

IN THE JUDICIAL COMMITTEE OF No. 22 of 1978
THE PRIVY COUNCIL
ON APPEAL FROM THE FEDERAL COURT
OF MALAYSIA

B E T W E E N :

	(1) OH HIAM (f)	
	(2) TEO KIM CHOON	
	(3) TEO PENG YONG	
	(4) TEO AH CHYE	
10	(5) TEO HYE HUAT	
	(6) TEO AH TOH	
	(7) TEO BOON SEE (f)	
	(8) TEO CHOON LIAN (f)	
	(9) TEO KIM LIAN (f)	<u>Appellants</u>

- and -

THAM KONG	<u>Respondent</u>
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CASE FOR THE RESPONDENT

Record

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| 20 | 1. This is an Appeal from the Judgments and Order of the Federal Court of Malaysia (Syed Sheh Barakbah, L.P., Azmi, C.J. and Ong Hock Thye, F.J.) dated the 18th day of September, 1967 which allowed an Appeal by the Respondent herein from the Judgment of the High Court of Malaya in Kuala Lumpur (Gill, J.) dated the 18th day of August, 1966. In the High Court it was ordered that on payment of a sum of \$250 by the Appellants into Court the Respondent do execute a registrable transfer of certain land in favour of the Appellants. | pp.71 - 96 |
| 30 | 2. The land in question formed part of the estate of the husband of the First Appellant, who was the administratrix of the said estate. The First Appellant died on the 24th August, 1958 and the Second and Seventh Appellants obtained Letters of Administration of the said estate <u>de bonis non</u> . | p. 50 |
| | By an Agreement in writing dated the 30th September, 1956, the First Appellant agreed to sell to the Respondent | pp.98 - 100 |

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seven lots of land including the land in question, Lot 3660.

p. 6

The First Appellant obtained the leave of the High Court to transfer the land to the Respondent, pursuant to the said written Agreement. Lot 1537 and Lot 3660 were conveyed to the Respondent and registered in his name on the 20th January, 1958. The other Lots of land were conveyed to members of the Respondent's family.

pp. 9 - 11

3. In their Statements of Complaint, dated the 30th July, 1958, the Appellants claimed that Lot 3660 had been included in the said written Agreement by mistake of the Appellants. It was the Appellants' intention to convey to the Respondent only "rubber lands" situated at Gombak Road. Lot 3660 had a house on it and was therefore not "rubber land". Moreover, it was not at Gombak Road. The Appellants claimed that the Respondent knew of this mistake and prayed (inter alia) that Lot 3660 be re-conveyed to them.

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pp. 12 - 15

4. In his Defence, dated the 20th August, 1958, the Respondent denied that the Appellants had made any mistake and claimed that Lot 3660 was "rubber land" although there was a house on the land.

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pp. 19 - 27

5. The First Appellant died before the trial of the action. The other Appellants (children of the First Appellant) gave evidence that their mother had told them about the proposed sale of the land situated at Gombak Road but that they were not told about the sale of the land in question - Lot 3660.

pp. 27 - 30

6. One Lee Kim Seng, a taxi-driver (P.W.7), gave evidence for the Appellants that he had acted as broker for the First Appellant and that Lot 3660 was not included in the land proposed to be sold. He stated that he had attempted to sell the land at Gombak Road first to one Saw Ban Huat, and, on this proving unsuccessful, to the Respondent. The said Saw Ban Huat gave evidence that he had been brought an option by the said Lee Kim Seng for the sale of land and that he had been shown land at Gombak Road but had not been shown Lot 3660.

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pp. 30 - 31

The Appellants also called one Lee Yew Siong (P.W.1), the Solicitor who had prepared the written Agreement of Sale referred to above and the subsequent

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transfer of the said land. He stated that he had been brought seven separate title deeds by the First Appellant relating to the seven Lots of land referred to in the written Agreement mentioned in paragraph 2 above. He was asked to prepare the Sale Agreement in respect of those title deeds.

10 7. Evidence was given by the Chief Clerk in the Registry of Titles, Kuala Lumpur, (P.W.2) that Lots 1537 and 3660 had been transferred from the First Appellant to the Respondent on the 20th January, 1958. pp. 18 - 19

20 8. The Respondent (D.W.1), gave evidence that he had been introduced to the First Appellant by one Chow Wing Hing, a hawker, who told him that the First Appellant was selling certain land. The Respondent stated that he was shown both the land at Gombak Road and Lot 3660 by the Second Appellant and others, including one Chow Kit Yee the Respondent's wife. The Respondent said he eventually agreed to buy the land at \$450 per acre provided Lot 3660 was included, since without Lot 3660 the land was worth little more than \$200 per acre. pp. 31 - 36

9. The Respondent stated that there were 20 to 30 old rubber trees on Lot 3660, that in his opinion the Lot was worth \$7000 and that he had a Rubber Cultivation Book in respect of both the Lots that were conveyed to him (i. e. Lots 1537 and 3660).

