

11 of 1975

11

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

No. 23 of 1973

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :-

TRACTORS MALAYSIA BERHAD

Appellants

- and -

TIO CHEE HING

Respondent

RECORD OF PROCEEDINGS

SLAUGHTER AND MAY
35, Basinghall Street,
LONDON, EC2V 5DB
Solicitors for the Appellants.

COWARD CHANCE,
Royex House,
Aldermanbury Square,
LONDON, EC2V 7LD.
Solicitors for the Respondent.

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

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to His Majesty the Yang Dipertuan Agung

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Affidavit of Tio Chee Hing

Further Affidavit of Sandrasegaram Woodhull

Notes of Argument of the Honourable
Mr. Justice Tun Azuri, Lord President

Notes of Argument of the Honourable
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Notes of Argument of the Honourable
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Submission of the Respondent/Applicant

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

No. 23 of 1973

ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN :-

TRACTORS MALAYSIA BERHAD

Appellants

- and -

TIO CHEE HING

Respondent

RECORD OF PROCEEDINGS

In the High
Court in Borneo

No. 1

No. 1

WRIT OF SUMMONS

Writ of Summons
16th May 1973

1. WRIT OF SUMMONS
(O. 2. r. 3)

MALAYSIA
IN THE HIGH COURT IN BORNEO
KOTA KINABALU REGISTRY

Civil Suit No. 199 of 1972

Between

10 Tio Chee Hing
No.14, Neil Malcolm Street,
1st Floor,
Kampong Ayer,
Kota Kinabalu ... Plaintiff

And

Tractors Malaysia Berhad
Mile 3 $\frac{1}{4}$ North Road,
Sandakan. ... Defendant

In the High Court in Borneo

No. 1

Writ of Summons
16th May 1972
(continued)

THE HONOURABLE, TAN SRI ISMAIL KHAN, P.S.M.
D.M.K., P.P.T., B.K.T., Chief Justice of the High Court in Borneo in the name and on behalf of His Majesty the Yang di-Pertuan Agong.

To:

Tractors Malaysia Berhad,
Mile 3½ North Road,
Sandakan.

We command you, that within 20 days after the service of the 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 10

Tio Chee Hing,
No.14 Neil Malcolm Street,
1st Floor,
Kampong Ayer,
Kota Kinabalu.

AND TAKE NOTICE that in default of your so doing the Plaintiff may proceed therein and judgment may be given in your absence, 20

WITNESS, CHEW KUI SANG, Acting Registrar of the High Court in Borneo the day of 1972.

(Sgd) Tio Chee Hing
.....
Plaintiff

.....
Deputy Registrar,
High Court in Borneo,
Kota Kinabalu.

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 the last renewal, including the date of such date and not afterwards. 30

The Defendant (or Defendants) may appear hereto by entering an appearance (or appearances) either personally or by Advocate, at the Registry of the High Court at Kota Kinabalu, Sabah.

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 of \$3.00 with an addressed envelope to the Deputy Registrar of the High Court at Kota Kinabalu, Sabah. 40

STATEMENT OF CLAIMIn the High
Court in BorneoNo. 1Writ of Summons
16th May 1972
(continued)

1. The Plaintiff is the Managing Director of Southern Estate Sendirian Berhad, a Company incorporated in Malaysia and having a place of business at No.14, Neil Malcolm Street, 1st Floor, Kampong Ayer, Kota Kinabalu, Sabah (hereinafter called "Southern")

10 2. Southern entered 19 hire agreements with the Defendant on 1st October, 1967, whereby the Defendant agreed to let and Southern agreed to hire 19 tractors. Each of the 19 hire agreements was in respect of a single tractor, the terms of which are identical save for the rents payable.

3. Southern was unable to pay the rents under the said hire agreements and on 31st October, 1968, Southern was indebted to the Defendant in the sum of \$2,298,617.75.

20 4. The Defendant re-possessed the 19 tractors under the said hire agreements on 31st October, 1968.

5. It became obvious that Southern was insolvent and the Defendant would be unable to recover the said sum of \$2,298,617.75. Legal action against Southern would be futile.

6. The said 19 hire agreements were not guaranteed through the oversight of the Defendant.

30 7. On 20th November, 1968 the Defendant, through their (sic) Solicitors, Thomas Jayasuriya & Co., contracted the Plaintiff by telephone to say that the Defendant wanted to discuss Southern's debt. The Plaintiff agreed and accordingly went along to Thomas Jayasuriya's office in Kota Kinabalu on 21st November, 1968.

8. Present at the meeting were the Defendant's representatives, Mr. J.S.Eakin and Mr. Edward Chan, and Mr. Thomas Jayasuriya.

40 9. The Defendant's aforesaid representative asked Plaintiff if he would be prepared to ensure repayment of Southern's debts. The Plaintiff said he would but made it clear that all his lands comprised in the Lahad Datu New Town development

In the High
Court in Borneo

No. 1

Writ of Summons
16th May 1972
(continued)

projects will under no circumstances be utilized in repaying Southern's debts. The Plaintiff agreed as aforesaid solely as a man of honour and a gentleman.

10. At no time either before or during this discussion was the question of action against Southern by the Defendant ever raised.

11. Immediately after the Plaintiff agreed as aforesaid Mr. Jayasuriya got his staff to prepare a document. The document was prepared on the same morning of the 21st day of November, 1968. The Plaintiff is not literate in English. Mr. Eakin and Mr. Jayasuriya orally assured the Plaintiff that all that the document contained only the terms of the agreement as stated in paragraph 9 hereof. No one read over or translated the lengthy document to the Plaintiff before he signed it. In reliance on the said assurance the Plaintiff signed the document. In fact the assurance was false and was made fraudulently in that, as Mr. Eakin and Mr. Jayasuriya well knew, the Agreement contained the following terms:-

- (a) That the Defendant had "at the request of the (Plaintiff) ... agreed not to take legal proceedings for the recovery of the said sums from (Southern) for the time being.
- (b) That the Plaintiff guarantees as principal debtor the payment to Southern's debts.

12. The assurance was also false in that the agreement that the Plaintiff's lands comprised in the Lahad Datu New Town development projects were not to be utilized in reducing Southern's indebtedness to the Defendant was not made a term in the Agreement.

13. On 1st May, 1969 the Plaintiff executed a charge on Country Lease Nos. 10786, 10793, 10795, 10797, 10800, 10801 and 10806 in favour of the Defendant to secure the sum of \$1,000,000.00 being part of the debt owing by Southern to the Defendant as aforesaid.

14. In spite of this on 29th October, 1969, the Defendant commenced legal proceedings against

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Southern in Civil Suit No. 189 of 1969 and against the Plaintiff in Civil Suit No. 190 of 1969 in pursuance of the said document for the full sum of \$2,298,617.75 and obtained summary judgment in the suit on 27th December, 1969.

