Privy Council Appeal No. 22 of 1978

Oh Hiam (f) (since deceased) and Others - - - - *Appellants*

v.

Tham Kong - - - - - - - - - *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD JUNE 1980

Present at the Hearing:
LORD WILBERFORCE
LORD DIPLOCK
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL
LORD LANE
[*Delivered by* LORD RUSSELL OF KILLOWEN]

This appeal raises two questions. Firstly: whether the Federal Court was right to reverse the decision of Gill J. that the evidence disclosed a case of sufficient cogency to justify the equitable remedy of rectification of a contract for the sale of land on the ground of mistake common to vendor and purchaser, in including one among seven lots of land in an agreement for sale. Secondly: whether, if the Federal Court was not so justified, rectification (or its equivalent) could be ordered notwithstanding the subsequent transfer of the one lot to the purchaser and his registration as proprietor thereof, under the applicable Torrens system, and the provision of the applicable law that his title was " indefeasible."

Oh Hiam (plaintiff No. 1) was the widow of Teo Teow Guan who died in 1943. She took out letters of administration to his estate. They had five sons and three daughters, (plaintiffs 2 to 9 inclusive). Included in the estate of the deceased were six plots of rubber growing land, forming one area (" the Gombak land "), in the Mukim of Setapak, Kuala Lumpur, totalling nearly 34 acres. Also included in the estate (*inter alia*) was a plot, in the village of Setapak, some miles from the first group, in area 1 rood 36 perches (just under ½ acre): this was Lot 3660.

On 30th September 1956 the vendor, as administratrix of the deceased, entered into a written agreement with the defendant Tham Kong to sell to him 7 lots, including the third Lot 3660, at a price of $450 per acre. Subsequently on 1st August 1957 an originating summons was issued by Oh Hiam. She applied for leave to carry out that sale, which leave was required because she was administratrix and was provided for in the sale contract. Parties to the originating summons were her eight children. Leave to sell was given by order on 23rd September 1957: the children (though parties) took no part in those proceedings. The agreement was completed by four transfers

which were registered on 20th January 1958. The transfers of Lot 3660 and Lot 1537, in total about 8½ acres, were registered in the name of the defendant Tham Kong: the other three transfers were to and registered in the respective names of the defendant's wife (some 8¾ acres), his half brother-in-law (some 9¾ acres) and his mother-in-law (some 7½ acres).

Some months later in 1958 it was discovered by Oh Hiam and her family that an attempt was being made on the defendant's behalf to collect rents from tenants of the residential building on Lot 3660. There was evidence that the building housed some 30 to 40 people including tenants and their families, and that a daughter (plaintiff 7) and her small children lived there. The house was known as No. 99 Klang Gates Road. As a consequence Oh Hiam started proceedings based on the contention that Lot 3660 was not intended to be included in the agreement or transfers and was included by mistake. Rectification was sought and a retransfer of Lot 3660 against repayment of its purchase price at $450 per acre.

Oh Hiam died on 24th August 1958 before the action came on for hearing and a grant was made *de bonis non* to two of the children in her place (plaintiff 2 and plaintiff 7). The action proceeded at a leisurely pace, no doubt in part due to the death of Oh Hiam, and was heard by Gill J. starting in June 1965 and finishing with his reserved judgment in favour of the plaintiffs in August 1966. The defendant appealed to the Federal Court which unanimously reversed the decision of Gill J. and dismissed the action. This was in September 1967. Application was made for leave to appeal to His Majesty the Yang di-Pertuan Agong, and the application was adjourned *sine die* in May 1968, apparently in connection with a bankruptcy of the defendant from which he was later discharged, and final leave to appeal was not given until March 1978, which gives some explanation why the matter comes before this Board in 1980, though the original muddle (if muddle it was) was in 1956, and the original dispute in 1958.

The Statement of Claim of the plaintiffs contained the following averments:

> " 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.
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> 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 under valued 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."

