession but this was subject to an exception in favour of Choo Tak Chuan, Aw Yew Pooi and Lee Kon Yew of Mahluan Film Enterprises Ltd. This exception was created because of a licence agreement dated 11th July 1963 between Ong Keng Huat and the persons named in the exception in terms of which those persons were granted a license to operate the Star Theatre for a period of 10 years commencing on the 14th August 1964. The terms on which this license were granted were, inter alia :-

(i) that a premium of \$8,000.00 was paid for the grant of the license

(ii) that a sum of \$7,800.00 per month was paid from the 14th August 1964 to the 30th June 1967 and a sum of \$7,962.50 per month from the 1st July 1967 for the remainder of the period of the license

(iii) that the licensees were to pay and discharge all moneys payable by and liabilities of the Lessor under the memorandum of sub-lease

(iv) that the licensees were to observe each and every of the covenants terms and conditions contained in the sub-lease as if the names of the licensees were substituted in the

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sub-lease in place of the name
of the licensor.

EXHIBITS

CMB-4
Points of
Claim
4th July
1977

(continued)

10 The effect of these terms was that the
licensees were paying for the use of the
Star Theatre from the 1st July 1967 a
total of \$12,962.50 being the license fee
and the rent payable to the sub-lessor by
the sub-lessee under the sub-lease. In
addition the licensees paid insurance
10 premia, were responsible for repairs of
the land, Theatre, furniture, fittings,
equipment, plant and effects, had to pay
all existing and future rates taxes assess-
ment and other outgoings, had to install an
air-conditioning plant at their expense and
had to pay the quit rent. After allowing
for the rent of \$700.00 payable to the
Owners during the period of the license this
20 meant a monthly profit in excess of \$12,000.00
was being made by the Licensor during the
period of the license.

30 7. The Owners contend that the monthly sum
paid by the licensees above referred to
affords a guide as to the rental to be paid
for the Star Theatre. The rent to be paid
should be not less than the sum paid by
the licensee after deduction of a fair and
proper sum as rental for the furniture,
fittings, equipment, plant and effects but
bearing in mind the responsibility of the
licensees to keep these in repair. The
Owners contend that the present position in
terms of which the Lessee and sub-lessee are
enabled to make very large profits every
month cannot be allowed to continue and that
the position must be remedied by the fixing
of a proper rent for the Star Theatre. The
Owners further contend that the power given
40 to the arbitrator to fix the rent is in no
way qualified or restricted so that he is
empowered to fix a full, fair and proper rent.

Dated this 4th day of July 1977.

Sd:

Solicitors for the Owners

EXHIBITS

CMB-5
Statement
of Claim
of Goh Eng
Wah
8th July
1977

5. Under Clause 1 (iii) of the said Lease the rent from the beginning of the 16th year to the end of the 20th year was at Dollars Seven Hundred (\$700/-) per month

10 6. Under Clause 1(iv) of the said Lease the rent commencing from the 21st year to the end of the 25th year shall be such sum exceeding the said Dollars Seven Hundred (\$700/-) as shall be agreed to by the Parties hereto or failing agreement as shall be fixed by an Arbitrator.

(continued)

7. On the 24th day of September 1976 the First Party through their Solicitors informed the Second Party that the First Party desire to increase the rent of the said Lease to Dollars Four thousand (\$4000/-) per month commencing from the 1st day of January 1977.

20 8. The Second Party through his Solicitors replied to the First Party on the 27th day of October 1976 that the proposed rent stated in paragraph (7) above was excessive and offered a rent of Dollars Nine Hundred (\$900/-) per month.

30 9. As the Parties hereto could not agree on the monthly rent of the said Lease for the period commencing the 21st year to the end of the 25th year the First Party referred the matter for Arbitration.

10. The Second Party through the advice of his Valuers offers the sum of Dollars One thousand one hundred and thirty-one (\$1,131/-) per month being the fair ground rent.