In the High
Court in Borneo

—
No. 1

Writ of Summons
16th May 1972
(continued)

10 15. Contrary to the true Agreement between the Plaintiff and the Defendant as aforesaid, the Defendant on 3rd July, 1971, sought and obtained a prohibitory order wherein the Plaintiff was prohibited from transferring, charging or sub-
leasing his lands comprised in Lahad Datu Lease Nos. 30809, 10784, 10785 and 10792 and provisional Lease No. 28039. As a result the Plaintiff has suffered loss and damage.

20 16. Again contrary to the true Agreement between the Plaintiff and the Defendant as aforesaid the Defendant on 28th August, 1971 sought and obtained a prohibitory order wherein the Plaintiff was prohibited from transferring, charging or sub-
leasing his lands comprised in Lahad Datu Country Lease No. 10789. Further the Defendant obtained an Order of Sale from this Honourable Court of the land comprised in the said Lease. As a result the Plaintiff has suffered loss and damage.

17. The Plaintiff is now advised by his Solicitors that the document is not enforceable, the consideration stated therein to be given was not in fact given.

And the Plaintiff claims:-

- 30 (i) That Order of the learned Deputy Registrar giving leave to the Defendant to enter judgment under Order 14 rule 1 in Civil Suit No. 190 of 1969 be set aside.
- (ii) A declaration that the Judgment entered pursuant to the said Order be set aside.
- 40 (iii) A declaration that the document signed by the Plaintiff as aforesaid is null and void and unenforceable as no consideration was given by the Defendant.
- (iv) Alternatively that the document be rectified to include the term as set out in paragraph 12 hereof.

In the High Court in Borneo

No. 1

Writ of Summons
16th May 1972
(continued)

- (v) Rescission of the written Agreement dated 21st November, 1968 and made between the Plaintiff and the Defendant.
- (vi) An order that the prohibitory order referred to in paragraph 15 hereof be set aside.
- (vii) That the order referred in paragraph 16 hereof be set aside.
- (viii) Damages for fraudulent misrepresentation. 10
- (ix) Damages flowing from broach of the agreement stated in paragraph 16 hereof.
- (x) Further or other relief.

Dated the 16th day of May, 1972.

(Sgd) Tio Chee Hing

Plaintiff

This Writ was issued by Tio Chee Hing whose address for service is No.14 Neil Malcolm Street, 1st Floor, Kampong Ayer, Kota Kinabalu. 20

This Writ was served by me at
on the Defendant
on the day of 1972
at the hour of

Indorsed the day of 1972.

(Signed)

(Address)

No. 2SUMMONS IN CHAMBERSIn the High
Court in BorneoNo. 2Summons in
Chambers
22nd June 1972

LET ALL parties concerned appear before the Judge in Chambers on Friday the 30th day of June, 1972, at 9.00 o'clock in the forenoon on the hearing of an application on the part of the Defendant herein for an Order.-

10 (1) That the Writ of Summons herein and the service thereof and all subsequent proceedings herein be set aside and the action dismissed on the grounds following:-

(a) That the Writ is not indorsed in accordance with O. 3. r. 3 of the Rules of the Supreme Court 1957;

(b) That the Plaintiff is estopped from taking the present action;

(c) That the present action is frivolous or vexatious, and

20 (2) That the Plaintiff do pay to the Defendant costs of this action and of and occasioned by this application to be taxed.

Dated this 22nd day of June, 1972.

Sgd: Deputy Registrar,
High Court in Borneo,
Kota Kinabalu.

30 This Summons is taken out by Messrs. Thomas Jayasuriya & Co., Advocates for the abovenamed Defendant, whose address for service is at Great Eastern Life Building, 2nd Floor, Kota Kinabalu, Sabah, Malaysia.

The affidavit of Mr. Thomas Jayasuriya sworn to on the 20th day of June, 1972 and filed herein will be read in support of this Summons.

In the High
Court in Borneo

No. 3

No. 3

AFFIDAVIT OF THOMAS JAYASURIYA

Affidavit of
Thomas
Jayasuriya
25th June 1972

I, THOMAS JAYASURIYA, of Great Eastern Life Building, 2nd Floor, Kota Kinabalu, a partner in the firm of Thomas Jayasuriya & Co., Advocates for the above-named Defendant make oath and say as follows:-

1. I have the conduct of this case on behalf of the Defendant and also the case in Civil Suit No. 190 of 1969 to which reference is made in the Plaintiff's Statement of Claim in the present proceedings and whose judgment the Plaintiff seeks to set aside in the present proceedings. 10

2. The Statement of Claim indorsed on the Writ in the present proceedings contains an allegation of fraud in paragraph 11 thereof and is excepted from the provisions of O. 3 r. 6 of the Rules of the Supreme Court 1957. The indorsement on the Writ is not therefore in accordance with O. 3 r 3 of the said Rules. 20

3. The Judgment in Civil Suit No. 190 of 1969 was entered on the admitted defence of the Plaintiff (Defendant in that Suit), a fact that is not mentioned in the Statement of Claim in the present proceedings. The Plaintiff had also in earlier proceedings heard on the 13th day of March, 1972 (hereinafter referred to as "former proceedings") applied for the Judgment to be set aside on the same or substantially the same allegation, and his application was dismissed. 30

4. The Agreement dated the 21st day of November, 1968, which presumably is the Agreement referred to in the Statement of Claim, was not prepared in the manner alleged by the Plaintiff.

5. In the month of November, 1968, Mr. J.S.Eakin, the then Singapore Finance Manager of the Defendant, came to consult me on action to be taken against Southern Estate Sendirian Berhad (hereinafter referred to as "the Company") in respect of a large amount of debt due to the Defendant for tractors hire. The Company was wholly owned by the Plaintiff and his wife and the tractors were hired to the Company at the Plaintiff's request. 40

6. The next day or a few days later, Mr. Eakin came with the Plaintiff to see me for an agreement to be drawn up for the Plaintiff to guarantee and pay for the Company's debt and for the Defendant not to take Court action against the Company. From the discussion that followed it was obvious that the Plaintiff would wish to avoid Court action because of his Lahad Datu New Town project. The concessions made by the Plaintiff and contained in the Agreement reflect the respective positions of the parties at the discussion. The Plaintiff was confident in raising loans to pay the debt.

10

7. I personally prepared the draft of the Agreement on the basis of the discussion and on the next day I gave a copy of the draft to each of the parties. They discussed amendments to the draft with me at a subsequent meeting, following which the Agreement was faired. The Plaintiff later signed the Agreement in my presence and I recollect that he read it before signing. Mr. Eakin later signed the Agreement but not in my presence. The Plaintiff spoke in English and all the discussions were conducted in the English language.

