15, 1982

IN THE JUDICIAL COMMITEE OF THE PRIVY COUNCIL No.6 of 1980

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN :-

GARDEN CITY DEVELOPMENT BERHAD — Appellant

- and -

THE COLLECTOR OF LAND REVENUE FEDERAL TERRITORY — Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an Appeal from an Order of the Federal Court of Malaysia (Lee Hun Hoe C.J. Borneo Wan Suleiman F.J. and Chang Min Tat F.J.) made on 14th December 1978 allowing an appeal from an Order of the High Court in Malaya (Harun J.) made on 1st June 1978 cancelling a Notice (hereinafter called "the Notice") in National Land Code Form 7A dated 12th July 1976 issued to the Appellant. p.52 p.20 p.66

2. The appeal concerns the system of classification of land use contained in the National Land Code (Act 56 of 1965) and unless otherwise stated statutory provisions are provisions of the National Land Code (hereinafter called "the N.L.C."). Copies of the N.L.C. and relevant provisions of the predecessor the Federated Malay States Land Code (F.M.S. Cap 138, hereinafter called "the Land Code") are lodged with this Case.

3. The Notice is in the form required under Section 128 where there has been a breach of condition exposing alienated land to forfeiture to the State Authority under Section 127 but it appears to the Collector that the breach is capable of being remedied. A notice has to be served on the proprietor of the land in question, specifying the action required for remedying the breach and calling on him to take such action within a specified time. The Notice stated in the Schedule that the condition breached was "Using Agricultural Land for Commercial purposes" and in the body of the Notice, that the specified breach was "Failing to amend the condition of land use from that of Agricultural to Commercial" and the action required to remedy the breach, "From Agricultural to Commercial on payment of the sum of $623,199.00 as contained in the letter of this (salicet the Respondent's) Department .. dated 17th February 1976."

4. The land in question (hereinafter called "the Land") is held under Certificate of Title No.3443 and comprises some two acres one rood thirty-four poles in Lot 36 Section 58 of the Town of Kuala Lumpur which was formerly part of the State of Selangor but which became part of the Federal Territory when it was established on 1st February 1974. The Land was first alienated as part of a lot of some 100 acres comprised

in a Lease for Agricultural Land Number 746 granted on 20th July 1886 to one H.C. Sayers. Following subdivisions of that lot Certificate of Title No.3443 was issued on 8th August 1909. An indorsement on it records that the Land was originally granted under Lease Number 746. The Appellant became registered proprietor on 9th June 1972. Before that date a residential house, Number 147 Jalan Ampang, had been erected on the Land for which a quit rent had been paid at the rate applicable to a residential house. Such house was demolished in 1973 or 1974 and commencing in September 1974 the Appellant built on the Land an office and shopping complex completed in December 1975 and known as the Wisma Central for which a temporary Certificate of Fitness up to the sixth floor was issued on 5th January 1976. By letter dated
p.79 20th July 1972 surveyors acting for the Appellant applied to the Collector for subdivision of the Land so that the title of land required for road widening in accordance with planning permission could be transferred. By letter dated 17th February 1973 the Collector replied to such application stating
p.80 that the Appellant should have applied under Section 124 to alter the condition/impose an appropriate express condition on this land. By letter dated 13th April 1973 referring to
p.81 the last mentioned letter the Collector again stated that an application had to be made under Section 124 for imposition of a new and appropriate express condition and for amendment, from the rate applicable to a residential building to that applicable to a commercial building, by the State Authority. By letter dated 7th June 1973 the Appellant duly applied for
p.70 conversion of condition under Section 124. By letter dated
p.59 14th February 1975 the Appellant was informed that the Land Executive Committee (to which the powers of the State Authority had been transferred on establishment of the Federal Territory) had considered its application under Section 124 and to surrender part of the land for road widening and that such application would not be considered but that the Committee would approve surrender of the land and then approve grant of title to the Appellant as regards the balance of the land after exclusion of the area necessary to be surrendered for road repairs with conditions and payments as follows:-

Document of Title	Registered Document of Title
Nature of Title:	99 year Lease.
Premium:	$6.00 per square foot (30% from $20/- - per sq. ft.
Annual Rent:	12 cts. per sq. ft.
Surveyor Fees and other payments:	Rate as fixed.
Nature of Land Use:	Building.

Express Condition

(i) This land shall be used only for shopping and office complex.