11. The Second Party claims that the First Party be precluded from demanding a rent in excess of the fair ground rent of Dollars One thousand one hundred and thirty-one (\$1,131/-) for the following reasons :-

40 (a) The calculations for working out a fair ground rent are shown in the Valuation Report (hereinafter called "the Valuation Report") submitted with the Bundle of Documents as item 11.

50 (b) The net return to the Second Party on his total investment incurred in respect of the said Lease as more particularly shown on page 5 of the Valuation Report amounts to

EXHIBITS

CMB-5
Statement
of Claim
of Goh Eng
Wah
8th July
1977

(continued)

only 10% approximately

- (c) The fair ground rental for the First Party should not exceed the aforesaid net return of the Second Party, bearing in mind:-
- (i) the First Party had made no capital investment on the said land, and
 - (ii) the value of the reversionary interest of the said land together with the cinema building is substantial as is shown on page 7 of the Valuation Report 10
- (d) The present market value of the First Party's interest is Dollars Two hundred and eighty thousand two hundred and fifteen (\$280,215) (as shown on page 7 of the Valuation Report). The fair ground rent for a well secured return calculated at 6% will be Dollars Sixteen thousand eight hundred and twelve (\$16,812/-) per annum or Dollars One thousand four hundred and one (\$1,401/-) per month. The mean average as worked out on page 8 of the Valuation Report shows that the fair ground rent should be Dollars One thousand one hundred and thirty-one (\$1,131/-) per month 20 30
- (e) The comparisons made on pages 8 and 9 of the Valuation Report with similar independent cinemas show that the lessors are receiving lower returns than the First Party
- (f) The present rental return and profits of the Second Party are attributable entirely to the
- (i) good and efficient management of the cinema 40
 - (ii) proper maintenance of the cinema
 - (iii) modern facilities, fixtures and fittings

WHEREFORE the Second Party claims as follows:-

- (a) a declaration that the fair ground rental

commencing from the 21st year to the end of the 25th year of the said Lease shall be at Dollars One thousand one hundred and thirty-one only (\$1,131/-) per month.

(b) the costs of this Arbitration be borne by the Parties hereto equally.

(c) such further and other relief.

Dated this 8th day of July 1977.

EXHIBITS

CMB-5
Statement
of Claim
of Goh Eng
Wah
8th July
1977

(continued)

10

Sd: Shearn Delamore

SOLICITORS FOR THE
SECOND PARTY

EXHIBITS

A.

LETTER JONES LANG WOOTTON
TO SKRINE & CO.

A.
Letter
Jones Lang
Wootton
to Skrine
& Co.
26th July
1977

20

JONES LANG WOOTTON 4 Jln Ampang,
Incorporating Kuala Lumpur 01-16
WICKS & PARTNERS Malaysia
International Real Cables: "Wonderment"
Estate Agents Kuala Lumpur
 Telephone: 23561
 Telex: MA 30926

Your ref. P/CF/43596/77

Our ref. V/25/77

26th July 1977

Skrine & Co.
Straits Trading Building
Leboh Pasar Besar
KUALA LUMPUR

30

Attention S.D.K.Peddie Esq.

Dear Sirs,

RE: STAR THEATRE ARBITRATION

You will be aware that leave of the High Court is required prior to submission to the Court of any matters as a Special Case. At present the High Court is on vacation. I myself will be leaving for three months holiday on the 30th July 1977.

EXHIBITS

Subject to your consent I will make my award on

A.
Letter
Jones Lang
Wootton
to Skrine
& Co.
26th July
1977

- a) the submission by Makhanlall (Properties) Limited of the existence of a verbal understanding
- and
- b) on the two alternative bases discussed, that is, on the basis of a rental attributable to the land and building and on the basis of a rental attributable to the land only.

(continued)

10

The award will be made before 30th July 1977 and upon my return from holiday in early November this year I will submit the matter to the High Court.

Kindly signify your consent to this proposal. In view of the pending Case to be stated to the High Court kindly also signify your agreement that the award to be handed down by 30th July 1977 is to be effective only after a decision by the High Court on the Case stated. Needless to say, any new rental payable would date back to 1st July 1977.