20

8. The Agreement contains a faithful account of the matters agreed to at the discussion. A copy of the Agreement is attached to the affidavit exhibited under paragraph 32 hereof.

9. There is no truth in the Plaintiff's allegation that he made it clear at the discussion that his lands comprised in the Lahad Datu New Town project would under no circumstances be utilised to repay his Company's debt to the Defendant paragraph 9 of his Statement of Claim. Clause 2 of the Agreement clearly provides that no demand for the immediate full payment of the debt shall be made to the Plaintiff so long as he complies with the conditions specified in that clause, one of which (clause 2(3)) requires the Plaintiff at the request of the Defendant to execute a charge of all his lands except lands comprised in his New Town project. That clause was to give him time to pay, to require him to pay by instalments and to give security by charging his lands. The exclusion is in reference to charging of lands and at no time has the Plaintiff been asked to charge the excepted lands.

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In the High
Court in Borneo

No. 3

Affidavit of
Thomas
Jayasuriya
25th June 1972
(continued)

In the High
Court in Borneo

No. 3

Affidavit of
Thomas
Jayasuriya
25th June 1972
(continued)

10. There is also no truth in his allegation that at no time during the discussion was the question of action against the Company ever raised.

11. There is also no truth in his new allegations that the assurances stated in paragraph 11 and 12 of his Statement of Claim were given to him, and these allegations and the allegation of fraud could have been raised in the former proceedings but were not raised. The allegation of fraud has also not been pleaded with sufficient particularity. 10

12. On the 1st day of May, 1969, as a result of the Plaintiff's failure to make the payment under the Agreement, the Plaintiff was required and did execute a Charge in respect of 7 pieces of land. Such request was in accordance with Clause 2(3) of the Agreement.

13. On the 28th day of October, 1969 as a result of the Plaintiff's continued failure to make any payment under the Agreement despite repeated demands, the Defendant took out a Specially Indorsed Writ of Summons against the Plaintiff claiming the total sum of \$2,056,987.68. (A separate Writ was also taken against the Company on the same day). 20

14. The Writ was served personally on the Plaintiff. He had full notice of the Statement of Claim indorsed thereon, which expressly referred to the Agreement, to the Defendant's forbearance to sue the Company as its consideration and to the non-payment by the Plaintiff.

15. On the 14th day of November, 1969 the Plaintiff entered appearance by his Advocates Messrs. Chong Thain Yun & Co. On the 1st day of December, 1969 by his advocates he entered Defence admitting liability to the extent of \$718,266.85. The reduced figure was as agreed between the parties after allowing for certain rebates and payments made. No objection was taken against the Agreement. 30

16. On the 4th day of December, 1969, the Defendant made application for leave to enter final judgment against the Plaintiff in the said sum of \$718,266.85. Leave was granted on the 27th day of December, 1969 and judgment entered. The Plaintiff was represented by his advocates at the hearing of the application who again admitted to the said sum. 40

17. On the 26th day of January, 1970, the Defendant obtained a prohibitory order in respect

of 5 land titles which included the 4 land titles comprised in the New Town project. No objection was taken to the application or the prohibitory order at any time. Nor was the application in breach of the Agreement for the reasons given in paragraph 9 herein and in any event the whole of clause 2 of the Agreement giving the Plaintiff a no demand protection would have no further application by reason of his own breaches.

In the High
Court of Borneo

No. 3

Affidavit of
Thomas
Jayasuriya
25th June 1972
(continued)

10. 18. On the 16th day of June, 1970, the Plaintiff was examined on a Judgment Debtor Summons at which he was also represented by his advocates. He spoke again of loans he hoped to raise to pay the debt.

20 19. On the 28th day of August, 1971, a further prohibitory order was obtained against Lease No. 10789. This is the land which evidently has given rise to his present complaint and in the former proceedings. The land was the subject of a previous order for sale in favour of the Chartered Bank (Civil Suit No.37 of 1970) and Lawrence Chin and Associates (Civil Suit No.115 of 1971) whose debts were subsequently satisfied by the Plaintiff and the land released. This is not land "comprised" (clause 2(3) of the Agreement) in the New Town project. In any event clause 2 of the Agreement would have no further application for the reasons given in paragraph 17 hereof.

30 20. On the 18th day of September, 1971 the Defendant obtained an order of sale of the land in Lease No. 10789 by auction, the auction to take place on the 16th day of October, 1971.

21. The sale was postponed at the request of the Plaintiff to enable him to raise funds to satisfy the judgment, and on the 8th day of October, 1971 the Defendant obtained an order for the postponed sale to take place on 30th day of October, 1971.

40 22. The sale was again postponed at the request of the Plaintiff to enable him to raise funds to make payment, and on the 1st day of November, 1971 the Defendant obtained an order for the sale to take place on the 27th day of November, 1971.

23. On the 18th day of November, 1971, Messrs. Shelley Yap acting for the Plaintiff wrote to our firm informing us that the Plaintiff was "determined" to sell by tender the 4 pieces of land comprised in the New Town project and asked us not to proceed

In the High
Court in Borneo

No. 3

Affidavit of
Thomas
Jayasuriya
25th June 1972
(continued)

with the auction sale on the 27th day of November, 1971. The Defendants did not agree to further postponement.

24. However, the scheduled auction on the 27th day of November, 1971 did not take place because the Court Bailiff could not obtain a plane seat to Lahad Datu.

25. On the 30th day of November, 1971, the Defendant obtained a new date for the auction of the said land in Lease No. 10789 to take place on the 8th day of January, 1972. 10

26. Various requests were made by the Plaintiff by himself and by his advocates to me and to the Defendant for postponement.

27. On the 6th day of January, 1972 on the application of the Plaintiff by his advocates Messrs. Chong Thain Vun & Co., this Honourable Court granted a postponement of the auction sale for 2 months to the 29th day of February, 1972 to enable the Plaintiff to raise funds. 20

28. Upon the expiry of the postponed date, and with no prospects of raising funds, the Plaintiff filed an application to set aside the Judgment referred to in paragraph 6 hereof. The application was supported by an affidavit of the Plaintiff and I also filed an affidavit. The application was heard and dismissed on the 13th day of March, 1972, and against the dismissal there has been no appeal.

29. At the same time the Plaintiff filed an application for a further postponement of the auction sale for 6 months on the ground that negotiations for financial assistance were pending. This Honourable Court granted the application on the 13th day of March, 1972 but for a period of 4 months from the said date of the order. It was also ordered that the Plaintiff was to keep the Defendant informed of progress of his negotiations but in so far as I am aware the Defendant has not been kept so informed. 30

30. On the 16th day of May, 1972 the Plaintiff issued the Writ in the present proceedings. 40

31. The allegations and issues raised in the Statement of Claim and this Affidavit are the same or substantially the same as those raised or could have been raised in the two affidavits filed in the former proceedings and referred to in paragraph 28 hereof.