30 10. The said Chow Wing Hing (D.W.3) gave evidence that he had been given an option by the Second Appellant to sell land for the First Appellant in 1956. The land comprised both the land at Gombak Road and Lot 3660. The witness said that he made one unsuccessful attempt to sell the land and was then given a second option by the Second Appellant. Chow Wing Hing stated that he then introduced the Respondent to the First Appellant, and the Respondent and the Second Appellant, together with Chow Wing Hing and others, among them the said Chow Kit Yee, went to see both the land at Gombak Road and Lot 3660. pp. 38 - 41

40 11. The said Chow Wing Hing further gave evidence that in 1956 there were 20 to 30 rubber trees in a dying state on Lot 3660 and that the value of the Lot at that time was between five to six thousand dollars, whereas the value of the land at Gombak Road was \$200 per acre.

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pp. 42 - 45

12. The said Chow Kit Yee (D.W. 4) gave evidence that the broker for the sale of the land at Gombak Road and Lot 3660 was the said Chow Wing Hing, that she had accompanied the Respondent (her husband), the Second Appellant and others to see both the land at Gombak Road and Lot 3660, and that there were 17 rubber trees on the said Lot which were about to fall down.

The said Chow Kit Yee further stated that after the sale and transfer of the said land she was put in charge of Lot 3660.

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pp. 36 - 37
and p. 45

13. Evidence was also called relating to the transfer of the titles of the said land (including evidence relating to a Rubber Cultivation Book) from a clerk in the Registry of Titles, Kuala Lumpur (D.W. 2). The said clerk gave evidence that the owner of Lot 3660 was the Respondent.

pp. 50 - 59

14. The learned Trial Judge, having reviewed the evidence, concluded (it is respectfully submitted wrongly) that there was never any agreement either to sell or to buy Lot 3660 and that the said Lot had been included in the written Agreement of Sale without the knowledge of either party by mistake.

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p. 66

Having so concluded the learned Trial Judge, it is respectfully submitted wrongly, ordered rectification of the written Agreement mentioned in paragraph 2 above and also, it is again submitted wrongly, ordered that Lot 3660 be re-transferred to the Appellants.

pp. 69 - 71

15. The Respondent appealed to the Federal Court of Appeal on the 27th October, 1966 upon various grounds including the ground that the Appellants had based their case on unilateral mistake, and on the ground that the learned Trial Judge had failed to consider whether the Appellants' evidence was of sufficient weight so as to entitle them to the relief of rectification.

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pp. 72 - 96

16. The Court of Appeal unanimously allowed the Respondent's Appeal and quashed the Order of the learned Trial Judge.

17. It is respectfully submitted that the Court of Appeal were right to allow the Appeal for the reasons

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given by the Court of Appeal. In particular it is submitted that :

- (a) there was no mistake at all for the reasons given in the Judgment of Syed Sheh Barakbah, the Lord President, pp. 74 - 77
- alternatively,
- (b) that it was a unilateral mistake on the part of the First Appellant which merely went to the value of the land, Lot 3660, per Ong Hock Thye, F.J., pp. 83 - 94
- (c) that the Appellants had failed to discharge the heavy burden of proof on them in a rectification case (per Azmi, C.J.). pp. 78 - 80

It is further submitted that,

- (d) the learned Trial Judge was wrong to order the Respondent to re-transfer Lot 3660 to the Appellants in view of the title of the Respondent to that land being indefeasible under the Torrens system of registration of land which is applicable to Malaysia by virtue of the National Land Code, 1965.

18. It is submitted that the burden of proof in a case of rectification is a very high one, particularly so when a written contract was drawn up by a solicitor with the benefit of title deeds that had plans of each of the plots of land attached to them (see the argument for Counsel for the Respondent in the High Court at page 46 of the Record, line 30).

It is submitted that the following passage from the Judgment of Simonds J. in Crane v. Hegeman-Harris Co. Inc. 1939 1 A.E.R. at pages 664 to 665 correctly represents the law :

"Secondly, I want to say this upon the principle of the jurisdiction. It is a jurisdiction which is to be exercised only upon convincing proof that the concluded instrument does not represent the common intention of the parties. That is particularly the case where one finds prolonged negotiations between

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the parties eventually assuming the shape of a formal instrument in which they have been advised by their respective skilled legal advisers. The assumption is very strong in such a case that the instrument does represent their real intention, and it must be only upon proof which Lord Eldon, I think, in a somewhat picturesque phrase described as "irrefragable" that the court can act. I would rather, I think, say that the court can only act if it is satisfied beyond all reasonable doubt that the instrument does not represent their common intention, and is further satisfied as to what their common intention was. For let it be clear that it is not sufficient to show that the written instrument does not represent their common intention unless positively also one can show what their common intention was."