It will be noted that these averments are more aptly framed to suggest that from the beginning the defendant knew that Oh Hiam had made a mistake in including Lot 3660 in the sale which indeed might form a ground for rectification, but is inconsistent with mistake on the part of the defendant. However the case below has settled down, so to speak, on the assumption that what is sought is based on the common mistake of Oh Hiam and the defendant, and that the relief sought is in the nature of rectification by the retransfer by the defendant to the personal representatives of the deceased father of Lot 3660 against repayment of the price paid of $450 an acre for that Lot.

An unusual feature of the case is that the trial judge found it, on the evidence, a very clear case of mistake common to both vendor and purchaser: yet the Federal Court concluded that neither had been mistaken.

Their Lordships turn to the evidence. Oh Hiam instructed an advocate Lee Yew Siong (P.W.1) to prepare a contract for sale of certain lands belonging to the estate of the deceased: she handed to him seven documents of title to the seven lots including 3660: the defendant also instructed him to act for him. P.W.1 said " As far as I can remember I was told that the lands to be sold were rubber lands ". (Unlike Lot 3660 the other group had no residence on it.) P.W.1 prepared the contract which was later executed.

The contract for sale dated 30th September 1956 set out the seven lots of land as agreed to be sold, including as the third Lot 3660, totalling 34 acres, 1 rood, 21 perches, at a price of $450 per acre. The vendor was recited as agreeing to deposit the seven titles pertaining to the said lands with P.W.1 pending execution of registrable transfers in favour of the defendant or his nominees. The defendant agreed to deposit $5,000 with P.W.1 as part payment pending transfer. The vendor agreed to make the requisite application (already referred to) to the Court for leave to sell the said lands. Clause 3 gave the defendant liberty to enter into possession of the said lands forthwith " and to take any profits which may be derived from the *produce* thereof and/or be liable for any losses ". On the obtaining of leave to sell the defendant was to deposit the balance of the purchase price with P.W.1 who was to hand it over to the vendor after due registration of transfer. Clause 6 provided for the event of the Court refusing to give leave to carry out the sale: in that case the bargain was off, but the defendant was to pay the vendor $50 per month with effect from 1st October 1956 (when he was to go into possession) " in respect of the *produce* of the said lands ". (Stress added.)

Whereas Lot 3660 is plainly included, the appellants, in support of their contention of mistake, point to the fact that on that small lot there was a tenanted house: that there was in the contract no mention of this: that the word twice used of " produce " while appropriate to mere rubber lands such as those at Gombak was, they suggested, quite inappropriate to Lot 3660 with its house: that nothing was said as to rent from the house.

It is convenient to turn next to the application for leave to implement the agreement, in search of Oh Hiam's intention, though it is not suggested that the defendant had any cognisance of it. The application (and supporting affidavit) were prepared by P.W.1, as the contract required. The summons sought leave to sell the seven lots for a sum of not less than $450 per acre. Oh Hiam deposed that the seven lots (identifying them as in the contract) " are seven pieces of old rubber lands ": no tapping had been carried out on the said lands since the emergency began in June 1948 because of the difficulty of getting tappers: it had become a liability to the estate because annual quit rents had to be paid, and because of the difficulty of supervision and lack of labourers " the *whole area* is now over grown with weeds and lallang ": she further said she had agreed to sell because she considered " this *whole area* may be covered with secondary jungle " (Stress added). It was contended that Oh Hiam could not have, in using those phrases, had in mind as included the separate ½ acre plot in the village with the house thereon in which her daughter and grandchildren (and many others) lived, even though (as appears later) there had at one time at least been some rubber trees on Lot 3660. Moreover the language used supports the evidence of P.W.1 (the draftsman) that his instructions were that the lands to be sold were rubber lands—i.e. only rubber lands. In evidence P.W.1 said that the affidavit was drawn exactly according to his instructions from Oh Hiam, and that nothing was said to him by her about any house on any of the Lots.

Their Lordships find considerable force in the contentions based on the contract and on the application for leave to sell. It is of course true that Lot 3660 is expressly mentioned in both: but that is the very hurdle that the appellants must surmount.