32. There are now produced and shown to me the following copies of documents filed in Civil Suit No. 190 of 1969 (to be read in reverse order as regards Plaintiff and Defendant) -

In the High
Court in Borneo

No. 3

Affidavit of
Thomas
Jayasuriya
25th June 1972
(continued)

- 10 (1) A copy of the Defence referred to in paragraph 15 hereof and marked "TJ-1".
- (2) A copy of the Judgment referred to in paragraph 16 hereof and marked "TJ-2".
- (3) A copy of the Summons and supporting affidavit (with Agreement attached) of the Plaintiff in the former proceedings referred to in paragraphs 28 and 31 hereof and marked "TJ-3A and "TJ-3B" respectively;
- (4) A copy of my affidavit in reply filed therein and referred to in paragraphs 28 and 31 hereof and marked "TJ-4".
- 20 (5) A copy of the Order of this Honourable Court dismissing the application referred to in paragraph 28 hereof and marked "TJ-5".

33. In the premises, I say that the Plaintiff is estopped from taking the present proceedings.

34. I also say that the action in the present proceedings is frivolous or vexatious with intent to defeat the ends of justice and delay in the legitimate execution of the Judgment in respect of which ample opportunity has been given to the Plaintiff to settle.

30 35. I pray that the Writ may be set aside and the action dismissed with costs.

SWORN at Kota Kinabalu by the)
said Thomas Jayasuriya this } Sd. Thomas Jayasuriya
25th day of June, 1972. }

Before me,

Sd. E.L.B. Hawkin
Commissioner for Oaths,
Kota Kinabalu,
SABAH.

40 This Affidavit is filed by Messrs. Thomas Jayasuriya & Co., Advocates for the Defendants, whose address for service is Great Eastern Life Building, 2nd Floor, Kota Kinabalu, Sabah.

In the High
Court in Borneo

EXHIBIT "T.J. 1" DEFENCE IN CIVIL SUIT NO.190 OF
1969

Exhibit "TJ-1"
Defence in
Civil Suit
No. 190 of 1969
1st December
1969

COPY

M A L A Y S I A

STATE OF SABAH

IN THE HIGH COURT IN BORNEO

KOTA KINABALU REGISTRY

CIVIL SUIT NO. 190 OF 1969

BETWEEN

TRACTORS MALAYSIA BERHAD ... Plaintiff 10

AND

TIO CHEE HING
P.O. BOX NO. 56,
LAHAD DATU. ... Defendant

D E F E N C E

1. The Defendant says that the adjusted sum now due to the Plaintiff is \$718,266.85.
2. The Defendant admits liability as to the said sum of \$718,266.85.

Dated the 1st day of December, 1969. 20

(SGD) CHONG THAIN VUN & CO.

ADVOCATES FOR DEFENDANT

This Defence is filed by Chong Thain Vun & Co., Advocates for the Defendant whose address for service is 135, Gaya Street, (2nd Floor), Kota Kinabalu.

EXHIBIT "T.J.2" JUDGMENT IN CIVIL SUIT NO. 190
OF 1969

In the High
Court in Borneo

COPY

Exhibit "T.J.2"
Judgment in
Civil Suit
No. 190 of 1969
27th December
1969

M A L A Y S I A

STATE OF SABAH

IN THE HIGH COURT IN BORNEO

KOTA KINABALU REGISTRY

CIVIL SUIT NO. 190 OF 1969

BETWEEN

10 TRACTORS MALAYSIA BERHAD ... Plaintiff

And

 TIO CHEE HING ... Defendant

BEFORE MR. ADRIAN LEE
DEPUTY REGISTRAR

IN CHAMBERS

THIS 27TH DAY OF DECEMBER, 1969

JUDGMENT

20 The Defendant having appeared to the Writ of
Summons herein, and the Plaintiff having by the
Order of Mr. Adrian Lee, Deputy Registrar, High
Court, Kota Kinabalu, dated the 27th day of
December, 1969, obtained leave to enter Judgment
under the Rules of the Supreme Court, Order 14,
Rule 1, in the sum of \$718,266.85 with interest
thereon at the rate of 6% per annum from the date
of Judgment to the date of payment and \$120/-
costs IT IS THIS DAY ADJUDGED that the Plaintiff
recover against the Defendant the sum of
\$718,266.85 with interest thereon at the rate of
30 6% per annum from the date of Judgment to the
date of payment and \$120/- costs.

Given under my hand and the Seal of the Court
this 27th day of December, 1969.

(SEAL)

(SGD.) RONALD CHIN
DEPUTY REGISTRAR,
HIGH COURT,
KOTA KINABALU.

In the High Court in Borneo

EXHIBIT "T.J.3A" SUMMONS-IN-CHAMBERS IN CIVIL SUIT NO. 190 OF 1969

Exhibit "T.J.3A"
Summons-in-Chambers in Civil Suit No. 190 of 1969
6th March 1973

COPY

M A L A Y S I A

STATE OF SABAH

IN THE HIGH COURT IN BORNEO

KOTA KINABALU REGISTRY

CIVIL SUIT NO. 190 OF 1969

BETWEEN

TRACTORS MALAYSIA BERHAD ... Plaintiffs 10

And

TIO CHEE HING ... Defendant

SUMMONS-IN-CHAMBERS

LET ALL PARTIES CONCERNED appear before the Honourable Judge in Chambers before the High Court, Kota Kinabalu on Monday, the 13th day of March, 1972, at 10.00 o'clock in the forenoon on the hearing of an application on the part of the Defendant that:-

- (1) the Order of the learned Deputy Registrar giving leave to the Plaintiffs to enter judgment under Order 14 r.1 be set aside; 20
- (2) the Judgment entered pursuant to the said Order to set aside, and
- (3) that the Defendant be granted unconditional leave to defend,

and that the costs of this application may be provided for.

Dated this 6th day of March, 1972. 30

(SEAL)

(SGD) ROLAND CHIN
DEPUTY REGISTRAR
HIGH COURT IN BORNEO,
KOTA KINABALU.

Exhibit "T.J.3A"
Summons-in-
Chambers in
Civil Suit
No. 190 of 1969
6th March 1972
(continued)

This Summons is taken out by Messrs. Shelley Yap, Advocates for the abovenamed Defendant, whose address for service is at No. 121 Gaya Street, P.O. Box No. 980, Kota Kinabalu, Sabah.

10 This Affidavit of Mr. Tio Chee Hing affirmed on the 1st day of March, 1972 and filed herein will be read in support of this Summons in Chambers.

