Chuan Hong Petrol Station Pte Ltd
v
Shell Singapore (Pte) Ltd

[1992] SGCA 35

Court of Appeal — Civil Appeal No 23 of 1989
Yong Pung How CJ, Chan Sek Keong J and Warren L H Khoo J
30 April 1992

Civil Procedure *— Injunctions — Interlocutory injunction — When death of commercial relationship will be considered as a factor*

Civil Procedure *— Injunctions — Licence to operate petrol station — Owners terminating licence because of fire hazard — Whether serious issue to be tried — Role of common knowledge and experience — Weight of views taken by regulatory bodies*

Contract *— Contractual terms — Parol evidence rule — Parol evidence rule not precluding party from raising promissory estoppel — Representations alleged to constitute promise indeterminate and ambiguous — Whether promissory estoppel can be raised*

Contract *— Remedies — Specific performance — Rule against ordering specific performance of contract of service — Whether terms in operating licence sufficient to turn it into contract of service — Contract on which specific performance sought part of single transaction involving two contracts — Other contract allowed party to render transaction redundant — Whether specific performance to be ordered*

Facts

This was an appeal from a decision denying various interlocutory orders sought by the appellant ("CHPS"). CHPS operated one of the respondent Shell's petrol stations under an operating licence. Under cl 12(d) of the operating licence, Shell could terminate the licence if CHPS did any act which was or might be detrimental to Shell's interests. Shell supplied petrol to the station pursuant to a supply contract. On 12 August 1989, CHPS held a prayer session at the station premises with lighted candles and joss sticks, despite having been warned by Shell that this might result in the Director of Fire Service cancelling its licence to store and dispense petrol. Shell terminated the operating licence pursuant to cl 12(d) on the basis that the prayer session was detrimental to its interests. Shortly thereafter, Shell stopped supplying petrol to the station. Subsequently, the Director of Fire Service cancelled CHPS's licence to store and dispense petrol because the prayer session was a contravention of the Petroleum Byelaws. CHPS sought interlocutory orders to restrain Shell from repossessing the station, and to compel it to continue supplying petrol under the supply contract. The expert witness for CHPS took the view that the activities did not constitute a fire hazard. The judge denied CHPS the relief it sought and CHPS appealed against both orders, contending that there were serious questions to be tried as to whether the operating licence had been properly terminated, and whether there was promissory estoppel arising from an alleged promise made by Shell or its agent to grant CHPS (under its former name) an "evergreen" contract. In this

appeal, there was a further issue as to whether Shell was in breach of the supply contract by stopping supplies after CHPS failed to obtain interlocutory relief.

Held, dismissing the appeal:

(1) The judge was entitled to draw on common knowledge and experience that petrol was a highly volatile and dangerous substance, and might justifiably allow himself, even when hearing the matter at an interlocutory stage, to take a sceptical view of CHPS's expert witness, and to prefer the view of the regulatory authorities as the more reliable and decisive. Even if CHPS's acts had no actual risk of fire, it would expose Shell to inconvenience and embarrassment with the authorities, or to cancellation of its licences. It was more likely than not that in the circumstances, Shell would be able to establish at trial that the operating licence had been properly terminated: at [44] to [47].

(2) While the rule against varying a written contract by parol evidence did not prevent a party from raising promissory estoppel, the judge was justified in his view that the allegations of representations pertaining to the "evergreen" contract were so indeterminate and ambiguous that they could not raise an estoppel against Shell. The alleged representation would in any event be subject to cl 12(d), and therefore no representation could have been made that Shell would not terminate the licence when an event contemplated by the clause occurred: at [60], [61] and [62].

(3) The judge was right not to compel Shell to continue supplying petrol to CHPS. The supply contract and the operating licence were so intimately connected that it made no sense to compel Shell to perform the supply contract if it was entitled to terminate the operating licence. Furthermore, CHPS no longer had the necessary licences for storing and dispensing petrol, and to enforce the supply contract would be to compel Shell to participate in an illegal act, and to compel it to perform a contract when CHPS was not in a position to perform its part: at [68].

[Observations: While it is the rule in contract law that specific performance will not be ordered of a contract of service, the provisions of an operating licence that the appellant (through its agents and servants) should conform to the rules and regulations of the respondent, keep the premises clean and tidy, employ competent staff to provide efficient and courteous service to promote the sale of the respondent's brands of goods to the satisfaction of the respondent and use the premises for the sole purpose of selling the respondent's products, were not capable of turning what essentially was a commercial contract between two independent contractors into a contract of service within the rule: at [72] and [75].

The fact that the commercial relationship is dead is not always a factor to be considered. The court obviously must guard against being presented with a *fait accompli*, against a party taking advantage of his own wrong. In a case where the death of the relationship has been brought about by the wrongful act of the applicant for an injunction, it is obvious that that should not be taken in his favour; it should rather be taken against him. Similarly, where the deterioration of the relationship has been brought about by matters the rights and wrongs of which are disputed, the court would regard it as nothing but a neutral factor: at [78].

