

18/20

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 22 of 1978

O N A P P E A L

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

B E T W E E N:

OH HIAM AND OTHERS

Appellants

- and -

THAM KONG

Respondent

RECORD OF PROCEEDINGS

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

PHILIP CONWAY THOMAS & CO.,
61 Catherine Place,
Westminster,
London SW1E 6HB.

Appellants' Solicitors

Respondent's Solicitors

No. 22 of 1978

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

B E T W E E N :

OH HIAM AND OTHERS

Appellants

-v-

THAM KONG

Respondent

RECORD OF PROCEEDINGS

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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

B E T W E E N :

OH HIAM AND OTHERS Appellants

-v-

THAM KONG Respondent

RECORD OF PROCEEDINGS

No. 1

ORIGINATING SUMMONS

10

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

Originating Summons No. 122 of 1957

(Petition No. 127 of 1948)

In the High Court

No. 1
Originating
Summons
1st August
1957

In the matter of the Estate
of Teo Geow Guan also spelt
as Teoh Teow Guan also spelt
as Teo Teow Yuen and also
spelt as Ting Teo Guan,
deceased.

Oh Hiam (f) Applicant

20

and

1.	Teo Kim Choon	}	All of No. 471 Batu Road, Kuala Lumpur	Respondents
2.	Teo Peng Yong			
3.	Teo Ah Chye			
4.	Teo Hye Huat			
5.	Teo Ah Toh			
6.	Teo Boon See (f)			
7.	Teo Chooi Lian (f)			
8.	Teo Kim Lian (f)			

In the High Court

Originating Summons

No. 1
Originating
Summons
1st August
1957
(cont'd)

Let the respondents abovenamed within ten (10) days after the service of this Summons on them, inclusive of the day of such service, cause an appearance to be entered for them to this Summons which is issued upon the application of Oh Hiam (f), the Administratrix of the abovenamed estate for an Order that she be at liberty to sell and transfer the 7 pieces of lands held under EMR Nos. 4139, 4140, 5339, 4219, 4076, 5634 and 5633 in the Mukim of Setapak, for the sum of not less than \$450/- an acre.

10

Dated this 1st day of August 1957.

Senior Assistant Registrar,
Supreme Court,
Kuala Lumpur.

This Summons was taken out by Mr. Y.S. Lee, Solicitor for the Applicant and whose address for service is No: 46, Cross Street (1st Floor), Kuala Lumpur.

20

This Application will be supported by the Affidavit of Oh Hiam (f) affirmed on the 30th day of July, 1957, filed herein.

The Respondents may appear hereto by entering appearance either personally or by their Advocate and Solicitor at the Registry of the Supreme Court, Kuala Lumpur.

Note:

If the respondents do not enter an appearance within the time and place above-mentioned such order will be made and proceedings taken as the Judge may think just and expedient.

30

No. 2

In the High Court

AFFIDAVIT OF OH HIAM

No. 2
Affidavit of
Oh Hiam
30th July
1957

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

Originating Summons No: 122 of 1957

(Petition No: 127 of 1948)

In the matter of the Estate
of Teo Teow Guan also spelt
Teoh Teow Guan also spelt
Teo Teow Yuen and also
spelt as Ting Teo Guan,
deceased.

10

Oh Hiam (f)

Applicant

and

- 1. Teo Kim Choon)
- 2. Teo Peng Yong)
- 3. Teo Ah Chye)
- 4. Teo Hy Huat)
- 5. Teo Ah Toh)
- 6. Teo Boon See (f))
- 7. Teo Chooi Lian (f))
- 8. Teo Kim Lian (f))

all of No. 471,
Batu Road,
Kuala Lumpur.

20

Respondents

A F F I D A V I T

I, Oh Hiam (f) of full age of Chinese nationality residing at No. 473 Batu Road, Kuala Lumpur affirm and say as follows:-

30

1. I am the Administratrix of the Estate of the deceased abovenamed by virtue of Grant of Letters of Administration made in my favour by this Honourable Court on the 11th day of March, 1948 in Administration Petition No. 127 of 1948.

2. The deceased died on the 1st day of August, 1943 leaving beside myself the following beneficiaries, (1) Teo Kim Choon, son, (2) Teo Peng Yong, son (3) Teo Ah Chye, son, (4) Teo Hye Huat, son (5) Teo Ah Toh, son, (6) Teo Boon See, daughter (7) Teo Chooi Lian, daughter and (8) Teo Kim Lian, daughter all of whom are now of age.

In the High Court

No. 2
Affidavit of
Oh Hiam
30th July
1957
(cont'd)

3. Amongst the immoveable estate are 7 pieces of old rubber lands comprised and held as under:-

1.	EMR	4139	Lot No.	2663	2a 2r 15p	
2.	"	4140	"	"	2664	2a 2r 20p
3.	"	5339	"	"	3660	0a 1r 36p
4.	"	4219	"	"	2771	8a 3r 00p
5.	"	4076	"	"	2562	9a 3r 00p
6.	"	5634	"	"	1538	2a 1r 00p
7.	"	5633	"	"	1537	<u>7a 3r 30p</u>
					<u>34a 1r 21p</u>	

10

situate in the Mukim of Setapak, District of Kuala Lumpur (hereinafter called the "said lands").

4. Since the emergency began in June, 1948 no tapping for rubber was carried on the said lands because of the difficulty of getting tappers. The area was also considered a bad area for security reasons.

5. What was once considered an asset became a liability to the estate as the annual quit rents have to be paid. Moreover, owing to the difficulty of supervision and the lack of labourers for reasons given above the whole area is now over grown with weeds and lallang.

20

6. In order to save the estate from waste as I am of the opinion this whole area may be covered with secondary jungle. I have on the 30th day of September, 1956 entered into an Agreement of Sale of the said lands to one Tham Kong of No: 28C, San Peng Road, Kuala Lumpur, at the agreed price of \$450/- an acre. This amounts to \$15,500/- for the whole area and therefore compares favourably with the value set on the said lands by the Collector of Estate Duty of \$13,200/-. A copy of the said Agreement is attached hereto and marked "OH".

30

7. The costs of this application are to be borne and defrayed by the purchaser and in the event of the approval of the sale by this Honourable Court all charges up to the execution of the transfer are to be borne and defrayed by the Purchaser.

40

8. Under the Distribution Enactment (Cap. 71) I am entitled to one-third of the Estate of the deceased and the children are entitled to two-thirds in equal shares.

In the High Court
No. 3
Order of Mr. Justice Sutherland
23rd September 1957.
(cont'd)

- | | | | |
|----|--------------------|---|---|
| 1. | Teo Kim Choon |) | |
| 2. | Teo Peng Yong |) | |
| 3. | Teo Ah Chye |) | |
| 4. | Teo Hye Huat |) | all of No. 471 Batu Road, Kuala Lumpur. |
| 5. | Teo Ah Toh |) | |
| 6. | Teo Boon See (f) |) | |
| 7. | Teo Chooi Lian (f) |) | |
| 8. | Teo Kim Lian (f) |) | Respondents |

Before the Honourable Mr. Justice Sutherland,
Judge, Federation of Malaya.

10

IN CHAMBERS

This 23rd September, 1957.

O R D E R

UPON HEARING Mr. Y.S. Lee of Counsel for the Applicant AND UPON READING the Originating Summons dated the 1st day of August, 1957 the affidavit of Oh Hiam (f) affirmed on the 30th day of July, 1957 and the Certificate of Non-Appearance of the Respondents dated the 23rd day of August, 1957 and filed herein IT IS ORDERED that the said Oh Hiam (f) be and is hereby at liberty to sell and transfer the lands held under E.M.R. 4139, 4140, 5339, 4219, 4076, 5634 and 5633 in the Mukim of Setapak in terms of the Agreement of Sale dated the 30th day of September, 1956 (a copy whereof is hereto attached) and that the proceeds of such sale be distributed amongst those persons entitled thereto under the Distributions Enactment (Cap. 71).

20

Given under my hand and the seal of the Court this 23rd day of September, 1957.

30

Sgd: Yap Yeok Siew
Senior Assistant Registrar,
High Court,
Kuala Lumpur.

No. 4

In the High Court

GENERAL FORM OF WRIT OF SUMMONS

No. 4
General Form
of Writ of
Summons

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

Civil Suit No. 366 of 1958

- | | | | |
|----|--------------------|---|------------|
| 1. | Oh Hiam (f) | } | Plaintiffs |
| 2. | Teo Kim Choon | | |
| 3. | Teo Peng Yong | | |
| 4. | Teo Ah Chye | | |
| 5. | Teo Hye Huat | | |
| 6. | Teo Ah Toh | | |
| 7. | Teo Boon See (f) | | |
| 8. | Teo Chooi Lian (f) | | |
| 9. | Teo Kim Lian (f) | | |

10

versus

Tham Kong

Defendant

GENERAL FORM OF WRIT OF SUMMONS

The Honourable Mr. Reginald Dykers
Richardson Hill, Barrister-at-law, Acting Chief
Justice of the Federation of Malaya, in the name
and on behalf of His Majesty the Yang di-Pertuan
Agong Abdul Rahman Ibni Al-Marhum Tuanku Muhamed.

20

To: Tham Kong,
No. 28 - C, San Peng Road,
Kuala Lumpur.

WE COMMAND you, that within eight days after
the service of this Writ on you, inclusive of the
day of such service, you do cause an appearance
to be entered for you in an action at the suit of
the Plaintiffs.

30

AND TAKE NOTICE that in default of you so
doing the Plaintiffs may proceed therein and
judgment may be given in your absence.

Witness Sarwan Singh Gill, Registrar of the
Supreme Court of the Federation of Malaya, the
day of 1958.

Sgd. Bannon & Bailey
Plaintiff's Solicitors.
Senior Assistant Registrar,
High Court, Kuala Lumpur.

In the High
Court

No. 4
General Form
of Writ of
Summons
(cont'd)

N.B. This Writ is to be served within twelve months from the date thereof, or if renewed, within six months from the date of last renewal, including the day of such date, and not afterwards.

The Defendant may appear hereto by entering an appearance (or appearance) either personally or by his Solicitor at the Registry or the Supreme Court at Kuala Lumpur.

A Defendant appearing personally may, if he desires, enter his appearance by post, and the appropriate forms may be obtained by sending a Postal Order for $\text{RM}3/-$ with an addressed envelope to the Registrar of the Supreme Court at Kuala Lumpur.

10

The Plaintiffs' claim is for:-

- (i) an Order that the said Order of Court dated the 23rd day of September 1957 be set aside;
- (ii) that the sale of the said lands aforesaid be also set aside or in the alternative that such sale be set aside in so far as it conveys lot No. 3660 to the Defendant;
- (iii) an Order that the said Agreement of Sale between the 1st Plaintiff and the Defendant be set aside or in the alternative that it be set aside in so far as it agrees to convey lot No. 3660 to the Defendant;
- (iv) an Injunction restraining the Defendant from disposing of or dealing in any other manner with the said lands until the determination of this case or alternatively for damages; and
- (v) for such further or other order as the Court deems fit and just.

20

30

Sgd: Bannon & Bailey
Plaintiffs' Solicitors

This Writ was issued by Bannon & Bailey whose address for service is Laidlaw Building, Mountbatten Road, Kuala Lumpur, Solicitors for the said Plaintiffs who reside at No. 471 Batu Road, Kuala Lumpur.

40

In the High
Court

No. 5
Statement of
Plaint
30th July
1958
(cont'd)

Nos. 4139, 4140, 5339, 4219, 4076, 5634 and
5633 in the Mukim of Setapak for lots Nos. 2663,
2664, 3660, 2771, 2562, 1538 and 1537
respectively for the sum of \$450/=, per acre
subject to the terms and conditions therein set
out. A copy of the said Agreement is annexed
hereto and marked "A". The said lands formed
part of the estate of Teo Teow Guan, deceased.

5. The said Agreement was entered into by
mistake in that the Plaintiffs did not know that
House No. 99 Klang Gates Road, Kuala Lumpur, was
situated on the said lot No. 3660 which was
therefore sold as rubber lands. The said lot No.
3660 was sold for \$450/- an acre whereas the said
property is actually worth \$25,000/- per acre as
it is situated within the village of Setapak and is
within the Municipal Boundaries. There is no
rubber planted on the said land nor was there any
rubber planted on it on the date of the said
agreement.

10

20

6. The Plaintiffs aver that at the time the
said Agreement was made the Defendant knew that
the 1st Plaintiff had by mistake agreed to sell
to him the said lot No. 3660 at \$450/- per acre
which was a gross undervalued of the actual price
of the said property and that it was not the real
intention of the 1st Plaintiff to convey to the
Defendant any lands except rubber lands. By
reason thereof, the Plaintiff aver that the said
Agreement was null and void and of no effect.

30

7. On the 1st day of August, 1957, pursuant to
the said Agreement, the 1st Plaintiff as the
Administratrix as aforesaid made an application
to Court for an Order that she be at liberty to
sell the said lands hereinbefore referred to on
the grounds set out in her affidavit affirmed on
the 30th day of July, 1957. A copy of the said
application and affidavit in support is annexed
hereto and marked "B". An order was duly made
in terms of the said application on the 23rd day
of September, 1957. The 2nd, 3rd, 4th, 5th, 6th,
7th, 8th and 9th Plaintiffs consented to the
said Order being made in the mistaken belief that
the lands, the subject matter of the application
were rubber lands.

40

8. On the 13th day of January, 1958, pursuant
to the said Order of Court dated the 23rd day of

September, 1957 the 1st Plaintiff by a transfer of the said date conveyed to the Defendant the said lands aforesaid in the belief that the said lot No. 3660 was in respect of old rubber land.

In the High
Court
No. 5
Statement of
Plaint
30th July
1958
(cont'd)

10 9. The Plaintiffs have called upon the Defendant to rectify the mistake by re-conveying to the 1st Plaintiff the said lot No. 3660 upon the Plaintiffs undertaking to repay to the Defendant the sum paid to the 1st Plaintiff by way of the purchase price of the said lot together with all proper charges and expenses attributable to the said sale and purchase but the Defendant has refused to reconvey the said lot.

10. The Plaintiffs therefore pray for:-

- 20 (i) an Order that the said Order of Court dated the 23rd day of September 1957 be set aside;
- (ii) that the sale of the said lands aforesaid be also set aside or in the alternative that such sale be set aside in so far as it conveys lot No. 3660 to the Defendant;
- (iii) an Order that the said Agreement of Sale between the 1st Plaintiff and the Defendant be set aside or in the alternative that it be set aside in so far as it agrees to convey lot No. 3660 to the Defendant;
- 30 (iv) an Injunction restraining the Defendant from disposing of or dealing in any other manner with the said lands until the determination of this case or alternatively for damages; and
- (v) for such further or other Order as the Court deems fit and just.

Dated this 30th day of July, 1958.

Sgd: Bannon & Bailey
Plaintiffs' Solicitors

In the High Court

No. 6

D E F E N C E

No. 6
Statement of
Defence
20th August
1958

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

Civil Suit No. 366 of 1958

- | | | | |
|----|--------------------|---|------------|
| 1. | Oh Hiam (f) |) | |
| 2. | Teo Kim Choon |) | |
| 3. | Teo Peng Yong |) | |
| 4. | Teo Ah Chye |) | Plaintiffs |
| 5. | Teo Hye Huat |) | |
| 6. | Teo Ah Toh |) | 10 |
| 7. | Teo Boon See (f) |) | |
| 8. | Teo Chooi Lian (f) |) | |
| 9. | Teo Kim Lian (f) |) | |

vs.

Tham Kong

Defendants

D E F E N C E

The Defendant abovenamed states as follows:-

1. The Defendant admits paragraphs 1, 2 and 3 of the Plaint.
2. As to paragraph 4 of the Plaint the Defendant says that the 1st Plaintiff agreed to sell the lands to the Defendant or his nominee or nominees. Except to this, the Defendant admits the rest of the allegations contained in the plaint. 20
3. As to paragraph 5 of the plaint the Defendant denies each and every allegation contained therein and in particular the Defendant denies that the Plaintiffs had made any mistake. The Plaintiffs knew that a dilapidated wooden house was on lot 3660. Among the seven lots Lot 3660 was the best lot. The remaining six lots have useless old rubber trees and were not worth \$450/- per acre. Lot 3660 was rubber land but the trees had been cut down. If not for lot 3660, no purchaser would have bought the seven lots consisting of 34 acres 1 rood and 21 poles at \$450/- per acre or at the total price of \$15,471.56. The 1st Plaintiff gave an option to one Chow Wing 30

Hing to sell the said seven lots at the price of \$450/- per acre but the latter was unable to get any purchaser. A second option was given to him, and he succeeded in persuading the defendant and his nominees to purchase the said seven lots at \$450/- per acre or at the total price of \$15,471.56.

In the High
Court
No. 6
Statement of
Defence
20th August
1958.
(cont'd)

10 4. As to paragraph 6 of the plaint the Defendant denies each and every allegation contained therein and in particular the Defendant denies that the Plaintiffs had made any mistake, or that the said seven lots had been undervalued. In August 1943 the 1st Plaintiff in her Death Estate Duty Affidavit declared the value of the said seven lots at \$13,200/-. The Collector of Estate Duty, Kuala Lumpur, assessed their value at \$14,000/-. On 16.7.1948, the 1st Plaintiff filed a corrective Estate Duty
20 Affidavit and the value of the said seven lots was reduced to \$7,000/-. On 30.9.1956, the 1st Plaintiff as administratrix of the Estate sold the said seven lots to the Defendant and his nominees at \$15,471.56.

30 5. The 1st Plaintiff on 1.8.1957 applied to this Honourable Court in Originating Summons No. 120/57 for permission to sell the said seven lots to the Defendant at the price of \$450/- per acre or at the total price of \$15,471.56. In support of her applications, the 1st Plaintiff in her affidavit affirmed that:

"4. Since the emergency began in June 1948, no tapping for rubber was carried on the said lands because of the difficulty of getting tappers. The area was also considered a bad area for security reasons.

40 5. What was once considered an asset became a liability to the estate as the annual quit rents have to be paid. Moreover, owing to the difficulty of supervision and lack of labourers for reasons given above, the whole area is now overgrown with weeds and lallang.

6. In order to save the estate from waste as I am of the opinion this whole area may be covered with secondary jungle, I have on the 30th day of September, 1956 entered into an Agreement of Sale of the said lands to

In the High Court

No. 6
Statement of
Defence
20th August
1958
(cont'd)

one Tham Kong of No. 28C, San Peng Road, Kuala Lumpur, at the agreed price of \$450/- an acre. This amounts to \$15,500/- for the whole area and therefore compares favourably with the value set on the said lands by the Collector of Estate Duty of \$13,200/-."

6. The 1st Plaintiff served the said Originating Summons on the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Plaintiffs abovenamed who all consented to the said application for leave to sell the said seven lots to the Defendant at the said price. A copy of the said Sale Agreement was attached to the said application. 10
7. The said seven lots especially lot 3660 have now become valuable, because the Forlong Co-operative Housing Society Ltd. have put up many houses nearby. The Defendant and his nominees have also expended large sums of money in improving the said lands. The Plaintiffs are trying to cheat the Defendant and his nominees of the benefits of the said contract of sale validly and voluntarily entered into between them and the Defendant, and duly approved by the Court with the consent of all the Plaintiffs. 20
8. As to paragraph 7 of the plaint, the Defendant denies that there was any mistaken belief as alleged or at all.
9. As to paragraph 8 of the Plaint the Defendant denies each and every allegation contained therein but admits that the 1st Plaintiff in pursuance to the Order of this Honourable Court dated 23.9.1957 (whereof a copy is hereto attached and marked "A") transferred the said seven lots to the Defendants and his nominees on or about the 13th day of January, 1958. 30
10. As to paragraph 9 of the Plaint the Defendant denies that there was any mistake as alleged or at all. The Defendant admits that he and his nominees refused to agree to permit the 1st Plaintiff to revoke the said contract of sale which the 1st Plaintiff had voluntarily and validly entered into and duly approved by this Honourable Court with the consent of all the Plaintiffs. 40

11. As to paragraph 10 of the Plaintiff, the Defendant maintains that the Plaintiffs are not entitled to the Orders asked for.

In the High Court

12. Save as hereinbefore admitted, each and every allegation contained in the Plaintiff is denied.

No. 6
Statement of Defence
20th August 1958
(cont'd)

13. The Defendant avers that the Statement of Claim is bad in law and prays that it may be dismissed with costs.

10 Dated this 20th day of August, 1958.

Sgd. S.M. YONG & CO.