(ii) Building on this land shall comply with building orders issued by the City Mayor. Additional payments were requested and the appropriate forms enclosed. By letter dated 13th May 1975 Solicitors acting for the Appellant wrote objecting to the Committee's decision in that it involved surrender of a title in perpetuity in exchange for a 99 year lease and applied
p.75 for such decision to be reconsidered. By a registered letter dated 13th January 1976 those Solicitors wereinformed that this application had been rejected by the Committee. The Appellant

says it never received this letter. By letter dated 17th February 1976 the Appellant was referred to such letter and it was stated that the decision of the Land Executive Committee of 14th February 1975 would be implemented forthwith but the premium payable was reduced to $623,199 payable within one month. The Appellant has neither made an application to surrender the title as suggested or paid the further premium. Accordingly on 12th July 1976 the Collector issued the Notice and served it on the Appellant. p.75 p.66

5. By Originating Motion dated 11th October 1976 (No.96 of 1976) the Appellant applied to the High Court of Malaya at Kuala Lumpur for an order that the Respondent cancel the Notice served on it on the ground that the Notice was bad in law and invalid. The Application was heard by Harun J. on 18th April 1977, an application on the part of the Respondent by Notice of Motion dated 4th January 1977 to set aside the Appellant's Application having previously been dismissed without argument on 20th January 1977. Harun J. gave judgment on 1st June 1978 and ordered that the Notice be cancelled and that costs be paid by the Respondent to the Appellant. p.1 p.3 p.9

6. After setting out the facts Harun J. said that there were two main grounds of appeal which he proceeded to consider in turn. The first was that there was no condition regarding the user of the land and so no breach. The Respondent had argued that there was such a condition and that the land was clearly agricultural as the title clearly stated that it was derived from the original Lease for Agricultural Land but the learned Judge rejected this argument on several grounds. He held, first, that payment of rent at the enhanced rate for a residential house in respect of the house No.147 Jalan Ampang constituted an acquiescence and waiver of any breach. Secondly he referred to the fact that the land was situated in the Town of Kuala Lumpur and to the provisions of the Land Code to which the land was previously subject. Section 35 of the Land Code laid down that "When alienated land is brought within the boundaries of any town or village any condition as to cultivation of such land .. shall cease to be operative", and the learned Judge therefore concluded that before the commencement of the National Land Code the Land had ceased to be agricultural land and was town land. He then asked whether the new Code altered the rights of proprietors, and after setting out the saving provision in Section 4 answered that question in the negative. The learned Judge next analysed the provisions of the N.L.C. as to regulation of land use, referring to the three categories of land use established by Section 52(1), "Agriculture" "Building" "Industry", and to the implied conditions applicable to land subject to those categories respectively under Sections 115, 116 and 117. He indicated that alienated lands fell into three separate classes - "new lands", i.e. those alienated under the N.L.C. itself, "old lands", i.e. those alienated previously, and "declared lands", i.e. those in respect of which an express declaration imposing some condition of land use had been made under Section 4 (? 54). The land in the present case fell into the class of old land, so that Section 53 applied, the relevant provisions being as follows:

> "53. (1) This Section applies to all land alienated before the commencement of this Act other than land which, immediately before that commencement, is subject to an express condition requiring its use for a particular purpose.

(2) All other land to which this Section applies shall become subject at the commencement of this Act to an implied condition that it should be used neither for agricultural nor for industrial purposes:

Provided that this condition -

(i) shall not prevent the continued use of any part of the land for anyagricultural or industrial purpose for which it was lawfully used immediately before the commencement of this Act; and

(ii) shall not apply to any part of the land which is occupied by or in conjunction with -

(a) any building lawfully erected before that commencement, or

(b) any building erected after that commencement, the erection of which would (under Section 116) be lawful if the land was subject instead to the category "Building".

(4) Land shall not be liable to forfeiture under this Act by reason of any breach of any condition to which it is subject by virtue of this Section except upon payment of such compensation as may be agreed or determined under Section 434."

The learned Judge stated that the Land was not subject to an express condition requiring its use for a particular purpose and therefore Section 53(1) applied. It was not used for agricultural or industrial purposes and there was therefore, he said, no breach of the implied conditions under subsection.

(3) Even assuming the land was agricultural, the Wisma Central was a building within the meaning of Section 116(4)(b) erected after the commencement of the N.L.C. which could have been lawfully erected if the land were subject to the Building category so that the proviso to subsection (3) applied. Finally, the learned Judge referred to Section 53(4), saying that even if there was a breach the land was not subject to forfeiture except upon payment of compensation and that there was no such offer here.

