18, 1980

No. 22 of 1978

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

BETWEEN :

(1) OH HIAM (f) (since deceased)
(2) TEO KIM CHOON (since deceased)
(3) TEO PENG YONG
(4) TEO AH CHYE
(5) TEO HYE HAUT
(6) TEO AH TOH
(7) TEO BOON SEE (f)
(8) TEO CHOOI LIAN (f)
(9) TEO KIM LIAN (f) (Plaintiffs) Appellants

- and -

THAM KONG (Defendant) Respondent

CASE FOR THE APPELLANTS

RECORD

1. This is an appeal from an Order of the Federal Court of Malaysia holden at Kuala Lumpur (Syed Sheh Barakbah L.P., Azmi C.J., and Ong Hock Thye F.J.) dated the 18th September 1967 allowing an appeal by the Respodent from an Order of Gill J. dated the 18th August 1966. The application of the Appellants for final leave to appeal was adjourned sine die on the 6th May 1968 and was granted by the Federal Court (Lee Hun Hoe, C.J. (Borneo), Wan Suleiman and Chang Min Tat F.JJ) on the 21st March 1978. p.94 p.24 p.96

Outline

2. This appeal is concerned with the ownership of a piece of land held under E.M.R. 5339 for Lot 3660 in the Mukim of Setapak, which at all material times had a house erected on it known as 99, Klang Gates Road, Kuala Lumpur (and which is hereafter referred to as "the disputed property"). Prior to 1956, the disputed property formed part of the assets of the estate of Teoh Teow Guan (hereinafter referred to as "the Deceased") who

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died in 1943. The 1st Appellant, Oh Hiam, was the widow of the Deceased and the administratrix of his estate. The 2nd to 9th Appellants are his children. Under Rules Nos. (2) and (4) of section 7 of the Distribution Enactment, Cap.71, Oh Hiam was entitled to one-third of the estate of the Deceased and the 2nd to 9th Appellants were entitled to the remaining two-thirds equally between them. Oh Hiam died during the course of the proceedings, and a grant de bonis non to the estate of the Deceased was obtained by the 2nd and 7th Appellants.

3. The disputed property was included with another Lot in a Transfer registered on the 20th January 1958 from Oh Hiam to the Respondent. In the action, the Appellants as plaintiffs claimed to set aside the Transfer so far as it related to the disputed land, on the ground that the land had been included in the Transfer by mistake. Gill J. in the High Court found in favour of the Appellants, and by way of rectification of the Transfer ordered the Respondent to execute a transfer of the disputed property back to the 2nd to 7th Appellants, on
p.66 payment by them of the sum of $250 into Court.
The Federal Court allowed the Respondent's appeal
p.90 and set aside the order of Gill J. Although there was some discussion of the law applicable, all three members of the Federal Court reversed Gill J. on the facts. The Appellants submit that the decision on the facts of Gill J., who saw and heard the witnesses on each side and made findings, should not have been disturbed, and that Gill J. correctly applied the law.

Facts

p.98 4. By an Agreement in writing dated the 30th September 1956 made between (1) Oh Hiam as representative of the estate of the Deceased and (2) the Respondent, it was recited that Oh Hiam had agreed to sell to the Respondent or his nominee or nominees 7 Lots including the disputed property, comprising a total of a little over 34 acres at
p.99 the agreed price of $450 per acre. Provision was made in the Agreement for Oh Hiam to apply to the Court for leave to carry out such sale (such leave being necessary in respect of immoveable property vested in an administrator, under section 94(ii) of the Probate and Administration Enactment, Cap.8). By clause 3 of the Agreement, the Respondent was to be at liberty to enter into possession of all the lands "with effect from the 1st day of October and to take any profits which may be derived from the produce thereof and/or be liable for any losses". By clause 6, it was agreed that in the event of the Court refusing to grant leave to sell, the Respondent would pay to Oh Hiam "the sum of $50 per month with effect from 1st day of October 1956

in respect of the produce of the said lands". The Agreement did not mention the house on the disputed property, nor did it make any provision as to the rents thereof.