TO:-

Tractors Malaysia Berhad and
their Advocates, Messrs.
Thomas Jayasuriya & Co.,
Great Eastern Life Building,
2nd Floor,
Kota Kinabalu, Sabah,
Malaysia.

In the High Court in Borneo

EXHIBIT "T.J.3B" AFFIDAVIT OF TIO CHEE HING IN CIVIL SUIT NO. 190 OF 1969 WITH AGREEMENT ATTACHED

Exhibit "T.J.3B" Affidavit of Tio Chee Hing in Civil Suit No. 190 of 1969 with Agreement attached 1st March 1972

COPY
M A L A Y S I A
STATE OF SABAH
IN THE HIGH COURT IN BORNEO
KOTA KINABALU REGISTRY
CIVIL SUIT NO. 190 OF 1969

BETWEEN

TRACTORS MALAYSIA BERHAD ... Plaintiffs 10

And

TIO CHEE HING ... Defendant

A F F I D A V I T

I, TIO CHEE HING (NRIC NO.302083) of Mile 1/2, Tengah Nipah Road, Lahad Datu, Sabah, affirm and say as follows:-

1. I am the Defendant named in the above-mentioned suit.
2. I am also the Managing Director of Southern East Sendirian Berhad (hereinafter called "Southern"), the Defendant named in Civil Suit No. 189 of 1969, in which the abovenamed Plaintiffs were also the Plaintiffs therein. 20
3. On 1st October, 1967, the Plaintiffs entered into 19 hire agreements with Southern for the hire of tractors to Southern.
4. Southern was heavily indebted to the Plaintiffs under the said hire agreements.
5. By November, 1968 Southern was owing to the Plaintiffs about \$2,000,000-00. 30
6. At no time did the Plaintiffs talk of or mention legal proceedings against Southern to recover the said debt. The reason for this is obvious. Southern had no means of discharging the

debt and, being a registered company, the only remedy against it would be to cause it to be wound up. This is borne out by the fact that none of the correspondence in the matter predates 21st November, 1968. Furthermore in none of the letters sent by the Plaintiffs in the matter after 21st November, 1968 was this ever mentioned.

10 7. As the Plaintiffs have, for reasons best known to themselves, neglected to see that security was given before the 19 hire agreements were signed as aforesaid they were in a quandary. Consequently their Solicitor Mr. Thomas Jayasuriya got in touch with me by telephone on 20th November, 1968. He asked me if I could be at his office to discuss Southern's indebtedness to the Plaintiffs. I said I could and went to Mr. Jayasuriya's office on 21st November, 1968.

20 8. Present at the meeting were J.S. Eakin (Finance Manager of Tractors Malaysia Berhad) Edward Chan (Tractors Malaysia Berhad, Kota Kinabalu office) Thomas Jayasuriya (Solicitor of Tractors Malaysia Berhad) Tio Chee Hing.

30 9. Mr. Jayasuriya asked me if I would agree to sign a personal guarantee to ensure that Southern's debts to the Plaintiffs under the said agreements would be discharged in view of the fact that the Plaintiffs had not obtained security prior to entering into the agreements. I could have refused as I was in no way personally liable to the Plaintiffs. However I agreed not because the Plaintiffs threatened to sue Southern (this was never even mentioned) but being a gentleman and a man of honour. I told the meeting that I would assume primary liability but made it clear that my lands comprised in the Lahad Datu New Town projects should on no account be utilised in any way to discharge Southern's debts to the Plaintiffs. Mr. J.S. Eakin agreed.

40 10. Prior to 21st November, 1968 the Plaintiffs had already re-possessed all but 6 of the tractors and spare parts hired to Southern under the said agreements. If I were to personally pay Southern's debts to the Plaintiffs I would need these 6 tractors to carry out the logging at Bintulu to earn sufficient income. I therefore asked the Plaintiffs' representative at the meeting to let

In the High
Court in Borneo

Exhibit "T.J.3B"
Affidavit of
Tio Chee Hing
in Civil Suit
No. 190 of 1969
with Agreement
attached
1st March 1972
(continued)

In the High
Court in Borneo

Exhibit "T.J.3B"
Affidavit of
Tio Chee Hing
in Civil Suit
No. 190 of 1969
with Agreement
attached
1st March 1972
(continued)

me have the use of the 6 tractors. They agreed.

11. The Guarantee was then immediately prepared by Mr. Jayasuriya and I signed it. A copy of the said agreement is annexed hereto and marked "TCH 1".

12. In end December, 1968 the Plaintiffs re-possessed the 6 tractors contrary to the agreement, causing me considerable loss. I protested to the Plaintiffs who were adamant. At the same time they pressed for payments under the Guarantee. Copies of correspondence are put in a bundle annexed hereto and marked "TCH 2". 10

13. The Plaintiffs proceeded to mount pressure on me to discharge Southern's debts to them.

14. The Plaintiffs pressed me to sign a Memorandum of Charge under Section 104 of the Lands Ordinance Cap.68 authorising them to obtain an Order from the Collector of Land Revenue for the sale of lands comprised in Country Leases Nos. 10786, 10793, 10795, 10797, 10800, 10801 and 10806, should I fail to make payments. Being a man of honour I signed the Memorandum of Charge as aforesaid on 1st May, 1969. Not satisfied with this the Plaintiffs commenced the abovementioned suit against me. They consequently applied for a summary judgment and obtained summary judgment in the suit on 27th December, 1969. Although I tried my very best to obtain funds I failed. Thereupon on 3rd July, 1971 the Plaintiffs sought and obtained a prohibitory order wherein I was prevented from transferring, charging or sub-leasing my lands comprised in Lahad Datu Leases Nos. 30809, 10784, 10785, 10792 (NEW TOWN PROJECT TITLES) and provisional Lease No. 28039. 20 30

15. Contrary to the agreement reached at Mr. Jayasuriya's office on 21st November, 1969 as aforesaid the Plaintiffs have caused land belonging to me and comprised in Lease No. 10789 (which forms part of my New Town Lahad Datu Project) to be auctioned on 6th March, 1972.

16. When the Plaintiffs sought summary judgment as aforesaid I did not instruct my Solicitors, Messrs. Chung Thain Vun & Co. to oppose the application for only one reason i.e. being a man of honour I did not wish to go back on my words once 40

10 given. However in view of what the Plaintiffs have done in hounding me and persisting in ruining me financially I sought the advice of Messrs. Sharikat S.K. Lee of 42, Jalan Ah Fook, Johore Bahru, West Malaysia. I have now been advised by Messrs. Sharikat S.K. Lee that the Guarantee which stated that the consideration was the forbearance of legal proceedings against Southern Estate Sendirian Berhad was in fact not given by the Plaintiffs. The agreement is not enforceable. In view of this I have been advised that the judgment had been obtained pursuant to Order 14 r. 1 of the Rules of the Supreme Court I am entitled to set aside the Order of the learned Deputy Registrar giving leave to the Plaintiffs to enter judgment under Order 14 r. 1 the judgment entered pursuant to the said Order. I have been advised that having regard to the facts of this case I have a good defence on the merits.