Signature of Defendant's Solicitors.

No. 7

PROCEEDINGS

No. 7
Proceedings
7th September 1965

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO. 366 of 1958.

Between

20	1.	Oh Hiam (f))	
	2.	Teo Kim Choon)	
	3.	Teo Peng Yong)	
	4.	Teo Ah Chye)	
	5.	Teo Hye Huat)	Plaintiffs
	6.	Teo Ah Toh)	
	7.	Teo Boon See (f))	
	8.	Teo Chooi Lian (f))	
	9.	Teo Kim Lian (f))	

And

Tham Kong

Defendant

30 NOTES OF GILL, J.

7th June, 1965.

In Chambers

In the High Court

No. 7
Proceedings
7th September
1965
(cont'd)

Civil Suit 366/58 (Enclosure 11).

Enche K.T. Chai for Plaintiffs/
Applicants.
Enche J.H. Yong for Defendant/
Respondent.

Application to be amended and the other
plaintiffs to be served.

Costs in the cause.

Signed: (S.S. Gill)

7th September, 1965

In open Court

10

Enche Peddie for 2nd to 9th Plaintiffs.
Enche Yong for Defendant.

Enche Peddie says that the first plaintiff
who was the administratrix of the estate is dead
and that Letters of Administration De Bonis Non
have been granted to 2nd and 7th Plaintiffs. He
applies that Teo Kim Choon and Teo Boon See (f)
be substituted as First Plaintiffs in place of
the original first Plaintiff. Enche Yong has no
objection.

20

I made an order substituting Teo Kim Choon
and Teo Boon See as First Plaintiffs in place of
the original first Plaintiff.

Enche Peddie opens case. Property sold was
estate property. Court order was necessary as
well as consents of beneficiaries. On the date of
sale the Court had no valuation certificate before
it. In August, 1943 the Estate Duty Office had
valued the lands at \$14,000/-, and they were
agreed to be sold for the same price in September
1956 subject to necessary consents and Court order.

30

Only one substantial issue, namely, whether
a mistake was made by the Plaintiffs. Parties
were never at one on the subject matter. If the
Court finds that a mistake has been made, the Court
should intervene to set aside the sale made.

Enche Peddie calls evidence.

LEE YEW SIONG

In the High
Court

Plaintiff's
Evidence
No. 8
Lee Yew Siong
Examination.

P.W.1. LEE YEW SIONG: affirmed, states in
English:

10 I am an Advocate and Solicitor now
practising at 73 Jalan Bandar, Kuala Lumpur. I
was also in practice in 1956. In that year I
received certain instructions to prepare an
agreement for the sale of certain lands
belonging to the estate of Teow Teow Guan. As
far as I remember, one Madam Oh Hiam who was
then the administratrix of the estate and Tham
Kong, the intended purchaser, gave me the
instructions. Tham Kong, the defendant, called
at my office to give instructions. He is the
defendant. I recognise him. As far as I can
remember, I was told that the lands to be sold
were rubber lands. I prepared the agreement. I
20 see the copy of agreement attached to the
statement of claim. This is a copy of the
agreement I prepared.

There was no provision in the agreement
in respect of vacant possession of any house on
the lands mentioned in the agreement. Provision
was made about produce from the land, namely,
natural rubber. There was nothing said about
income by way of rent from houses.

30 Subsequently I received instructions to
apply to Court for leave to sell the lands. I
prepared the affidavit in support of the
application. Madam Oh Hiam gave me the
instructions for the affidavit. I think
instructions for the sale agreement and for the
application to be made to Court were given at
the same time. But Madam Oh Hiam came later and
gave me the reasons for the sale to be embodied
in the application. The affidavit sets out
exactly the instructions given to me. When
instructions were given for the affidavit nothing
40 was said to me about the existence of any house on
any piece of land.

I prepared the transfer after obtaining the
necessary Court Order. There were 7 pieces of land
altogether and they were sold to the defendant or

In the High Court
Plaintiff's Evidence
No. 8
Lee Yew Siong
Examination.
(cont'd)

his nominee or nominees. I believe I prepared four separate transfers, one transfer in favour of defendant, one transfer to his wife and two transfers to relatives of defendant.

Cross-Examination

Cross-examined: When Oh Hiam came to see me about the sale of lands she came with an Indian clerk, who subsequently witnessed the agreement, the defendant and another Chinese who I believe was the brother. On some occasion the defendant's wife also came with the defendant. This happened a long time ago. I cannot remember if somebody else came. (Chow Wing Hing produced in Court and shown to witness). This man did come to my office but I do not know on what occasion. I believe he was one of the defendant's relatives and one of the transferees. Teo Kim Choon did not come to my office on the first occasion. I cannot remember whether he came on any subsequent occasion. Oh Hiam handed me the title deeds. There were 7 separate title deeds, one for each of the pieces of lands as mentioned in the agreement. Those were the titles in respect of which I was asked to draw an agreement of sale. As far as I can remember, she did not bring any other titles to me.

10

20

I prepared the affidavit as well as the originating summons at about the same times. Instructions for them were given a few days earlier, as best as I can remember. They were prepared some time before the actual typing.

30

Re-Examination

Re-examined: I cannot remember whether Chow Wing Hing was the broker who came with the defendant.

Plaintiff's Evidence
No. 9
Pawanteh Bin Din
Examination

No. 9

PAWANTEH BIN DIN

P.W.2., PAWANTEH BIN DIN, affirmed, states in English:

10 I am the Chief Clerk in the Registry of Titles, Kuala Lumpur. I have brought with me Transfer Presentation No. 25435 which is a transfer registered on 20.1.1958. The titles comprised in the transfer are E.M.R. 5633 and 5339 for lots 1537 and 3660 respectively, both in the Mukim of Setapak. The amount of consideration stated in the transfer is \$3,786 and the area transferred is 8 acres 1 rood 26 poles. The transferor was Oh Hiam (f) as Representative and the transferee was Tham Kong. The stamp duty paid on the transfer was \$38/-.

In the High Court
Plaintiff's Evidence
No. 9
Pawanteh Bin Din
Examination
(cont'd)

No cross-examination.

No. 10

TEO KIM CHOON

Plaintiff's Evidence
No. 10
Teo Kim Choon
Examination

P.W.3. TEO KIM CHOON, affirmed, states in English:

20 I am a merchant carrying on business at 467-473 Jalan Tuanku Abdul Rahman, Kuala Lumpur. I am one of the owners of Yuen & Co. Ltd., a motor firm.

30 I am one of the sons of Teoh Teow Guan deceased. When Teoh Teow Guan died, my mother named Oh Hiam obtained Letters of Administration of the estate of my deceased father. This is a certified copy of the grant she obtained (marked P.1.). Madam Oh Hiam died on 24.8.1958. This is her death certificate (marked P.2.). Following on her death I and my elder sister Teo Boon See applied for and obtained Letters of Administration De Bonis Non. This is the grant which was issued to us by the Court (marked P.3.).

40 I remember that late in 1957 some of my late father's estate was sold. My mother took the decision to sell that part of the estate. She was sick at the moment, and she needed money to go to Australia for treatment. She discussed the sale with a few of her children, including me. She was going to sell a piece of rubber land situated about 11 miles from Kuala Lumpur town on Bentong

In the High Court

Plaintiff's Evidence
No. 10
Teo Kim Choon
Examination
(cont'd)

Road. She asked me whether I would agree to the sale of the land. I agreed. The estate owned a property in Setapak. She did not say anything to me about selling that property. This property in Setapak is not anywhere near the rubber estate intended to be sold.

In 1958 my sister named Teo Boon See was living in a house on the property in Hot Springs, Setapak. I know now that this property has been transferred to Tham Kong. I first came to know about this transfer when Tham Kong came to collect rent from my sister and she told me about it. I got from my sister this letter of demand for rent from Tham Kong's solicitors (marked P.4.). 99 Klang Gates Road is the house on this Setapak property. The letter was addressed to Lim Ser, one of the tenants in the house. I then gave instructions to my solicitors to have the sale set aside. This is a copy of the letter written by my Solicitor to Mr. Y.S. Lee (marked P.5). The defendant did not agree to rectify the mistake. I therefore filed this action.

After deciding to sell the rubber estate, my mother told a friend about it casually. I know that an option over the land was given. I was told about this when the land was about to be sold by my brother Teo Ah Chye. I do not know personally to whom the option was handed over. I cannot remember whether my mother paid any commission on the sale of the land. The value of the land on which No. 99 Klang Gates Road was situate in 1956 was about \$40,000/- because the land is in the town. House projects were coming up just opposite and right behind the land.

I know later my mother applied to Court for permission to sell the rubber land. A copy of the application was served on me. I was given a copy of the affidavit which my mother had filed in support of the application. I gave a consent to the Court for the proposed sale. I did not give consent to the sale of the land on which 99 Klang Gates Road stands. I was never asked to consent to the sale of that land.

Cross-Examination

Cross-examined: Yuen & Co. Ltd. has been doing business at the present premises for about 50 years. I have been working at those premises since my father died about 30 years ago. I have been in charge of the business since then. My

10 mother stayed on the premises. I used to see my mother every day. In 1956 my mother was about 52 years old. She was ill then, seriously ill with cancer. She could sit up and talk, but she could not and did not do any work. I am the eldest son. I am the eldest child of my parents. When my mother was ill the family responsibility did not fall on my shoulders. I was the head of the family but without any power because I was not the administrator of the estate of my father.

In the High Court
Plaintiff's Evidence
No. 10
Teo Kim Choon
Cross-Examination
(cont'd)

20 I did not know how many titles to property in Setapak my father left. My mother was in charge of everything. She was still quite capable. I do not know why she did not let us look after the estate. I was quite happy that she was competent to look after the estate. I was not always happy with whatever decisions she made with regard to the estate. Occasionally she consulted me about matters relating to the estate. She also
30 consulted some of my brothers and sisters, plaintiffs 3, 4 and 7. She consulted me whenever there was any question of buying and selling, especially lands. She did not consult me about buying and selling. She consulted me about the sale of rubber land. She did not tell me about any option. If she was intended to give an option she would have consulted me.

30 In 1956 the value of the land on which No. 99 Klang Gates Road stands was \$40,000/-. This is my estimate of the value. I did not have it properly valued. Until today I have not had it valued because I do not intend to sell. I have not had the other six lots valued. I did not have the lands valued at the time of the sale. My mother agreed to sell at \$450 per acre. My mother told me that the neighbouring rubber estates were being sold at \$450 per acre. (Chow Wing Hing produced in Court and shown to witness).
40 I do not know this man. I may have met him during the execution of the transfers, but I cannot recollect. I do not know whether my mother gave him an option to sell the lands. I cannot remember my mother telling me about her having given an option to this man.

50 Whenever my mother executed documents she put her thumb print. She never signed. I know nothing about my mother giving an option to Chow Wing Hing on 5.9.1956. I cannot remember my mother giving another option on 8.9.1956 in extension of the previous option. *

In the High
Court
Plaintiff's
Evidence
No. 10
Teo Kim Choon
Cross-
Examination
(cont'd)

I first saw the defendant on the date of the transfer in the lawyer's office. It is not true that Chow Wing Hing brought the defendant to my premises to discuss the sale with me and my mother. It is not true that I took the defendant and some others to show them the lands. I do not know whether any of my brothers and sisters took them. My mother was not in a position to take anybody to the lands because of her illness. None of my brothers and sisters told me that they had taken the defendant to see the lands. It is not true that I took the defendant, Chow Wing Hing and three others to see first the lands at the 2nd mile Bentong Road and then the land at Setapak. It is not true that a few days before I took another prospective buyer to see both lands.

10

The estate had other lands. One rubber land in Ampang belonging to the estate has been sold. I have now in my possession several titles to lands belonging to the estate. The estate has land in Setapak town, the title of which is in my possession. There is a bungalow house off Setapak Road just before Setapak town which also belongs to the estate. This bungalow is in Kong Nam Road.

20

I know that my mother as administratrix entered an agreement to sell the lands. I first came to know about it after she had signed the agreement. In 1956 I had two Indian clerks in Yuen & Co. Ltd. They were working part-time in my shop. I was not paying them any salaries. They were doing accounts for other firms and making use of my premises in exchange for doing some of my accounts.

30

As far as I know, the lands mentioned in the agreement of sale meant the rubber lands.

(Witness shown a document). This is an agreement about sale of land (marked D.6.). I was not present when my mother executed the agreement for the sale of the land. I have never seen this document (D.6) before. After my mother had entered into an agreement to sell lands I did not take any steps to find out what lands she had agreed to sell. P.5 was written on my instructions. Until I saw P.4 I did not take any steps to find out what lands had been sold.

40

All I know about the agreement of sale was that my mother had agreed to sell rubber lands. My mother told me that she had agreed to sell rubber lands. I did not know the defendant before 1956. I did not know any of his family before 1956. As far as I can remember, my mother never informed me that she knew the defendant and his family. As far as I am concerned, the defendant was a complete stranger to me.

In the High Court
Plaintiff's Evidence
No. 10
Teo Kim Choon
Cross-Examination
(cont'd)

10

No re-examination.

Adjourned until 2.30 p.m.

Signed: (S.S. Gill).

No. 11

TEO BOON SEE

Plaintiff's
Evidence
No. 11
Teo Boon See
Examination.

Resumed at 2.30 p.m.

P.W.4. TEO BOON SEE (f) affirmed, states in Hokkien:

20

I live at 99 Klang Gates Road, Setapak, Kuala Lumpur. I have stayed in that house for 8 years. I am a daughter of Teoh Teow Guan and a sister of P.W.3.

In 1956 my mother discussed with me about the sale of some lands, rubber lands with old rubber trees at Gombak. She was ill. That is why she discussed the sale with me. I agreed to the sale of the land. Nothing was said to me about the sale of the house in which I was living.

30

I did not know that my mother had to apply to Court for permission to sell the lands. I did not receive any documents relating to the sale of the land. I was never asked to agree to the sale of the house in which I lived. I am not aware that the house in which I am now living has been sold. Quite a long time ago a person came to my house to collect rent for the house. A neighbour named Ang Yeow came to my house to collect rent. After the man had called at my house I rushed to my brother (P.W.3.) to tell him about it.

In the High Court
Plaintiff's Evidence
No. 11
Teo Boon See
Cross-Examination

Cross-examined: The house I lived in 1956 was a wooden house with tiled roof. Many people lived in that house. My younger brother was living in that house. The rest of the people living there were my friends. About 30 to 40 people lived in that house. The house was a bit longer than this Court (46 feet 9 inches). The width of the house was about 40 feet. There were ten living rooms in the house. I do not know where the rest of the members of my family lived. They lived on the upper floor of Yuen Motor Company.

10

The discussion about the sale of lands took place on the upper floor of Yuen Motors. Nobody else was present when my mother discussed the sale with me. The rest of the members of the family were not in the house then. They were at work. My mother did not tell me that she had signed an agreement to sell. I did not know then whether she had signed any agreement of sale. She did not tell me at any time that she had signed an agreement to sell. I was then 30 odd years old. I was married then. I had two children then, aged 3 years and 6 months respectively.

20

I know nothing about the negotiations which my mother had with the buyers for the sale of the lands. I had known the neighbour who came to collect rent from me from the time I lived there. I do not know whether the neighbour worked or not. He was then in his fifties. I did not know why he came to collect rent from me. I was frightened. I do not know whether he asked for rent from other people living in the house. I was surprised why he asked me for rent.

30

No re-examination.

Plaintiff's Evidence
No. 12
Teo Peng Yong
Examination

No. 12

TEO PENG YONG

P.W.5. TEO PENG YONG, affirmed, states in Hokkien:

I live on the upper floor of 471 Jalan Tuanku Abdul Rahman, Kuala Lumpur, on the top of Yuen & Co. I am a son of Teoh Teow Guan and brother of P.W.4.

40

I know that after my father's death my mother was the administratrix of his estate. My mother consulted me about the sale of lands belonging to the estate. She said that the rubber lands with old rubber trees at Gombak were to be sold. She did not at any time discuss with me the sale of 99 Klang Gates Road, Setapak, Kuala Lumpur. I agreed to the sale of the old rubber lands at Gombak.

In the High Court
Plaintiff's Evidence
No. 12
Teo Peng Yong
Examination
(cont'd)

10 I did not prepare any document relating to the sale of the lands. I remember my mother informing me that she had asked an Indian to prepare some documents. That Indian was previously handling our income tax matters. I do not know what document the Indian was asked to prepare. I know how the buyers for the land were found. An option was given to a taxi driver named Mr. Lee. This is Mr. Lee (Lee Kim Seng identified). My mother gave him the option.
20 I did not know whether he found the buyer or not. I remember that the price was \$400/- per acre when the option was given.

I did not know that my mother had to ask the Court for permission to sell. I remember receiving some documents from the Court. I did not read or have read the documents which I received from the Court.

30 I did not at any time give my consent to the sale of the land on which house No. 99 Klang Gates Road, Setapak stands.

Cross-examined: I did not at any time take any prospective buyers to see the lands. I got the documents from the Court. I cannot remember how long after the options I received these Court documents. This happened a long time ago. I did not see the option. My mother did not tell me at any time that she had signed an agreement for the sale of land. My mother did not inform me about negotiations with buyers.
40 The first time I knew about the sale was when I was asked to give my consent.

Cross-
Examination

The Indian who was asked to prepare the document is not in the precincts of the Court. I did give consent to sell the rubber lands but not the house at 99 Klang Gates Road, Kuala Lumpur. My mother never asked me for my consent to sell 99 Klang Gates Road, Kuala Lumpur.

In the High Court

Plaintiff's
Evidence
No. 12
Teo Peng Yong
Cross-
Examination
(cont'd)

Apart from what my mother told me I know nothing about this sale.

By Court: I had visited the rubber lands. They were all at one place.

Plaintiff's
Evidence
No. 13
Teo Ah Chye
Examination

No. 13

TEO AH CHYE

P.W.6. TEO AH CHYE, affirmed, states in Hokkien:

I reside at 467 - 473 Jalan Tuanku Abdul Rahman, Kuala Lumpur. I am a son of Oh Hiam (f). In 1956 she told me about the sale of some lands belonging to the estate of Teoh Teow Guan deceased. She told me that she wanted to sell the old rubber lands at Gombak. She did not mention to me the sale of the house and land at 99 Klang Gates Road, Kuala Lumpur. I agreed to the sale of the rubber lands. There was not even a single rubber tree on the land at 99 Klang Gates Road, Kuala Lumpur.

10

Cross-
Examination

Cross-examined: My mother did not any time tell me about her having signed an agreement to sell the lands. She talked to me about the sale of lands at Gombak and asked for my consent. I gave the consent. She wanted money to proceed to Australia for medical treatment. If not for that, I would not have consented to the sale.

20

Somebody brought a document to me while I was in my upstairs office and I just signed it. I do not know what the document was about. I did not care what the document was about, but my mother told me that it was about the sale of rubber lands. I accepted my mother's word for it. Nothing was mentioned about the sale of the land at 99 Klang Gates Road, Setapak, I came to know about it only when my eldest sister told me about it.

30

I cannot remember the lapse of time between my discussion with my mother about the sale of the lands and the receipt of the documents which I

merely signed. I cannot remember the difference in time.

In the High Court

Plaintiff's Evidence
No. 13
Teo Ah Chye
Cross-Examination
(cont'd)

Re-examined: P.W.4. is the sister who told me about the sale of 99 Klang Gates Road, Setapak.

Re-examination

No. 14

LEE KIM SENG

Plaintiff's Evidence
No. 14
Lee Kim Seng
Examination

P.W.7. LEE KIM SENG, affirmed, states in Hokkien:

10 I live at 4¼ mile Ulu Gombak Road, Kuala Lumpur. I am a taxi driver. I knew Madam Oh Hiam. She discussed with me the sale of some lands. I received information from a friend that Madam Oh Hiam wanted to sell her rubber land at Gombak. I went to see her personally in her shop. I went to see her about her sickness. Previously I had gone to her shop to have my car repaired.

20 I brought the buyer to see the land. I had an option to sell the land from P.W.5. The option was signed by P.W.5. He and I signed it. Only both of us signed the option. Oh Hiam knew about the option. She told P.W.5. in my presence that she wanted to sell the land in order to get money to proceed to Australia for treatment. I do not remember when I got my option. I remember that the price written on the option was \$500/- an acre. I got my commission, and I did not bother to keep the option.