5. The other 6 Lots comprised in the Agreement formed a single area of land about 11 miles from Kuala Lumpur at Gombak. This area consisted of hilly rubber land without any building on it, and comprised just under 34 acres. The disputed property was some miles away, in the village of Setapak, and comprised under ½ an acre.

6. Oh Hiam duly applied to the Court by an Originating Summons dated the 1st August 1957 for leave to sell the 7 lots. In paragraph 3 of her Affidavit in support, Oh Hiam referred to the Lots as "old rubber lands". In paragraph 5, she described the whole area as "now grown with weeds and lallang", and in paragraph 6 stated that she had entered into the Agreement dated the 30th September 1956 "in order to save the estate from waste as I am of the opinion this whole area may be covered with secondary jungle". The Affidavit did not mention the house on the disputed property. The 2nd to 9th Appellants were all Respondents to the Originating Summons, but none of them entered an appearance. By an Order made on the 23rd September 1957 Sutherland J. granted Oh Hiam leave to sell under the Agreement. p.1 p.4 p.5

7. The Agreement was thereafter completed by 4 transfers to different persons, all registered on the 20th January 1958. The disputed property, together with Lot 1537 was transferred to the Respondent. The other lots were transferred to the Respondent's wife Chow Kit Yee (D.W.4), the Respondent's brother-in-law Chow Wing Hing (D.W.3) and the Respondent's mother-in-law Cheung May Keow respectively.

Proceedings before Gill J.

8. The action first came on for hearing before Gill J. on the 7th June 1965, and he heard evidence and argument in open court on the 7th and 8th September 1965 and the 24th May 1966. He gave his reserved judgment in favour of the Appellants on the 18th August 1966. p.50

9. The evidence is fully set out in the Notes of Gill J. and summarised in his Judgment. There were conflicts of evidence as to several matters. In one particular matter, Lee Kim Seng (P.W.7), a taxi-driver, gave evidence that he had p.53

been given a written so-called "option" (which in the context means an authority to negotiate a sale), and that he took the Respondent and Chow Wing Hing
.55 (D.W.3) to see the rubber lands at Gombak, but not No.99 Klang Gates Road. D.W.3, however, gave evidence that he had had two successive written "options" from Oh Hiam, handed to him by the 2nd Appellant, Teo Kim Choon (P.W.3). (No written option was produced by any witness.) D.W.3 also said that P.W.3 took him and the Respondent to see both the rubber lands at Gombak and No.99 Klang Gates Road, and that the next day he and the Respondent went to see P.W.3 and Oh Hiam; D.W.3's evidence was supported by the Respondent, but denied by P.W.3.

10. Gill J. preferred the evidence of P.W.7 to
.57 D.W.3., and found that P.W.7 was the only broker in the case. Gill J. also accepted P.W.7's evidence that he had taken the Respondent and D.W.3 to see only the rubber lands at Gombak. He thought that part of P.W.7's evidence was to some extent borne out (i) by evidence of Mr. Y.S. Lee (P.W.1), an Advocate and Solicitor who had acted for both parties in connection with the Agreement and the Transfers and also for Oh Hiam in the Originating Summons, and who had given evidence that his instructions related only to rubber lands; (ii) by the Agreement itself; and (iii) by Oh Hiam's Affidavit.

.57 11. Gill J. said: "Taking the evidence as a whole, I am satisfied that during the course of negotiations between the parties there was no mention made about the land at Setapak", and that the title to the disputed property "was handed along with the other titles to Mr. Lee at the time of the preparation of the agreement in the mistaken belief that it also related to a piece of land which formed part of the rubber estate". He concluded his review of the evidence as follows :-

.59 > "In my opinion the evidence in this case for the conclusion that neither side knew about the inclusion of the property at Setapak in the agreement until after the transfer is overwhelming. The title to this property was included in the agreement in the mistaken belief on the part of Oh Hiam and the defendant that it was a title to one of the lands which collectively formed the rubber estate at the 11th mile, Gombak Road. I have therefore arrived at the conclusion that it was neither the intention of Oh Hiam to sell nor the intention of the defendant to purchase the land at Setapak; it seems to me a clear case of common mistake as could occur."