7. Harun J. then turned to the second of his two main grounds of appeal, namely that in any event the remedy of the breach was contrary to law, saying that the effect of the letter of 14th February 1975 and the Notice referring to it was that the Appellant was confronted with a situation that the Land would be forfeited to the State unless it surrendered its perpetuity title in exchange for a 99-year lease. He referred to a previous judgment of his own with regard to the exchange of perpetuity titles for 99-year leases as conditions precedent for the approval of applications for conversion and subdivision, stating that the Land Executive Committee had no power to impose such a condition. The decision of the learned Judge on this point has since been upheld by the Federal Court in Pengarah Tanah dan Galian, Wiliyah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd. /1979/ 1 M.L.J.135 and the Respondent does not seek to challenge that decision. This point does not therefore arise in the present appeal.

8. By Notice and Memorandum of Appeal dated 22nd June and p.21 7th July 1978 respectively the Respondent appealed to the Federal Court of Malaysia and the appeal was heard on 8th

November 1978. The Judgment of the Federal Court was delivered on 14th December 1978 and when it allowed the appeal with costs there and below. p.52

9. The judgment of the Federal Court was delivered by Chang Min Tat F.J. After summarising the facts and certain of the contentions the learned Federal Judge stated that the basic question was whether there was a condition for specified category of land use and if so what it was. He commented on the view of the then respondent that by administrative error or admission the land had not been classified, that both the Land Code and the N.L.C. make classification the foundation of land administration, and that it would be a strong case for it to succeed on this argument. After some general observations on the system of land transfer embodied in the N.L.C. the learned Judge pointed out that it makes a classification of land and of use and stated that the question for the Court could be answered by first determining under the Land Code the twin characteristics of each holding, that is the nature of the title and the category of use to which the land could be put, and then by ascertaining how the N.L.C. dealt with it. He read the Certificate of Title and observed that though it was issued before the coming into force of the Land Code there was a saving provision in Section 1(ii) thereof which preserved its validity. He explained that under the Land Code there were two forms of title known as Land Office title and Registry title, there being no doubt that the Certificate of Title in the present case was a Registry title. As to the use of the land in the Title the Certificate clearly stated that the Land was within the town of Kuala Lumpur and applying the definition of 'town land' in Section 2 of the Land Code it was clear that it had become town land on the coming into force of the Land Code. The learned Judge then referred to the argument on behalf of the Respondent that the fact that the Land had been carved out of a lease for agricultural land preserved its characteristic as of agricultural land, rejecting the argument that while Section 35 of the Land Code rendered the condition for cultivation inoperative it did not eliminate it altogether, saying that the Section should not be read for anything more than what it plainly says and that by definition the Land was town land. The learned Judge said that it then remained to see how a piece of town land held under a Registry title was dealt with on the coming into force of the N.L.C. and how it was absorbed into the new system. He referred to the saving clause in Section 4(i) and the recognitiion of the distinction between the two forms of title, reading the statutory definitions in Section 5 and saying that on these statutory definitions the conclusion must be reached that C.T. 343 remained a Registry title. The learned Judge then said that it was important to notice that under Section 52 three categories of use were contemplated for all land alienated under the Act so that it became necessary that all lands previously alineated should be made at one stage or another to fall within one of the three categories. He referred to Sections 110 and 53, holding that the Land came fairly and squarely within Section 53(3), that it "shall be used neither for agricultural nor for industrial purposes". He rejected, however, the conclusion that there was to be implied a condition that it should be used for the only other purpose left, namely building, since it would disregard the peculiar language used in the Section and rewrite it. He next referred to Section 54, whereby a date is provided for the absorption of land alienated before the commencement of the N.L.C. into the defined categories of land use by declaration and said that he would assume, in the absence of evidence, that there had been no notification under that Section. The learned Judge continued p.36

to say that this meant that town or village land held under a Registry title under the Land Code was in a sort of limbo - certainly neither for agricultural nor for industrial purposes. It might, he reasoned, seem somewhat incongruous that such land, which is eventually to be used for building since it could not be used for any other purpose, should have to be subject to an application under Section 124 for an alteration of the category of land use, but the heading of the Section did not convey its full scope and it included an application for the imposition of any category. The learned Judge set out the terms of Section 124(1) and concluded that it imposed on the landowner of Section 53(3) land which had not had the benefit of action under Section 54 the duty to apply for the imposition of the category of use for building if he proposes to build thereon any building of the type listed in Section 116(4). For these reasons he said that he had come to the conclusions that the Appellant was in breach of condition. As regards the fact that the Notice referred to commercial land use, the learned Judge said that the
p.59 Collector had been wrong in the Notice but the correct word "building" had been used in the letter of 14th February 1975 and it could not be said that the Appellant was misled or that the mistake was so fundamental that the whole proceedings should be avoided. If the Appellant had correctly advised itself on the law before undertaking construction of the complex it would have known that it should first apply for the imposition of the category of land use for its land which at the relevant time had no category of land use. The learned Judge further held that, as contended on behalf of the Respondent, the appeal to the High Court was out of time in that the period of three months allowed by Section 418 ran
p.75 from the date of the letter of 17th February 1976 which constituted a decision for the purposes of the Section.