I knew the land which was to be sold. It was situated at 11th mile Gombak Road. No land in Klang Gates Road was included in the sale.

30 I tried to find buyers for the land. At first I saw a man called Saw Ban Huat and asked him to buy. He did not buy because he offered

In the High
Court
Plaintiff's
Evidence
No. 14
Lee Kim Seng
Examination
(cont'd)

₹450/- per acre which the owner refused to accept. Then I looked up the defendant and a man called Chow Hing who is sitting outside the Court. I call the defendant Ah Kong. I do not know whether defendant and Chow Hing are related. They went to see the rubber estate with me in their car. They did not go to see 99 Klang Gates Road, Kuala Lumpur. They offered a lesser price. I told them to see the owner if they wanted reduction in the price. So I took them to see P.W.5. I do not know whether the price was reduced.

10

P.W.5. paid me a commission. Defendant's wife gave me ₹200 commission. The ₹200 commission was a token commission and not worked out on any basis. I have not acted as a broker in any other sales of land. I am a taxi driver.

I was present in Y.S. Lee's office when some sort of transfer of the land took place.

This is Saw Ban Huat (Saw Ban Huat identified).

20

Adjourned until 10 a.m. tomorrow.

Signed: (S.S. Gill)

No. 15
Proceedings
8th September
1965

No. 15
PROCEEDINGS

8th September 1965

Civil Suit No. 366/58

Hearing continued. Counsel as before.

By consent of both counsel letters dated 1st July, 1958 and 22nd July, 1958 put in as exhibits and marked P.7 and P.8 respectively.

30

By consent para. 10 of the Statement of Defence amended by adding a new sentence at the end of the paragraph: "The defendant says that the first plaintiff is estopped from contending that she was mistaken as to the contents of the agreement dated 30th September, 1956."

LEE KIM SENG (RECALLED)

In the High Court

Plaintiff's Evidence
No. 16
Lee Kim Seng (Recalled)

P.W.7. LEE KIM SENG (re-affirmed and continuing):

Cross-Examination

Cross-examined: I have stayed at 4½ mile Gombak Road, Kuala Lumpur ever since I was 15 years old, that is, 30 to 40 years.

10 I received information from a friend that Oh Hiam wanted to sell rubber lands. He was a passenger in my taxi. I do not know his name. He paid me my taxi fare. I have not seen him since. He was just an ordinary passenger. I did not know him before I gave him a ride in my taxi. Oh Hiam did not tell me herself that she wanted to sell lands. None of Oh Hiam's children told me so.

20 I was given an option by P.W.5. The option was written in English. The paper on which the option was written was 9 inches by 6 inches. I could not read it. I only knew that it was an option to sell lands. I examined the option. It contained English letters. I did not understand the letter. I could not understand the contents of the option. I did not understand any single word of the option. P.W.5. did not explain the contents of the option to me. Nobody explained the contents of the option to me. All I knew was that it was an option to sell land, not to buy land.

30 I know the defendant. I recommended to him to buy the rubber estate. Before I recommended to him to buy the lands I did not know him. I did not know Chow Wing Hing. I never knew him before. An employee working in Thye Hoe Sauce Factory at Gombak Road introduced them to me. This happened in the sauce factory. I do not know when. The name of this employee of the sauce factory is Ah Cham. I have not seen him since. I believe he is still there. I had known him before that. I do not remember when I last saw him prior to the introduction.

40 I took the defendant and Chow Hing to see the rubber lands. Several years have passed.

In the High Court
Plaintiff's Evidence
No. 16
Lee Kim Seng
(Recalled)
Cross-Examination
(cont'd)

I cannot remember the date on which I took them. I took them to see the estate four or five days after I had received the option. I got only one option. I took Saw Ban Huat to see the estate. Altogether I went to see the estate twice. I have not been to see the estate after I took the defendant. I saw the estate twice in my whole life. When I took Saw Ban Huat only both of us went to see the estate. When I took the defendant and Chow Wing Hing four of us went. They had one of their friends with them.

10

It is not true that I have never seen the defendant before yesterday.

Re-examination

Re-examination.

By Court: The estate is situated at the 11½ mile, Gombak Road. The towkay who gave me the option told me so. But I had not seen the estate before I took Saw Ban Huat there.

Plaintiff's Evidence
No. 17
Saw Ban Huat
Examination
8th September 1965

No. 17

SAW BAN HUAT

20

P.W.8. SAW BAN HUAT, affirmed, states in Hokkien:

I am the owner of Chop Kim Huat of 4½ mile Ulu Gombak Road, Kuala Lumpur. I know P.W.7. I have discussed with him the purchase of a rubber estate at Gombak. It was about 9 years ago. P.W.7. brought an option and I knew from the option that the land belonged to Yuen Company. I remember the selling price in the option was \$500/- an acre. I went to see the land with P.W.7. I did not buy the land because I offered only \$450/- per acre. The land which I was shown was only rubber land. I was not shown a house in Klang Gates Road. The rubber estate I was shown was near the main road but the nature of the land was hilly. I estimate the value of one acre to be \$450.

30

When I did not get this land I did not buy other rubber land. I bought 86 acres of rubber land in Serendah. I have one-fourth share in 86 acres. I paid \$700 per acre for it. I bought this rubber land in 1960 or 1961.

40

Cross-examined: This happened a long time ago. It was 9 to 10 years ago. I saw the option which P.W.7 had. It was written in the English language. I cannot read English. P.W.7 explained the document to me. Apart from what he told me, I could not understand the document. There was a signature on the option. I cannot remember how many signatures.

In the High Court
Plaintiff's Evidence
No. 17
Saw Ban Huat
8th September 1965
Cross-Examination

10 I saw the land. It was hilly. The trees were old. The grass was not weeded. In connection with the sale of the land I was not introduced to Oh Hiam or her children.

Case for the plaintiff.

Enche Yong calls evidence for the defence.

No. 18
THAM KONG

No. 18
Defendant's Evidence
Tham Kong
Examination

D.W.1. THAM KONG, affirmed, states in Cantonese:

20 I am a mechanic, at present unemployed, living at No. A7 Lornie Road, Kuala Lumpur. I never saw P.W.7 before yesterday.

30 In 1956 I bought some lands under an agreement. I cannot read English. (Shown D.6.) It bears my signature. I know a man named Chow Wing Hing. He is my friend. He came to my house and told me that some land in Setapak was to be sold. He asked me whether I was interested to buy the land. He told me that the land was \$450/- per acre. He then took me to see the owner of the land. The name of the owner was Oh Khim alias Kim Choon. Oh Khim was a woman. Kim Choon is a man. Kim Choon is P.W.3. I saw Oh Khim in Yuen Company at Batu Road. I saw her upstairs. Chow Wing Hing and I went to see Oh Khim. I saw her upstairs. Kim Choon (P.W.3.) was present.

I entered the shop with Chow Wing Hing and went upstairs and saw Oh Khim and Kim Choon (P.W.3). Kim Choon went upstairs together with

In the High Court

Defendant's
Evidence
Tham Kong
Examination
(cont'd)
No. 18

us. He went with us from downstairs. I discussed about the land with Oh Khim. Then six of us went to see the rubber estate and the land. The six of us were Chow Wing Hing, myself, Chow Kit Yee, Tham Pat Yaw, Yip Yaw Seong and Kim Choon (P.W.3). Chow Wing Hing and Kim Choon took me to see the land. At first I was brought to Gombak Road to see the big piece of land. The land was very hilly land containing damaged rubber trees. The whole area was covered with lallang and bushes. It was a restricted area then because of the Emergency. No foodstuffs could be brought to the estate. I was then brought to Klang Gates Road. I was shown a very small piece of land, not even half an acre in area on which was a very old house with wooden walls. There were 20 to 30 rubber trees on this land in their dying stage.

10

After seeing the lands we went home. This happened a long time ago. I cannot say in how many cars we went. Now I say we went in two cars. They went in one car and we went in one car. P.W.3 and Chow Wing Hing went in one car, and four of us (including myself) went in the other car. After seeing the lands I decided to buy. I told the seller that I wanted to buy the lands. Having seen the lands I told Chow Wing Hing that I wanted to think over the matter. I told him that I would go with him to see the owner on the next day about the price of the land. I went with Chow Wing Hing to see the owner the next day at his office in Huen Company at Batu Road. There I bargained with him about the price of the land. I bargained about the price with Oh Khim and Kim Choon. Chow Wing Hing was there. Four of us discussed. The price they demanded was \$450 per acre. I offered them \$400 per acre. They refused to accept my offer. I then increased my offer to \$425 per acre, which they also refused. Finally I agreed to buy the land at \$450 per acre. Something was mentioned about the land at Klang Gates Road. I said that I would buy the land provided the land at Klang Gates Road was included, the reason being that the land at Gombak Road was not worth \$400 per acre. At most it was worth a little more than \$200 per acre. But with the land at Klang Gates Road included I was ready to buy the whole area at \$450 per acre.

20

30

40

On the following day I went to the office

50

of Mr. Y.S. Lee (P.W.1). An agreement was drawn up. I remember it was signed in 1956 but I do not remember the day and month. After the agreement was signed I had the grass on the land cleared. Subsequently I had the land replanted with rubber. In 1958 the lands were transferred to me and some other people.

In the High Court

Defendant's Evidence
Tham Kong Examination
(cont'd)
No. 18

10 After the lands were transferred to me, I went to have the Rubber Cultivation Book transferred to my name. This is the Rubber Cultivation Book which was given to me (marked D.9).

Cross-examined: I cannot say whether I declared to the authorities that land held under E.M.R. 5339 was rubber land. D.9 was issued to me in place of the old book which was given to me by P.W.3. I cannot remember how many new books there were.

Cross-Examination

20 The lands I bought were transferred to four different persons. I think each of them got his own Rubber Cultivation Book. I got D.9 for the two pieces of land I took. I got the Book (D.9) to cover rubber on E.M.R. 5339. I do not know to which piece of land E.M.R. 5339 refers.

30 Before I bought the lands I insisted that the Klang Gates property should be included. I did check to make sure that the title to the Klang Gates property was included. Title for Lot 3660 referred to the Klang Gates property. It is included in D.9. The Book was issued to me like that. I asked for four books. It is not true that lot 3660 is included in D.9 because it was part of the rubber lands at Gombak.

In 1956 I was a mechanic. I was a contractor. I have stopped my contracting business. I stopped it several years ago. I am now doing my own work, some building construction. I struck a lottery. That is how I got the capital to buy the estate.

40 Chow Kit Yee is my wife. She is a relative of Chow Wing Hing. They themselves know how they are related. Cheung May Keow is my mother-in-law. I transferred three of the titles to my mother-in-law. I did not have enough money. So my mother-in-law provided some. My wife provided some money. Chow Wing Hing also provided some money.

In the High Court

Defendant's
Evidence
Tham Kong
Cross-
Examination
(cont'd)
No. 18

That is why Chow Kit Yee and Cheung May Keow got some of the titles. I did not have sufficient funds in 1956 when I entered into agreement.

I know Chow Wing Hing well. At first he did not know that I did not have sufficient cash. He thought that I could produce \$15,000 to buy the rubber estate. The \$15,000 covered all the lands including the small piece of land.

When Chow Wing Hing came to see me he said all the land was being offered at \$450/- an acre. I insisted on the small piece being included because the other land being in the restricted area was not worth more than \$200/- an acre. 10

Changes have been made since 1956 to the Klang Gates property. That piece of land has come under the care and management of my wife. I am a busy man and have to go out to do work. My wife alone will know about the changes. My wife gets money from me. I do not know whether she has spent any of it on that land. 20

I have been to the land since 1956, only once. I cannot remember when. This was shortly after I had purchased it. There were attaps there. I do not know whether there were houses on it. I do not know whether there are any rubber trees there still. I had no idea whether this land was within the Municipality area. There were neighbouring houses. I did not pay attention to whether there were many houses there. 30

A co-operative society started commencing work opposite the land in 1957. Houses started going up. I do not know whether the co-operative society was clearing squatters from the land.

I put a value of \$7,000 on the Klang Gates Road property in 1956. Mr. Lee had the transfers stamped. I was not responsible for the working out of the stamp duty. I did not tell Mr. Lee that this property in 1956 was worth \$7,000. I got 2 pieces of land including the Klang Gates Road property. I cannot remember whether for me there was one transfer and what the amount entered in the transfer was. 40

There were people living in the houses on

10 the Klang Gates Road property. I was in Mr. Lee's office when the agreement was prepared. I cannot remember whether I told Mr. Lee that it was important that the Klang Gates Road property be included in the agreement. I did make arrangements to go into possession of the lands. I cannot remember whether these were set out in the agreement. I got possession on 1st October, 1956. I took no steps to take possession of the Klang Gates Road property. I left it to my wife. She told me that she was going to collect rent from people living on the land. I told her that it was her business. My wife told a solicitor on my instructions to write a letter asking for rent. If P.4 asks for rent from February, 1958, then those could be my instructions. My wife may be able to answer the question as to why rent was asked for from February 1958. I myself know nothing about assessment on this property.

In the High Court

Defendant's Evidence
Tham Kong Cross-Examination (cont'd)
No. 18

20 My estimate of the monthly production in 1956 from the Gombak Road rubber lands was 2 to 3 piculs. I did not buy the land for profit purposes. I bought it for replanting purposes. From the Klang Gates Road property I expected several tens of dollars a month.

30 I cannot remember the clause in the agreement that I would pay \$50/- a month to the seller if the Court refuse to give permission to sell. If this amount is there, I do not remember how this was worked out.

I was not asked in 1958 to transfer back the Klang Gates Road property. If I had been asked I would have refused. I am not in a position to transfer back all the lands if the Court sets aside the agreement of sale. Some of the other lands have been sold. I have sold my lands at Gombak. The only land which still remains in my name is the land at Klang Gates Road.

40 When I visited the Klang Gates Road land in 1956 there were 20 to 30 rubber trees in a dying stage. I do not know whether it is stated in my defence that lot 3660 was rubber land but the trees had been cut.

I do not know whether Forlong Co-operative Housing Society Limited have put up any houses near the Gombak Road lands. The housing Society

In the High Court

Defendant's Evidence
Tham Kong
Cross-Examination
(cont'd)
No. 18

has no project in Gombak.

My wife knows the amount of money she has spent on improving the Klang Gates Road property.

It is not true that I was never given the opportunity of purchasing the Klang Gates Road property. It is not true that I know that it was transferred to me as a result of a mistake.

Adjourned to 2.15 p.m.

Signed: (S.S. Gill)

Resumed at 2.15 p.m.

10

D.W.1. THAM KONG (on former oath):

Re-Examination

Re-examined: I went to the Land Office in Kuala Lumpur to get D.9. I handed in the Old Book at the Land Office and got D.9 in its place. The old Book was not returned to me. I waited for half an hour to get the new book. I did not have to fill in any form to get a new book, or to sign any document.

About this case my wife saw the solicitors. My wife consulted the lawyers, not I.

20

No. 19.
Defendant's Evidence
Alias bin Mohamed Yunos
Examination

No. 19

ALIAS bin MOHAMED YUNOS

D.W.2. ALIAS bin MOHAMED YUNOS, affirmed, states in English:

I am a clerk in the Registry of Titles, Kuala Lumpur. I have with me the Register document of Title of E.M.R. 4139, lot 2663, Mukim of Setapak. The present registered owners are Lee Tham Yin Realty Limited. The previous owner was Cheung May Keow (f). Previous to that was Oh Hiam (f) as representative.

30

I have with me the Register document of Title E.M.R. 4140, lot 2664, Mukim of Setapak. The present registered owners are the Lee Tham Yin Realty Limited. Previous owner was Cheung

May Keow (f) and before that Oh Hiam (f) as representative.

In the High Court

I have with me the Register document of Title E.M.R. 5339, lot 3660, Mukim of Setapak. Present owner is Tham Kong and the previous owner was Oh Hiam as representative.

No. 19
Defendant's
Evidence
Alias bin
Mohamed Yunos
Examination
(cont'd)

10 I have with me the Register document of Title E.M.R. 4219, lot 2771, Mukim of Setapak. Present owner is Lee Tham Yin Realty Limited, previous owner was Chow Kit Yee (f) and previous to that Oh Hiam (f) as representative.

I have the Register document of Title E.M.R. 4076, lot 2562, Mukim of Setapak. Present owners are Lee Tham Yin Realty Limited. Previous owner was Chow Wing Hin and previous to that Oh Hiam (f) as representative.

20 I have the Register document of Title E.M.R. 5634, lot 1538, Mukim of Setapak. Present owners are Lee Tham Yin Realty Limited. Previous owner was Cheung May Keow (f) and before her Oh Hiam (f) as representative.

I have with me Register document of Title No. 5663, lot 1537, Mukim of Setapak. Present owners are Lee Tham Yin Realty Limited. Previous owner was Tham Kong and before him Oh Hiam (f) as representative.

30 Memoranda of Transfers bearing Presentation numbers 25034, 25035, 25036 and 25037 are all transfers by Oh Hiam (f) as representative. All these transfers were registered on 20.1.58.

I see D.9. This is a Rubber Cultivation Book. I can recognise the signature on this book. It is the signature of the then Assistant Collector of Land Revenue, Kuala Lumpur, Enche Ismail bin Mohamed.

40 Cross-examined: E.M.R. 5633, lot 1537 was transferred to Lee Tham Yin Realty Ltd. on 15.4.64. E.M.R. 5634, lot 1538 was also transferred on the same day. So were E.M.R.s 4076, 4219, 4140, 4139 on the same day.

Cross-
Examination

D.W.3. CHOW WING HING, affirmed, states in
Cantonese:

I am a hawker living in Chan Sow Lin Road, Kuala Lumpur. I knew Madam Oh Hiam. I had known her for a long time. In 1956 she was staying in Yuen Company's premises at Batu Road, Kuala Lumpur. I know P.W.3. He is Mr. Teo Kim Choon. I do not have a sauce factory in Setapak or in any other place.

10

I do not know P.W.7. In 1956 I was concerned in a land deal with Oh Hiam (f). I went to sell things. That is how I came to know here. She told me that she wanted to sell her land. At that time I had known her for two to three years. I asked her for an option. This was in August 1956, I got an option. The option referred to sale of land, but I do not read or write English. It referred to the sale of 6 pieces of land at Gombak and one piece at Setapak.

20

Kim Choon (P.W.3) handed me the option. There was a thumb print on it. Having got the option, I went to look for buyers. I found a prospective buyer named Ah Khoo. I took him to P.W.3. P.W.3 took me and Ah Khoo to see the six pieces of land at Gombak and another piece at Setapak. The lands at Gombak were very steep and covered with lallang shrubs and bushes. There were few rubber trees on the lands. They were trees which were about to die. P.W.3 also took me to see the land at the 3rd mile Setapak Road, Kuala Lumpur. I know the Police Station at Setapak. The land was about a quarter mile away from the Police Station at Setapak, further away from Kuala Lumpur. There were several rubber trees on this land. There was an old house on the land, which was about to fall down. After inspecting the land we went back to our respective homes. Ah Khoo did not buy the lands because he said he could not get any profits from the land.

30

40

I then went to look for other buyers. Kim Choon (P.W.3) gave me another option because the previous option had expired. The second option

also had a thumb print on it. I found a prospective buyer named Tham Kong, the defendant. I have known Tham Kong for a very long time. He is my relative. I took the defendant to see Kim Choon (P.W.3) in the latter's house at Yuen Company premises. We went with four other persons. We went in a motor car. Five of us went in that motor car, but only the defendant and I went to see Kim Choon. We saw Oh Hiam. Kim Choon then took us to see the land. We went by car. We went by two cars. Kim Choon and I went in the first car. The defendant went in the second car with three others. Those three others were Chow Kit Yee, Tham Tat Yaw and Yip Yaw Cheong.

In the High
Court

No. 20
Chow Wing Hing
Examination
(cont'd)

We went to see the six pieces of land at Gombak. On our way back we went to see the land at Setapak Road, at Klang Gates Road. The Klang Gates Road land was the same land to which I had taken Ah Khaw. Kim Choon then asked the defendant his views about the lands. The defendant told Kim Choon that he would give a reply on the next day.

On the next day I went to see the defendant in his house. Defendant said that he would go with me to see Kim Choon to discuss the price of the land. So, we went to see Kim Choon. When we saw Kim Choon, Oh Hiam was there. Four of us were present when the discussion took place. The defendant offered to buy the lands. At this discussion something was said about the house on the Setapak land. Subsequently I went to a lawyers's office.