In the High Court in Borneo

Exhibit "T.J.3B"
Affidavit of
Tio Chee Hing
in Civil Suit
No. 190 of 1969
with Agreement
attached
1st March 1972
(continued)

20 17. My solicitors have also pointed out to me that the fact that the Guarantee cited that I was the principal debtor is consistent with what I have said about my agreement to become principal debtor in discharging Southern's debts to the Plaintiffs. Furthermore paragraph 3 of the said Guarantee clearly supports what I have said in paragraph 9 hereof.

30 18. Having regard to the matters aforesaid, I respectfully ask that the Order granting leave to the Plaintiffs and the said judgment may be set aside and that I may be granted unconditional leave to defend this action.

AFFIRMED on the 1st day)
of March, 1972 at Kota) (Sgd.) Tio Chee Hing.
Kinabalu.

Before me,

(Sgd) Wong Kiang Fun

Advocate & Solicitor
Commissioner for Oaths,
Sabah.

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This Affidavit is filed by Messrs. Shelley Yap, Advocates for the abovenamed Defendant, whose address for service is at No.121, Gaya Street, P.O. Box 980, Kota Kinabalu, Sabah.

In the High Court in Borneo

Exhibit "T.J.3B"
Affidavit of
Tio Chee Hing
in Civil Suit
No. 190 of 1969
with Agreement
attached
1st March 1972
(continued)

AN AGREEMENT made this 21st day of November, 1968 BETWEEN TRACTORS MALAYSIA BERHAD a Company incorporated in Malaysia and having its registered office at 54 Ampang Road, Kuala Lumpur, Selangor (hereinafter referred to as "the Company" which expression shall unless the context otherwise requires include its successors and assigns) of the one part AND TIO CHEE HING of Mile $\frac{1}{2}$, Tengah Nipah Road, Lahad Datu, Sabah (hereinafter referred to as "the Guarantor" which expression shall unless the context otherwise requires include his successors and assigns) of the other part

10

WHEREAS at the request of the Guarantor the company let on hire to the Southern Estate Sendirian Berhad a Company incorporated in Malaysia and having its registered office in Sabah (hereinafter referred to as "the Hirer") the machinery referred to in the various Agreements specified in the Schedule hereto;

20

AND WHEREAS in default of payments under the said Agreements and in pursuance of the said Agreements the Company has taken or is in the course of taking possession of the said machinery:

AND WHEREAS under the said Agreements the Hirer is indebted to the Company:-

- (a) in the sum of \$1,978,933.36 (One million nine hundred and seventy eight thousand, nine hundred and thirty three dollars and thirty six cents) as shown by the respective amounts against the said Agreements in the Schedule hereto, which sum has become due and payable;
- (b) in the sum of \$272,131.31 (Two hundred seventy thousand, one hundred and thirty one dollars and thirty one cents) in respect of spare parts supplied and services rendered, which sum has also become due and payable;
- (c) such additional sum as representing the costs of taking possession of the machinery as aforesaid and such other additional sums as may be due under the said Agreements in respect of which the Company shall inform the Guarantor and the Hirer as soon as the sums are known,

30

40

and all such aforesaid sums shall hereinafter collectively be referred to as "the debt";

In the High
Court in Borneo

AND WHEREAS at the request of the Guarantor the Company has agreed not to take legal proceedings for the recovery of the said sums from the Hirer for the time being:

Exhibit "T.J.3B"
Affidavit of
Tio Chee Hing
in Civil Suit
No. 190 of 1969
with Agreement
attached
1st March 1972
(continued)

NOW THIS AGREEMENT WITNESSETH as follows:-

1. In consideration of the aforesaid premises the Guarantor hereby undertakes and guarantees as principal debtor the payments to the Company on demand the said sum of \$1,978,933.36 (one million, nine hundred and seventy eight thousand, nine hundred and thirty three dollars and thirty six cents) and such additional sum as representing the costs of taking possession of the machinery and any other additional sums as may be due under the said Agreements as aforesaid (hereinafter collectively referred to as "the debt"). The Company shall inform the Guarantor as soon as the additional sums are known.

2. No demand to the Guarantor for the immediate full payment of the debt shall be made for so long as the Guarantor complies with each and every one of the following conditions:-

- (1) The Guarantor shall transport and deliver at his own expense all the machinery in respect of which possession has been or is in the course of being taken by the Company as aforesaid to such place or places as shall be required by the Company;
- (2) The Guarantor shall within two weeks hereof furnish to the Company a list of the titles of all lands owned by the Guarantor or the Hirer with information as to whether the lands are charged, to whom they are charged and for what amounts;
- (3) At the request of the Company the Guarantor shall execute a charge or a second charge as the case may be in respect of all lands owned by the Guarantor and shall cause the Hirer to execute a charge or a second charge as the case may be in respect of all lands owned by the

In the High
Court in Borneo

Exhibit "T.J.3B"
Affidavit of
Tio Chee Hing
in Civil Suit
No. 190 of 1969
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attached
1st March 1972
(continued)

Hirer subject in every case to any consent that may be required of any charges and pending the execution of such charges the Guarantor shall not and undertakes to ensure that the Hirer shall not create new or further charges in respect of the lands owned by them respectively without the consent of the Company provided that the provisions of this paragraph shall not apply to the lands comprised in the Guarantor's New Town Project in Lahad Datu;

10

(4) The Guarantor shall not and undertakes to ensure that the Hirer shall not obtain new loans or overdrafts or obtain any increase to their present loans or overdrafts without the consent of the Company provided that such consent shall not be withheld in respect of loans to be obtained from the Singapore Finance Group or Company with which the Guarantor is presently negotiating for the purpose of financing the Guarantor's New Town Project in Lahad Datu;

20

(5) The Guarantor shall pay monthly to the Company towards the discharge of the debt as aforesaid the sum of \$50,000.00 (fifty thousand dollars), the first payment to be made on the 15th day of March, 1969 and thereafter on the 1st day of every succeeding month;

30

(6) If the Guarantor succeeds in obtaining a loan from the Singapore Finance Group or Company as aforesaid the Guarantor shall immediately pay to the Company without demand the sum of \$300,000.00 (Three hundred thousand dollars), such payment shall be in addition to the monthly payments specified in the preceding paragraph and shall be towards reduction of the debt as aforesaid.