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12. Gill J. then considered at some length the legal position where an agreement has been reached on the basis of a common mistake, referring to Cheshire and Fifoot on the Law of Contract (6th Edn) pp.189 to 202, and the English cases on the subject. He held that where there is clear evidence that an agreement does not carry out the true intention of the parties, the English Court will grant the equitable remedy of rectification so as to carry out that intention, even though the mistake has been embodied in a deed of conveyance. Gill J. further held, after referring to Lake Yew v. Port Swettenham Rubber Co. Ltd. 1913 A.C. 491, Wilkins v. Kannamal 1951 M.L.J. 99, and Lim Hong Shin v. Leong Fong Yew 1918 2 F.M.S.L.R. 187 per Edwards J.C. at p.188, that the Malaysian Court had similar powers to grant the equitable remedy of rectification. p.59

13. Gill J. therefore ordered a notional rectification of the Agreement and the Transfer in the present case by ordering the Respondent to retransfer the disputed property to the 2nd and 9th Appellants, on repayment of the purchase price and expenses, together with any money spent on improvements (which he found to be nil). p.66

The appeal to the Federal Court

14. The present Respondent's appeal from the decision of Gill J. was heard on the 18th May 1967 and the reserved judgments of the Federal Court allowing the appeal were given on the 18th September 1967.

15. The Lord President took the view that, on the facts, there had been no mistake at all on the part of either or both parties. He referred to the fact that P.W.3, P.W.4., P.W.5 and P.W.6 (all children of Oh Hiam) had stated that the sale was due to the fact that their mother needed money to go to Australia for treatment as she was sick, and that they did not know the disputed land was included in the 7 pieces of land being sold. He stated that he was unable to accept that evidence by reason of the Order made in the Originating Summons proceedings. The Lord President also attached importance to the Rubber Cultivation Book kept under the Rubber Supervision Enactment 1937, in which the disputed property was registered as rubber land. He further stated that "the Agreement for sale was made during the Emergency period and that Setapak was a black area" and considered that "although the said land was in the village of Setapak it was not possible p.74 p.75

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to get a ready purchaser for it at the normal price". (There was no evidence to that effect given before Gill J., and there Lord President appears to have relied on his onw knowledge of the property marked in the locality at the time). He concluded that the lands were sold for what they were worth at the time of the Emergency, and that there was no
p.76 mistake, citing Okill v. Whittaker (1847) 2 Ph.338.

p.75 16. Azmi C.J. expressed his agreement with the judgments of the Lord President and Ong Hock Thye F.J. He also stated that the burden of proof on a party claiming rectification is a heavy one, citing a passage from the judgment of Singleton
p.78 L.J. in Frederick E. Rose (London) Ltd. v. William H. Pim & Co. Ltd. 1953 2 A.E.R. 739 at p.744. He
p.74 expressed the view that the Appellants had failed to discharge that burden.

p.81 17. The main judgment in the Federal Court was given by Ong Hock Thye F.J. He pointed out that the Statement of Claim had relied on unilateral mistake, but that Gill J. had rested his decision on a common mistake. However, he considered that
p.84 the pleadings could be duly amended. The Appellants submit that he was clearly correct to do so, having regard to the evidence given and the submissions made to Gill J.

18. Ong F.J. considered, however that Gill J. was wrong to hold that the Appellants had proved their case of a common mistake on the facts. He thought that Gill J. had been wrong on the following points :-

(1) P.W.3., P.W.4., P.W.5., and P.W.6 had given evidence that their mother consulted them with regard to the proposed sale and that at no time was any mention made of the land in Setapak as being one of the lands intended to be sold. Ong F.J. held that this evidence was inadmissable
p.86 under section 32 of the Evidence Ordinance (which reproduces the English law concerning hearsay evidence prior to the Civil Evidence Act 1967).

(2) Gill J. had preferred the evidence of P.W.7 to that of D.W.4. Ong F.J. thought that
p.87 Gill J. was wrong to hold P.W.7 to be a truthful witness, in view of certain discrepancies between his evidence and the evidence of P.W.5., and that even if P.W.5 were to be believed "that was no reason to reject the evidence of the second broker Chow" (D.W.3).

p.89 (3) Ong F.J. disagreed with Gill J.'s opinion that the disputed property was "essentially residential land".