Cross-examined: Chow Kit Yee is my elder sister. She is married to the defendant. I have been a hawker for 11 years. I was a hawker at the time of this land transaction. I have lived in Chan Sow Lin Road for the last 15 years. I do not carry on my business round my place of residence alone. I go round the whole of Kuala Lumpur. I sell Chinese sauce. I was selling Chinese sauce in 1956. I bought sauce from factories. I had bought sauce from Thye Hoe Sauce Factory in Gombak.

Cross-
Examination

Oh Hiam was an old woman. She was very thin. I came to know her when she bought things from me at Yuen Company premises in Batu Road. She was on the ground floor when she bought things from me, that is, sauce.

In the High
Court

No. 20
Chow Wing Hing
Cross-
Examination
(cont'd)

I was acting as a broker in this trans-
action. I got commission from the defendant,
\$400. I got E.M.R. 4076 put into my name. The
Defendant said he did not have enough funds to
buy all the land. So, I bought one piece. That
is how one piece came to be registered in my
name.

I got two options in this case. I handed
both options to a lawyer named Y.S. Lee. The
price stated in the option was \$450/- per acre. 10
Tham Kong went to discuss the price. He went to
bargain. He wanted a reduction in the price.
The value of the Klang Gates Road property in
1956 was five to six thousand dollars. The price
of rubber lands in Gombak was \$200 an acre. I
have sold my piece of rubber land. I had it
replanted and sold it at \$1,500 per acre. It
was bought by a Housing Estate Company, for
what purpose I do not know.

I have seen the Klang Gates Road property. 20
I have not seen it recently. I have not been there
for a long time. Nothing has been done to that
land since 1956. I do not know anything about
it, because I have not been there recently. I
last went there two years ago. The land looked
different from when I saw it in 1956. In 1956
there were twenty to thirty rubber trees in a
dying state and the house was tilted to one side.
When I saw it in 1963 all the trees were gone and
the house had been repaired. It is a wooden 30
house, a big one, a long house with many people
living in it. In 1963 there were many people
still living there. There were smaller houses
behind the bigger house on the same land. I did
not count to find out how many houses there were.
I think there were four houses. They were there
in 1956 and still there in 1963, except that they
had been repaired.

Question: Why was it necessary for you to take
Kim Choon when you wanted to show the lands to 40
the Defendant?

Answer: I did not take Kim Choon. Kim Choon
took me there.

I had gone with Ah Khaw and Kim Choon to see
the lands so that I knew where the lands were.
When Tham Kong got interested in the lands he
said he wanted to see the lands. I took him there.
Tham Kong insisted on my bringing Kim Choon along.

In the High
Court

And

No. 21
Defendant's
Evidence
Chow Kit Yee
(cont'd)

Tham Kong

Defendant

NOTES OF GILL, J.

24th May, 1966

In open Court.

Hearing continued.
Inche Peddie for Plaintiffs.
Inche J.H. Yong for Defendant.

Examination

D.W.4. CHOW KIT YEE: affirmed, states in
Cantonese:

I am 42 years old, residing at 7A Lornie Road, Kuala Lumpur. I am the wife of the defendant. Chow Wing Hing (D.W.3) is my half younger brother (same mother but different fathers).

10

I remember when my husband entered into an agreement to buy the lands at Setapak. Chow Wing Hing (D.W.3) was the broker. I was taken to see the piece of land. D.W.3 took me to see the lands. Yip Yow Seong, Tham Kong (my husband) and Tham Tat Yan also went with us. A man named Kim Choon also went with us. We first went to see the large piece of land at Gombak. Then we went to Setapak to see a smaller piece of land. There were rubber trees on the smaller piece of land, 17 trees. I counted the trees. The trees were about to fall down. I counted them after the land was sold to my husband. I asked someone to cut them down. This was in 1957. I paid \$3,000/- to have the 17 trees cut down.

20

After my husband had signed the agreement to purchase the lands I was put in charge. There were people living on the smaller piece of land. I collected rent from them. Prior to my husband signing the agreement, I did go and see other lands at Gombak. Those were lands opposite to the lands subsequently purchased by my husband. The selling price of those lands was \$210, per acre. The land was 104 acres in area. I did not buy that land because the rubber trees on the land were too old. I thought that the land was not worth \$210/- per acre. I do not know whether the land was sold later on.

30

40

This is the title to the smaller piece of

land at Setapak (put in and marked D.10). The other land which my husband purchased was situated at 10 3/4 mile Pahang Road.

In the High Court

No. 21
Defendant's
Evidence
Chow Kit Yee
Examination
(cont'd)

Cross-
Examination

10 Cross-examined: I cannot remember when in 1957 I had the trees cut down. It was at the beginning of 1957. I did not know that the land in Setapak belonged to the estate of Teo Teow Guan deceased. The land was transferred to my husband as soon as he agreed to buy. The agreement was entered into in September, 1956. The land was transferred to my husband in January, 1958. After the agreement was signed the land was ours. I do not know the terms of the agreement. I am illiterate. Now there are no rubber trees on the land. There is a big house on the land. Five families are now living in that big house. I last went to the house at the end of 1958. At that time there was one big house on the land and five families were living in the house then. The area of the land is under half an acre.

20 If it is put to me that there were no rubber trees on the land in 1956 or 1957, I do not agree. I am not calling the man who cut down the trees. I do not know where he is. I have no receipt for the \$3,000/- I paid him. I keep no account relating to this land. I do not keep accounts for the rubber lands at Gombak. I do not know anything about D.9.

30 I have no account of the rents I received from the Setapak land. I gave no receipts when people paid rent.

I do not know that a summons was filed against my husband to get the land back from him. The Court has ordered my husband not to sell the land until this case is settled.

40 I was managing the land. I provided the information for the Statement of Defence in this case. I provided the information that there was a dilapidated house on the land. I do not know whether the house is still there. I provided the information in the Statement of Defence that lot 3660 had been rubber land but the trees had been

In the High
Court
No. 21
Defendant's
Evidence
Chow Kit Yee
Cross-
Examination
(cont'd)

cut down. The Forlong Housing Society started building houses near the land in 1957. I do not know whether they had started developing the land before that.

I spent large sums of money on improving the land. I repaired the plank walls of the house and cemented the floor. I have no accounts and no receipts. I spent a little more than \$3,000/- on repairs and cementing of the floor.

Teo Boon See (P.W.4) was not living in the house on the land in 1957. She was not there in 1958. I saw her there on the last occasion I visited the house at the end of 1958. I went to collect rent from her. This case had started before that. Before the summons was issued I did demand rent from the person who had moved out of the house. I asked him for rent before he moved out.

10

I collected rent from one person for 4 months and from another person for 6 months. I collected rent in 1956, from 1st October, 1956, from one family for 4 months and from another family for 6 months. The other three families refused to pay rent to me. I then saw Mr. Lee Yew Siong, the lawyer (P.W.1). I told him about the refusal by the three families to pay rent.

20

This case began in August 1958. The two families I collected rent from moved out. Nobody moved in. I was collecting \$10/- from each family. It would be \$50/- for the 5 families.

30

The rubber lands in Gombak were producing rubber. There was income from the estate there. Chow Wing Hing (D.W.3) got one of the pieces of land because my husband did not have sufficient money to pay for all the land. D.W.3 paid for his own land. He paid \$1,000/- odd.

I paid some sort of rent to a Government office under the Clock Tower. I have receipts in my house. I never paid anything to the Municipality.

40

Re-
Examination

Re-examined: I have not been to the land since 1958 because people who moved back to the house threatened to stab me to death. When I saw Mr. Lee about the three families refusing to pay me

rent, he told me to collect rent only after the land had been transferred to my husband.

Court adjourned and resumed after 30 minutes.

In the High Court

No. 21
Defendant's
Evidence
Chow Kit Yee
Re-
Examination
(cont'd)

No. 22

ALIAS bin MOHAMED YUNOS

No. 22
Defendant's
Evidence
Alias bin
Mohamed Yunos
Examination

D.W.5 ALIAS bin MOHAMED YUNOS, affirmed, states in English:

10 I have the register of Certificate of Title No. 10306, lot No. 2947, Mukim of Setapak. The area of the land is 104 acres 0 rood 20 poles. At the last hearing I produced the Register of E.M.R. 5633, lot 1537. Both these pieces of land are at 10 3/4 mile Gombak Road. I have with me Transfer Presentation No. 52011, Volume CCXLII, Folio 106, relating to Transfer of C.T. 10306, lot No. 2947, Mukim of Setapak. The date of transfer is 23rd November, 1956. The transfer is for the whole of the land. The consideration
20 stated in the Transfer is \$22,000/-.

Cross-examined: The transferors of C.T.10306 were Wong Chiew Hin and Wong Siew Sin. Transferees were Lee Sang Nin, Lee Khoo Hin, Lee Kon Lin and Pang Lee (f). The Transfer does not say what sort of land it is. The stamp duty paid on the transfer as valued by the Collector of Stamp Duties is \$250/-. The Stamp Office found the land to be undervalued.

Cross-
Examination

No re-examination.

30 Case for the defendant.

PROCEEDINGS

Inche Yong addresses Court:

Only two issues involved: one a question of fact, namely, whether any mistake was made; secondly, if mistake was made, what sort of mistake it was and what is the legal position and what remedies are available to plaintiffs.

Agreement made between Oh Hiam (f) as representative of the one part and Tham Kong of the other part. The other parties to this action were not parties to the agreement. 10

The question is, was there any mistake by Oh Hiam (f)? The evidence very scanty. Evidence of P.W.1 who has said that Oh Hiam handed him 7 title deeds. Evidence of P.W.3, P.W.4, P.W.5, P.W.6, P.W.7 and P.W.8, Evidence of the agreement. Statement of Claim, paragraph 4. Evidence of P.W.7 and P.W.8 at complete variance with the evidence of defendant and his witnesses. Defendant could not have bought through both brokers. Evidence of defendant and his witness should be preferred. Evidence of P.W.7. fantastic. Evidence of P.W.5 regarding alleged option. Evidence of P.W.7 that he was given the option by P.W.5. Quite clear that there was no such option. P.W.7 was never a broker. The land at Setapak (Lot 3660) was in fact rubber land. No mistake could have been made. Every title deed had a plan attached. Title deed taken to a lawyer who drew the agreement. Plan on D.10 very clearly indicates the road and number of the lot. On facts, it must have been a fantastic blunder. There was in fact no mistake made. No sufficient evidence. 20 30

Suppose a mistake was made, plaintiffs have to find a remedy. What is the nature of the mistake? If there was any mistake made, it was about the potential value of lot 3660. Value of all 7 lots in the corrective affidavit of \$7,000/-. Estate opposite the land in Gombak sold in November 1956 for \$22,000/-. 40

What is the mistake alleged? Evidence suggests that it was not intended to sell lot 3660.

It is not alleged that the agreement did not contain what had been agreed upon. If there was a mistake, it was in relation to value of land. Refer to Bell & another v. Lever Brothers, Ltd. & others (1932) A.C. 161, 218, 224; Chitty on Contracts (22nd edition) paras. 203, 204 and 205; Halsbury (3rd edition), Volume 26, page 893, paragraph 1651; page 900, paras. 1665, 1666; Smith v. Hughes (1871) L.R. 6 Queen's Bench Cases, 597.

In the High
Court
No. 23
Proceedings
24th May 1966
(cont'd)

Whatever the mistake, the plaintiffs have no remedy. Only two possibilities. Either there was a contract which the plaintiffs now seek to set aside, or there was no binding contract from the beginning. If there was a contract, Section 96 of the Evidence Ordinance applies. Halsbury (3rd edition) Volume 26, paragraph 1661. Tamplin v. James (1880) 15 Ch. D. 215, 217, 221; Halsbury (3rd edition) Volume 26, page 906, para. 1679; Contract Ordinance, 1950, section 21, section 23.

Non est factum does not apply. It only applies where the document signed was of a completely different nature.

Adjourned to 2.30 p.m.

Signed (S.S. Gill)

Resumed at 2.30 p.m.

Inche Yong (continuing):

Refer to Halsbury (3rd edition) Volume 11 page 360, para. 586; Chitty on Contracts (22nd Edition) paras. 219, 220; Charlisle & Cumberland Banking Company v. Bragg (1911) 1 K.B. 489, 495; Hunters v. Walters (1871) 7 Chancery Appeal Cases 75, 88.

Remedies. Rectification not asked for. Even if agreement was voidable, the contract had been completed by actual conveyance. Section 42 of Land Code. Refer to Kesarmal & another v. Valliappa Chettiar (1954) M.L.J. 119, 122, Specific Relief Ordinance, 1950, Section 3.

Evidence of P.W.4.

Inche Peddie addresses Court:

Apart from Oh Hiam, other beneficiaries

In the High
Court

No. 23
Proceedings
24th May 1966
(cont'd)

were concerned in the sale of land. Alleged that evidence that Oh Hiam made a mistake was scanty. That is not all the evidence that the Court is to go on. Mistake shown by the agreement and the affidavit which are part of the pleadings. Affidavit shows that she never contemplated sale of land in Setapak. Paragraph 5 of the Statement of Claim considered with paragraph 3 of the Statement of Claim. No rubber trees on Setapak land at the time of the agreement. 10

Evidence of what the parties were thinking at the time of the agreement, not what they think now. Evidence of P.W.8. not attacked. P.W.7. was corroborated by the defendants themselves. P.W.7 went to sauce factory. This is corroborated by the evidence of D.W.3. P.W.7 and P.W.8 independent witnesses.

Mistake not about value of land. No intention to sell land in Setapak. Never put her mind consciously to sale of land. Beneficiaries agreed to sale of rubber land which was rapidly deteriorating. 20

In 1956 both parties made a mistake. Not our case that we made any mistake as to quality. Refer to Smith v. Hughes (1871) 6 Queen's Bench Cases 597, 609 (both parties must agree to the same thing in the same sense). Paragraph 3 of the agreement speaks of produce. Paragraph 6 of agreement - payment of \$50/- in respect of produce. Evidence of P.W.1. Mutual mistake, dealing purely and simply with rubber land. Evidence of value of adjacent land should be disregarded. Nothing known about the type of land and circumstances of sale. No evidence by parties to the sale. Stamp Office found land undervalued. 30

If there is no ambiguity in the agreement, then nothing other than rubber land was sold. Case of V. Farmer Enterprises Ltd. v. Haynes 193 States Gazette 1123, mentioned in Butterworth's Weekly Law Sheet issue No. 756 dated 4.5.65. Refer to Chitty (22nd edition) paragraph 222, as regards the value of Bragg's case (1911) 1 K.B. 489. 40

The land in dispute has not gone to a third party. Other lands were transferred to various

people. We offered rectification in 1958. Defendant has put out of his power any form of reinstatement.

In the High Court

No. 23
Proceedings
24th May 1966
(cont'd)

Section 42 of Land Code is no bar to the equitable remedies which this Court can give. Torrens System does not abrogate the principles of equity. Relief we are asking for is equitable relief.

10 Parties made a mutual mistake. Contradiction of this comes from the defendant after he realised that he had got the land for nothing. Both made mistake, one as to what she was selling and the other as to what he was buying.

20 There was never a contract in respect of the piece of land at Setapak. Beneficiaries not parties to contract. Cheshire & Fifoot (6th edition) pages 187 & 189, 198; Huddersfield Banking Company Ltd. v. Henry Lister & Sons Ltd. (1895) 2 Ch. 273, 275, 280; Scriven Brothers & Co. v. Heindley & Co. (1913) 3 K.B. 564; Burrow v. Scammell (1881) 19 Ch. D. 175, 182; Paget v. Marshall (1884) 28 Ch. D. 255; Pollock & Mulla on Contract (8th edition) pages 86, 89 98; unreported decision of Dato Aziz, J. in Kuala Lumpur Civil Suit 1028/62.

30 Plaintiffs other than the first plaintiff entitled to come forward under Section 34 of Specific Relief Ordinance, 1950. Each Beneficiary has own separate right. Refer to Ganapathy Chettiar v. Periskaruppan Chettior & Anor. (1962) M.L.J. 207.

Beneficiaries misled. Court misled into making the order. Che Ah's case (1946) M.L.J. 126.

We agree that we have to make reparation for stamp duty and registration fee (roughly \$10/-). No proof what quit rent was paid.

C.A.V.

Signed: (S.S. Gill)

40 Certified true copy,
Sd: ? ? ?
Secretary to Judge,
Kuala Lumpur.
24.9.1966

In the High Court

No. 24

No. 24
Judgment of Gill, J.
18th August, 1966

JUDGMENT OF GILL, J.

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO. 366 OF 1958

Between

- | | | | | |
|----|--------------------|---|------------|----|
| 1. | Oh Hiam (f) | } | Plaintiffs | 10 |
| 2. | Teo Kim Choon | | | |
| 3. | Teo Peng Yong | | | |
| 4. | Teo Ah Chye, | | | |
| 5. | Teo Hye Huat | | | |
| 6. | Teo Ah Toh | | | |
| 7. | Teo Boon See (f) | | | |
| 8. | Teo Chooi Lian (f) | | | |
| 9. | Teo Kim Lian (f) | | | |

And

Tham Kong

Defendant

JUDGMENT OF GILL, J.

This is an action to set aside a transfer in 1958 to the defendant by Oh Hiam, the lawful widow and administratrix of the estate of Teoh Teow Guan deceased, of land held under E.M.R. 5339 for Lot 3660 in the Mukim of Setapak, which formed part of the assets of the said estate. The action was commenced by Oh Hiam as first Plaintiff with eight other Plaintiffs who, as the children of the said deceased, are the other beneficiaries of the estate. As Oh Hiam died before the action came up for trial, the second and seventh Plaintiffs, who are the present administrators (de bonis non) of the estate, were substituted in her place as first Plaintiffs.

The events leading to the transfer were as follows. By an agreement in writing dated the 30th day of September, 1956 Oh Hiam as representative agreed to sell and the defendant agreed to purchase the several pieces of land comprised in and held under E.M.R. 4139, 4140, 5339, 4219, 4076, 5634 and 5633 for lots

2663, 2664, 3660, 2771, 2562, 1538 and 1537 respectively, in the Mukim of Setapak, Kuala Lumpur at an agreed price of \$450 per acre. Under the agreement, pending the execution of a registrable transfer, the vendor was to deposit the title deeds to the land and the purchaser to deposit \$5,000 by way of part payment of the purchase price of the land, with Mr. Y.S. Lee, an Advocate and Solicitor, at whose office the agreement was prepared and executed. The purchaser was at liberty to enter into possession of the said lands with effect from the 1st day of October, 1956 and to take any profits which may be derived from the produce thereof and/or be liable for any losses, and the vendor undertook within a reasonable time to make the requisite application to the Court for leave to sell the said lands to the purchaser or his nominee or nominees.

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On 1st August, 1957 Oh Hiam made an application to this Court in Originating Summons No. 122 of 1957 for leave to transfer the lands mentioned in the agreement, which, in her affidavit in support of the application, she described as "7 pieces of old rubber lands". On 23rd September, 1957 the Court made an Order granting her application. In pursuance of the Court order she conveyed the seven pieces of land to different persons by four separate transfers, all of which were registered on 20th January, 1958. The lands comprised in E.M.R. 5633 and 5339 for lots 1537 and 3660 respectively were transferred to the defendant, in E.M.R. 4219 for lot 2771 to Chow Kit Yee (the defendant's wife), in E.M.R. 4076 for lot 2562 and Chow Wing Hin (defendant's brother-in-law) and in E.M.R. 4139, 4140 and 5634 for lots 2663, 2664 and 1538 respectively to Cheung May Keow (defendant's mother-in-law).

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The land held under E.M.R. 5339 for lot 3660, which is the subject matter of the dispute in this case, is just under half an acre in area and is situate at the 3rd mile Setapak Road, Kuala Lumpur, whereas the other six pieces of land with a total area of approximately 34 acres are situate at one place at the 11th mile, Gombak on the road from Kuala Lumpur to Bentong. It is common ground that at all material times the land at Setapak had, and still has, a house on it

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known as 99, Klang Gates Road, Kuala Lumpur and was therefore essentially a residential land, whereas the lands at Gombak were rubber lands which have been described collectively as the rubber land or the rubber estate at Gombak.