The fundamental principle applicable, in a court's exercise of its discretion to grant or refuse an interim injunction, whether mandatory or prohibitory, was that the court should take whichever course appeared to carry the lower risk of injustice if it turned out to be wrong at trial in the sense of granting relief to a party who fails to establish his rights at the trial, or of failing to grant relief to a party who succeeds at the trial: at [88].]

Case(s) referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396 (refd)

Eng Mee Yong v V Letchumanan s/o Velayutham [1979] 2 MLJ 212; [1980] AC 331 (folld)

Films Rover International Ltd v Cannon Film Sales Ltd [1987] 1 WLR 670 (refd)

Heysek v Boyden World Corp [1988] 2 SLR(R) 298; [1988] SLR 862 (refd)

Locabail International Finance Ltd v Agroexport [1986] 1 WLR 657 (refd)

Shell-Mex and BP Ltd v Manchester Garages Ltd [1971] 1 WLR 612; [1971] 1 All ER 841 (distd)

Shepherd Homes Ltd v Sandham [1971] Ch 340 (refd)

Sky Petroleum Ltd v VIP Petroleum Ltd [1974] 1 WLR 576 (distd)

Tee Than Song v Caltex Oil Malaysia Ltd [1970] 1 MLJ 68 (refd)

Legislation referred to

Evidence Act (Cap 97, 1990 Rev Ed) s 94

Evidence Ordinance (M'sia) s 92

Joseph Ang and Mark Lim (Lee & Lee) for the appellant;
Wong Meng Meng and Sundaresh Menon (Shook Lin & Bok) for the respondent.

30 April 1992

Warren L H Khoo J (delivering the grounds of judgment of the court):

1 The appellants were operators of a petrol-filling station at Coronation Shopping Plaza, Bukit Timah Road, owned by the respondents. They occupied and operated the station under a filling station operating licence ("the operating licence") granted by the respondents. Motor fuels and other products were supplied by the respondents under a resellers' bulk motor fuels contract ("the supply contract").

2 Arising from certain events taking place at the station on 12 August 1988, to be more fully described later, the respondents terminated the operating licence and later stopped supplying fuels and other products to the appellants. The appellants commenced action against the respondents and made an application by Summons No 5779 of 1988, which, as subsequently amended, was for:

(a) an interim injunction restraining the respondents from repossessing the station and compelling the respondents to perform and observe the terms of the operating licence;

(b) an order restraining the respondents from withholding supplies of motor fuels and other products in accordance with the terms of the supply contract;

(c) an order compelling the respondents to maintain and repair pumps accessories and related equipment.

3 As the appellants failed to vacate the premises after the termination of the licence, the respondents made an application of their own for an order restraining the appellants from continuing to remain in occupation of the premises.

4 Lai Kew Chai J had, in September 1988, dismissed the appellants' summons in its original terms. The appellants asked to present further arguments, and in the course of the further arguments, the summons was amended. The respondents' application was heard at the same time as the further arguments on the appellants' summons. On 23 March 1989, Lai Kew Chai J dismissed the appellants' application as amended. He granted the respondents the injunction they sought, upon the usual undertaking as to damages and the further undertaking by the respondents not to appoint another dealer to the filling station but to operate it themselves. Lai Kew Chai J refused a stay of his orders pending the appeal.

5 From these decisions, the appellants brought this appeal. We heard the appeal and dismissed it. We now give our reasons.

The facts

6 The history of this station starts in 1951, when the respondents granted a licence to operate a station on this site to Chen Chin Feng, trading under the name Chuan Hong & Co. Chen was the uncle of Mr Tan Yeow Seng, a director of the appellants. This station, consisting of a vehicle service bay and other facilities, as well as a petrol-filling station, was larger than the station with which we are concerned. In 1976, the respondents conveyed the site to Goldhill Properties for redevelopment with an adjacent plot of land into the Coronation Shopping Plaza. The then current operating licence, dated 27 April 1970, ("the 1970 operating licence") was terminated with effect from 1 December 1976.

7 The original station was demolished and a smaller station was erected as part of the shopping development. When the new station was ready some four years later, Chuan Hong & Co were reappointed as dealers, and a new operating licence and supply contract were concluded on 19 May 1980.

8 In 1984, Chuan Hong & Co were converted to Chuan Hong Petrol Station Pte Ltd, the present appellants, who then took over Chuan Hong & Co's business of operating the station.

The contractual framework

9 It was not disputed that the contractual relations between the parties were governed by the operating licence and the supply contract, the appellants being treated as successors to Chuan Hong & Co.

10 The operating licence was in the form of an agreement between the parties. It gave the appellants the right to enter upon the land on which the station stands and to make use of the station for the sole purpose of marketing the respondents' petroleum products. Under it, the respondents were obliged to maintain the station and its accessories in good repair.

11 Clause 12 was an important clause in this case. It allowed the respondents to determine the operating licence forthwith if the licensee should commit any of the acts listed in that clause. In particular, cl 12(d) allowed the respondents to terminate if the licensee:

> shall do any act which is or may be detrimental to the interests of the company and for this purpose the company shall be the sole judge as to the doing and effect of such act.