The only other document to which attention should be drawn at present is the defence: that (*inter alia*) contended that the Gombak area was not worth $450 per acre and that no one would without Lot 3660 have paid $450 per acre. As will be seen later an independent witness had according to the evidence offered $450 per acre for the Gombak land. No value was placed on Lot 3660 in the Defence, though evidence (on both sides) ventured estimates which make it perhaps surprising that it should be included in an overall " per acre " price.

Their Lordships turn now to the notes of Gill J. of the oral evidence. That of P.W.1 (the lawyer) has already been mentioned. P.W.2 from the Registry of Titles produced the transfer to the defendant, the documents showing consideration for both Lots 1537 and 3660 at a figure which is based on $450 per acre for the whole.

P.W.3 Teo Kim Choon (since deceased), one of the sons and one of the administrators *de bonis non* after the death of Oh Hiam, was a merchant and a part owner of Yuen & Co. Ltd. a motor firm. The tenor of his evidence was that he first learnt of the transfer of Lot 3660 when his sister Teo Boon See (P.W.4) came to him in anxiety because someone had in 1958 sought to collect rents on behalf of the defendant from tenants of No. 99 Klang Gates Road on Lot 3660. Indeed lawyers had on 3rd June 1958 written to one Lim Ser (one of the tenants) on behalf of the defendant to say that the defendant had on 20th January 1958 bought Lot 3660 " on which is erected the above temporary building " (i.e. 99 Klang Gates Road), and calling for payment to the defendant of rent as from February 1958. Their Lordships remark that such a letter appears to be inconsistent with the defendant having considered that the terms as to entry into possession of the agreed lots and entitlement to produce in the contract in 1956 were related to a situation in which there was a house with rent-paying tenants on part of the land.

P.W.3 had written to P.W.1 through other solicitors adumbrating a claim for return of the Lot 3660 title (copy to the solicitors who wrote to Lim Ser) but nothing further was heard and this action was launched. He estimated the value in 1956 of Lot 3660 at $40,000 because the land was in town and house projects were coming up opposite and behind it: but their Lordships observe that in the letter last mentioned written on the instructions of P.W.3 the estimate of $25,000 per acre in 1958 was given, which is more like $12,000 for Lot 3660.

P.W.3 said that his mother had consulted him about selling some lands and in cross-examination said that she had agreed to sell " rubber lands ". He made it plain (for what it is worth) that it had not occurred to him as a result of his talks with his mother that No. 99 Klang Gates Road was to be sold or had been. He said that the estate still had title to other land in Setapak town, including a bungalow just before the town in Kong Nam Road. In the light of the case as developed for the defence that an option (i.e. authority to find a purchaser) had been given to Chow Wing Hing (D.W.3, half brother-in-law of the defendant, and transferee of Lot 2562) reference should be made to other parts of the evidence of P.W.3. He knew an option had been given, as he thought for the Gombak rubber lands, but did not know to whom, and could not remember whether his mother had paid any commission (i.e. to an option holder). D.W.3 was shown to him in Court, and he said he did not know him, though he might have met him during the execution of transfers. He did not know whether his mother gave D.W.3 an option to sell the lands. He denied that D.W.3 brought the defendant to his premises (where his mother lived) to discuss the sale with him and his mother. He denied that he took the defendant and some others to show them the lands; specifically he denied taking the defendant and D.W.3 and three others to see first the land at Gombak and then Lot 3660. He also denied that he had a few days before taken another prospective purchaser to see both lands.

Finally P.W.3 said that he had never seen the contract for sale and had taken no steps to find what had been agreed to be sold until the question of rent collecting blew up in 1958.

P.W.4 was the married daughter Teo Boon See. It is plain from the general tenor of her evidence that she had discussed with her mother the sale of lands in 1956 and that she had no notion that No. 99 Klang Gates Road was to be or had been sold until in 1958—presumably about the time of the letter to Lim Ser—she was asked to pay rent. She described the house as wooden with a tiled roof. She lived there in 1956, married, with two children aged 3 years and 6 months. Thirty or forty people lived in the house, the rest her friends. The house was 46' 9" plus in length and about 40' wide, with ten living rooms.