40

3. Nothing herein contained shall extinguish or reduce the liability of the Hirer for the debt as aforesaid except to the extent of payments made by the Guarantor and nothing herein contained

shall preclude the Company from proceeding or taking legal proceedings against the Hirer for the recovery of the debt or balance thereof or part thereof upon the breach by the Guarantor of any of the conditions of this Agreement, and for the avoidance of doubt it is hereby declared that the taking of such proceedings against the Hirer as aforesaid shall not relieve the Guarantor of his liability and obligations under this Agreement and shall not preclude the taking of legal proceedings against the Guarantor for the recovery of the debt or balance thereof or part thereof.

In the High
Court in Borneo

Exhibit "T.J.3B"
Affidavit of
Tio Chee Hing
in Civil Suit
No. 190 of 1969
with Agreement
attached
1st March 1972
(continued)

4. The liability and obligations of the Guarantor shall not be discharged except by performance and then only to the extent of such performance and shall not be impaired by any failure to assert any right or remedy against the Hirer or by any arrangements made with or concession given to the Hirer and shall not in any way be prejudiced or affected by any collateral or other security which may hereafter be given to or taken by the Company in respect of the debt.

5. This Agreement shall not be determined or affected in any way by the death or insanity of the Guarantor but shall in all respects and for all purposes be binding and operative until discharge by performance as aforesaid.

6. The Guarantor shall pay all fees in connection with the preparation of this Agreement and of the charges hereinbefore mentioned, including stamp duties and fees incidental thereto, and the Guarantor shall further pay all expenses for the recovery of the debt or balance thereof or part thereof as a result of the Guarantor's failure to comply with the conditions of this Agreement.

7. Pursuant to section 4(3) of the Stamp Ordinance Cap 137 this Agreement and the charges referred to in clause 2(3) herein are instruments used in one transaction and for the purpose of the said subsection this Agreement shall be deemed to be the secondary instrument.

SCHEDULE

In the High Court in Borneo

Exhibit "T.J.3B"
Affidavit of
Tio Chee Hing
in Civil Suit
No. 190 of 1969
with Agreement
attached
1st March 1972
(continued)

<u>AGREEMENT NO.</u>	<u>TOTAL DEBT</u>
R. H. 1/67	\$130,528.14
R. H. 2/67	\$130,528.14
R. H. 3/67	\$131,334.00
R. H. 4/67	\$130,704.88
R. H. 5/67	\$132,486.39
R. H. 6/67	\$124,528.24
R. H. 7/67	\$128,757.50
R. H. 8/67	\$104,797.89
R. H. 9/67	\$106,606.50
R. H. 10/67	\$106,606.50
R. H. 11/67	\$107,836.76
R. H. 12/67	\$107,836.76
R. H. 13/67	\$107,836.76
R. H. 14/67	\$ 94,114.14
R. H. 15/67	\$ 80,345.15
R. H. 16/67	\$ 79,895.38
R. H. 17/67	\$ 70,814.61
R. H. 18/67	\$ 43,366.76
R. H. 19/67	\$ 59,998.76
	<hr/>
	\$1,978,933.36
	<hr/> <hr/>

10

20

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

SIGNED by JOHN STEWART EAKIN,
Finance Manager for and on
behalf of the said TRACTORS
MALAYSIA BERHAD in the
presence of :-

(Sgd.)
JOHN STEWART EAKIN

30

(SGD.)

SIGNED by the said TIO CHEE
HING in the presence of :-

(SGD.) TIO CHEE HING

(SGD.) THOMAS JAYASURIYA

EXHIBIT "T.J.4" AFFIDAVIT OF THOMAS JAYASURIYA IN
CIVIL SUIT NO. 190 OF 1969

In the High
Court in Borneo

C O P Y
M A L A Y S I A
S T A T E O F S A B A H
I N T H E H I G H C O U R T I N B O R N E O
K O T A K I N A B A L U R E G I S T R Y
C I V I L S U I T N O . 1 9 0 O F 1 9 6 9

Exhibit "T.J.4"
Affidavit of
Thomas
Jayasuriya in
Civil Suit
No.190 of 1969
10th March 1972

BETWEEN

10 TRACTORS MALAYSIA BERHAD ... Plaintiffs

And

 TIO CHEE HING ... Defendant

DEFENDANT'S APPLICATION TO SET ASIDE
JUDGMENT

A F F I D A V I T

I, THOMAS JAYASURIYA, of Great Eastern Life Building, 2nd Floor, a partner in the firm of Thomas Jayasuriya & Co., Advocates for the above-named Plaintiffs, make oath and say as follows:-

- 20 1. I have had the personal conduct of this case on behalf of the Plaintiffs at all material times.
2. The Agreement dated the 21st day of November, 1968 and exhibited to the Defendant's affidavit sworn herein on the 1st day of March, 1972 was not prepared in the manner alleged by the Defendant in his affidavit.
3. The matters deposed to herein are based on notes and records from my firm's files.
- 30 4. In the month of November, 1968, Mr. J.S.Eakin, the then Singapore Finance Manager of the Plaintiffs, came to consult me on action to be taken against Southern Estate Sendirian Berhad (hereinafter referred to as "the Company") in respect of a large amount of debt due to the Plaintiffs for tractors hire. The Company was

In the High
Court in Borneo

Exhibit "T.J.4"
Affidavit of
Thomas
Jayasuriya in
Civil Suit
No. 190 of 1969
10th March 1972
(continued)

wholly owned by the Defendant and his wife and the tractors were hired to the Company at the Defendant's request.

5. The next day or a few days later, Mr. Eakin came with the Defendant to see me for an agreement to be drawn up for the Defendant to guarantee and pay for the Company's debt and for the Plaintiffs not to take Court action against the Company. From the discussion that followed it was obvious that the Defendant would wish to avoid Court action because of his Lahad Datu New Town project. The concessions made by the Defendant and contained in the Agreement reflect the respective position of the parties at the discussion. The Defendant was confident in raising loans to pay the debt. 10

6. I personally prepared the draft of the Agreement on the basis of the discussion and on the next day I gave a copy of the draft to each of the parties. They discussed amendments to the draft with me at a subsequent meeting, following which the Agreement was faired. The Defendant later signed the Agreement in my presence and I recollect that he read it before signing. Mr. Eakin later signed the Agreement but not in my presence. 20

7. The Agreement contains a faithful account of the matters agreed to at the discussion.

8. There is no truth in the Defendant's allegation that it was agreed at the discussion that his lands comprised in the Lahad Datu New Town project should "on no account be utilised in any way to discharge" his Company's debt to the Plaintiff: paragraph 9 of his affidavit. Clause 2 of the Agreement clearly provides that no demand for the immediate full payment of the debt shall be made to the Defendant so long as he complies with the conditions specified in that clause, one of which clause 2(3) requires the Defendant at the request of the Plaintiffs to execute a charge of all his lands except lands comprised in his New Town project. That clause was to give him time to pay, to require him to pay by instalments and to give security by charging his lands. The exclusion is in reference to charging of lands and at no time has the Defendant been asked to charge the excepted lands. 30 40

9. There is also no truth in his allegation that it was agreed at the discussion that the 6 tractors should not be re-possessed; paragraph 10 of his affidavit. On the contrary, the second preamble to the Agreement and clause 2(1) thereof make it quite clear that the Defendant was to deliver at own expense all the tractors in respect of which possession had been or was in the course of being taken to such place or places as might be required by the Plaintiffs. The costs of re-possession were included in the Plaintiffs' claim (referred to below) to which no objection had been taken.