(4) Ong F.J. disagreed with Gill J's finding that the Respondent did not know until well after the date of the Transfer that he had bought Lot 3660. p.90

19. Ong F.J. then considered the law. He held that, unless the mistake was an essential or integral matter sufficient to invalidate the contract, it was not possible to adduce oral evidence to contradict or vary a written contract. He said that even if Oh Hiam had made a mistake, it was not such a fundamental mistake as to entitle the Appellants to relief, referring to Okill v. Whittaker supra. p.93

Appellants' Submissions

20. The Appellants' main submission as to the facts is that the Federal Court were wrong in rejecting the findings of Gill J. and substituting a conclusion of their own. There was ample evidence to support Gill J.'s findings, which were arrived at on sharply conflicting evidence given by witnesses who were seen and heard by the learned judge. It was not possible for the Federal Court to say that the findings were plainly unsound. In the circumstances, the Federal Court disregarded the well settled principles concerning appeals against findings of fact by a lower court, stated in Youill v. Youill 1945 P.15 and Watt or Thomas v. Thomas 1947 A.C. 484.

21. The Appellants further submit that Gill J.'s findings were strongly supported by the documentary evidence before him. The forms of both the Agreement itself and the Affidavit sworn by Oh Hiam are inconsistent with there being a house on any of the Lots agreed to be sold. Both documents were prepared by Mr. Y.S. Lee (P.W.1) an independent witness (who was instructed by both Oh Hiam and the Respondent). It is most unlikely that he would have prepared them in those forms if he had been aware that there was a house on the disputed property. It is equally unlikely that either Oh Hiam or the Respondent told Mr. Y.S. Lee about the house. Furthermore, on any footing it was clear that the disputed property was worth far more per acre than the other lands comprised in the Agreement (even on the evidence of the Respondent himself and D.W.3 the disputed land was worth $7000). If it had really been intended to include the disputed property in the sale, it is unlikely that the purchase price would have been calculated at a price per acre rather than stated as an overall sum.

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22. The Appellants further submit that the Federal Court's reasons for rejecting Gill J.'s findings of fact are themselves open to criticism and cannot be supported. The Appellants draw particular attention to the following :-

(1) The Lord President did not accept the evidence of P.W.3., P.W.4., P.W.5 and P.W.6 that they did not know that the disputed property was included in the land to be sold by reason of the Originating Summons proceedings and the Order made therein. The Appellants submit that this is an insufficient reason for rejecting that evidence. The Lord President appears to have thought that there was some kind of estoppel or bar against the Appellants arising out of those proceedings, but the Appellants contend that they did not, and could not, constitute any estoppel or bar in favour of the Respondent.

(2) There was no evidence to support the Lord President's statements as to the value and marketability of the disputed property, and that statement is in effect contradicted by the evidence of the Respondent himself and D.W.3.

p.82 (3) Ong F.J. said that "except as to the facts turning on /the identity of the successful broker concerned in the transaction/, there was not dispute as to the relevant facts". This is not correct. There was considerable conflict of evidence on many other points, including the important questions of (i) whether P.W.3 showed the Respondent the disputed property (ii) the state of the disputed property at the time of the Agreement and (iii) when the first attempt to collect rent was made by the Respondent or his wife.

p.86 (4) Ong F.J. said that "nowhere in the judgment does it appear that the statements in /Oh Hiam's/ affidavit influenced the judge in coming to his decision." This was incorrect.

p.86 (5) Ong F.J. held that the evidence of P.W.3., P.W.4., P.W.5 and P.W.6 and their mother consulted them with regard to the proposed sale but did not mention the disputed property as one of the lands to be sold was inadmissable as hearsay evidence. The evidence was not as to a statement of fact within the knowledge of Oh Hiam, and the Appellants submit that it was not hearsay evidence within the rule. Furthermore, the Appellants submit that Gill J. in fact placed little or no reliance on that evidence, but relied wholly or mainly on other evidence.