In relation to the intention of Oh Hiam to sell Lot 3660 with this house where her daughter and small grandchildren lived it appears to their Lordships to say the least remarkable that if she had so intended she would have said nothing of her intention to her daughter.

P.W.5 Teo Peng Yong was another son. Again the tenor of his evidence was that he did not know that Lot 3660 was being sold, though his mother discussed the sale of estate lands with him. (He also lived at the Yuen premises). He said that he knew an option was given by his mother to a taxi driver Lee Kim Seng (later P.W.7), and that was how buyers were found. (There was conflict here with the later evidence of P.W.7 who said that P.W.5 in fact gave him the option, and that the price was $500 per acre not $400 as P.W.5 recalled.) He denied that he ever took any prospective buyers to see the lands. The first time he knew about the sale was when he was asked to consent to the sale of the rubber lands, meaning at Gombak. To the court he said he knew the rubber lands: " they were all in one place ". It is to be noted that there was no map or plan attached to the contract for sale which might have indicated the substantial difference in location between Lot 3660 and the rest.

P.W.6 Teo Ah Chye was another son of Oh Hiam. Again the tenor of his evidence was that he had been told nothing of any sale or proposed sale of Lot 3660 and 99 Klang Gates Road house until his sister (P.W.4) told him about it, sc. in 1958. He also said that there was not a single rubber tree on Lot 3660—clearly speaking of the time when he was discussing in 1956 sale of lands with his mother.

P.W.7 Lee Kim Seng, a taxi driver, knew Oh Hiam and heard that she wanted to sell rubber land at Gombak. He lived at 4¼ Mile Ulu Gombak Road. He said he had an option to sell the land from P.W.5 signed by P.W.5 and himself, and that the price was $500 per acre. (Compare the contrary evidence of P.W.5.) He said he brought " the buyer " to see the land and that he got his commission. He said he knew the land that was to be sold was at 11th Mile Gombak Road, and none in Klang Gates Road. He first saw one Saw Ban Huat (P.W.8), who did not buy because he offered $450 per acre and the price was $500. (P.W.8 later underlined the fact that he was only taken by P.W.7 to the Gombak land). P.W.7 then contacted Chow Wing Hing (D.W.3) and the defendant. He said that those two went with him to see the rubber estate (sc. at Gombak) and they did not go to see 99 Klang Gates Road. They offered a lesser price, so he told them to see the owner and took them to see P.W.5. He said that P.W.5 paid him a commission and that the defendant's wife (D.W.4) paid him a commission of $200, not worked out on any basis.

In cross-examination P.W.7 (taxi driver) said that he lived at 4½ Mile Gombak Road for over 30 years and that he had learned from a fare that Oh Hiam wanted to sell rubber lands. He repeated that he was given an option by P.W.5 which being in English he could not read though he knew it was an

option to sell rubber lands. He took the defendant and D.W.3 (Chow Wing Hing) to see the rubber lands. P.W.5 told him where they were—at 11¼ Mile Gombak Road. It does not appear to have been suggested to him either that he did not go with the defendant and D.W.3 to Gombak lands, or that he took them also to Lot 3660. (Both the defendant and D.W.3 denied having met P.W.7.)

P.W.8 (Saw Ban Huat) owned Chop Kim Huat at 4¼ Mile Ulu Gombak Road. He knew P.W.7 and discussed with him purchase of a rubber estate at Gombak. He could not read the option (in English) but he knew the price was $500 per acre. He went with P.W.7 to see only the rubber lands at Gombak and offered $450 per acre which was why he did not buy. He said it was hilly and the trees were old and the grass not weeded. He was not taken to see a house in Klang Gates Road.