12 Clause 15 provided as follows:

> The company may in its discretion and without assigning any reason therefor forthwith determine this agreement without notice and thereupon the company shall pay to the licensee a sum equivalent to the difference between the wholesale and retail prices on the sale of motor fuels made by the licensee from the licensed premises during a period of one calendar month immediately preceding such determination and the licensee shall not be entitled to any further sum by way of damage [*sic*] or otherwise.

13 Clause 11 provided as follows:

> At the expiration or sooner determination of this licence for whatever reason the licensee shall peaceably and quietly quit the licensed premises and shall not thereafter re-enter upon the licensed premises without the company's consent.

14 The 1970 operating licence had printed terms identical to those of the 1980 licence. The 1970 operating licence was, however, stated to be from 1 January 1970 to 31 January 1970, and thereafter from month to month, whereas in the 1980 licence no commencement date was inserted in the blank spaces provided. As the new station was only a filling station, the 1980 licence was headed "*Filling* station operating licence" while the 1970 licence was headed "*Service/Filling* station operating licence".

The supply contract

15 The supply contract governed the sale of motor fuels by the respondents to the appellants and their resale by the appellants. The

appellants were described as the buyers and the respondents were described as the sellers. Clause 1 read:

> Buyers have this day bought of the sellers for delivery during the period . . . the whole of their requirements of motor fuels (motor spirit and automotive gas oil/diesel fuel) for all purposes and agree that after the expiry of the said period they will unless and until this agreement shall be determined by either party giving to the other one month's previous notice on [*sic*] writing of determination purchase the whole of their requirements of motor fuels for all purposes from sellers.

16 The first part of the clause was left blank presumably because it was for some reason inapplicable when the contract was made. This makes the clause somewhat incomplete, but nothing turned on this, as it was conceded by the respondents that the supply contract was not formally terminated, either in pursuance of cl 1 or otherwise.

17 Clause 2 provided that the respondents shall give and the appellants shall take delivery at pumps installed at the station. By cl 12, the appellants agreed not to sell motor fuels other than those of the respondents. By cl 10, the respondents had the right to stipulate the resale prices of the motor fuels supplied.

The background

18 Among the more traditional sections of the non-Christian Chinese population in Singapore, it is believed that the seventh month of the lunar calendar is the month of the hungry ghosts. The ghosts are appeased by offerings of food. The ceremony calls for placing items of food on an altar table. Candles are lighted, and the praying is done with lighted joss sticks. At the conclusion of the ceremony, joss paper is burned.

19 For some time before the event giving rise to this suit, the Director of Fire Service, as the regulatory authority in relation to the storage of petroleum products in Singapore, had been concerned about the danger posed by petrol station operators and their staff engaging in the performance of the prayer ceremonies just described. The director issued letters of warning to the major oil companies in Singapore, including the respondents, and the respondents in turn issued similar warnings to their dealers, including the appellants. The respondents exhibited to their affidavit copies of letters of warning they received from the director about cigarette smoking and the holding of the seventh month prayer ceremonies, and their own letters of warning to their dealers. These letters were all in clear terms, warning of the danger posed by these activities, and, in the case of the letters from the respondents to their dealers, warning of the cancellation of their licences and the possibility of their status as dealers being affected. The appellants did not deny the receipt of such letters of warning. They said they received many letters from the respondents and they could not remember whether they received these particular ones.

The triggering event

20 On 12 August 1988, the first day of the seventh lunar month, Tan Yeow Seng and his staff, true to a long-standing custom, went about the prayer activities described above. Two tables were joined together to serve as the altar table. In his own words:

> On the altar table, we had placed all the usual offerings. I placed two small red candles with wooden legs into a sand-filled metal container. I lighted the two candles, then I prayed with three lighted joss sticks. Before I could place the three joss sticks into the metal container the two candles had been blown off due to the strong breeze that day. No effort was made to light the candles again because of the strong wind.

21 Mr Tan Yeow Seng was interrupted in his prayer by Francis Ong, the auto market development manager of the respondents, who was taking a colleague from England around their stations on a survey in preparation for a regional merchandising seminar to be held in Singapore. After they left, Mr Tan Yeow Seng said he finished off his prayer by burning joss paper by the side of Coronation Road away from the station.

22 There was dispute about the exact location of the altar table. Mr Tan Yeow Seng said it was 6.1m away from the nearest pump just in front of the ladies' toilet, but Mr Francis Ong said it was no more than 3m away. There was dispute whether the candles were burning. There was also dispute whether joss paper was burned in the urn on the altar table, or, as Mr Tan Yeow Seng said, by the side of Coronation Road, some 13m away from the nearest pump.

23 On 20 August 1988, the respondents' solicitors wrote to the appellants, referring to the incident and informing them that the respondents were reviewing the appellants' operating licence.

24 On 22 August, the respondents' solicitors gave the appellants notice of termination of the operating licence. The letter stated:

> Further to our letter of 20 August 1988, we are instructed to and hereby inform you that our clients consider the burning of joss paper and joss sticks and the presence of lighted candles referred to therein to be acts detrimental to the interests of our clients in that these acts were dangerous to the safety of the station and to the public.