You may signify your consent to the above by signing the copy of this letter which is attached.

Your urgent attention to this is requested.

Yours faithfully,

Sd: C.M.Boyd
C.M. BOYD
JONES LANG WOOTTON INC. WICKS & PARTNERS

30

c.c. Shearn Delamore

EXHIBITS

B.

LETTER JONES LANG WOOTTON
TO SHEARN DELAMORE & CO.

EXHIBITS

B.

Letter
Jones Lang
Wootton
to Shearn
Delamore &
Co.
26th July
1977

10 JONES LANG WOOTTON 4 Jln Ampang,
Incorporating Kuala Lumpur 01-16
WICKS & PARTNERS Malaysia
International Real Cables: "Wonderment"
Estate Agents Kuala Lumpur
Telephone: 23561
Telex: MA 30926

Your ref. SD 38490(BC)
Our ref. V/25/77 26th July 1977

Shearn Delamore & Co.
The Chartered Bank Building
2 Benteng
KUALA LUMPUR

Attention Miss Betty P.K.Chew

Dear Sirs

20

RE: STAR THEATRE ARBITRATION

You will be aware that leave of the High Court is required prior to submission to the Court of any matters as a Special Case. At present the High Court is on vacation. I myself will be leaving for three months holiday on the 30th July 1977.

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EXHIBITS

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In view of the pending Case to be stated to the High Court kindly also signify your agreement that the award to be handed down by 30th July 1977 is to be effective only after a decision by the High Court on the Case stated. Needless to say, any new rental payable would date back to 1st July 1977.

You may signify your consent to the above by signing the copy of this letter which is attached.

10

(continued)

Your urgent attention to this is requested.

Yours faithfully,

Sd: C.M.Boyd
C.M.BOYD
JONES LANG WOOTTON INC. WICKS & PARTNERS

c.c. Skrine & Co.

CMB-6
Award of
the
Arbitrator
30th July
1977

EXHIBITS
CMB-6

AWARD OF THE ARBITRATOR

IN THE MATTER OF ARBITRATION

20

BETWEEN

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

AND

GOH ENG WAH

AWARD

I, C.M.Boyd being appointed as Arbitrator by the parties above-mentioned by letter dated 16th March, 1977 from Messrs. Skrine & Co. Advocates and Solicitors and by letter dated 28th May, 1977 from Messrs. Shearn, Delamore & Co., Advocates and Solicitors, a copy of which was forwarded to me by Messrs. Skrine & Co. under cover of their letter dated 17th June, 1977, over the dispute between the parties as stated in the Reference hereinafter, do state, find and award as follows :

30

REFERENCE

EXHIBITS

10 This is a dispute between Yap Phooi Yin and Yap Fook Sam as representatives of the estate of Yap Kon Fah, deceased (hereinafter referred to as the First Party) who are the landlords of property held under Certificate of Title No.15741 for Lot No.573, Section 62, in the town of Kuala Lumpur and Mr. Goh Eng Wah (hereinafter referred to as the Second Party) who is the occupant and lessee by assignment from Messrs. Makhanlall (Properties) Pte.Ltd. by assignment dated 29th June, 1971 of a memorandum of lease dated 16th August, 1957.

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1977

(continued)

20 The dispute is over the interpretation of Clause 1(iv) as regards the proper rental payable thereunder to the landlord from the beginning of the 21st year of the lease to the end of the 25th year. There was also a dispute as to the existence of an alleged verbal understanding between Yap Kon Fah and Makhanlall (Properties) Ltd. (later known as Makhanlall (Properties) Pte.Ltd.) supposingly agreeing that the rental after the 21st year shall be based on the land value only.

30 Clause 7 of the abovementioned lease contained a submission of any dispute or differences touching upon any clause matter or thing whatsoever in the lease contained or the construction thereof or any matter or thing in anyway connected to the lease or the rights duties or liabilities of either party under or in connection with the lease to arbitration.