That concluded the oral evidence for the appellants. The defendant was the first witness for the defence. He said at the outset that he had never seen P.W.7 (taxi driver) before. He said that D.W.3 (in fact his half brother-in-law) told him that some land " in Setapak " was to be sold, and asked whether he was interested to buy it. D.W.3 told him that the land was $450 per acre and took him to see Oh Hiam upstairs at the Yuen Company premises. He said that P.W.3 was present. He said they discussed the land. Then six of them went to see the land, namely the defendant, D.W.3, the defendant's wife, P.W.3, and two people called Tham Pat Yaw and Yip Yaw Seong (who were not called). He said they first went to Gombak Road, which was hilly with damaged rubber trees, the " whole area " was covered with lallang and bushes—an interesting echo of the " whole area " in Oh Hiam's affidavit. He said that he was then brought to Klang Gates Road, a very small piece of land, not even ½ an acre, on which was a very old house with wooden walls, and 20 to 30 rubber trees in their dying stage. He said that next day with D.W.3 he went to the Yuen building; there were present also Oh Hiam and P.W.3: they bargained on price, one side demanding $450 per acre and the defendant offering $400 per acre. He increased to $425, which was also refused, and finally he agreed to pay $450. " 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." He also said that after the contract was signed he had the grass on the land cleared, and that subsequently he had the land replanted with rubber. This appears to refer to Gombak Road.

In cross-examination it emerged that Lot 3660 had been the subject of a Rubber Cultivation book or certificate under Ordinance No. 10 of 1937, which contained provisions relating to the cultivation of rubber trees, and after the transfers one such was issued to the defendant embracing the *two* lots transferred to him. The defendant said he had insisted that the Klang Gates property should be included and checked to ensure that. He said that since 1956 changes had been made to Lot 3660 but did not know what, since its care and management had been under his wife (D.W.4). He had only been to Lot 3660 once since 1956, shortly after he bought. He said he put a value of $7,000 on Lot 3660 in 1956. He said he took no steps to take possession of Lot 3660, but left it to his wife (D.W.4) who (he said) had told him she was going to collect rents from it, and he told her that was her business. He said that it was not true that he knew Lot 3660 had been transferred to him by mistake.

It appeared from the evidence of D.W.2 (Registry Clerk) that the transferees in 1958 of the whole of the Gombak Land in April 1964 transferred them to a company.

D.W.3 Chow Hing Wing was the half brother-in-law of the defendant, and a hawker in sauces. He said he knew Oh Hiam and did not know P.W.7 (the taxi driver). Oh Hiam told him she wanted to sell " her land " and that he asked her for an option. P.W.3 handed him one in English which he could not read but said that it referred to six pieces of land at Gombak and one at Setapak: he said that P.W.3 took him and a prospective buyer Ah Khow to the Gombak lands and Lot 3660, but Ah Khow would not buy: he described the Gombak lands much as had the defendant, and Lot 3660 as having on it several rubber trees, and an old house which was about to fall down. He said he then got another option from P.W.3 because the first had expired, and approached the defendant. The rest of his evidence in chief substantially confirmed that of the defendant about the visit to the Yuen building, the visit to the Gombak lands and to Lot 3660 with P.W.3, and the discussion on the following day with Oh Hiam and P.W.3. " At this discussion something was said about the house on the Setapak land."

In cross-examination he said he was acting as broker in the transaction and the defendant paid him $400 commission. (The defendant had not said that.) He said the two options were for $450 per acre and he handed them over to the lawyer P.W.1, a point not suggested to P.W.1. His estimate of the value in 1956 of Lot 3660 was $5,000 to $6,000, and of the Gombak land $200 per acre. His piece of the latter (Lot 2562, 9¾ acres) which was transferred to him he said he paid nearly $2,000 for, and after replanting sold (in 1964 see above) for $1,500 per acre. In further describing Lot 3660 he said he had visited it again in 1963: in 1956 there were 20 to 30 rubber trees in a dying state and the house was tilted to one side: in 1963 all the trees were gone and the house repaired: both in 1956 and 1963 the house was a big one with many living there, and there were on the same ground about four small houses behind the big house.