25 The respondents gave the appellants notice of termination of the operating licence with effect from 30 September 1988. They purported to act under cl 12(d) of the operating licence, set out above.

26 The appellants wrote several letters of appeal for reconsideration to the respondents, but to no avail.

27 On 19 September 1988, the respondents' solicitors wrote to the appellants' solicitors, reaffirming the notice of termination and requiring the appellants to vacate the premises by 1 October.

28 On 21 September 1988, the appellants commenced action against the respondents and on the same day they commenced interlocutory proceedings for the interim reliefs already mentioned. Their application, Summons No 5779 of 1988, was dismissed by Lai Kew Chai J on 30 September.

29 From 4 October, the respondents, no doubt on the strength of this dismissal of the appellants' application, stopped supplying fuel to the appellants. The station ceased functioning as a petrol-filling station on 14 October.

30 On 13 October, the appellants renewed their application under another summons, seeking the same interim reliefs pending further arguments on Summons No 5779 of 1988. This was again dismissed, on the same day.

Revocation of storage licences

31 On 31 October 1988, the respondents wrote to the Director of Fire Service, putting Mr Tan Yeow Seng's version of what took place at the prayer session on 12 August, and enclosing a sketch plan showing the position of the altar table according to Mr Tan Yeow Seng himself, in relation to the pumps and other parts of the premises. They asked the director for his views on the assumption, as Mr Tan Yeow Seng contended, that only joss sticks were burnt and unsuccessful attempts made to light two candles. In reply, the Director referred to byelaw 66(f)(1) of the Petroleum Byelaws, which prohibits any naked light within 9m of any underground tank. He stated that he regarded as contrary to safe practice the use of any source of ignition, be it cigarettes, joss sticks, burning paper, or even the use of naked light in attempting to ignite candles. He also said that on the basis of Mr Tan Yeow Seng's version of where the altar table was, the appellants would have contravened the byelaws and were "subject to further action".

32 On 22 December 1988, apparently after communicating with the appellants, the Director of Fire Service revoked the appellants' licences for storage and dispensing of petrol on the basis that byelaw 66(f)(1) of the Petroleum Byelaws had been contravened as a result of what took place on 12 August.

33 In two subsequent letters, the Director of Fire Service stated that he would not withdraw the revocation of the licences, and that any application for a fresh licence would have to be considered on its own merits, whatever the result of the legal proceedings.

Issues before Lai Kew Chai J

34 The central issues before Lai Kew Chai J concerned the following matters: (a) the purported termination of the operating licence; and (b) a

promissory estoppel said to have arisen in relation to the operating licence and supply contract.

35 A total of 35 affidavits were filed. Much of the argument on the facts centred on the question whether what Mr Tan Yeow Seng and his staff did on 12 August constituted a fire hazard so as to attract the operation of cl 12(d) of the operating licence.

36 It was conceded by the respondents that on a proper construction of cl 12(d), they must have reasonable grounds before coming to a view that any act or omission was detrimental to their interest, although the clause in terms designated them as the sole judge of the question. The respondents, however, submitted that so long as the respondents could reasonably have come to the conclusion which they did, the court would not interfere.

Fire hazard point

37 In support of their contention that there was no fire hazard, the appellants produced a report of one Mr N J Mistry, who was described as a safety surveyor and engineer. He was said to have, among other qualifications, those of a registered chartered engineer of the United Kingdom, and a registered professional engineer in Singapore in marine engineering and naval architecture. He had taught at the Singapore Polytechnic and was in charge of the fire safety of buildings.

38 Mr Mistry conducted what might neutrally be described as an interesting experiment at the petrol station, using a round container 20cm in diameter and 15cm deep and half-filled with petrol. Twenty joss sticks "after being lighted" (presumably well away from the container) were brought to a position some 15cm above the container of petrol, and the petrol was stirred. No ignition took place. The lighted joss sticks were progressively brought closer to the rim of the container as the petrol was continuously being stirred. The experiment lasted for some 10 minutes, and the petrol did not ignite.

39 On the basis of this experiment, Mr Mistry concluded that the burning of joss sticks "at the stated place" (presumably on the prayer table just outside the ladies' toilet) "would not pose any threat of fire".

40 Mr Teo Tee Hong, the respondents' marketing project engineer, who was a professional engineer registered in Singapore and Malaysia, expressed his rather robust view that Mr Mistry's conclusion was misconceived. He said: "There would be utterly disastrous consequences in the petroleum industry if Mr Mistry's views on the safety standards in the handling of petrol were to be followed." Mr Teo pointed out that petrol vapour has to be mixed with air in a certain proportion before it becomes flammable. The proportion needed is in the range of 1–6% of petrol vapour in a homogeneous mixture with air. If the proportion falls within this range, the mixture is flammable, and it will ignite if a source of ignition such as a

spark, hot element or flame is present within it. In the precincts of a petrol station or petrol storage area, Mr Teo said one cannot predict when such a flammable mixture might come into existence, and every step must be taken to avoid the possibility. He might have added that if and when a flammable mixture does occur, and an ignition source is present, the potential for disaster is absolutely predictable.

