

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No.10 of 1977

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA (APPELLATE
JURISDICTION)

B E T W E E N :

MALAYSIAN ARMED FORCES CO-OPERATIVE
HOUSING SOCIETY LIMITED

Appellants
(Plaintiffs)

- AND -

NANYANG DEVELOPMENT (1966) SDN. BHD.

Respondents
(Defendants)

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CASE FOR THE APPELLANTS

RECORD

1. This is an appeal from a Judgment and Order of the Federal Court of Malaysia (Suffian L.P., Lee Hun Hoe C.J., Borneo and Wan Suleiman F.J.) dated 21st February, 1976, which dismissed the Appellants' appeal from a Judgment and Order of the High Court in Malaya at Kuala Lumpur (Abdul Hamid J.) dated 2nd October, 1975, wherein it was ordered -

pp 37-44

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(1) that by identical Clauses 8 contained in two agreements dated 15th March, 1966 and 23rd August, 1966, both entered into between the Appellants and the Respondents, the Appellants were liable to pay to the Respondents not only the costs of connecting water and electricity supply to the buildings purchased by the Appellants under the agreements but also the costs of laying the water mains and electrical wires necessary for such supply;

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(2) that subject to the Appellants' liability under the said Clauses 8, the Respondents' Counter-claim be dismissed; and

(3) that the Appellants pay half the Respondents' taxed costs.

2. The Appellants are a co-operative society registered under the Co-operative Societies Ordinance, 1948, with the object of procuring for its members

Record
pp.49-60
pp.61-77

dwelling houses. By written agreements executed on 15th March, 1966 and 23rd August, 1966, the Appellants agreed to purchase from the Respondents 117 building lots in the Gombak area of Kuala Lumpur and 108 building lots in the Ampang area of Kuala Lumpur, respectively, each such lot to be purchased together with a dwelling house to be constructed thereon by the Respondents. By mutual agreement, the numbers of building lots (each with a dwelling house constructed thereon) eventually purchased by the Appellants were 143 in the Gombak area and 65 in the Ampang area.

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p.47
p.48

3. By a Specially Indorsed Writ and Statement of Claim dated 30th September, 1971, the Appellants claimed against the Respondents the refund of \$1,069,423.35 alleged to have been over-paid by the Appellants on the purchase prices of the building lots and the dwelling houses actually purchased, together with interests. In their Defence, the Respondents claimed that they were entitled to deduct from the amount alleged to have been overpaid various sums, including the costs of water supply and electricity supply to the buildings purchased, and the costs of maintenance of roads and drains; and these costs were repeated and included in the Respondents' Counterclaim. A settlement was later reached between the Appellants and the Respondents on the Appellants' claim and the main action was discontinued. Under the terms of the settlement, the Respondents' Counterclaim was to be limited only to the issues related to their entitlement or otherwise to recover from the Appellants the costs incurred by the Respondents in laying the water supply and electricity supply to the buildings purchased and the costs of maintenance of the roads and drains.

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p.1-4

p.4-6

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4. On 31st July, 1975, at the hearing of the Counterclaim (limited to the issues agreed), the Respondents abandoned their claim to the costs of the maintenance of roads and drains and proceeded only with their remaining claims for the costs of laying water supply and electricity supply. Full particulars of these claims were furnished by the Respondents to the High Court. By agreement between the Appellants and the Respondents, only the question of the Appellants' liability or otherwise on the remaining claims was to be left to the High Court to decide, it being for the parties, depending on the decision of the Court, to determine after proper verification what the quantum should be.

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p.9,L.25-
p.11,L.8

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p.53,LL.19-26
p.65,LL.41-48

5. The question for decision involves the constuction of the identical Clauses 8 of the agreement dated 15th March, 1966 and 23rd August, 1966, which read -

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"The Respondents further undertake(s) to apply on behalf of the Appellants for the connection to the said houses of such water and electrical services as are provided by the local authority but all costs of the making of such connections inclusive of the costs of laying water mains and of electric supply and metering thereof shall be borne and paid by the Appellants."