D.W.4 Chow Kit Yee was wife of the defendant and half-sister of D.W.3. She said she recalled the purchase in 1956 in which she said D.W.3 was the broker. She confirmed that they visited both the Gombak land and Lot 3660 with P.W.3. She said there were 17 rubber trees on Lot 3660 (" I counted them ") about to fall down. She said that early in 1957 she paid someone $3,000 to cut them down. She said that there were people living on Lot 3660 and after the defendant signed the agreement she collected rent from them. She last went to the house at the end of 1958. She did not know where the man was who cut down the trees: she had no receipt for the $3,000: she kept no account relating to the land: she had no account of the rents received from Lot 3660 and had given no receipts to the payers. She said she had spent large sums on improving Lot 3660, repairing the plank walls and cementing the floor. She denied that the sister (P.W.4) was living in the house in 1957 or until the end of 1958, when she went to collect rent from her after the action had started. She said specifically that she had collected rent from 1st October 1956 from one family in the house for four months and from another family for six months at $10 per family. She said the other three families had refused to pay rent to her, a fact she said she reported to the lawyer, P.W.1, who told her to collect rent only after the land had been transferred to the defendant: this was not suggested to P.W.1.

Gill J., in holding a common mistake proved, delivered a full reserved judgment. He rehearsed the evidence for the two sides and the documentary evidence. He rejected the evidence of D.W.3 that he had been the broker (and therefore the other evidence for the defendant involving that) and accepted the evidence of P.W.7 (taxi driver) that he was the broker, evidence supported by P.W.8 the prospective purchaser who was only prepared to offer $450 and not $500 per acre for the Gombak land. The judge found this " notwithstanding some apparent discrepancies in the evidence ": this must be a reference to the fact that P.W.5 said that Oh Hiam gave P.W.7 the option but P.W.7 said that P.W.5 and not Oh Hiam gave it

to him. Their Lordships, unlike Ong F.J. in the Federal Court, agree that this difference of evidence is rightly described as only " discrepancies ": the important point is that both agreed that an option was given to P.W.7: exactly who gave it in respect of the lands is unimportant, and might well involve a difference of recollection after nine years: just as P.W.5 was clearly in error in his recollection that the option was for $400 per acre not $500. The judge accepted the evidence of P.W.7 that the defendant and D.W.3 were taken only to the Gombak lands and not to Lot 3660. He clearly rejected the evidence, as untrue, of the defendant and D.W.3 (who denied all knowledge of P.W.7) and told their story of being taken to both pieces of land by P.W.3 who had denied that, and denied the conversation alleged by the defendant and D.W.3 at the Yuen premises in which they said that Lot 3660 had been specifically mentioned as an important aspect of any bargain.

Without going into the details it is plain that the judge rejected lock stock and barrel the evidence given by and led for the defendant in support of his contention that it was intended on both sides to include Lot 3660 in the contract in addition to the Gombak land, and in their Lordships' opinion he was entitled to form that view of their evidence. In addition he expressly rejected as untrue the evidence of the wife D.W.4 as to her alleged activities on Lot 3660 after the contract, by way of improvements and expense of $3,000 in cutting down 17 rubber trees which she had described as falling down, and of collection of rents from October 1956 for some months.

In the Federal Court Ong F.J. sought to analyse the Notes of Evidence, arriving at a diametrically opposite view to that taken by the trial judge on which evidence should be accepted. This approach in an Appellate Court is on general principle very rarely acceptable, as has more than once been said by this Board, notably recently in *Chow Yee Wah v. Choo Ah Pat* [1978] 2 M.L.J. 41.

There remains however on the facts the question whether the learned judge was right in concluding that the evidence to establish a case of common mistake on the part of Oh Hiam and of the defendant in including Lot 3660 in the contract and consequently in the transfer to the defendant was of a sufficiently convincing cogency to satisfy the well known requirements for the remedy of rectification. It was the opinion of Azmi C.J. that the heavy burden had not been overcome by the plaintiffs, though at the same time it must be noted that he agreed with the judgment of Ong F.J.