PARTIES

40 In this Award except so far as the context otherwise requires, the following words and expressions have the meanings hereunder respectively assigned to them:

The expression "Star Theatre" means all that land held under Certificate of Title No.15741 Lot 573 Section 62 Town and District of Kuala Lumpur together with all buildings and improvements thereon.

The words "First Party" means Yap Phooi Yin and Yap Fook Sam as representatives of the estate of Yap Kon Fah, deceased.

EXHIBITS

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The words "Second Party" means Goh Eng Wah, the lessee by assignment of the Star Theatre.

The words "the said lease" means Memorandum of Lease Presentation Number 55033 Volume CXXII folio 141.

(continued)

The words "the Company" means Makhanlall (Properties) Pte. Ltd. formerly known as Makhanlall (Properties) Ltd.

The words "the said land" means the land held under Certificate of Title No.15741 Lot 573 Section 62 Town of Kuala Lumpur in the district of Kuala Lumpur. 10

HEARING

Pursuant to my appointment, a preliminary hearing was held at 3.00 p.m. on Monday, 20th June, 1977 at the office of Jones Lang Wootton inc. Wicks And Partners at No.4, Jalan Ampang, Kuala Lumpur. Representing the First Party was Mr. S.D.K.Peddie of Messrs. Skrine & Co., Advocates and Solicitors. Representing the Second Party was Miss Betty P.K.Chew of Messrs. Shearn, Delamore & Co. Advocates and Solicitors. 20

Consequently, the hearing was held on Friday, 15th July, 1977 at the same venue. Mr. S.D.K. Peddie represented the First Party and Miss Betty P.K.Chew represented the Second Party with the assistance of Mr. K.Tharmalingam who is a Chartered Surveyor and Registered Surveyor in Malaysia. 30

BACKGROUND

The circumstances leading up to the Reference were as follows :

- 1) By means of the said lease the said Yap Kon Fah, deceased of the one part and Makhanlall (Properties) Pte.Ltd. (formerly known as Makhanlall (Properties) Ltd. a company incorporated in the Republic of Singapore with a place of business at Unit 1001 10th Floor, Shenton House, Shenton Way, Singapore 1) of the other part, the said Yap Kon Fah, deceased granted the said Company a lease of the said land together with the building erected thereon for a term of 30 (thirty) years commencing from the 1st day of July, 40

1957 upon the terms and conditions therein contained.

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- 2) By an assignment dated the 29th day of June, 1971 and executed between the Company of the one part and Goh Eng Wah of the second part, the said Company agreed to assign the said lease to Goh Eng Wah upon the terms and conditions stated therein.

(continued)

10

- 3) Under Clause 1(iii) of the said lease the rent from the beginning of the 16th year to the end of the 20th year was at Dollars Seven hundred (\$700/-) per month.

- 4) Under Clause 1(iv) of the said lease the rent commencing from the 21st year to the end of the 25th year shall be such sum exceeding the said Dollars Seven hundred (\$700/-) as shall be agreed to by the Parties hereto or failing agreement as shall be fixed by an Arbitrator.

20

- 5) On the 24th day of September 1976 the First Party through their solicitors informed the Second Party that the First Party desire to increase the rent of the said lease to Dollars Four Thousand (\$4000/-) per month commencing from the 1st day of January 1977.

30

- 6) The Second Party through his solicitors replied to the First Party on the 27th day of October 1976 that the proposed rent stated in paragraph (5) above was excessive and offered a rent of Dollars Nine hundred (\$900/-) per month.

- 7) As the Parties hereto could not agree on the monthly rent of the said lease for the period commencing the 21st year to the end of the 25th year the First Party referred the matter for arbitration.

40

SUBMISSION OF PARTIES

At the hearing, Counsel on behalf of the First Party contended generally as follows :

- 1) 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

50

EXHIBITS

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(continued)

business from the business of showing
films for public entertainment.