6. Evidence was given on behalf of the Appellants by one Yeap Yooi Eng, the purport of which is as follows:- pp.16-18

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- (a) It was the practice of every developer when selling a piece of land with a house to be built thereon by him, to provide the necessary infrastructure consisting of roads, drains, water supply, sewerage and electricity supply.
- (b) It was the developer's obligation to construct the house according to specifications until it was ready for occupation.
- (c) Upon completion of the house, the purchaser would with the assistance of the developer apply to the appropriate authorities for the supply of water and electricity to the house; and this merely involved the connection of supply from the boundary of the house to the mains already provided by the developer. The liability of the purchaser was only for the cost of these connections and for providing any sums required to be deposited by the authorities.
- (d) The cost of developed land (with infrastructure) in 1966 was approximately \$1.00 per sq. ft. in the Gombak area and \$1.12 per sq. ft. in the Ampang area.

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7. Abdul Hamid J. gave judgment on 2nd October, 1975. After deciding that Yeap Yooi Eng's evidence did not lend much weight to the Appellants' contention that the purchase prices for the building lots as specified in the Agreements included the costs of infrastructure, he held (it is submitted, correctly) that the best approach was to construe Clauses 8 of the Agreements in the light of all the provisions of those Agreements. The learned Judge then considered Clauses 5 which read -

pp.20-27
p.24, LL.4-40

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"The Respondents undertake(s) that the said Lots are sold ... TOGETHER with the free right and liberty for the Appellants its successors and assigns and its or their servants agents ... in common with the Respondents ... for

Record

all purposes whatsoever connected with the use and enjoyment of the said Lots ... to pass and repass along and over and upon all roads shown on the Layout Plan TOGETHER also with the full right and liberty to make all necessary connections and thereafter to use in a proper manner ... the pipes cables or wires laid or constructed by the Respondents under or over the said roads for the purpose of the supply of water electricity ... to ... the said Lots ...", 10

p.25,LL.30-43 and said -

"It would therefore seem to me that whilst the Appellants are entitled under the first limb to free right and liberty to use the roads, they are not expressly given free right to use the pipes laid or constructed by the Respondents although they have full right to make the necessary connections. Such right must therefore be viewed in the light of Clause 8. Looking at the words "The Respondents undertake(s) ..." appearing at the commencement of Clause 5 and the words "The Respondents further undertake(s) ..." appearing in Clause 8 it is significant that the words "The Respondents further undertake(s) ..." were used with special reference to Clause 5." 20

p.26,LL.24-48

Following from this, Abdul Hamid J. then held that the words "inclusive of" appearing in Clauses 8 of the Agreements must be construed to mean "in addition to" or "apart from" and that the Appellants were liable to pay not only the costs of connection of water and electricity supply from the mains to the buildings purchased but also the costs of laying the water and electricity mains. The learned Judge, however, dismissed the Respondents' Counterclaim in regard to the costs of a pump house and elevated tanks and other costs incurred in connection with a sub-station. 30

p.27,LL.1.7

8. It is respectfully submitted that the learned Judge erred in principle by, in fact, failing to consider the whole of the Agreements when construing Clauses 8. 40

p.49,LL.19-25
p.61,LL.19-37

Since it is stated in the Agreements that the building lots to be purchased formed parts only of certain lands which the Respondents intended to develop as housing estates, the learned Judge should have considered that the Respondents would, perforce, have had to provide the necessary infrastructure at their own costs. Moreover, Clauses 1 and 2 of the Agreements speak of "the total of the purchase prices of each of the said Lots" and "the total sum payable in respect of each such house so completed" and Clauses 5 expressly mention "pipes, cables or wires laid or constructed by the Respondents". Further, the purchase prices 50

p.50.L.4-
p.51.L.6
p.51.L.43-
p.52.L.25
p.64,LL.18-47

of the building lots to be purchased by the Appellants were at least equal to, if not more than, the then current prices for land developed with infrastructure, as was shown by the evidence of Yeap Yooi Eng. Had the Agreements been considered as a whole, it would have been clear that the costs payable by the Appellants under Clauses 8 were payable only to the appropriate authorities providing the connections for water and electricity supply to the individual houses and could not have included any costs other than those of making such connections. This is especially so having regard to the fact that the whole of the costs referred to in Clauses 8 would only arise and become payable if the applications envisaged in those Clauses were made by the Respondents "on behalf of the Appellants".