There is no doubt that Gill J. did not overlook this aspect of the matter, for he cited appropriate authorities to that effect. The fact remains that this is an unusual case, with the vendor unable to give evidence through death before trial. Further there is no evidence of actual words or writings by the defendant before the execution of the contract either that he did not intend to buy Lot 3660, or that he intended to buy only the Gombak lands. For the defendant it was argued before the Board that if all admissible evidence for the plaintiffs was accepted and all evidence for the defendant was rejected, nevertheless a sufficiently convincing case of common mistake had not been made out. While their Lordships would not go so far with Gill J. as to say that the evidence that neither side knew of or intended the inclusion of Lot 3660 was " overwhelming ", or that it was " as clear a case of common mistake as could occur ", nevertheless in their opinion the case is sufficiently made out for purposes of rectification by the evidence and all the circumstances of the case that neither vendor nor purchaser knew or intended when the contract was signed that the Klang Gates Road property was included in the sale. The rejection of evidence does not of course in all cases prove the opposite: but in the instant case the evidence for the defence which was rejected cannot be considered as merely an attempt to improve upon a case that already existed.

Whether the conclusion of the learned judge was right that not until after the *transfer* did the defendant realise that he had got an unintended windfall in Lot 3660 may be open to some question, for some consideration must have been given before transfer to the allocation of the lots among the transferees. On the other hand it may be that the allocation of broadly comparable acreages of land among the four was made on the assumption that they were all Gombak rubber lands. In any event if the former were the fact the defendant would on ordinary principles be liable to suffer rectification on the lines originally pleaded by the plaintiffs.

Accordingly on the factual side of the case their Lordships would uphold the decision of Gill J. that there should be rectification (in effect) by ordering retransfer of the estate to the deceased of Lot 3660, against payment to the defendant of a sum substantially based upon the rate of $450 per acre.

There remains the question of law taken for the defendant, that the equitable remedy of rectification in that form is not available having regard to the fact that the relevant system of land registration is the Torrens system, and to the language of the relevant Land Code (Cap. 138).

Sections 42 and 43 are in the following terms:

> " 42(i) The title of a proprietor, chargee or lessee shall be indefeasible except as in this section provided.
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> (ii) In the case of fraud or misrepresentation to which he is proved to be a party the title of such proprietor, chargee or lessee shall not be indefeasible.
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> (iii) If the registration of any proprietor, chargee or lessee has been obtained by forgery or by means of an insufficient or void instrument such registration shall be void.
>
> (iv) Nothing in sub-sections (ii) or (iii) shall affect the title of a proprietor, chargee or lessee who has taken *bona fide* for valuable consideration from any proprietor, chargee or lessee whose registration as such was procured by any such means or by means of any such instrument as aforesaid or of any person claiming *bona fide* through or under him.
>
> (v) When at the time the proprietor becomes registered a tenant shall be in possession of the land under an unregistered lease or agreement for a lease or for letting for a term not exceeding one year the title of the tenant under such lease or agreement shall prevail.
>
> (vi) Nothing in this section shall be construed so as to prevent the title of any proprietor being defeated by operation of law.
>
> 43. No title to land adverse to or in derogation of the title of the proprietor shall be acquired by any length of possession by virtue of the Limitation Enactment, nor shall the title of any proprietor be extinguished by the operation of any such Enactment ".

It was contended by the defendant that this means what it says: he being on the register his title is indefeasible and accordingly the court cannot take it away from him, since it was neither alleged nor proved that there was fraud or misrepresentation to which he was a party, nor that his registration was obtained by forgery or by means of an insufficient or void instrument.

Apart from authority their Lordships would not expect that the intervention of equity by a remedy *in personam* based upon a transaction to which the plaintiff and defendant were parties would be ousted by such provisions. The Torrens system is designed to provide simplicity and certitude in transfers of land, which is amply achieved without depriving equity of the ability to exercise its jurisdiction *in personam* on grounds of conscience. In the instant case the defendant could have shown an indefeasible title had he sold Lot 3660, a step which he could not take because he undertook to the Court not

to: the Court could have granted an injunction against sale, and that could scarcely have been described as an order inconsistent with his indefeasible title. If the registered proprietor were a trustee, his indefeasible title would not have precluded intervention by the Court in execution of the trust: under the then Land Code there was no express provision for registration as trustee. The indefeasible title would not preclude an order for specific performance of a contract for sale by the proprietor. All these are instances of equity acting in *personam*, and indeed the order in the instant case may be described as an order *in personam* that the registered proprietor should defeat his own title.