10. Conditional leave to appeal to the Yang di-Pertuan Agong was granted by Federal Court on 19th March 1979 and final
p.55/56 leave on 19th September 1979.

11. The Respondent's first submission is that by reason of the fact that it was originally comprised in a Lease for Agricultural Land the Land was subject to the agricultural category of land use and that construction of the Wisma Central was therefore in breach of condition. The Respondent respectfully submits that the High Court and the Federal Court were wrong to decide that Section 35 of the Land Code affected this, for two reasons. First, the Section applies "when alineated land is brought within the boundaries of a town or village" and it is submitted that this means land brought within such boundaries after the commencement of the Land Code in 1928, whereas in the present case the Land had, as appears from the Certificate of Title, been within the boundaries of a town as long ago as 1909, when the Certificate was issued. Secondly, it is submitted that even if Section 35 of the Land Code is applicable to the Land, its effect is only to render inoperative "any condition as to the cultivation of .. land", and it is submitted that it is mistaken to identify such condition with a category of land use or the conditions implied in consequence of land being subject to such a category. Thus, in the Respondent's respectful submission, the Section which, as Chang Min Tat F.J. said, "should not be read for anything more than what it plainly says" is immaterial to the question for decision in this appeal. The relevant statutory provision is rather Section 110(a) under which land alienated before the commencement of the Act is to be subject to express conditions and restrictions in interest referred to in the Certificate of Title. It is submitted that the reference in the Certificate

of Title in the instant case in the original Lease is a sufficient reference for this purpose.

12. Alternatively, the Respondent will seek leave to advance an argument not put forward below based on Section 110(d) and the Third Schedule. Section 110(d) imposes an additional implied condition in the case of town land whether held under Registry title or Land Office title as indicated in that Schedule. Paragraph 1 thereof defines a "shop house" as "a detached, semi-detached or terraced house used or intended to be used wholly or in part for any commercial or industrial purpose". It is submitted that the Wisma Centre falls within this definition. Under the substantive provisions of the Schedule different conditions are implied in different States and in the case of Selangor, where the Land was situated, paragraph 5 prohibits the erection of shop houses on land subject to the payment of rent at the rate prescribed for town or village land and not at the rate prescribed for building lots. It is respectfully submitted that this provision is applicable in the present case.

13. In relation to the point that the Notice referred to commercial rather than building use the Respondent respectfully adopts the reasoning of Chang Min Tat F.J. in relation to both arguments set out above.

14. In the alternative to the above arguments, the Respondent will contend that for the reasons given in the judgment of the Federal Court it was right to conclude that a duty is imposed on the proprietor of what it termed Section 53(3) land which has not had the benefit of action under Section 54 to apply for the imposition of an appropriate land category.

15. In the further alternative the Respondent will rely on Section 418 and adopts the reasoning of the Federal Court on this point.

16. The Respondent submits that the Order of the Federal Court was right and that this appeal should be dismissed with costs for the following (among other)

R E A S O N S

(A) BECAUSE erection of Wisma Central was in breach of the implied conditions set out in Section 115 of the N.L.C. which were applicable to the Land because it had originally been comprised in a Lease for Agricultural Land No.746.

(B) Alternatively BECAUSE erection of Wisma Central was in breach of the implied condition in paragraph 5 of the Third Schedule which was applicable to the Land.

(C) Alternatively BECAUSE erection of the Wisma Central was in breach of the obligation of a proprietor of Section 53(3) land to apply for imposition of the category of use building before building thereon as held by the Federal Court.

(D) In the further alternative BECAUSE the application by the Appellant was out of time for the reasons given by the Federal Court.

DONALD RATTEE

ROBERT HAM

No. 6 of 1980

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:

GARDEN CITY DEVELOPMENT BERHAD Appellant

- and -

THE COLLECTOR OF LAND REVENUE FEDERAL TERRITORY Respondent

CASE FOR THE RESPONDENT

STEPHENSON HARWOOD,
Saddlers' Hall,
Gutter Lane,
Cheapside,
London, EC2V 6BS

Solicitors for the Respondent