The Plaintiffs' case is that Oh Hiam as administratrix intended to sell the rubber lands at Gombak, which were the only lands shown to the defendant, that there were no negotiations for the sale of the land at Setapak and that the grant relating to the land at Setapak got included in the agreement in the mistaken belief that it also related to the several pieces of land at Gombak. Oh Hiam, of course, was not there to give evidence at the trial, but four of the Plaintiffs (P.W.3, P.W.4, P.W.5 and P.W.6) have given evidence to say 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. 10 20

Teo Boon See (P.W.4), a daughter of the deceased, has stated in evidence that she was living in the house at 99 Klang Gates Road, Setapak when her mother discussed with her the sale of rubber lands with old rubber trees at Gombak, and that nothing was said about the sale of the house in which she was living. She was not aware that the house in which she was living had been sold until a neighbour named Ang Yeow came to her to collect rent, whereupon she rushed to her brother (P.W.3) to tell him about it. P.W.3 has stated that he first came to know about the transfer of the Setapak property to Tham Kong when his sister showed him the letter of demand for rent (P.4) from Tham Kong's solicitors to Lim Ser, one of the tenants in the house. 30

Teo Kim Choon (P.W.3) has further testified that after deciding to sell the rubber estate his mother told a friend about it casually. His brother Teo Ah Chye (P.W.6) told him that an option for the sale of the rubber land was given, but he does not personally know to whom it was given. Teo Peng Yong (P.W.5) has said that his mother gave an option to a taxi driver named Lee Kim Seng, but he did not know whether Lee found a buyer or not. 40

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10 The evidence of Lee Kim Seng (P.W.7), a
taxi driver who has stayed at 4½ mile, Gombak
Road, Kuala Lumpur for 30 to 40 years, is that
he acted as broker for the sale of Oh Hiam's
rubber land at the 11th mile, Gombak Road and
that no land in Klang Gates Road was included in
the sale. At first he found a prospective
buyer named Saw Ban Huat, but Saw Ban Huat did
not buy because he offered \$450 per acre which
the owner refused to accept. Then he was
introduced to the defendant and one Chow Wing
Hing. He took both of them and one of their
friends to see the rubber lands, and not the
land at 99 Klang Gates Road, Kuala Lumpur. He
was present in Y.S. Lee's office when some sort
of transfer of the land took place. P.W.5 gave
him a commission and the defendant's wife gave
him a token commission of \$200/=. Saw Ban
20 Huat (P.W.8), the owner of Chop Kim Huat at 4¼
mile, Ulu Gombak Road, Kuala Lumpur, has given
evidence to say that about 9 years ago P.W.7
brought an option to him and he knew from the
option that the land belonged to Yuen Company.
The sale price in the option was \$500 per
acre. He went to see the land with P.W.7, but
he did not buy because he offered only \$450
per acre. He was not shown a house in Klang
Gates Road.

30 Then there is the evidence of Mr. Y.S. Lee
(P.W.1), an Advocate and Solicitor, in whose
office the agreement of sale was prepared and
executed, that as far as he can remember, when
he received instructions to prepare an agreement
for the sale of certain lands belonging to the
estate of Teoh Teow Guan deceased from Madam Oh
Hiam, who was then the administratrix of the
estate, and Tham Kong, the intending purchaser,
he was told that the lands to be sold were
40 rubber lands. There was no provision in the
agreement in respect of vacant possession of any
house on the lands mentioned in the agreement.
Provision was made about produce from the land,
namely, natural rubber, but there was nothing
said about income by way of rent from houses.
Subsequently, he received instructions to apply to
the Court for leave to sell the lands. Madam Oh
Hiam gave him instructions for the affidavit in
support of the application. Nothing was said
about the existence of any house on any piece of
50 land when such instructions were given.

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The defendant's evidence is that his brother-in-law named Chow Wing Hing told him in 1956 that some lands in Setapak were for sale and took him to the upstairs of the premises of Yuen Company at Batu Road where he saw a woman named Oh Him and a man called Kim Choon (P.W.3). He had a discussion about the land with Oh Kim, after which he went with Chow Wing Hing, Kim Choon and three others to Gombak Road to see a big piece of hilly land containing damaged rubber trees and then to Klang Gates Road where he was shown a very small piece of land not even half an acre in area, on which where were 20 to 30 rubber trees in their dying state and a very old house with wooden walls. Having seen the land, he decided to buy it. On the next day he went with Chow Wing Hing to see the owner at his office in Yuen Company at Batu Road. After some bargaining he agreed to buy the land at \$450 per acre. Something was mentioned about the land at Klang Gates Road in the course of the discussions, and he said he would buy the land provided this land was included, the reason being that the land at Gombak Road was only worth a little more than \$200 per acre. On the following day he went to the office of Mr. Y.S. Lee (P.W.1) where an agreement was signed. After the agreement he had the land at Gombak cleared of grass and replanted with rubber. In 1958 the lands were transferred to him and to three other persons.

His story under cross-examination is that before he bought the lands he insisted that the Klang Gates property should be included, and he did check to make sure that the title to that property was included in the agreement. As he did not have enough money, three of the titles were transferred to his mother-in-law named Cheung May Keow. His wife and Chow Wing Hing also provided some money. He cannot remember whether he told Mr. Lee that it was important that the Klang Gates property should be included in the agreement. He got possession on 1st October, 1956, but he took no steps to take possession of the Klang Gates property as he left it to his wife who told him that she was going to collect rent from people living on the land. Changes were made to the Klang Gates property since 1956 when it came under the care and management of his wife, but he went to

the land only once shortly after he had purchased it. He had no idea whether the land was within the Municipal Area, but there were neighbouring houses. More houses started going up when a co-operative society started commencing work opposite the land in 1957. He knew nothing about assessment on this property and it was for his wife to answer why rent was asked for from February 1958. In conclusion he denied that he was never given the opportunity of purchasing the Klang Gates Road property and that it was transferred to him as a result of a mistake.

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Chow Wing Hing (D.W.3) has given evidence on behalf of the defendant to say that as a hawker of Chinese sauce he came to know Oh Hiam who in 1956 told him that she wanted to sell her land. At his request she gave him an option for the sale of six pieces of land at Gombak and one piece at Setapak. At first he found a prospective buyer named Ah Khow. He took Ah Khow to Kim Choon (P.W.3) who took him and Ah Khow to see six pieces of land at Gombak and another piece of land at the 3rd mile, Setapak Road, Kuala Lumpur, on which there were several rubber trees and an old house which was about to fall down. Ah Khow, however, did not buy the land. He then looked for other buyers after getting another option from Kim Choon. This time he found a prospective buyer named Tham Kong, the defendant, a relative of his whom he had known for a very long time. He took the defendant and four other persons to see Kim Choon in the latter's house at Yuen Company's premises. He and the defendant saw Oh Hiam. Kim Choon then took them all to see the land. At first they saw the six pieces of land at Gombak and on their way back went to see the land at Setapak. On the following day he and the defendant saw Kim Choon and Oh Hiam. After some discussion the defendant offered to buy the lands. Subsequently he went to a lawyer's office.

Under cross-examination the witness said that he was selling Chinese sauce in 1956 and he had bought sauce from Thye Hoe Sauce Factory in Gombak. He acted as a broker in this transaction and was paid a commission of \$400 by the defendant. He also bought one of the pieces of land because the defendant did not

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have enough funds to buy all the lands. At the time of sale a discussion took place about possession of the lands, and it was agreed that possession was to be given in October, 1956. The Klang Gates property was included when the question of possession was discussed.

Chow Kit Yee (D.W.4), the defendant's wife, has given evidence to say that she was taken to see the lands which her husband agreed to buy. Chow Wing Hing (D.W.3) was the broker. At first she saw a larger piece of land at Gombak and later a smaller piece at Setapak. There were 17 trees on the land at Setapak, and she had them cut down at a cost of \$300 as she was to be in charge of this land after the agreement was signed. There was a big house on the land with people living in it and she collected rent from them, but Teo Boon See (P.W.4) was not living there in 1957. She spent large sums of money on improving the land, but she kept no accounts and had no receipts for the amount she spent. Before the agreement she had gone and seen other lands at Gombak opposite to the lands which were subsequently purchased by her husband. The selling price of these other lands was \$210 per acre. The land was 104 acres in area, but she did not buy because the rubber trees on the land were too old.

Evidence was also produced on behalf of the defendant that a piece of land at 10 3/4 mile Gombak Road, which was 104 acres in area, was sold for \$22,000 in November, 1956.

As I have already stated, the evidence for the plaintiffs is that the defendant was shown only the rubber lands at Gombak. The evidence on behalf of the defendant, on the other hand, is that the land at Setapak was also shown to him and that the agreement was entered into on the express understanding that this land was also to be included. Each side has produced evidence as to who the broker in relation to the transaction was. The evidence of P.W.3. is that his brother Teo Ah Chye (P.W.6) told him about an option. P.W.5 has given evidence to say that an option was given by his mother to a taxi driver named Lee Kim Seng. Lee Kim Seng has said that he had the option from P.W.5. Chow Wing Hing (D.W.3), the other alleged broker,

says that he got two options from Kim Choon, (P.W.3) who also showed the lands to him and the defendant. All this is denied by P.W.3. Both brokers claim to have known Oh Hiam. Lee says that he knew her because he had taken his car to her shop for repairs. Chow claims that he came to know her because he used to sell things to her. Chow is in fact related to the defendant and he ultimately bought one of the lands which were agreed to be sold.

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I have considered the evidence of the two brokers very carefully and have come to the conclusion that, notwithstanding some apparent discrepancies in the evidence, Lee Kim Seng was the only broker in this case, because he struck me as being a more truthful witness than Chow Wing Hing. Moreover, he is an independent witness and his evidence is corroborated by the evidence of Saw Ban Huat (P.W.8), another independent witness. Chow Wing Hing, on the other hand, is very much an interested party as he bought one of the rubber lands. I accept Lee's evidence that he got information from a man who had travelled in his taxi that Oh Hiam wanted to sell her rubber lands, that he went to see her and got an option and that an employee working in Thye Hoe Sauce Factory at Gombak Road, where Chow Wing Hing was in the habit of buying sauce, introduced Chow Wing Hing and the defendant to him. I also accept his story that he showed the defendant and Chow Wing Hing only the rubber lands at Gombak. This part of his evidence, to some extent, is borne out by the evidence of Mr. Y.S. Lee (P.W.1), yet another independent witness, and by the agreement itself in which the title to the Setapak land was shown as No. 3 in the list and not as the first or the last to distinguish it from the titles relating to the rubber lands at Gombak. Moreover, Oh Hiam in her affidavit in support of her application for a Court order spoke of "7 pieces of old rubber lands."

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. The negotiations were in respect of a rubber estate at the 11th mile, Gombak Road. There were six different titles to contiguous lands which the plaintiffs have

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described as the rubber estate belonging to the estate. The seventh title 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. It was for this reason that no provision was made in the agreement in respect of vacant possession of any house on the lands mentioned in the agreement. As Mr. Lee has stated in evidence, as far as he can remember, the lands to be sold were rubber lands.

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Under the agreement the defendant was to have possession of the lands on the date of the agreement. It is quite clear from the evidence that he took possession of the rubber lands at Gombak and had them cleared and replanted, but he took no steps to assert his right to the land at Setapak for the obvious reason that he had no knowledge that he had acquired any such right. When questioned as to why he took no steps to bring the land at Setapak under his control, he explained it away by saying that he left it to his wife. I do not accept the wife's evidence about her collecting rents from various people who were living on the land. I consider her story that she spent \$3,000 to have 17 trees on the land cut down as fantastic. In my opinion there is very little truth in all her evidence. If she was to look after the Setapak land, why was it not transferred to her?

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The defendant has said that the Setapak land was worth \$7,000 in 1956. P.W.3, on the other hand, says that the land was worth \$40,000. In any event, the defendant obtained the Setapak land and land held under E.M.R. 5633 for lot 1537 (which is nearly 8 acres in area) for a mere \$3,786. No independent evidence as to the valuation of the Setapak land was produced, but I am satisfied that there was no intention to include this land in the rest of the lands merely because the other lands were not worth \$450 per acre. Evidence has been produced about the sale of 104 acres of land in the neighbourhood of the land at Gombak Road for a little over \$200 per acre, but there is no evidence as to what sort of land that was. In the first place the Stamp Office thought that the land was undervalued and charged a stamp duty on the basis that it

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was worth \$25,000. In the second place, assuming that it was a rubber land, there is no evidence as to whether the whole area was planted with rubber.

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10 The truth is that it was only after the transfers were executed in January 1958 that the defendant came to know that he had obtained a transfer in respect of this piece of land at Setapak. It was nearly six months after this transfer that he took any steps to assert his right to the land by asking his solicitors to send the letter dated 3rd June, 1958 (P.4) to Lim Ser demanding that all rents as from February 1958 be paid to him. The plaintiffs themselves did not know that the title to this property had got included in the agreement until some one went to collect rent from Teo Boon See (P.W.4). 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 over-whelming. 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 as clear a case of common mistake as could occur.

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40 The legal position with regard to cases where agreement has been reached, but upon the basis of a common mistake, is discussed by Cheshire and Fifoot on the Law of Contract, 6th Edition, at pages 189 to 202. At page 198 the conclusion stated is that "at common law a contract is not void merely because the parties have made the same mistake, however fundamental. A contract will be void only if there is nothing to contract about, either because the subject-matter does not exist at the time of the agreement or because the object of a purported sale already belongs to the buyer;" In other words, a mistake common to both parties renders the contract void only if it is a mistake as to the existence of a state of facts forming the basis or foundation of the contract and not merely

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collateral to it. Thus, where A agrees to sell to B a cargo of corn on its way to England which (unknown to both) has been previously sold because it was affected by heat on the voyage, the contract will be void: Couturier v. Hastie.(1) Similarly, the contract will be void where A contracts to lease to B property which (unknown to both of them) actually belongs to B: Cooper v. Phibbs. (2)

A Common error as to some incident of the contract, which is not basic but collateral, will not affect its validity. This is illustrated by the case of Bell v. Lever Brothers Ltd.(3) In that case Lever Brothers, who had a controlling interest in the Niger Company, appointed Bell Managing Director of the latter company for five years at an annual salary of £8,000. After three years the services of Bell became redundant owing to the amalgamation of the Niger Company with a third company, and Lever Brothers agreed to pay him £30,000 as compensation for the loss of his employment. After they had paid this money, they discovered for the first time that Bell had committed several breaches of duty during his directorship which would have justified his dismissal without compensation. They therefore sued for the recovery of £30,000 on the ground inter alia of common mistake. It was held that the company could not recover, as the mutual mistake of the parties did not destroy the identity of the subject-matter, but related only to a quality that was not material.

It is to be observed that the agreement terminating Bell's contract of service was made by the company in ignorance of the fact that he had been guilty of a breach of duty which would have entitled them to terminate the service contract summarily. Bell, also, gave no thought to the breach at the time the cancellation agreement was entered into. Consequently, there was a mutual mistake as to the true facts, but, although the company could have determined the service contract summarily, and would not have entered into the cancellation agreement if it had not been for that mistake, the fact remained

- (1) (1856) 5 H.L. Cas. 673.
- (2) (1867) L.R. 2 H.L. 149.
- (3) (1932) A.C. 161.

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now applied to the court to set aside the Order on the ground that it represented an agreement based on a common mistake, and the court did set it aside. Kay, L.J. said (at page 284):

"It seems to me that, both on principle and on authority, when once the court finds that an agreement has been come to between parties who were under a common mistake of a material fact, the court may set it aside, and the court has ample jurisdiction to set aside the order founded upon that agreement. Of course, if ... third parties' interests had intervened and so on, difficulties might arise; but nothing of that kind occurs here."

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As regards rectification of written agreements Cozens Hardy, M.R. stated in Lovell and Christmas Ltd. v. Wall (5) :-

"The essence of rectification is to bring the document which was expressed and intended to be in pursuance of a prior agreement into harmony with that prior agreement. It presupposes a prior contract and it requires proof that by common mistake the final completed instrument as executed fails to give proper effect to the prior contract. For this purpose evidence of what took place prior to the execution of the completed document is obviously admissible and indeed essential."

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In Frederick E. Rose (London) Ltd. v. William H. Pim & Co. Ltd. (6) Denning, L.J. said:

"In order to get rectification it is necessary to show that the parties were in complete agreement upon the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, one does not look into the inner minds of the parties - into their intentions - any more than one does in the formation of any other contract. One looks at their outward acts, that is, at what they said or wrote to one another in coming to their agreement,

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(5) (1911) 104 L.T. 85, 88.

(6) (1953) 2 Q.B. 450, 461.

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the deed conformed strictly with the written agreement, and although the effect of ordering rectification was to grant specific performance of a written agreement with a parol variation. It was also held that the defendant was a trustee of the legal estate for the plaintiffs, and must be ordered to convey it to them. Warrington, L.J. said (at page 159):-

"The jurisdiction of Courts of equity in this respect is to bring the written document executed in pursuance of an antecedent agreement into conformity with that agreement. The conditions to its exercise are that there must be an antecedent contract and the common intention of embodying or giving effect to the whole of that contract by the writing, and there must be clear evidence that the document by common mistake failed to embody such contract and either contained provisions not agreed upon or omitted something that was agreed upon, or otherwise departed from its terms. If these conditions are fulfilled then it seems to me on principle that the instrument so rectified should have the same force as if the mistake had not been made, in which case the Statute of Frauds would be no defence to an action founded upon it."

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It is clear from the authorities that, although the agreement in the present case is not a nullity, the Courts in England would order rectification of such an agreement, provided the following conditions are satisfied: (a) there must be an actually concluded contract antecedent to the instrument to be rectified, as the Court will not make a new agreement for the parties; (b) there must be clear evidence of the real intention; (c) there must be a mistake common to both parties, and it must have existed at the time of the execution of the instrument; (d) the mistake must be exactly proved, i.e. the plaintiff must show the precise form in which the instrument ought to be drawn up; and (e) the mistake must be one of expression only. A written contract or a deed may be rectified even if the parties can no longer be restored to the position occupied when the contract was made, and even though the the mistake has been embodied in a deed of conveyance. Extrinsic and even parol evidence

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will be admitted to ascertain the true intent of the parties, notwithstanding that the contract is one which is required to be under seal or one which the Statute of Frauds requires to be evidenced by writing.

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10 The question, however, is whether the rules of equity pertaining to rectification apply to lands registered under the local land law, in view of the provision in Section 42 of the F.M.S. Land Code (now Section 340 of the National Land Code) that the title of a registered proprietor of any land shall be indefeasible except in any case of fraud or misrepresentation to which such registered proprietor was a party or privy. There is ample authority for the proposition that they do apply. In Loke Yew v. Port Swettenham Rubber Company, Limited (8) it was held by the Privy Council that, apart from 20 the exception in Section 7 of the Registration of Title Regulation, 1891 (the terms of which were similar to Section 42 of the F.M.S. Land Code or Section 340 of the National Land Code), as the rights of third parties did not intervene, the respondents could not better their position by obtaining registration under circumstances which made it not honest to do so, and that it was the duty of the Court to order rectification. In Wilkins and Others v. Kannammal (f) and Anor. (9) it was held by the 30 Court of Appeal that the Torrens Law is a system of conveyance; it does not abrogate the rules of equity; it alters the application of particular rules of equity but only so far as necessary to achieve its own special objects.

In Lim Hong Shin v. Leong Fong Yew (10) Edmonds, J.C. said:-

40 "the general principle applicable in cases of rectification on account of mistake is set out in section 31 of the Specific Relief Enactment (since replaced by Section 30 of the Specific Relief (Malay States) Ordinance 1950). The mistake must be common to all parties, and there must be very clear evidence of the real intention.

(8) (1913) A.C. 491

(9) (1951) M.L.J. 99.

(10) (1918) 2 F.M.S. L.R. 187, 188.