There was moreover a number of authorities which deny to the Torrens system the effect for which the defendant contends, where there is not merely a question of competitive claims to the title, but a relationship between the parties justifying intervention by equity acting *in personam*.

In *Frazer v. Walker* [1967] A.C.569 in delivering the judgment of the Board on an appeal from New Zealand in a Torrens system case, Lord Wilberforce, while recognising the immunity of the registered proprietor from adverse claims, added (p.585):

> " In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim *in personam* founded in law or in equity, for such relief as a Court acting *in personam* may grant. That this is so has frequently, and rightly, been recognised in the Courts of New Zealand and Australia: see for example *Boyd v. Mayor, etc. of Wellington* [1924] NZLR 1174, 1223 and *Tataurangi Tairuakena v. Mua Carr* [1927] NZLR 688, 702."

It is worth noting that Sir Garfield Barwick, who would have intimate experience of the Torrens system, was of the Board in *Frazer v. Walker*.

In *Zdrojkowski v. Pacholczak* [1959] NSW 382 it was said (at p.390):

> " The principles relating to the indefeasibility of the title to the land under the Real Property Act on the one hand and the right to rectify documents, which erroneously state the interest to which parties were entitled on the other, do not conflict in any way."

In *Wilkins v. Kannamal* [1951] 17 M.L.J. 99 it was said that the Torrens law is a system of conveyancing; it does not abrogate the principles of equity; it alters the application of particular rules of equity but only so far as is necessary to achieve its own special objects.

In *Taitapu Gold Estates v. Prouse* [1916] NZLR 825 there was erroneously omitted from the conveyance a reservation or exception of minerals which under the contract had been provided to be excepted or reserved. By way of rectification a retransfer of the minerals was ordered. No difficulty was found in ordering reconveyance of the minerals by way of rectification. This followed the comments of the Court in *Paora Torotoro v. Sutton* 1 NZJR NS SC 57 (at p.65) that the effect of a certificate of title is not " as between immediate parties to a contract to alter their rights against and liabilities to each other ". The *Taitapu* case plainly set out the principle that indefeasibility of title under the Torrens system of conveyancing, while operating effectively and indeed necessarily for its effectiveness as between independent rival claimants to a property, in no way interfered with the ability of the Court, exercising its jurisdiction *in personam* to insist upon proper conduct in accordance with the conscience which all men should obey.

Those authorities are additional to those adverted to in *Frazer v. Walker* (*supra*), which latter it is not necessary further to cite.

Their Lordships accordingly reject the legal contention for the defendant that, whatever the facts, rectification is denied by the language of the relevant Land Code.

Accordingly, in summary, their Lordships are of opinion that the appeal should be allowed and the order of Gill J. restored. It would seem that the property Lot 3660 has throughout not been taken over in fact by the defendant. Gill J. made some allowance for the possibility of quit rent having been paid by the defendant. There is no suggestion that since the decision of the Federal Court there has been expenditure by the defendant on Lot 3660, and it is common ground that the defendant has steered clear of the property—the evidence of his wife being rejected. It is possible that some quit rent has since been paid, but there is no evidence. Justice will in their Lordships' view be sufficiently done by simply reversing the decision of the Federal Court and restoring the order of Gill J., with costs here and in the Courts below to be paid by the defendant.

However, in as much as the costs of the appellants now ordered to be paid by the respondent must inevitably exceed the sum of $250 subject to the payment of which the judge ordered rectification, his order should be varied by deleting the condition for payment into Court by the plaintiffs of the sum of $250; but against his liability to pay costs under this order the respondent is to be credited with that sum of $250.

Their Lordships advise His Majesty the Yang di-Pertuan Agong accordingly.

In the Privy Council

OH HIAM (f) (since deceased)

and OTHERS

v.

THAM KONG

DELIVERED BY

LORD RUSSELL OF KILLOWEN

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