41 Mr Teo concluded, albeit somewhat circuitously, that in Mr Mistry's experiment, the conditions obviously were not such that a flammable mixture was created.

Appellants' submissions

42 The appellants submitted before Lai Kew Chai J and before us that there were serious questions to be tried on the question whether the operating licence had been properly terminated. They pointed to the disputes as to the exact location of the altar table, whether joss paper was burned there or away from the station, and whether there were burning candles. They also pointed to disputes about the allegedly inconsistent position which the respondents had taken in regard to incidents raising questions of fire safety at the respondents' other petrol-filling stations, at Serangoon Road and Ang Mo Kio. They submitted generally that the entire question whether what took place on 12 August constituted a fire hazard was a serious question to be tried, and that it would be wrong for the judge to try to resolve the matter on affidavit evidence.

43 The learned judge, in a brief oral judgment, disposed of this point as follows:

> In my judgment, the defendants have lawfully terminated the operating licence and accordingly the plaintiffs are trespassers. On the basis of undisputed facts, the plaintiffs' action, excluding the question of the burning of joss papers, constituted a serious fire hazard and the defendants could not but act, as they were entitled to, under cl 12(d) of the licence agreement. There is no issue to be tried in this regard.

44 The learned judge based his decision on the undisputed facts. He did not say what the undisputed facts were, but we can see at least the following. Firstly, on the day in question, on Mr Tan Yeow Seng's own admission, he put two small candles in the metal container on the altar table and lighted them, although according to him they were blown out by high wind and he did not try to relight them. He admitted that he used three burning joss sticks. Secondly, he admitted that the altar table was 6.1m from the nearest petrol pump. Thirdly, the Director of Fire Service, the regulatory authority in these matters, took a serious view of the sort of activity which Mr Tan Yeow Seng and his staff had engaged in. The appellants had had more than one warning about this serious view, and about the possibility of the cancellation of licences. Fourthly, and most importantly, the Director of Fire Service, accepting Mr Tan Yeow Seng's account, including the position

of the altar table as he described it, took the view that what was done was a contravention of the relevant byelaws and he revoked the storage licences issued to the appellants. Fifthly, the appellants were in no position to successfully challenge the decision of the Director, and had not succeeded in doing so.

45 As to the views of the appellants' expert based on the one experiment conducted at the premises, the learned judge would be entitled, in our view, to draw on common knowledge and experience that petrol is a highly volatile and dangerous substance. That is the reason for the strict control of its storage and handling. He might justifiably allow himself, even when hearing a matter at the interlocutory stage, to take a sceptical, if not cynical, view of Mr Mistry's experiment and his conclusions. He would be entitled, even at this interlocutory stage, to prefer the view of the fire safety engineer and the licensing authorities as the more reliable or more plausible. (See *Eng Mee Yong v V Letchumanan s/o Velayutham* [1979] 2 MLJ 212 at 217, *per* Lord Diplock.)

46 The learned judge would be entitled to go on the basis that the views of the regulatory authority carry great, if not decisive, weight. Even if what the appellants allowed to be done had no actual, or only a most remote, risk of fire, it may be assumed that the last thing that the respondents would wish would be to get into difficulty with the licensing authorities on account of the acts of their dealers. In view of the fact that the Director of Fire Service look to the respondents to ensure that the seventh month prayer ceremonies would not be held at their stations, the appellants' acts would expose the respondents to at least inconvenience and embarrassment with the authorities. It would also expose the appellants to cancellation of their licences, resulting in disruption of the respondents' business as well as the appellants'.

47 It seems to us very much more likely than not that in the circumstances, the respondents would be able to establish at trial that the operating licence has been properly terminated. The learned judge said there was "no issue" to be tried. We cannot say he was not entitled to come to this view.

Promissory estoppel

48 The other main issue of fact which the appellants' counsel said ought to be tried was the question of promissory estoppel. The foundation for the argument about promissory estoppel is to be found in an affidavit of Mr Tan Yeow Seng. In it, Mr Tan said that, prior to the redevelopment of the site, there were, in addition to the petrol-filling station, a service bay, a repair bay, a wash bay and a place for the sale of tyres and batteries. When the respondents sold the site of the old station for redevelopment, Chuan Hong & Co were not paid any compensation and had to wait for two years before they were to operate the new station. Mr Chen Chin Feng, the

proprietor of Chuan Hong, and Mr Tan himself had a meeting with two senior executives of the respondents, Mr Tan Khin Nguan and Mr Loke Ah Chye. Mr Tan Yeow Seng said that Chuan Hong & Co were promised, what he called, an "evergreen" contract if they did not ask for compensation and if they agreed to wait for two years for the new station to be built.

49 On 27 September 1976, Mr Tan Khin Nguan, in his capacity as the automotive retail sales manager, wrote on behalf of the respondents to the appellants. In his letter, he formally informed Chuan Hong & Co about the proposed redevelopment of the site, and gave notice to terminate the 1970 operating licence.

50 Mr Tan Khin Nguan concluded his letter by saying:

> We expect construction of this new filling station to be completed sometime around end of 1978 and have pleasure in confirming that when it is ready for business, we will appoint you its operator, subject to our mutual agreement of terms to a separate agreement to be concluded between us.