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1966.
(cont'd)

When these conditions exist the Court may rectify the instrument so as to express the real intention so far as this can be done without prejudice to rights acquired by third parties in good faith and for value. These principles are applicable to instruments or registers relating to all land, whether it be held under Part III of the Land Enactment or the Registration of Titles Enactment; sections 74 and 75 of the latter Enactment provide for rectification of mistakes. In this respect, in my opinion, there is no reason to distinguish the two Enactments." 10

Section 32 of the Specific Relief (Malay States) Ordinance, 1950 states: "In rectifying a written instrument, the Court may enquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the enquiry what the language of the instrument was intended to be." 20

For the reasons I have stated I am satisfied that it is open to this Court to order notional rectification of the agreement in this case and the transfer executed in pursuance of that agreement by ordering the defendant to re-transfer the land held under E.M.R. 5339 for lot 3660 in the Mukim of Setapak on repayment of the purchase price, the expenses in connection with the original transfer and any money which he has spent on improving the land. In my opinion, the defendant has spent no money on improving the land. As I have already stated, I reject the wife's evidence that she spent large sums of money to have the trees on the land cut down and for improving the land. She has stated in her evidence that she did not go back to the land after 1958 because she was told that if she did, she would be stabbed to death. The purchase price of the land at \$450 per acre was less than \$225. I would add to that a sum of \$25 as the amount which might have been spent in connection with having the transfer stamped and registered. The order will therefore be that on payment of a sum of \$250 by the plaintiffs into Court the defendant do execute a registrable transfer in favour of the 2nd and 7th plaintiffs, Teo Kim Choon and Teo Boon See (f), as representatives and that, in the event of his failure to do so within a month after the money has been paid into Court, the Senior Assistant 30 40 50

Registrar of this Court do execute such registrable transfer on behalf of the defendant. The defendant will have to pay the costs of the action.

In the High Court

No. 24
Judgment of
Gill, J.
18th August,
1966.
(cont'd)

(S.S. Gill)
JUDGE,
HIGH COURT, MALAYA.

Kuala Lumpur,
18th August, 1966.

10

Inche S.D.K. Peddie of Messrs. Skrine & Co.,
Kuala Lumpur, for 2nd to 9th Plaintiffs.

Inche J.H. Yong of Dato S.M. Yong & Co.,
Kuala Lumpur, for defendant.

Certified true copy,
Sd: ? ? ?
Secretary to Judge,
Kuala Lumpur.
14.9.1966.

In the Federal
Court
(Appellate
Jurisdiction)

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No. 25
NOTICE OF APPEAL

No. 25
Notice of Appeal
14th September
1966

IN THE FEDERAL COURT OF MALAYSIA

(Appellate Jurisdiction)

Civil Appeal No. X 70 of 1966

Between

Tham Kong

Appellant

And

30

- 1. Oh Hiam (f))
- 2. Teo Kim Choon)
- 3. Teo Peng Yong)
- 4. Teo Ah Chye)
- 5. Teo Hye Huat)
- 6. Teoh Ah Toh)
- 7. Teo Boon See (f))
- 8. Teo Chooi Lian (f))
- 9. Teo Kim Lian (f))

Respondents

In the Federal Court
(Appellate Jurisdiction)

(In the matter of Civil Suit No: 366 of 1958
in the High Court in Malaya at Kuala Lumpur)

Between

No. 25
Notice of Appeal
14th September 1966
(cont'd)

- 1. Oh Hiam (f))
- 2. Teo Kim Choon)
- 3. Teo Peng Yong)
- 4. Teo Ah Chye)
- 5. Teo Hye Huat) Plaintiffs
- 6. Teo Ah Toh)
- 7. Teo Boon See (f))
- 8. Teo Chooi Lian (f)) 10
- 9. Teo Kim Lian (f))

And

Tham Kong

Defendant

NOTICE OF APPEAL

Take notice that the Appellant abovenamed being dissatisfied with the decision of the Honourable Mr. Justice Gill given at Kuala Lumpur on the 18th day of August 1966 appeals to the Federal Court against the whole of the said decision. 20

Dated this 14th day of September, 1966.

Sd: Tham Kong
(In Chinese)
.....
Appellant

To: The Registrar,
The Federal Court,
Kuala Lumpur.

and to

The Registrar,
The High Court in Malaya at Kuala Lumpur, 30

and to

The Respondents above named and to their Solicitors, Messrs. Skrine & Co., Kuala Lumpur.

The address for service for the Appellant is c/o Messrs. Dato S.M. Yong & Co., No. 52 (1st floor), Klyne Street, Kuala Lumpur.

No. 26

MEMORANDUM OF APPEAL

In the Federal Court
(Appellate Jurisdiction)

IN THE FEDERAL COURT IN MALAYSIA

(Appellate Jurisdiction)

No. 26
Memorandum of Appeal
27th October 1966

Civil Appeal No. X 70 of 1966

Between

Tham Kong

Appellant

And

10

- 1. Oh Hiam (f))
- 2. Teo Kim Choon)
- 3. Teo Peng Yong)
- 4. Teo Ah Chye)
- 5. Teo Hye Huat)
- 6. Teo Ah Toh)
- 7. Teo Boon See (f))
- 8. Teo Chooi Lian (f))
- 9. Teo Kim Lian (f))

Respondents

(In the matter of Civil Suit No. 366 of 1958
in the High Court in Malaya at Kuala Lumpur)

20

Between

- 1. Oh Hiam (f))
- 2. Teo Kim Choon)
- 3. Teo Peng Yong)
- 4. Teo Ah Chye)
- 5. Teo Hye Huat)
- 6. Teo Ah Toh)
- 7. Teo Boon See (f))
- 8. Teo Chooi Lian (f))
- 9. Teo Kim Lian (f))

Plaintiffs

30

And

Tham Kong

Defendant

MEMORANDUM OF APPEAL

Tham Kong, the Appellant abovenamed appeals to the Federal Court against the whole of the decision of the Honourable Justice Gill given

In the Federal
Court
(Appellate
Jurisdiction)

No. 26
Memorandum of
Appeal
27th October
1966
(cont'd)

at Kuala Lumpur on the 18th day of August, 1966
on the following grounds:-

1. The Learned Judge erred in that he found on the evidence that there was a mutual mistake of fact between the Appellant and the First Respondent, Oh Hiam as to the inclusion of lot 3660 in the agreement dated the 30th day of September, 1956 (Exhibit P6) whereas the Statement of Claim was based on a plea of unilateral mistake on the part of Oh Hiam and that this mistake was known to the Defendant. Mutual mistake was never pleaded at any time by the Respondents. 10

2. The Learned Judge erred in that on the evidence as adduced in Court, there was only evidence of unilateral mistake and he should have so held.

3. The Learned Judge erred in that he did not bring his mind to consider as to whether the evidence as adduced by the Respondents was of sufficient weight so as to discharge their burden of proof beyond reasonable doubt so as to entitle them to the relief of rectification. 20

4. The Learned Judge erred in granting the relief of rectification when there was no evidence of a complete antecedent contract.

5. The Appellant says that the Learned Judge placed undue weight on the evidence of the Respondents who are interested witnesses and whose consent to the sale was given. 30

6. The Learned Judge should have considered the plea of the Appellant of estoppel by agreement and should have given due consideration to this plea.

7. The Learned Judge should have held that the Respondents and each of them are estopped from denying their consent for sale given under the Kuala Lumpur High Court Originating Summons No: 122 of 1957 by estoppel by record.

8. The Learned Judge gave undue weight to the words "produce" contained in the agreement (Exhibit P6) and to the words "old rubber lands" contained in the Affidavit of Oh Hiam affirmed on 40

30th day of July, 1957; and should not have considered that no mention was made of any house in the agreement as such reference is not necessary.

In the Federal Court
(Appellate Jurisdiction)

9. The Learned Judge placed undue weight to the evidence of PW1, PW7 and who were not disinterested witnesses, and of PW8.

No. 26
Memorandum of Appeal
27th October 1966
(cont'd)

Dated this 27th day of October, 1966.

Sd: Oorjitham & Lam
Solicitors for the Appellant.

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To: The Chief Registrar,
Federal Court,
Malaysia,
Kuala Lumpur.

And to:

Messrs. Skrine & Co.,
Advocates & Solicitors,
Straits Trading Building,
(3rd Floor),
Kuala Lumpur.

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The address for service of the Appellant is c/o Messrs. Oorjitham & Lam, Advocates & Solicitors, Room 702 (7th Floor), Lee Yan Lian Building, Jalan Mountbatten, Kuala Lumpur.

No. 27

JUDGMENT OF SYED SHEH BARAKBAH, L.P.

No. 27
Judgment of
Syed Sheh
Barakbah, L.P.
18th September
1967

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT
KUALA LUMPUR

(APPELLATE JURISDICTION)

30

Federal Court Civil Appeal No. X.70 of 1966

Between

Tham Kong

Appellant

And

In the Federal Court (Appellate Jurisdiction)

No. 27 Judgment of Syed Sheh Barakbah, L.P. 18th September 1967 (cont'd)

- 1. Oh Hiam (f)
2. Teo Kim Choon
3. Teo Peng Yong
4. Teo Ah Chye
5. Teo Hy Huat
6. Teo Ah Toh
7. Teo Boon See (f)
8. Teo Chooi Lian (f)
9. Teo Kim Lian (f)

Respondents

(in the matter of Kuala Lumpur High Court Civil Suit No. 366 of 1958

10

Between

- 1. Oh Hiam (f)
2. Teo Kim Choon
3. Teo Peng Yong
4. Teo Ah Chye
5. Teo Hye Huat
6. Teo Ah Toh
7. Teo Boon See (f)
8. Teo Chooi Lian (f)
9. Teo Kim Lian (f)

Plaintiffs

20

And

Tham Kong

Defendant)

Cor: Syed Sheh Barakbah, Lord President, Malaysia Azmi, Chief Justice, Malaya. Ong Hock Thye, Judge, Federal Court.

JUDGMENT OF SYED SHEH BARAKBAH, LORD PRESIDENT, MALAYSIA.

By an agreement dated 30th September, 1956 (Exhibit D.6), the first respondent, the administratrix of the Estate of Teo Teow Guan, deceased, agreed to sell to the appellant seven pieces of land held under E.M.R. Nos. 4139, 4140, 5339, 4219, 4076, 5634 and 5633 in the Mukim of Setapak for Lots Nos. 2663, 2664, 3660, 2771, 2562, 1538 and 1537 respectively for the sum of \$450/- per acre. Respondents 2 to 9 are the beneficiaries of the said Estate. On 1st August, 1957, the first respondent made an application to the Court for an order that she be at liberty to sell all the seven pieces of land to the appellant. On 23rd September, 1957, an order was duly made in terms of the said application and on 20th

30

40

January, 1958, a formal transfer was made by the first respondent to the appellant. Amongst the seven pieces of land was one piece held under E.M.R. No. 5339 for Lot No. 3660 (hereinafter referred to as the "said land") which is just under half an acre in area and was situated at the 3rd mile Setapak Road, Kuala Lumpur, whereas the other six pieces with a total area of about 34 acres were situated at the 11th mile, Gombak. The said land had a house on it known as No. 99 Klang Gates Road, Kuala Lumpur. The respondents alleged that the first respondent intended to sell only the rubber lands at Gombak and the said land at Setapak Road was included by mistake and on 30th July, 1958, they filed this suit in Court praying for:-

In the Federal Court
(Appellate Jurisdiction)
No. 27
Judgment of Syed Sheh Barakbah, L.P.
18th September 1967
(cont'd)

"(i) an Order that the said Order of Court dated the 23rd day of September, 1957, be set aside;

(ii) that the sale of the said lands aforesaid be also set aside or in the alternative that such sale be set aside in so far as it conveys lot No: 3660 to the Defendant;

(iii) an Order that the said Agreement of Sale between the 1st Plaintiff and the Defendant be set aside or in the alternative that it be set aside in so far as it agrees to convey lot No: 3660 to the Defendant;

(iv) an Injunction restraining the Defendant from disposing of or dealing in any other manner with the said lands until the determination of this case or alternatively for damages; and

(v) for such further or other Order as the Court deems fit and just."

On 24th August, 1958, the first respondent Madam Oh Hiam died and respondents 2 to 9 obtained Letters of Administration de bonis non. On 18th August, 1966, judgment was given in their favour and the appellant now appeals to this Court.

It is not disputed that the seven pieces of land were mentioned in the Grant of Letters of

In the Federal Court (Appellate Jurisdiction)

No. 27
Judgment of Syed Sheh Barakbah, L.P.
18th September 1967.

(cont'd)

Administration (Exhibit P.3), that there was a proper sale and transfer by order of Court and that all the title deeds were registered in the Land Office. According to the Certificate of Registration of Cultivation (Exhibit D.9), all the seven pieces of land were certified as rubber lands and the dispute before us now is in connection with the said land only which happened to have a house on it and is just under half an acre in area, situated at the 3rd mile Setapak Road. It was alleged by the respondents that it was never their intention to include the said land in the agreement for sale. The first respondent had included it by mistake. 10

According to section 21 of the Contracts (Malay States) Ordinance, 1950, where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. Mistakes may be classified into:- (1) common mistake; (2) mutual mistake; and (3) unilateral mistake. Mistake is common where both parties make the same mistake. Each knows the intention of the other and accepts it, but each is mistaken about some underlying and fundamental fact. The mistake is mutual where the parties misunderstand each other and are at cross-purposes. In unilateral mistake one only of the parties suffers from some mistake. The Statement of Claim alleges there was a unilateral mistake on the part of the respondents, but the learned Judge found that there was a common mistake. I do not think I need go into the question of whether there was a unilateral, common or mutual mistake as according to the evidence on record I hold the view that there was no mistake at all on the part of either or both parties for reasons which I am about to state. 20 30

In the Grant of Letters of Administration (Exhibit P. 3) all the seven pieces of land were grouped together and so were they in the agreement (Exhibit D.6) which was prepared by P.W.1, an Advocate and Solicitor, who stated that as far as he could remember the lands to be sold were rubber lands. He also prepared the affidavit in support of Madam Oh Hiam's application for leave to sell the lands and nothing was said to him about the existence of any house on any piece of land. He admitted that the seven separate deeds were handed to him by Madam Oh 40

Hiam. He also prepared the transfer after obtaining the Court order.

In the Federal
Court
(Appellate
Jurisdiction)

No. 27
Judgment of
Syed Sheh
Barakbah, L.P.
18th September
1967.
(cont'd)

10 P.W.3, P.W.4, P.W.5 and P.W.6 in their evidence stated that the sale was due to the fact that their mother needed money to go to Australia for treatment as she was sick. They did not know that the said land was included in the seven pieces of land to be sold. I am unable to accept this piece of evidence. The Originating Summons which mentioned the seven title deeds was served on them and they chose not to attend Court at the hearing. The order for sale was made by the Court on the certificate of non-appearance of the respondents. They were not minors and in my view they cannot now come to Court and deny that they were aware of the sale of the said land. The respondents in their Statement of Claim stated that it was not the real intention of the first respondent to convey to the appellant any land except rubber lands. According to the Rubber Cultivation Book all the seven pieces were registered as rubber lands and the fact that one of them with a house on it was situated some miles away from the other pieces did not alter the condition of the land. Furthermore it was alleged in the Statement of Claim that the said land was sold for \$450/- per acre only whereas it was actually worth \$25,000/- per acre as it was situated within the village of Setapak and within the Municipal boundaries. P.W.3 gave evidence that according to his estimate its value in 1956 was \$40,000/- but he did not have it properly valued. It must be remembered that the agreement for sale was made during the Emergency period and Setapak was a black area. In her affidavit dated 30th July, 1957, in Originating Summons No. 122 of 1957 Madam Oh Hiam stated:-

40 "4. Since the emergency began in June, 1948 no tapping for rubber was carried on the said lands because of the difficulty of getting tappers. The area was also considered a bad area for security reasons.

5. What was once considered an asset became a liability to the estate as the annual quit rents have to be paid. Moreover, owing to the difficulty of supervision and the lack of labourers for reasons given above

In the Federal
Court
(Appellate
Jurisdiction)

No. 27
Judgment of
Syed Sheh
Barakbah, L.P.
18th September
1967.
(cont'd)

the whole area is now overgrown with weeds
and lallang.

6. In order to save the estate from waste
as I am of the opinion this whole area may
be covered with secondary jungle, I have
on the 30th day of September, 1956, entered
into an Agreement of Sale of the said lands
to one Tham Kong of No. 28C, San Peng Road,
Kuala Lumpur, at the agreed price of \$450/-
an acre."

10

Although the said land was in the village of
Setapak it was not possible to get a ready
purchaser for it at the normal price. It is
common knowledge that the value of land in black
areas was at its lowest ebb as people were scared
of living there. As the first respondent needed
money badly for her treatment in Australia she
had to sell the property for \$15,500/- to the
Appellant. According to her affidavit "This
amounts to \$15,500/- for the whole area and
therefore compares favourably with the value set
on the said lands by the Collector of Estate
Duty of \$13,200/-." The Certificate of the
Collector of Estate Duty was made on 21st December
2603 (1943), during the latter part of the
Japanese occupation period. Therefore the value
could be very much less in Malayan currency.

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But in 1956, according to P.W.3, housing
projects were coming up just opposite and right
behind the said land and consequently there would
be inflation in the value and the said land would
be worth about \$40,000/-. But there was no
evidence on record of the market value of the
said land. In my view there had been no mistake
at all. The lands were sold for what they were
worth at the time of the Emergency and in the
words of Lord Cottenham, Lord Chancellor, in
Okill v. Whittaker (1) (at p.974):-

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"Suppose a party proposed to sell a farm,
describing it as 'all my farm of 200 acres',
and the price was fixed on that supposition,
but it afterwards turned out to be 250 acres,
could he afterwards come and ask for a re-
conveyance of the farm, or payment of the
difference? Clearly not; the only equity

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(1) 41 E.R. 973.

being that the thing turns out more valuable than either of the parties supposed. And whether the additional value consists in a longer term or a larger acreage is immaterial."

In the Federal Court (Appellate Jurisdiction)

I would, therefore, allow the appeal with costs here and in the Court below.

No. 27 Judgment of Syed Sheh Barakbah, L.P. 18th September 1967 (cont'd)

(Sgd.) S.S. Barakbah. LORD PRESIDENT, FEDERAL COURT OF MALAYSIA.

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Kuala Lumpur, 18th September, 1967

=====

K.K. Lam Esq. for appellant. S.D.K. Peddie Esq. for respondent.

No. 28

JUDGMENT OF AZMI, C.J.

No. 28 Judgment of Azmi, C.J. 18th September 1967

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(APPELLATE JURISDICTION)

Federal Court Civil Appeal No. X.70 of 1966

20

Between

Tham Kong

Appellant

and

- 1. Oh Hiam (f))
- 2. Teo Kim Choon)
- 3. Teo Peng Yong)
- 4. Teo Ah Chye)
- 5. Teo Hye Huat)
- 6. Teoh Ah Toh)
- 7. Teo Boon See (f))
- 8. Teo Chooi Lian (f))
- 9. Teo Kim Lian (f))

Respondents

30

In the Federal Court (Appellate Jurisdiction)

(In the matter of Civil Suit No. 366 of 1958 in the High Court in Malaya at Kuala Lumpur

Between

No. 28 Judgment of Azmi, C.J. 18th September 1967 (cont'd)

- 1. Oh Hiam (f)
2. Teo Kim Choon
3. Teo Peng Yong
4. Teo Ah Chye
5. Teo Hye Huat
6. Teo Ah Toh
7. Teo Boon See (f)
8. Teo Chooi Lian (f)
9. Teo Kim Lian (f)
Plaintiffs

10

and

Tham Kong Defendant)

Coram: Barakbah, Lord President, Malaysia, Azmi, Chief Justice, Malaya. Ong Hock Thye, Judge, Federal Court.

JUDGMENT OF AZMI, CHIEF JUSTICE, MALAYA

I have had the opportunity of reading both the judgments of my lord the Lord President and of my brother Ong and wish to express agreement with them.

20

I would, however, like to say the following few words on the question of burden of proof.

In a case of this nature the burden of proof is a heavy one and in support of this view I would refer to the judgment of Singleton L.J. in the case referred to by the learned trial Judge himself when dealing with the question of rectification i.e. F.E. Rose, Ltd. v. Wm. H. Pim Ltd. reported at page 739, 1953 (2) All E.R. at page 744:-

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"The sole question is whether the buyers are entitled to rectification of the contracts. This depends, not on intention, but on proof that the written contract is not the contract into which the parties entered, and the terms of the contract into which they had entered must be clearly proved. In Crane v. Hegeman-Harris Co. Inc. (1) Simonds J., said:-

40

(1) 1939 1 A.E.R. 665

'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. It is in the light of those principles that I must examine the facts of this somewhat complicated case.'

In the Federal Court
(Appellate Jurisdiction)

No. 28
Judgment of
Azmi, C.J.
18th September
1967.
(cont'd)

When that case was before the Court of Appeal Sir Wilfred Greene, M.R. (1939) 4 All E.R. 71) spoke of the

"high degree of conviction which unquestionably is to be insisted upon in rectification cases."