p.53,LL.19-26
p.65,LL.41-48

9. By a Notice of Appeal dated 30th October, 1975, the Appellants' appealed against that part of the Judgment as decided that under Clauses 8 of the Agreements, the Appellants were liable to pay for the costs of laying the water mains and electricity wires. The appeal came on before Suffian, L.P., Lee Hun Hoe C.J., Borneo, and Wan Suleiman F.J.

p.29,L.1-

10. The Judgment of the Federal Court was delivered by Suffian, L.P. on the 21st of February, 1976. After considering Clauses 1, 2, 4, 5, 9 and 12 of the Agreements, Suffian L.P. agreed with the trial Judge that under Clauses 8, the Appellants were to be responsible for paying the costs of laying the water and electricity mains. Although he acknowledged that in the normal case of the sale of a house on a housing estate it was for the developer to pay for the necessary infrastructure, including the costs of laying water and electricity mains, Suffian L.P. nevertheless considered the transactions under the Agreements as unusual because of the large numbers of building lots to be purchased by the Appellants and especially because of the words "inclusive of the costs of laying water mains and of electric supply and metering thereof" appearing in Clauses 8. On those words, Suffian L.P. said -

pp.37-43

p.43.L.10-16
p.42.L.35-38

"The words "water mains" do not mean the same thing as water pipes. The word "main" means according to the Shorter Oxford Dictionary "a principal channel, duct or conductor for conveying water, sewage, gas or electricity, e.g. along the street of a town", so that the use of the words "water mains" in Clause 8 must in my opinion mean that the Appellants

p.42.L.39 -
p.43.L.6

accepted responsibility for paying the cost of laying the main water pipes along the streets which these houses front. The use of the words "and of electricity supply and the metering thereof" immediately after the words "water mains" must in my opinion mean that under the agreement the society is also responsible for paying the cost of laying electric wires along the roads leading to these houses."

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11. The Appellants respectfully submit that the Federal Court was wrong in so holding because:-

- (a) Clauses 8 of the Agreements should be read together with Clauses 5.
- (b) The words "inclusive of" should be construed by reference to the obligation agreed to be undertaken by the Respondents under Clauses 8.
- (c) the liability of the Appellants as a purchaser of building lots in a houseing estate should not be greater than that of any other purchaser buying individual lots in such estate.

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12. On the 10th of January, 1976, an Order was made granting the Appellants final leave to appeal to His Majesty the Yang di-Pertuan Agung.

13. The Appellants respectfully submit that this appeal should be allowed with costs for the following among other

R E A S O N S

1. BECAUSE each of the building lots was purchased by the Appellants together with a dwelling house to be erected thereon by the Respondents. 30
2. BECAUSE the prices payable under the Agreements in respect of the building lots were equal to, if not more than, the then current prices of comparable lots containing the necessary infrastructure.
3. BECAUSE under Clauses 5 of the Agreements, full right and liberty was conferred on the Appellants to make all necessary connections to water and electricity mains to be laid or constructed by the Respondents, for the purpose of the supply of water and electricity to the building lots. 40
4. BECAUSE the obligation of the Appellants to make any payment under Clauses 8 only arises if the applications to the appropriate authorities for the connections of water and electrical services were made by the Respondents on behalf of the Appellants.

5. BECAUSE both the trial Judge and the Federal Court failed to consider the Agreements as a whole when construing Clauses 8.

HUGH FRANCIS

RAJA AZIZ ADDRUSE

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- v -

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COWARD CHANCE
Royex House
Aldermanbury Square
London WC2V 7C8
Solicitors for the Appellant