51 Nothing was said in this letter about an "evergreen" contract.

52 Mr Tan Yeow Seng said that the most profitable part of the business was in the service bay. He said that it was because of the loss of this service bay and the two-year wait and disruption of business that Chuan Hong & Co were promised an "evergreen" contract. In the event, Chuan Hong & Co had to wait four years, not two, for the new station to be completed and a new operating licence to be granted.

53 Mr Tan Yeow Seng supported his contention of an "evergreen" contract by pointing to the fact that in the 1970 operating licence the duration was stated to be "for the term of one calendar month from 1 January 1970 to 31 January 1970, both days inclusive and thereafter from month to month", whereas in the 1980 operating licence the dates were left blank. According to Mr Tan Yeow Seng, it was because of the promise of an "evergreen" contract that these spaces in the printed form of the operating licence were left blank. The respondents denied that any such promise was ever made.

54 Before Lai Kew Chai J, it was submitted on behalf of the appellants that they had thus raised a serious question of promissory estoppel to be tried. The judge was not impressed. He did not refer to the denials of the respondents of the existence of such promises.

55 In his judgment, he said:

> The evidence of the plaintiffs in purported support of the alleged oral representations of a perpetually renewable licence are suspect. They were only asserted after the termination of the licence and were so wholly inconsistent with the contemporaneous correspondence, agreement and the commercial context that I am sure they were plainly

> afterthoughts made by the plaintiffs in the hope of raising some form of an equitable estoppel. The case of *Tee Than Song v Caltex Oil Malaysia Ltd* [1970] 1 MLJ 68 is plainly against the plaintiffs.

56 The learned judge further observed that: "the alleged representations were so indeterminate and ambiguous that they cannot in equity raise any estoppel against the defendants."

57 Counsel submitted that it was wrong for the judge to come to findings on the question of estoppel on disputed affidavit evidence. In regard to the judge's observation about the appellants' assertion being inconsistent with the "contemporaneous correspondence and agreement", counsel submitted that it is in the nature of a promissory estoppel that it arises only where what is represented is not in the contract; it is only where the representations are inconsistent with the contract that the doctrine applies.

58 As for the learned judge's reference to the *Tee Than Song* case, counsel made the fair comment that the learned judge did not say why it was against the appellants.

Our views

59 Our views are as follows. Firstly, we agree with counsel that the rule against varying a written contract by parol evidence does not prevent a party from raising promissory estoppel. The doctrine of promissory estoppel does not seek to contradict, vary, add to or subtract from the terms of a contract. In fact, it presupposes and recognises the existence of the terms of a contract. It only operates to prevent a party having the benefit of terms of a contract from enforcing them if the conditions for the operation of the doctrine are fulfilled.

60 Secondly, we are of the view that the learned judge was quite justified in his view that the allegations of representations were suspect and that the alleged representations were so indeterminate and ambiguous that they could not raise an estoppel against the respondents. In considering an issue of promissory estoppel, one has to ask what contractual provision is sought to be applied or enforced, and then to ascertain what representations have been made in relation to that contractual provision. There cannot be an estoppel *in vacuo*, unrelated to any contractual provision.

61 In the instant case, the contractual term in question is cl 12(d) giving the respondents the right to terminate the operating licence in the event the appellants committed any act detrimental to the interests of the respondents. The learned judge would have asked himself whether it was likely for the respondents to have represented to the appellants that they would not exercise such a right in the event mentioned. He must have concluded that it was highly unlikely or unimaginable.

62 Counsel for the appellants indeed conceded, properly, before the learned judge that the "evergreen" contract for which the appellants

contended would in any event be subject to cl 12(d). It seems to us that this is as good as saying that no representation was ever made that the respondents would not terminate the licence when an event contemplated by the clause occurred.

63 Thirdly, as for the *Tee Than Song* case, it is reasonably clear, in the context, that the learned judge was referring to that part of the case that deals with the question of a "collateral promise" and whether evidence of such a promise could be admitted to vary or add to the terms of the written contract. The case arose from the termination of an agreement granting an operating licence in respect of a Caltex service station in Kuala Lumpur. After the agreement was terminated, the licensee refused to vacate the premises. Caltex applied for an interlocutory injunction, preventing him from remaining on the premises. He resisted the application on the ground that he had been assured by an official of Caltex that in the event of the company terminating the agreement, he would be given a reasonably long notice so as to enable him to wind up his business and collect outstanding debts from his customers, and that the notice he got was not long enough. An interlocutory injunction was granted to Caltex.

64 The Federal Court of Malaysia, in dismissing the licensee's appeal, treated the allegation of an oral representation as an attempt to contradict, vary or add to the terms of a written contract contrary to s 92 of the Evidence Ordinance.

65 Unless the appellants in this case can satisfy the conditions necessary for the operation of a promissory estoppel, he is in no better position than the licensee in the *Tee Than Song* case. He is caught by our equivalent of s 92 of the Malaysian Evidence Ordinance. This, as we apprehend it, is why the learned judge in the case before us said that the *Tee Than Song* case was plainly against the appellants.