In the instant case what evidence have we got upon which the learned Judge ordered the rectification not only of the contract but of the register of titles? The evidence appears to be firstly, the evidence of the 4 respondents who stated that they merely agreed to the sale of the other 6 pieces of land which were rubber land; Secondly, that these pieces of land being in a residential area cannot therefore be intended to be included; Thirdly, that the price of land is much higher than the price at which it was sold and fourthly, the evidence of the broker who said that he never took the intended purchaser to the land in question.

Against this oral evidence there was the fact that the matter was handled by a Solicitor to whom was shown all the titles and also the fact that even after the sale the Land Office still considered these pieces of land as rubber land. See Certificate of Registration of Cultivation Exh. D.9.

In my view the Plaintiffs/respondents have failed to discharge their burden.

In the Federal Court
(Appellate Jurisdiction)
No. 28
Judgment of
Azmi, C.J.
18th September 1967
(cont'd)

Sd: Tan Sri Azmi bin Haji Mohamed.
Kuala Lumpur, 18th September, 1967
Chief Justice, Malaya.
Mr. K.K. Lam for Appellant.
Mr. S.D.K. Peddie for Respondents

No. 29
Judgment of
Ong Hock Thye, F.J.
18th September 1967

No. 29
JUDGMENT OF ONG HOCK THYE, F.J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR
(Appellate Jurisdiction)

10

FEDERAL COURT CIVIL APPEAL NO. X.70 OF 1966

Between

Tham Kong

Appellant

And

- 1. Oh Hiam (f))
- 2. Teo Kim Choon)
- 3. Teo Peng Yong)
- 4. Teo Ah Chye)
- 5. Teo Hye Huat)
- 6. Teo Ah Toh)
- 7. Teo Boon See (f))
- 8. Teo Chooi Lian (f))
- 9. Teo Kim Lian (f))

Respondents

20

(In the matter of Civil Suit No. 366 of 1958 in the High Court in Malaya at Kuala Lumpur)

Between

- 1. Oh Hiam (f))
- 2. Teo Kim Choon)
- 3. Teo Peng Yong)
- 4. Teo Ah Chye)
- 5. Teo Hye Huat)
- 6. Teo Ah Toh)
- 7. Teo Boon See (f))
- 8. Teo Chooi Lian (f))
- 9. Teo Kim Lian (f))

Plaintiffs

30

And

Tham Kong

Defendant

In the Federal
Court
(Appellate
Jurisdiction)

Coram: Syed Sheh Barakbah, Lord President,
Malaysia,
Azmi, Chief Justice, Malaya,
Ong Hock Thye, Judge, Federal Court,
Malaysia.

No. 29
Judgment of
Ong Hock
Thye, F.J.
18th September
1967
(cont'd)

JUDGMENT OF ONG HOCK THYE, F.J.

10 This is an appeal against the decision of
Gill, J. in the High Court at Kuala Lumpur,
setting aside the sale and transfer of a half-
acre of land, out of a total area of approximately
34½ acres sold, on the ground that the transferor
(since deceased), while making the sale was under
the mistaken belief that she was selling rubber
land, whereas this particular piece of land
contained an old plank house but no rubber trees.

20 By an agreement in writing dated September
30, 1956, Oh Hiam, administratrix of the estate
of Teoh Teow Guan deceased, contracted to sell to
the appellant seven pieces of land, all of which
are situate in the Mukim of Setapak, at the price
of \$450/- per acre, subject to approval of such
sale by the Court, pursuant to the provisions of
section 94(iii) of the Probate & Administration
Enactment (now section 60(4) of the Probate &
Administration Ordinance, 1959). Six pieces,
30 containing very old rubber trees, are contiguous
and situate at Gombak, at the 11th mile on the
road between Kuala Lumpur and Bentong. The
seventh, Lot 3660, is at the 3rd mile, Setapak
Road, Kuala Lumpur, in area 4 poles short of half-
an-acre. On it stands an old plank house, No. 99
Klang Gates Road, which was there at all material
times. The transfer set aside affects only this
particular property, which was ordered to be re-
transferred by the appellant to the 2nd 7th
respondents, as representatives, upon payment by
them of the sum of \$250/-.

40 Pursuant to the said agreement, Oh Hiam duly
applied, by way of Originating Summons No. 122/57,
for leave of the court to sell these lands, citing
as interested parties her eight children who were
joint beneficiaries with her in the estate of
their father. After service, they entered no

In the Federal
Court
(Appellate
Jurisdiction)

No. 29
Judgment of
Ong Hock
Thye, F.J.
18th September
1967
(cont'd)

appearance and on September 23, 1957 an order was made for sale and distribution of the proceeds among the beneficiaries entitled under the Distribution Enactment (Cap. 71).

On January 20, 1958, pursuant to the said order, Oh Hiam transferred E.M.R. 3633 and 5339, for Lots 1537 and 3660, to the appellant. Their aggregate area was 8 acres 1 rood 26 poles, and the consideration therefor \$3,786, at the rate of \$450/- per acre. No claim was made by the respondents in respect of Lot 1537. By three other transfers of the same date the other five titles were acquired by the appellant's wife, brother-in-law and mother-in-law. No question was raised regarding these transfers.

10

On June 3, 1958 the appellant, by his solicitors, sent a notice to the tenant of No. 99 Klang Gates Road, requiring him to pay all future rents to his new landlord. As a result Teo Kim Choon, one of the beneficiaries, came to realise that Lot 3660 had been sold together with the other six pieces of land. On June 16, 1958 Teo Kim Choon, purporting to represent the administratrix and all other beneficiaries, instructed his solicitors to write to Mr. Y.S. Lee, the solicitor who had prepared the sale agreement and subsequent transfers, offering the appellant the eirenicon of retransferring this property as the alternative to litigation. The appellant rejected the overtures.

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On July 30, 1958 action was commenced in the name of the respondents and their mother. The prime mover was Teo Kim Choon: as he put it, "I then gave instructions to my solicitors to have the sale set aside." Oh Hiam died on August 24, 1958, having been seriously ill of cancer since 1956, and the 2nd and 7th plaintiffs were substituted in her place after grant to them of Letters of Administration De Bonis Non. This explains why, as to one fact in acute controversy, namely, the identity of the successful broker concerned in the transaction, Oh Hiam's evidence was missing. Except as to facts turning on this point, there was no dispute as to the relevant facts.

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Of the several grounds of appeal the main ones are, first, that the learned judge erred in

his finding of a mutual mistake, contrary to a specific plea of unilateral mistake, and secondly, that he erred in holding the respondents entitled, on the evidence, to the relief of rectification. As to the first ground, mistake was pleaded in paragraph 6 of the statement of claim as follows:

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10 "The plaintiffs aver that at the time the said Agreement was made the Defendant knew that the 1st Plaintiff had by mistake agreed to sell to him the said Lot No. 3660 at \$450 per acre which was a gross under-value of the actual price of the said property and that it was not the real intention of the 1st Plaintiff to convey to the Defendant any lands except rubber lands. By reason thereof, the Plaintiffs aver that the said Agreement was null and void and of no effect."

20 These allegations were denied by the appellant in his defence. By an amendment, agreed to during the trial, he further pleaded that the first plaintiff was estopped from contending that she was mistaken as to the contents of the sale agreement. No argument, however, was addressed by counsel for either of the parties on this point and the trial judge was content to decide the action entirely on the issue of mistake. While estoppel is now raised again as a
30 subsidiary ground of appeal, I do not think the point calls for consideration, for reasons which will appear later.

40 Reverting to the plea of mistake, different considerations, of course, applied according as the mistake was mutual or unilateral. The statement of claim in categorical terms had alleged a unilateral mistake. Nevertheless, the learned trial Judge rested his decision on his finding that "it was as clear a case of common mistake as could occur." This was in line with the argument of counsel for the plaintiffs, although no amendment of the pleadings was ever applied for or made. It is clear law, as stated by Scrutton L.J. in Blay v. Pollard & Morris, (1) that "cases must be decided on the issues on the record: and if it is desired to raise other issues, they must be placed on the record by

(1) (1930) 1 K.B. 628, 634

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amendment." See also the judgment of Lord Radcliffe in Esso Petroleum Co. Ltd. v. Southport Corporation. (2) However, Rule 8(1) of the Federal Court (Civil Appeals) (Transitional) Rules, 1963 gives this Court "all the powers and duties, as to amendment or otherwise of the appropriate High Court." For my own part, therefore, I would assume that the pleadings were duly amended, so that all matters in controversy between the parties may be disposed of here and now. I am persuaded to do so after perusal of the record, since it is plain that such an amendment, even at this stage, in no way prejudices the appellant, for no further useful evidence can possibly be called by either side affecting the issue.

Before passing to the question of mutual or common mistake, I would first say a few words on the plea of unilateral mistake. The law covering the circumstances of this case is thus set out in 26 Halsbury (3rd Ed.) P. 898, citing Tamplin v. James: (3)

"When the contract is clear the mistake of one party only will not, as a general rule, prevent the formation of a contract and consequent liability in damages being incurred for non-performance, for, if a man will not take reasonable care to ascertain what he is contracting about, he must take the consequences. Even if the mistake is such as a reasonably diligent man might fall into, a party cannot successfully resist an action for damages, nor, as a rule, specific performance, by a simple statement that he has made a mistake where there has been no misrepresentation and where there is no ambiguity in the terms of the contract."

According to the evidence and the relevant findings, there can be no doubt that, howsoever the mistake arose on the part of the vendor, it did so for reasons entirely unconnected with the appellant and for which he was in no way responsible. In a recent East African case, Hasham v. Zenab (4) which shows several points of resemblance to the present appeal, Lord Tucker, delivering the judgment of the Privy Council, said:

- (2) (1956) 2 W.L.R. 81, 90-91
- (3) (1880) 15 Ch.D. 215, 217, 221
- (4) (1960) 2 W.L.R. 374, 381

10 "Their Lordships have, accordingly, reviewed the whole of the evidence in the light of the above considerations and having regard to the pleadings. In this connection reference must be made to paragraph 11 of the defence. It reads as follows: 'In the further alternative the agreement sued upon was entered into by mistake in that the terms thereof have been drawn up as to contravene the intention of the parties by purporting to refer to the whole of the plot 58/1 L.R. 209 as aforesaid, whereas as it should have referred to the said portion of land only'. This a plea of mistake common to both parties which was not the case made by the Defendant.

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20 Treating it, however, as a plea of unilateral mistake it could, in the absence of fraud, only afford ground for rescission if the mistake was induced by some innocent misrepresentation made by or on behalf of the plaintiff or by some misleading conduct on his part."

In the absence of any proof of fraud or misrepresentation, neither of which was pleaded or disclosed in the evidence, the respondents, therefore, must fail, had they relied on unilateral mistake.

30 Turning to the alternative, namely, a mistake common to both parties, the respondents' case, as the judge put it was -

40 " that Oh Hiam as administratrix intended to sell the rubber lands at Gombak, which were the only lands shown to the defendant, that there were no negotiations for the sale of the land at Setapak and that the grant relating to the land at Setapak got included in the agreement in the mistaken belief that it related to the several pieces of land at Gombak."

After a review of all the evidence, the learned judge came to the following conclusion:

" Taking the evidence as a whole, I am satisfied that during the course of negotiations between the parties there was

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no mention made about the land at Setapak. The negotiations were in respect of rubber estate at the 11th mile, Gombak Road. There were six different titles to contiguous lands which the plaintiffs have described as the rubber estate belonging to the estate. The seventh title 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."

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In short, then, the judge held that the respondents, as plaintiffs, had proved their case. But what was the evidence on which he based his conclusions? Oh Hiam, being dead, could not testify to her real intention. True, she had sworn an affidavit in support of her application for leave to sell. But nowhere in the judgment does it appear that the statements in her affidavit influenced the judge in coming to his decision. Instead, he recounted what he thought was material evidence given by certain of the beneficiaries: to quote him,

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" four of the plaintiffs (P.W.3, P.W.4, P.W.5 and P.W.6) have given evidence to say 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."

With respect, I think the judge was in error in thus taking account of inadmissible evidence. Under section 32 of the Evidence Ordinance, statements, written or verbal, of relevant facts made by a person who is dead are relevant only when they relate to the cause of death, or were made in the ordinary course of business, or against the interest of the maker etc. What the deceased lady said or did not say, regarded as a pregnant negative, by way of disclosing her intentions, was clearly irrelevant under section 32 and should not have been admitted.

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Then again, on another question of fact, the judge seems to have preferred the evidence of one broker, Lee Kim Seng, the respondents' witness, to the complete exclusion of that of another, Chow Wing Hing, who was called by the appellant. I quote from the judgment:

10 " I have considered the evidence of the two brokers very carefully and have come to the conclusion that, notwithstanding some apparent discrepancies in the evidence, Lee Kim Seng was the only broker in this case because he struck me as being a more truthful witness than Chow Wing Hing. Moreover, he is an independent witness and his evidence is corroborated by the evidence of Saw Ban Huat, another independent witness. Chow Wing Hing, on the other hand, is very much an interested party as he bought one of the rubber lands."

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I regret to say that I find myself in disagreement again with these conclusions of the learned trial judge. It is true, as Sir Hugh Wooding said recently in Chin Keow v. Government of Malaysia (5):

20 " He saw and heard the witnesses. His notes were not a verbatim reproduction of the viva voce proceedings but his own recorded account of the evidence. He was nonetheless aware of the questions asked and in a position of advantage to assess the answers given. He had thus impressed upon him the scope and nature of the evidence in a way denied to the appellate tribunal. No such tribunal could therefore have the same vivid appreciation of what the witnesses
30 said and what they meant by what they deposed."

Nevertheless, despite the advantage he had, I think that, in coming to his conclusions, he was going much further than is justified by the evidence. In holding Lee Kim Seng to be a truthful witness, the judge overlooked or did not pause to consider certain cogent facts, which are facts in issue and not merely "apparent discrepancies". In the first place, Lee Kim Seng said:

40 " The option was signed by P.W.5. He and I signed it: only both of us signed the option. Oh Hiam knew about the option I remember the price written on the option was \$500 an acre I was given an option by P.W.5. The option was written in English.

(5) P.C. Appeal No. 11/66, as yet unreported

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The paper on which the option was written was 9 inches by 6 inches."

But, was he corroborated by P.W.5, who was Teo Peng Yong? Far from doing so, Teo said:

" I did not prepare any documents relating to the sale of the lands. I remember my mother informing me that she had asked an Indian to prepare some documents An option was given to a taxi driver named Mr. Lee My mother gave him the option. I did not know whether he found the buyer or not. I remember that the price was \$400 per acre when the option was given I did not see the option."

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Now, I can well understand that the minor discrepancy as to the price might be a simple mistake due to the lapse of years. But the acid test of the truth of Lee Kim Seng's story was (a) his allegation that he obtained the option from Teo Peng Yong, a statement of fact flatly denied by the latter; and (b) Teo Peng Yong manifestly could not have given an option which he had no power to do.

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In the second place, assuming that Lee Kim Seng did hold an option to sell at \$500 per acre, and that Saw Ban Huat, another independent witness, corroborated Lee as to his own refusal to buy the land at that price, the fact remains that Lee had failed to find a buyer. Giving another option to a different broker was a perfectly reasonable explanation for Chow Wing Hing coming into the picture. In fact both the appellant and Chow Wing Hing, the second broker, stated that the option given to Chow was at a different and lower price of \$450. Why should Chow on any account be disbelieved? Why should there have been only one broker? After Lee had failed, was it not on the cards that Oh Hiam, being anxious to raise money, should have given an option to Chow at the lower price? In my judgment, therefore, even were the judge to believe in Lee, that was no reason whatever to reject the evidence of the second broker Chow. The latter was, moreover, regarded with some suspicion as an "interested party". I should observe that the decision, one way or the other, concerning Lot 3660, could result in neither benefit nor detriment to him. I do not

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agree that merely because a person had an interest in the outcome, his evidence should be discounted.

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10 Having thus stated, as I am bound to do, my reasons for disagreeing with the learned trial judge's conclusions, I feel again no less diffident in accepting his opinion on a material fact, for which he gave no reasons, that Lot 3660 was "essentially residential land". The building, a temporary dwelling house, according to Teo Boon See, occupied a superficial area of approximately 1,900 square foot. The area of Lot 3660 is 20,691 square feet. Was the presence of the building, occupying one-tenth the total area, sufficient ipso facto, to convert rubber land into residential land? What if the land was a rubber estate of, say, 5 acres and the owner builds himself a house therein? Does it then become "essentially residential land"? Where and how does one draw the line? At any rate, it seems to have been overlooked that, when Oh Hiam transferred this piece of land to the appellant, he was at the same time given the rubber cultivation book (Certificate of Registration of Rubber Cultivation) which every rubber estate owner is required by law to possess: see Rubber Supervision Enactment, 1937. The appellant duly exchanged the old book for a new one (Ex.D9) which is still a valid document. With respect, therefore, I am unable to agree with the learned judge that Lot 3660 was "essentially residential land", if by that term he meant that no reasonable person would be likely to regard it as rubber land. It should further be remembered that Oh Hiam herself, in her Estate Duty Affidavit, had grouped Lot 3660 with the other 6 lots as rubber land, and these 7 pieces were, on that basis, valued in 1948 at \$13,200. These lands were again grouped together in the Grant of Letters of Administration De Bonis Non: (See Exhibits P1 & P3), this subsequent grant being made on the application of two of these respondents after commencement of the action herein.

40 Be that as it may, the judge found that "it was only after the transfers were executed in January 1958 that (the appellant) came to know that he had obtained a transfer in respect of this piece of land in Setapak." In the result

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he held that "neither side knew about the inclusion of the property at Setapak in the agreement until after the transfers" and that it was "neither the intention of Oh Hiam to sell nor the intention of the defendant to purchase" such land.

This conclusion, of course, postulated that the evidence given to the contrary by the second broker Chow Wing Hing, and by the appellant himself, was rejected by the judge. He had indeed done so on the ground that there was only one broker, Lee Kim Seng. Consequently, in his opinion, both the appellant and Chow, gave false evidence. Speaking for myself, I do not think there is any evidence on the record showing that Chow Wing Hing was untruthful. The same cannot, in my judgment, be said of Lee Kim Seng. Since the decision of the learned trial judge was based on his belief in Lee as a witness of truth, it is on that account erroneous on the facts. His finding, for instance, that the appellant did not know, until much later, that he had bought Lot 3660, is an inference of doubtful validity. Apart from the fact that the appellant denied it, the mere inspection of the two titles and the plans thereon makes it impossible for anyone to say that the appellant did not know he was buying two pieces of land that were miles apart. Why did he choose to do so unless he knew what he was doing? As option-holder he should have had the first pick. If the answer is in the affirmative, on what grounds could there be a finding of common mistake?

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In disagreeing with several of the learned trial judge's conclusions, as I have done, I would say no more than that I do so on the authority of their Lordships' pronouncements in Yuill v. Yuill (6) and Watt or Thomas v. Thomas. (7)

In my judgment, however, these differences of opinion call for no retrial. What was agreed to be sold by the agreement of September 30, 1956 was land qua land. The agreement was expressed to be for the sale and purchase of land simpliciter. Hence, the real question is whether,

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(6) (1945) P.15, 19
(7) (1947) A.C. 484

when this vendor intended to sell land and this purchaser likewise intended to buy land, and their expressed intention goes no further, it could necessarily be implied from surrounding circumstances that the nature or quality of one small piece of land was, nevertheless, a basic or fundamental term of the contract. In other words, would there have been a fundamental breach, had the land been bare or contained only a few scattered rubber trees, so that the purchaser could have resiled from the contract? If he could not, then the principle of mutuality should apply equally to the vendor who was concerned to evade a bad bargain. Consequently, I do not think that mental reservations on the part of either party should be permitted to prevail so as to invalidate a clear agreement in writing. In my view, the provisions of sections 91 and 92 of the Evidence Ordinance should apply to exclude all oral evidence contradicting, varying, adding to or subtracting from the terms of a written contract unless, in the case of any mistake, the same relates to an essential or integral matter sufficient to invalidate the contract. I am fortified in this view by the law thus stated in 26 Halsbury (3rd Ed.) at pages 898-9:

"Where parties enter into a contract under a mutual mistake as to the existence of the subject matter or of some fact or facts forming an essential and integral element of the subject matter, their consent is nullified and the contract is void

When, however, the contract is for the sale of the subject thereof absolutely and not with reference to any collateral circumstances, the agreement is binding if the subject matter exists, notwithstanding that it is not in the condition supposed."