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(6) Ong F.J., having pointed out the inconsistencies in the evidence of P.W.7, went on to hold that even assuming the evidence of P.W.7 that he acted as broker was believed, there was no reason to reject the evidence of D.W.3. But D.W.3's evidence was contradicted in several other respects by more than one witness. In particular (i) D.W.3's evidence that P.W.3 had shown him and the Respondent the disputed property was contradicted by P.W.3 and P.W.7; (ii) D.W.3's evidence as to the state of the disputed property was contradicted by P.W.6 (whose evidence accorded with the Respondent's Defence); and (iii) D.W.3's evidence that he handed his "options" to Mr. Y.S. Lee (P.W.1) was contrary to Mr. Lee's evidence. The Appellants submit that there were ample grounds for not accepting D.W.3's evidence, and that Gill J. in his findings of fact plainly did reject it. p.88

(7) Ong F.J. described the house on the disputed property as a "temporary dwellinghouse", purporting to rely on the evidence of Teo Boon See (P.W.4). P.W.4 gave no such evidence. p.89

(8) Ong F.J. rejected Gill J.'s description of the disputed property as "essentially rubber land". As mentioned above, there was evidence, which accorded with the Respondent's Defence, that there were no rubber trees on the disputed property; and Gill J. rejected the evidence of the Respondent's wife (D.W.2) that she spent $3,000 on having 17 rubber trees on the disputed property cut down "as fantastic". The Appellants submit that on the facts Gill J.'s description of the disputed property was a fair and accruate one, notwithstanding the existence of a rubber cultivation book. p.89

(9) Ong F.J. considered that Gill J.'s finding that it was only after the Transfer was executed in January 1958 that the Respondent came to know he had obtained a transfer of the disputed property postulated that the evidence to the contrary by D.W.3. and the Respondent was rejected by Gill J. Ong F.J. went on to say: "He had indeed done so on the ground that there was only one broker Lee Kim Seng" (P.W.7). The Appellants submit that this inference is unwarranted, and that Gill J.'s finding was based on much wider grounds and having regard to the whole of the evidence. p.89 p.90

23. The Appellants' submissions as to the law applicable are that Gill J. correctly directed himself as to the consequences of a common

mistake, and as to the remedy of rectification, and that on his findings of fact his Order was correctly made. In the Federal Court Ong F.J. did not deal at all with the equitable remedy of rectification where there is a common mistake. He appears to have considered that the only remedy available was the total avoidance of the contract, in the event of a mistake as to an essential or integral term, or at any rate that no relief at all is available except in the event of such a mistake. The Appellants submit that Ong F.J. was wrong, and that his decision in this respect is contrary to the settled law established by the authorities cited by Gill J.

24. The Appellants further submit that the case of Okill v. Whittaker (1847) 2 Ph. 338, and the example set out in the passage from the judgment of Lord Cottenham L.C. therein referred to and relied on by both the Lord President and Ong F.J., are clearly distinguishable and have no bearing on the present case. In Lord Cottenham's example, there would have been no doubt or dispute as to the subject-matter of the sale, so that (contrary to the view of the Federal Court) the essential facts were quite different from those in the present case.

25. The Appellants therefore submit that the Order of Gill J. should be restored, or (alternatively) that the Respondent should be ordered to re-transfer the disputed property on payment by the Appellants of the sum of $250 plus any expenditure found upon an inquiry to have been expended on the disputed property by or on behalf of the Respondent.

26. The Appellants accordingly submit that this Appeal should be allowed for the following among other

R E A S O N S

(1) BECAUSE the Federal Court ought not to have reversed the finding of fact of Gill J. that neither party intended the disputed property to be included in the Agreement and the Transfer.

(2) BECAUSE on the said finding of fact of Gill J., the Appellants were entitled to have the Agreement and the Transfer rectified to exclude the disputed property.

(3) BECAUSE the judgment and order of Gill J. were correct and ought not to have been disturbed.

NIGEL HAGUE

No. 22 of 1978

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
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CASE FOR THE APPELLANTS

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

Solicitors for the Appellants