66 The learned judge thus entertained grave doubts that the appellants could overcome the first hurdle of establishing a clear promise on the part of the respondents. He said there was no serious question to be tried. On our analysis of the position, we think that he was quite entitled to hold this view.

Injunction relating to the supply contract

67 As stated earlier, the supply contract was not formally terminated. The respondents simply stopped supplies after the appellants failed to obtain an interim injunction in October 1988. The appellants said that in doing so, the respondents were in breach, and the respondents should be restrained from continuing the breach. The learned judge refused to intervene. He said he was not convinced that he should compel the respondents to sell their petroleum products to the appellants.

68 The learned judge did not elaborate on the reasons why he came to this view. However, the reality was as follows. Firstly, the supply contract and the operating licence were so intimately connected that once the learned judge came to the view that no injunction should be issued to compel the respondents to perform the operating licence, it would make no sense to compel them to perform the terms of the supply contract. Secondly, by the time he came to make his decision in March, the appellants no longer had the necessary licences to store and dispense petroleum. It would indeed, as counsel for the respondents said, be compelling the respondents to participate in an illegal act. Thirdly, without the necessary licences, the appellants would no longer be in a position to perform their obligations of taking delivery of petroleum, and the court would be compelling one party to perform a contract when the other party was not in a position to perform his part.

69 The learned judge said that the *Sky Petroleum* case did not assist the appellants at all. He was referring to the case of *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 WLR 576. In our view, it is indeed right that in the matter of granting or withholding interim injunctions, it is unhelpful to rely on what a court in another case did or did not do. It is the principle established that is of relevance, although cases with similar facts are no doubt of assistance. The difficulty is that hardly any two cases present similar facts. The *Sky* case, as an example, concerned a supply contract for ten years, whereas in the instant case, the supply contract appears to be terminable on one month's notice, and the operating licence could be terminated under cl 15 at any time on terms. In *Sky*, Goulding J was not able to form even a provisional view whether the allegations of breaches of the credit limit provisions of the contract were well founded. In the instant case, the learned judge was able, after very lengthy arguments, to come to quite clear views about the strength, or rather, the weakness of the appellants' case.

The respondents' case

70 Counsel for the respondents, in addition to dealing with the issues canvassed on behalf of the appellants, raised two points. Both points were made in connection with his view (which view we do not wholly share for reasons set out later) that the reliefs sought by the appellants, at least as far as the supply contract was concerned, were in the nature of mandatory injunctions.

The "contract of service" argument

71 Counsel's first point was that the contractual relationship between the parties was akin to one of a contract of service in that it was personal in nature and depended on the "personality" and "personal capabilities" of the appellants. A court, he said, would be extremely slow to grant an injunction,

the effect of which was to require the performance of such a contract. Counsel referred to cll 5, 6, 8(a) and 8(b) and 12(c) and 12(d) of the operating licence.

72 In gist, cl 5 of the operating licence provided that servants and agents of the appellants should conform to rules and regulations of the respondents, and allowed the respondents to exclude any offenders from the premises. Clause 6 required that the appellants should use the premises for the sole purpose of selling the respondents' products. Clause 8 required the respondents to keep the premises clean and tidy, and to employ competent staff to provide efficient and courteous service, *etc*. Clause 12(c) had the effect of requiring the appellants to promote the sale of the respondents' brands of goods to the satisfaction of the respondents.

73 Counsel referred to *Shell-Mex and BP Ltd v Manchester Garages Ltd* [1971] 1 All ER 841. In that case, the question that had to be decided was whether the dealers in occupation of a filling station, by virtue of a document described as a licence, were licensees or tenants protected by the Landlord and Tenant Act 1954. It was in this context that the members of the English Court of Appeal referred to the personal nature of the transaction. This is clear from the way Lord Denning posed the question: "Broadly speaking, we have to see whether it is a personal privilege given to a person, in which case it is a licence, or whether it grants an interest in land, in which case it is a tenancy."

74 It is clear that that case has nothing to do with the rule in contract law that specific performance will not be ordered of a contract of service. The case does not lend any support at all to the respondents' counsel's argument.

75 We are also of the view that the provisions of the operating licence referred to above are not capable of turning what essentially is a commercial contract between two independent contractors into a contract of service within the rule. We see no reason in principle why, if the conditions were right, an injunction could not be granted to preserve the status quo, even if to do so the respondents were compelled to continue to perform the contract.

"Commercial relationship dead" point

76 The respondents' counsel's next point was that the commercial relationship between the parties was dead. He said that the appellants had been out of the station, and it would be wrong to let the appellants go back. Counsel relied on *Heysek v Boyden World Corp* [1988] 2 SLR(R) 298.

77 In *Heysek*, Chan Sek Keong J referred to this factor as one among others which he had to consider under the much broader heading of whether a greater injustice would be caused by withholding the mandatory

injunction (requiring the plaintiffs, pending trial, to cease having as part of their name the defendants' proprietary name) than by granting it.