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It is submitted that the evidence for the Appellants in this case fell far short of the test propounded by Simonds J. and that the learned Trial Judge erred in his interpretation of the evidence for the reasons given by Ong Hock Thye, F.J.

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19. It is submitted that the title of the Respondent to Lot 3660 is indefeasible by virtue of Section 340 of the National Land Code, No. 56 of 1965. Section 340 provides that the title of the registered proprietor of land shall be indefeasible except -

"(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy;"

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It is submitted that it was never the Appellants' case that the Respondent was a party or privy to any fraud or misrepresentation and that the very highest the complicity of the Respondent can be put in any mistake made by the Appellants is that he stood by, knowing of the mistake. Even if this complicity (which was never pleaded as such) could amount to constructive fraud it is submitted that the Respondent would still be entitled to the protection of Section 340 of the National Land Code since only actual personal fraud on his part could defeat his claim as registered proprietor - see

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Gregory v. Alger 1893 19 V.L.R. page 565 and R. v. Price 1904-5 24 N.Z.L.R. page 291. The correct approach to the Malaysian Torrens system was, it is respectfully submitted, outlined in the following passage from the judgment of Lord Diplock in Damodaran v. Choe Kuan Him 1979 3 W.L.R. 383 at 387-8 :

10 "There is, however, a further reason for allowing the appeal with which their Lordships feel compelled to deal lest their failure to do so should allow the integrity of the Torrens System of registration of title to land in Malaysia to be undermined. The assumption underlying the decision of the majority in the Federal Court to order the money to be paid into court is that the purchaser on becoming registered as proprietor of the land on April 16th, 1974 did not thereby obtain a title to the land free from encumbrances, which he continues to hold. In their Lordships' opinion this assumption is incorrect. The National Land Code applies to Malaysia the Torrens System of registration of title to land. The whole purpose of the system is to get away from the complicated system of rules which in England regulate dealings with land, particularly those relating to such matters as notice of encumbrances and trusts. As was said by the Court of Appeal of New Zealand in relation to the corresponding New Zealand legislation, the Land Transfer Act 1885 :

30 'The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorised by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest . . .'

40 Fels v. Knowles (1906) 26 N.Z.L.R. 604, 620.

In the National Land Code it is section 340 that expressly provides that the title of a person registered

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as proprietor of any land shall be indefeasible. The only exceptions are where there has been fraud, misrepresentation, forgery or an ultra vires acquisition purporting to have been made under statutory authority. None of these exceptions apply to the instant case. Interests in land, short of proprietorship, which are capable of being registered are leases, charges and easements. If registered they would amount to encumbrances within the meaning of a covenant against encumbrances; but unless registered they do not derogate from the unencumbered title of the registered proprietor of the land. Claims to be entitled to the proprietorship of land or a registrable interest in land, whether or not they are the subject of litigation, are not registrable as encumbrances on a registered title. Instead they are protected by the system of private caveats which, while leaving the registered title unqualified and intact, have the effect of preventing any dealing with it by the registered proprietor so long as the caveat remains in force; that is, until it is removed from the register. The way in which this system of protection operates was dealt with by their Lordships in the recent case of Eng Mee Yong v. Letchumanan s/o Velayutham (1973) 3 W.L.R. 373 to which reference may conveniently be made."

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20. The Appellants gave Notice of Motion to Appeal from the Judgment of the Court of Appeal on the 6th May, 1968 and were granted Final Leave to Appeal on the 21st March, 1978.

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pp. 96 - 97

21. The Respondent respectfully submits that this Appeal should be dismissed with costs and the Judgment of the High Court quashed for the following among other

R E A S O N S

1. BECAUSE there was no or no sufficient evidence of a mistake on the part of either the Appellants or of the Respondent.
2. BECAUSE there was only evidence of a unilateral mistake on the part of the Appellants.

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3. BECAUSE on the question of mutual mistake the learned Trial Judge took into account inadmissible evidence.
4. BECAUSE the learned Trial Judge failed to apply the correct standard of proof to the evidence.
5. BECAUSE there was no evidence of fraud or misrepresentation.
6. BECAUSE the Respondent's title to the land in question is indefeasible on any reading of the evidence.
7. BECAUSE the Judgment and Order of the High Court was wrong.
8. BECAUSE the Judgments and Order of the Court of Appeal were right.

CHARLES FLETCHER-COOKE

GEORGE WARR

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CASE FOR THE RESPONDENT

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