- 2) By virtue of the definition 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 these being taken into account the right to use and occupy the building erected on the land. Only those trade fixtures and fittings specified in Clause 3(h) of the said lease should be excluded when assessing a fair rent. 10
- 3) Therefore, the amount of rental currently under dispute should be a full fair and proper rental such as to give a fair return to the First Party whilst still affording a reasonable margin of profit to the Second Party. 20
- 4) Sums paid by way of rental under Sub-leases and Licenses of the property were put forward as being a guide to the amount of rental which should now be fixed under Clause 1(iv) of the said lease.

Counsel on behalf of the Second Party contended generally as follows : 30

- 1) There was a verbal understanding between Yap Kon Fah and Makhanlall (Properties) Ltd., being the parties to the said lease that the rental should relate only to the value of the land.
- 2) This is evidenced by the fact that whilst the first paragraph of the said 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." 40
- 3) Counsel and witness further put forward certain arguments regarding the way in which the ground rent for the said property should be assessed.

QUESTION OF LAW/AGREEMENT PURSUANT TO SECTION 22(1) (a) OF ARBITRATION ACT 1952 FOR REFERENCE TO COURT ON A CASE STATED

The first question of law for reference to the Court is whether under Clause 1(iv) of the said lease, the rental to be fixed therein 50

should relate to the land and buildings erected thereon.

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10 It was also proposed that the question of the existence of an alleged verbal understanding between the parties as hereinbefore stated be also referred to the High Court as a question of law for decision or whether it affects the present dispute. I have however declined to refer this to the High Court for decision as I am of the view that this point could be disposed of at this arbitration itself for the reasons hereinafter appearing.

(continued)

AGREEMENT BETWEEN PARTIES FOR AWARD TO BE MADE PENDING CASE STATED BEING HEARD BY THE HIGH COURT ON A POINT OF LAW

On 26th July, 1977, I sent a letter to Counsel representing each party which stated as follows :

20 RE: STAR THEATRE ARBITRATION

You will be aware that leave of the High Court is required prior to submission to the Court of any matters as a Special Case. At present the High Court is on vacation. I myself will be leaving for three months holiday on the 30th July 1977.

Subject to your consent I will make my award on

30 a) the submission by Makhanlall (Properties) Limited of the existence of a verbal understanding

and

b) on the two alternative bases discussed, that is, on the basis of a rental attributable to the land and building and on the basis of a rental attributable to the land only.

40 The award will be made before 30th July 1977 and upon my return from holiday in early November this year I will submit the matter to the High Court.

Kindly signify your consent to this proposal. In view of the pending Case to be stated to the High Court kindly also signify your agreement that the award to be handed down

EXHIBITS

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Award of
Arbitrator
30th July
1977

(continued)

by 30th July 1977 is to be effective only after a decision by the High Court on the Case stated. Needless to say, any new rental payable would date back to 1st July 1977.

You may signify your consent to the above by signing the copy of this letter which is attached.

Your urgent attention to this is requested.

10

Written consent was duly received from the Counsel for each party.

FINDINGS

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

1) One of the parties to this alleged verbal understanding is long deceased and the arbitration therefore does not have the benefit of his evidence.

2) The submission as to the existence of this verbal understanding is based merely on hearsay.

20

3) The matter was itself not pursued seriously by Goh Eng Wah 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

1) 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 :

30

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

2) 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 erected thereon, I award as follows :

40

That a fair rental under Clause 1(iv) of the said lease is \$21,000.00 (Dollars Twenty-One Thousand Only) per month.

Costs of this arbitration and costs of the

High Court application as to case stated
shall be borne by both parties equally.

Handed down this 30th day of July 1977

Sd: C.M.Boyd

C.M. BOYD

EXHIBITS

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Award of
Arbitrator
30th July
1977

(continued)

No.6 of 1983

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L
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 as Representatives of
the Estate of YAP KON FAH,
deceased

First
Respondents
(Appellants)

- and -

C. M. BOYD (as Arbitrator)

Second
Respondent
(Respondent)

RECORD OF PROCEEDINGS

MASONS,
10 Fleet Street,
London, EC4Y 1BA

Solicitors for the
Appellant

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

Solicitors for the
First Respondents