78 In our view, the fact that the commercial relationship is dead is not always a factor to be considered. The court obviously must guard against being presented with a *fait accompli*, against a party taking advantage of his own wrong. In a case where the death of the relationship has been brought about by the wrongful act of the applicant for an injunction, it is obvious that that should not be taken in his favour; it should rather be taken against him. Similarly, where the deterioration of the relationship has been brought about by matters the rights and wrongs of which are disputed, we would regard it as nothing but a neutral factor.

79 In the instant case, the appellants left the station when their application for interim reliefs was dismissed and when the respondents stopped supplies. The rights and wrongs of these matters were in issue before Lai Kew Chai J and, on appeal, before us. The cessation of the commercial relationship between the parties is neither here nor there.

Mandatory and prohibitory injunctions: the guidelines

80 Counsel for the respondents submitted that what the appellants sought, at least as far as the supply contract was concerned, was in the nature of mandatory interlocutory injunctions. He submitted that this being the case, the relevant test was whether the court had a high degree of assurance that at the trial it would appear that the decision of granting the application was rightly made.

81 If, as we understand it, the difference between the two kinds of interim relief lies in whether the status quo is disturbed, it seems clear in this case that what the appellants sought was no more than to preserve the status quo pending final determination of the action, to carry on what they had been doing. In a normal case, following the guidelines in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, an interlocutory injunction may be granted on the applicant showing a serious question to be tried. This was in fact the approach taken by the learned judge when he referred to the issues raised by the appellants.

82 It seems to us that the status quo would not be disturbed if it were merely a question of granting the reliefs which the appellants sought. However, when, as was the case, the appellants' application was refused, even without the respondents' application being granted, the effect was to fundamentally alter the status quo. For this purpose, the status quo must be by reference to a time before the respondents stopped supplying fuels to the appellants and before the appellants were compelled to cease operations.

83 The refusal of the appellants' application and the granting of the respondents' application, had a mandatory effect in the real sense of the word.

84 We agree that in such circumstances, more than what is normally required in a case of a prohibitory injunction was required. Counsel mentioned the "high degree of assurance" test in this connection.

85 We take the opportunity to refer to what has been said in certain recent cases concerning the principles involved. We were referred to the English Court of Appeal decision in *Locabail International Finance Ltd v Agroexport* [1986] 1 WLR 657, in which the following statement of Megarry J in *Shepherd Homes Ltd v Sandham* [1971] Ch 340 at 351 was referred to and applied:

> … on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case, the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.

86 In the *Locabail* case, the injunction sought was a mandatory one which, if granted, would amount to granting a major part of the relief claimed in the action. Mustill LJ, following what was said in *Shepherd Homes*, said that such an application must be approached with caution and the relief granted only in a clear case.

87 These cases and the general question of principle were well analysed by Hoffmann J in *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670.

88 We respectfully agree with Hoffmann J that it is important to distinguish between fundamental principle and what are sometimes described as "guidelines", *ie* useful generalisations about the way to deal with the normal run of cases falling within a particular category. We agree with him that a fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong at trial in the sense of granting relief to a party who fails to establish his rights at the trial, or of failing to grant relief to a party who succeeds at the trial. We agree with Hoffmann J that the guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.

89 The "high assurance" test mentioned by counsel is no more than a generalisation, albeit a useful one, of what courts normally do. It is not a principle in the sense of being capable of application in all cases or capable of explaining what courts do in all cases. It is a factor, no doubt often a strong factor, which the court will take into consideration when granting a mandatory injunction. The stronger the case appears at this stage, the lesser the risk of being proved wrong at the trial. However, the court, of necessity, has to consider other relevant factors, such as the conduct of the parties and whether damages instead of an injunction are an adequate remedy. The

strength of a party's case (reaching a "high assurance" or "clear case" standard) is neither a necessary, nor is it a sufficient, condition for the grant of a mandatory injunction.

90 Thus, in the *Films Rover* case ([87] *supra*) itself, although the case was put no higher than an arguable case, Hoffmann J, nevertheless, allowed a mandatory injunction on the ground that the risk of injustice to the plaintiffs was greater if the injunction was withheld than the risk of injustice suffered by the defendant if the injunction was granted. On the other hand, in the *Shepherd Homes* case ([85] *supra*), there was a clear-cut infringement by the defendant of a restrictive covenant, but the plaintiffs were denied a mandatory injunction to require the defendant to remove a wall erected in breach of the covenant. Megarry J took into consideration, among other things, the fact that the plaintiffs delayed in taking proceedings. He said: "No doubt a mandatory injunction may be granted where the case for one is unusually sharp and clear; but it is not a matter of course."

Conclusion

91 In the instant case, in relation to the cl 12(d) question, the learned judge said there was "no issue to be tried". In relation to the promissory estoppel question, he said there was "no serious question to be tried". In relation to the respondents' application, he simply said he applied the usual and well-known principles. It is clear that when he said there was no question or serious question to be tried, it was another way of saying that the decision he was giving stood a good chance of not being proved "wrong" in the sense indicated above. It was not shown to us that the learned judge had gone wrong on principle. We saw no reason why we should interfere with the decision he made in the exercise of his discretion. We accordingly dismissed the appeal with costs.

Headnoted by Arvin Lee.