The vendor's alleged intention to sell nothing but rubber land was never disclosed to the appellant nor, by any admissible evidence, to her children. On the other hand, her intention to sell Lot 3660, together with the other six pieces of land, which was expressed in writing by the sale agreement, continued unchanged for over 15 months until January 20, 1958, when she executed the formal transfers. Was it not,

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therefore, an even possibility that it was actually Teo Kim Choon who decided, or persuaded her, to renege on the sale only after his subsequent discovery that the activities of property developers in the vicinity of Lot 3660 had rendered this land more valuable? It was he who gave instructions for the action: she did not, as she must have been very near death then. In fact there is no real evidence that she repented of the sale.

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As to the ascertainment of the intention of contracting parties, in Norwich Union Fire Insurance Society v. William H. Price Ltd., (8) Lord Wright said:

"It is true that in general the test of intention in the formation of contracts and the transfer of property is objective; that is, intention is to be ascertained from what the parties said or did. But proof of mistake affirmatively excludes intention. It is, however, essential that the mistake relied on should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic. Whether the mistake does satisfy this description may often be a matter of great difficulty."

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With the greatest respect to the learned trial judge, therefore, I do not think the mistake in the instant case presents a very difficult problem. After all, it related to the sale of a half-acre only, out of approximately 34½ acres. In point of fact, was this half-acre so conspicuously different from the rest that it should not have been lumped together with them? Oh Hiam herself considered it as rubber land, in spite of the house thereon, when she filed her estate duty affidavit in 1948. Had it been as valuable in 1956 as the respondents contended (remembering that they had made no attempt to support their contention by producing any valuation thereof at the trial) one should have thought that Oh Hiam herself could not have been oblivious of such a valuable piece of property, which by itself should have readily fetched a

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(8) (1934) A.C. 455, 463

price more than sufficient to pay for her trip to the hospital in Australia. In any event, even if she made a mistake, which I doubt, it was not such a fundamental mistake as to entitle the respondents to relief. As long ago as 1847, an English Court in Okill v. Whittaker (9) decided that, under somewhat similar circumstances, a conveyance should be upheld. In that case, premises were sold for the residue of a term, of which both parties at the time supposed that 8 years only were unexpired, and the price was fixed accordingly, but it afterwards appeared that 20 years were in fact unexpired at the time of the sale. Upon the vendor seeking to make the purchaser a trustee of the term for the additional 12 years, Lord Cottenham L.C., dismissing the bill, said:

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"Suppose a party proposed to sell a farm, describing it as 'all my farm of 200 acres' and the price was fixed on that supposition, but it afterwards turned out to be 250 acres, could he afterwards come and ask for a reconveyance of the farm, or payment of the difference? Clearly not; the only equity being that the thing turns out more valuable than either of the parties supposed. And whether the additional value consists in a longer term or a larger acreage is immaterial."

With respect, I would apply the same reasoning to this case. I do not think that what essentially was a mistake, due entirely to the fault of the vendor herself, should serve as a ground sufficient in law to deprive the blameless purchaser of a bargain. The maxim, caveat emptor is not wholly one-sided.

It was urged, on behalf of the respondents, that they were induced by a mistake on the part of their mother, the administratrix, to consent to the order of sale, and that a consent given under a mistake was no consent at all; consequently the order given as regards this particular piece of land should be set aside. The other 34 acres had already been resold; hence, admittedly, the order cannot be set aside concerning these six lots. For my own part, I am far from satisfied

(9) (1847) 2 Ph. 338; 41 E.R. 973

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as to the merits of this argument. The mistake, if at all it was one, was not a fundamental mistake. The respondents were all adults. If they chose to give their consent blindly, and none of them claimed to have made any enquiries before doing so, they had only themselves to blame. I do not think there is any equity in their favour under the circumstances.

I would accordingly allow this appeal and set aside the order of the court below, with costs in both courts to the appellant. 10

Sgd. H.T. ONG
JUDGE
FEDERAL COURT,
MALAYSIA.

Kuala Lumpur.
18th September, '67

Mr. K.K. Lam for the appellant
Mr. S.D.K. Peddie for the respondents.

Sd: B.E. Nettar
for Setia-usaha kapada Hakim
Mahkamah Persekutuan
Malaysia
Kuala Lumpur. 20

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No. 30
ORDER OF FEDERAL COURT

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA
LUMPUR

(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. X70 OF 1966 30

Between

Tham Kong

Appellant

And

1. Oh Hiam (f)
2. Teo Kim Choon
3. Teo Peng Yong
4. Teo Ah Chye
5. Teo Hy Huat
6. Teo Ah Toh
7. Teo Boon See (f)
8. Teo Chooi Lian (f)
9. Teo Kim Lian (f)

Respondents 40

(In the matter of Civil Suit No. 366 of 1958
in the High Court in Malaya at Kuala Lumpur

In the Federal
Court
(Appellate
Jurisdiction)

Between

1. Oh Hiam (f)
2. Teo Kim Choon
3. Teo Peng Yong
4. Teo Ah Chye
5. Teo Hye Huat
6. Teo Ah Toh
7. Teo Boon See (f)
8. Teo Chooi Lian (f)
9. Teo Kim Lian (f)

Plaintiffs

No. 30
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(cont'd)

10

And

Tham Kong

Defendant)

CORAM: SYED SHEH BARAKBAH, LORD PRESIDENT,
FEDERAL COURT, MALAYSIA;

AZMI, CHIEF JUSTICE, HIGH COURT
IN MALAYA;

ONG HOCK THYE, JUDGE, FEDERAL COURT,
MALAYSIA.

20

IN OPEN COURT

THIS 18TH DAY OF SEPTEMBER,
1967

O R D E R

THIS APPEAL coming on for hearing on the 18th
day of May, 1967, in the presence of Mr. Lam Khuan
Kit of Counsel for the Appellant and Mr. S.D.K.
Peddie of Counsel for the Respondents AND UPON
READING the Record of Appeal filed herein AND UPON
HEARING the arguments of Counsel aforesaid IT WAS
ORDERED that this Appeal do stand adjourned for
judgment and upon this Appeal coming on for judgment
this day in the presence of Counsel as aforesaid
IT IS ORDERED that this Appeal be allowed AND IT IS
ORDERED that the Respondents do pay the Appellant
the costs of this Appeal and the Court below AND IT
IS LASTLY ORDERED that the sum of \$500/- (Dollars
five hundred only) deposited as security for costs
of this Appeal be paid out to the Appellant.

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In the Federal Court
(Appellate Jurisdiction)

No. 30
Order of Federal Court
18th September 1967
(cont'd)

Given under my hand and the seal of the Court this 18th day of September, 1967.

Sd: Ng Mann Sau.

DEPUTY REGISTRAR,
FEDERAL COURT,
MALAYSIA.

No. 31
Order granting Final Leave to Appeal to H.M. the Yang di-Pertuan Agong
21st March 1978

No. 31

ORDER GRANTING FINAL LEAVE TO APPEAL

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

10

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL No. X.70 OF 1966

Between

Tham Kong

Appellant

And

1. Oh Hiam (f))
2. Teo Kim Choon)
3. Teo Peng Yong)
4. Teo Ah Chye)
5. Teo Hye Huat)
6. Teo Ah Toh)
7. Teo Boon See (f))
8. Teo Choon Lian (f))
9. Teo Kim Lian (f))

20

Respondents

(In the matter of Civil Suit No. 366 of 1958 in the High Court in Malaya at Kuala Lumpur

Between

1. Oh Hiam (f))
2. Teo Kim Choon)
3. Teo Peng Yong)
4. Teo Ah Chye)
5. Teo Hye Huat)
6. Teo Ah Toh)
7. Teo Boon See (f))
8. Teo Chooi Lian (f))
9. Teo Kim Lian (f))

30

Plaintiffs

And

Tham Kong

Defendant)

In the Federal Court
(Appellate Jurisdiction)

CORAM: LEE HUN HOE, CHIEF JUSTICE, HIGH COURT, BORNEO;

No. 31
Order granting Final leave to Appeal to H.M. the Yang di-Pertuan Agong
21st March 1978
(cont'd)

WAN SULEIMAN, JUDGE, FEDERAL COURT, MALAYSIA;

CHANG MIN TAT, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT

THIS 21ST DAY OF MARCH, 1978.

O R D E R

UPON MOTION preferred unto Court on the 6th day of May, 1968 in the presence of Mr. S.D.K. Peddie of Counsel for the Respondents and Mr. K.K. Lam of Counsel for the Appellant above-named AND UPON READING the Notice of Motion dated the 9th day of April, 1968 and the Affidavit of Teo Boon See and Teo Eng See and Teoh Kwee Hoay (f) affirmed on the 3rd day of April, 1968 AND UPON HEARING Counsel as aforesaid IT WAS ORDERED that the Notice of Motion be adjourned sine die AND the same coming on for hearing this day in the presence of Mr. S.D.K. Peddie of Counsel for the Respondents and mentioning on behalf of Messrs. K.K. Lam & Co., solicitors for the Appellant abovenamed AND UPON READING the Pleadings aforesaid AND UPON HEARING Counsel as aforesaid IT IS ORDERED that Final Leave be and is hereby granted to the Respondents to appeal to His Majesty, the Yang Dipertuan Agung from the decision and Order of this Court given on the 18th day of September, 1967 AND IT IS ORDERED that the Appeal Record be filed within six (6) months from the date hereof AND IT IS ALSO ORDERED that the costs of and incidental to this application be costs in the cause.

GIVEN under my hand and the seal of the Court this 21st day of March, 1978.

Sgd:

CHIEF REGISTRAR,
FEDERAL COURT,
MALAYSIA.

Exhibits

P.6.

Agreement of
Sale, Oh Hiam
and Tham Kong
30th September
1956.

P.6. Agreement of Sale,
Oh Hiam and Tham Kong

AGREEMENT OF SALE

MEMORANDUM OF AGREEMENT made this 30th day of September, 1956 BETWEEN OH HIAM (f) of No. 473, Batu Road, Kuala Lumpur as Representative of the Estate of TEOH TEOW GUAN deceased, (hereinafter called "the Vendor") of the one part and THAM KONG of No. 28C, San Peng Road, Kuala Lumpur (hereinafter called "the Purchaser") of the other part.

10

WHEREAS the Vendor has agreed to sell to the Purchaser or his nominee or nominees and the Purchaser has agreed to purchase free from encumbrances the several pieces of lands, comprised in and held under:-

1.	EMR. 4139	Lot No. 2663	2a 2r 15p
2.	EMR. 4140	Lot No. 2664	2a 2r 20p
3.	EMR. 5339	Lot No. 3660	0a 1r 36p
4.	EMR. 4219	Lot No. 2771	8a 3r 00p
5.	EMR. 4076	Lot No. 2562	9a 3r 00p
6.	EMR. 5634	Lot No. 1538	2a 1r 00p
7.	EMR. 5633	Lot No. 1537	<u>7a 3r 30p</u>
			<u>34a 1r 21p</u>

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in the Mukim of Setapak, Kuala Lumpur at the agreed price of Dollars Four hundred and fifty (\$450/=) only per acre (hereinafter referred to as the "said lands").

AND WHEREAS the Vendor agrees to deposit at the execution of these presents with Mr. Y.S. Lee an Advocate & Solicitor of No. 46, Cross Street, (1st Floor), Kuala Lumpur the seven titles pertaining to the said lands pending execution of a registrable transfer in favour of the Purchaser or his nominee or nominees.

30

AND WHEREAS the Purchaser agrees to deposit at the execution of these presents with the aforesaid Mr. Y.S. Lee the sum of \$5,000/- by way of part payment of the purchase price of the said lands which said sum of money shall be held by the said Mr. Y.S. Lee pending execution of a registrable transfer of the said lands and due registration thereof.

40

WITNESSETH that in consideration of the premises it is hereby agreed by and between the parties hereto as follows:-

Exhibits

P.6.
Agreement of
Sale, Oh Hiam
and Tham Kong
30th September
1956
(cont'd)

1. The Vendor shall within a reasonable time make the requisite application to the Court for leave to sell the said lands to the Purchaser or his nominee or nominees.

10 2. Subject to the leave aforesaid of the Court being granted the Purchaser shall pay the balance of the purchase price on the execution of the transfer.

3. The purchaser shall be at liberty to enter into possession of the said lands with effect from the 1st day of October, 1956 and to take any profits which may be derived from the produce thereof and/or be liable for any losses.

20 4. In the event of the Vendor failing to apply to the Court for the necessary permission to sell the said lands within three months from date hereof or refusing to sell the said lands after the said permission has been obtained, the Vendor shall pay to the Purchaser \$5,000/- by way of liquidated damages.

30 5. Immediately on obtaining the said permission, the Vendor shall give notice in writing to the Purchaser at the aforesaid address and the Purchaser shall within two (2) weeks from date of the said notice deposit the balance of the purchase price with Mr. Y.S. Lee who shall then pay the whole of the purchase price to the Vendor after due registration of the transfer of the said lands. In the event of the Purchaser failing to deposit the balance of the purchase price as aforesaid, the deposit of \$5,000/- with Mr. Y.S. Lee shall be forfeited and paid by Mr. Y.S. Lee to the Vendor by way of liquidated damages.

6. In the event of the Court refusing to grant leave to the Purchaser to sell the said lands the following consequence shall ensue:-

40 (a) The Purchaser shall pay to the Vendor the sum of \$50/= per month with effect from 1st day of October, 1956 in respect of the produce of the said lands.

Exhibits

P.6.

Agreement of
Sale, Oh Hiam
and Tham Kong
30th September
1956
(cont'd)

(b) The sum of \$5,000/- deposited with Mr. Y.S. Lee be refunded to the Purchaser.

(c) Neither party shall be entitled to any other compensation.

(d) The titles pertaining to the said lands shall be returned to the Vendor.

7. The requisite application to the Court for leave to sell the said lands shall be made through Mr. Y.S. Lee aforesaid and the Vendor shall pay all fees and other necessary costs and charges in respect thereof. 10

8. Subject to the leave of the Court to sell the said lands being granted the transfers of the said lands shall be executed at the office of Mr. Y.S. Lee aforesaid and the Purchaser shall pay all the requisite fees and charges for and incidental to the said transfers.

9. Any notice required by or in respect of the provisions hereof to be given to the purchaser and the Vendor may be delivered or sent by registered post to them at the addresses respectively set out at the commencement of this Agreement and any notice so sent by post shall be deemed to have been delivered at the time in the ordinary course of post it would have been so delivered. 20

10. Time shall be of the essence of this contract.

11. This Agreement shall be binding upon the heirs, Administrators, executors and assigns of the parties hereto.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first above written. 30

Signed by the said)
OH HIAM (f) in the) R.T.P. of Oh Hiam (f)
presence of:-)

Sd: Y.S. Lee

This is the Exhibit marked "OH" referred to in the Affidavit of Oh Hiam (f) sworn to before me this 30th day of July, 1957.

Sd: Lee Kong Beng
Commissioner for Oaths,
Supreme Court, Kuala Lumpur. 40

P.4. Letter, Doraisamy Aiyer & Kok
Thoy to Lim Ser

Exhibits

P.4.
Letter,
Doraisamy
Aiyer & Kok
Thoy to Lim
Ser
3rd June 1958.

DORAISAMY AIYER & KOK THOY,
Advocates & Solicitors,
P.O. Box 689,
63, Klyne Street,
Kuala Lumpur.
Federation of Malaya.
3rd June, 1958.

10 KT/DS/2082/1958

Mr. Lim Ser,
No. 99 Klang Gates Road,
Kuala Lumpur.

Dear Sir,

No: 99 Klang Gates Road,
Kuala Lumpur

20 We have been instructed by Mr. Tham Kong of
No. 28C, Loke Yew Road, Kuala Lumpur to inform
you that on the 20th January 1958 he purchased
the land held under E.M.R. No. 5339 for lot 3660
Mukim of Setapak on which is erected the above
temporary building.

As he is now the landlord of the said
temporary building, we would request you to pay
all rents as from February, 1958 to our client.

30 If you have already paid some rent to the
former Landlord, please produce the rent receipts
of such payments to our client or his
representative who will take the same into
consideration.

Please pay all future rents to our client
who is now the owner of the said premises.

Yours faithfully,
Sd: (illegible)

Exhibits

P.5.
Letter,
Bannon &
Bailey to
Y.S. Lee
16th June
1958.

P.5. Letter, Bannon & Bailey to
Y.S. Lee

16th June, 58.

P/LPE/16139/58

Y.S. Lee, Esq.,
Advocate & Solicitor,
Kuala Lumpur.

Dear Sir,

re: Estate of Teo Teow Guan,
deceased

10

We write to inform you that we have been instructed to act on behalf of the beneficiaries and the Administratrix of the abovementioned estate.

It appears that in September 1956 you prepared a Sale Agreement for the sale by the Administratrix of the estate to one Tham Kong of certain rubber lands in the Mukim of Setapak. Among the title deeds listed in this Agreement was E.M.R. 5339 for lot 3660. It has now come to our clients' knowledge that this title deed is not held in respect of rubber land but covers a lot in the actual village of Setapak within the Municipal boundary with a dwelling house erected on it known as No. 99 Klang Gates Road, Kuala Lumpur. This lot has been transferred to the purchaser.

20

We are now instructed to take proceedings to set aside the sale of this lot on the grounds that there was no consensus in the Agreement for the sale of this lot (the agreement being for sale of rubber lands) and on the ground that the order of Court for sale is bad as the Court has made an Order for sale at a figure very considerably below the true value of the property sold. We are informed that the lot in question is worth about \$25,000/- per acre and it was sold for \$450/- per acre.

30

Our clients are, of course, prepared to repay to the purchaser the amount paid by him for the purchase of this lot together with all proper charges and expenses attributable to the sale and purchase of this lot.

40

We shall be obliged if you would inform us early whether the purchaser agrees to re-transfer the above lot without the necessity of Court proceedings, failing which please inform us whether you have instructions to accept service.

Yours faithfully,

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Exhibits

P.5.
Letter,
Bannon &
Bailey to
Y.S. Lee
16th June
1958.
(cont'd)

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c.s. M/s. Doraiswamy Aiyer & Kok Thoy,
Advocates & Solicitors,
Kuala Lumpur.
(Your KT/DS/2082/1958 refers)

P.7. Letter, Bannon & Bailey to
Doraiswamy Aiyer & Kok Thoy

1st July,
KT/DS/2082/58
P/CYT/16139/58

P.7.
Letter,
Bannon &
Bailey to
Doraiswamy
Aiyer & Kok
Thoy
1st July, 1958.

20

Messrs. Doraiswamy Aiyer & Kok Thoy,
Advocates & Solicitors,
Kuala Lumpur.

Dear Sirs,

re: Estate of Teo Teow Guan,
deceased

We refer to our letter of the 16th June 1958 addressed to Mr. Y.S. Lee, a copy of which we sent to you. Mr. Lee informs us that you are dealing with the matter.

30

We should be obliged if you would let us have an early reply to our letter.

Yours faithfully,

???

Exhibits

P.8.
Letter,
Doraiswamy
Aiyer & Kok
Thoy to
Bannon &
Bailey
22nd July,
1958.

P.8. Letter, Doraiswamy Aiyer & Kok
Thoy to Bannon & Bailey

DORAISWAMY AIYER & KOK THOY
Advocates & Solicitors,
P.O. Box 689,
63 Klyne Street,
Kuala Lumpur.
Federation of Malaya.
22nd July, 1958.

KT/DS/2572/1958

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Messrs. Bannon & Bailey,
Advocates & Solicitors,
Kuala Lumpur.

Dear Sirs,

re: Estate of Teo Teow Guan
deceased

With reference to your letter Ref:
P/CYT/16139/58 dated the 1st July, 1958, we have
to inform you that we have no further instructions
on the matter.

20

Please communicate with the party direct.

Yours faithfully,
Sd: (illegible)

No. 22 of 1978

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L

IN THE FEDERAL COURT OF MALAYSIA HOLDE
AT KUALA LUMPUR

B E T W E E N:

OH HIAM AND OTHERS

Appellants

- and -

THAM KONG

Respondent

RECORD OF PROCEEDINGS

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

Appellants' Solicitors

PHILIP CONWAY THOMAS & CO.,
61 Catherine Place,
Westminster,
London SW1E 6HB.

Respondent's Solicitors