In the High Court in Borneo
 Exhibit "T.J.4"
 Affidavit of
 Thomas
 Jayasuriya in
 Civil Suit
 No. 190 of 1969
 10th March 1972
 (continued)

10. On the 1st day of May, 1969, as a result of the Defendant's failure to make the payment under the Agreement, the Defendant was required and did execute a Charge in respect of 7 pieces of Land. Such request was in accordance with clause 2(3) of the Agreement.

11. On the 28th day of October, 1969 as a result of the Defendant's continued failure to make any payment under the Agreement despite repeated demands, the Plaintiffs took out a Specially Indorsed Writ of Summons against the Defendant claiming the total sum of \$2,056,987.68. (A separate Writ was also taken against the Company on the same day).

12. The Writ was served personally on the Defendant. He had full notice of the Statement of Claim endorsed thereon, which expressly referred to the Agreement, to the Plaintiffs' forbearance to sue the Company as their consideration and to the non-payment by the Defendant.

13. On the 14th day of November, 1969 the Defendant entered appearance by their advocates Messrs. Chong Thain Vun & Co. On the 1st day of December, 1969 by his advocates he entered Defence admitting liability to the extent of \$718,266.85. The reduced figure was as agreed between the parties after allowing for certain rebates and payments made. No objection was taken against the Agreement.

14. On the 4th day of December, 1969 the Plaintiffs made application for leave to enter final judgment against the Defendant in the said sum of \$718,266.85. Leave was granted on the

In the High
Court in Borneo

Exhibit "T.J.4"
Affidavit of
Thomas
Jayasuriya in
Civil Suit
No. 190 of 1969
10th March 1972
(continued)

27th day of December, 1969 and judgment entered. The Defendant was represented by his advocates at the hearing of the application who again admitted to the said sum.

15. On the 26th day of January, 1970 the Plaintiffs obtained a prohibitory order in respect of 5 land titles which included the 4 land titles comprised in the New Town project. No objection was taken to the application or the prohibitory order at any time. Nor was the application in breach of the Agreement for the reasons given in paragraph 8 herein and in any event the whole clause 2 of the Agreement giving the Defendant a no demand protection would have no further application by reason of his own breaches.

10

16. On the 16th day of June, 1970 the Defendant was examined on a Judgment Debtor Summons at which he was also represented by his advocates. He spoke again of loans he hoped to raise to pay the debt.

20

17. On the 28th day of August, 1971 a further prohibitory order was obtained against Lease No. 10789. This is the land which evidently has given rise to his present complaint. The land was the subject of previous orders for sale in favour of the Chartered Bank (Civil Suit No. 37 of 1970) and Lawrence Chin and Associates (Civil Suit No. 115 of 1971) whose debts were subsequently satisfied by the Defendant and the land released. This is not land "comprised" (Clause 2(3) of the Agreement) in the New Town project and the Defendant in paragraph 15 of his affidavit himself referred to it as "forming part" of his New Town project. In any event clause 2 of the Agreement would have no further application for the reasons given in paragraph 15 herein.

30

18. On the 18th day of September, 1971, the Plaintiffs obtained an order for sale of the land in Lease No. 10789 by auction, the auction to take place on the 16th day of October, 1971.

40

19. The sale was postponed at the request of the Defendant to enable him to raise funds to satisfy the judgment, and on the 8th day of October, the Plaintiffs obtained an order for the postponed sale to take place on 30th day of October, 1971.

In the High
Court in Borneo

Exhibit "T.J.4"
Affidavit of
Thomas
Jayasuriya in
Civil Suit
No.190 of 1969
10th March 1972
(continued)

20. The sale was again postponed at the request of the Defendant to enable him to raise funds to make payment, and on the 1st day of November, 1971 the Plaintiffs obtained an order for the sale to take place on the 27th day of November, 1971.

10 21. On the 18th day of November, 1971 Messrs. Shelley Yap acting for the Defendant wrote to my firm informing us that the Defendant was "determined" to sell by tender the 4 pieces of lands comprised in the New Town project and asked us not to proceed with the auction on the 27th day of November 1971. The Plaintiffs did not agree to further postponement.

22. However, the scheduled auction on the 27th day of November, 1971 did not take place because the Court Bailiff could not obtain a plane seat to Lahad Datu.

20 23. On the 30th day of November, 1971 the Plaintiffs obtained a new date for the auction of the said land in Lease No. 10789 to take place on the 8th day of January, 1972.

24. Various requests were made by the Defendant by himself and by his advocates to me and to the Plaintiffs for postponement.

30 25. On the 6th day of January, 1972 on the application of the Defendant by his advocates Messrs. Chong Thain Vun & Co., this Honourable Court granted a postponement of the auction of 2 mon ths to the 29th day of February, 1972 to enable the Defendant to raise funds.

26. Upon the expiry of the postponed date, and with no prospects of raising funds, the Defendant has now filed the present application which is now before this Honourable Court seeking to vacate the judgment.

40 27. Between the 14th day of July, 1970 and the 15th day of July, 1971 inclusive the Defendant only paid the total sum of \$5,000-00 by 10 instalments at \$500.00 each. No further payments have been made.

28. In the premises, there are no merits in the Defendant's application, nor is his application bona fide. It is motivated by his failure to

In the High Court in Borneo

Exhibit "T.J.4"
Affidavit of Thomas Jayasuriya in Civil Suit No. 190 of 1969 10th March 1972 (continued)

obtain further postponements from the Plaintiffs and his failure to obtain loans. The Defendant had never previously disputed the validity of the Agreement. The judgment was entered on the basis of the Defendant's own admission, which was not disclosed in his affidavit. It has been acted upon and he has made payments, which also was not disclosed in his affidavit. In paragraph 16 of his affidavit he said:

"I have now been advised by Messrs. Sharikat S.K. Lee that the Guarantee which states that the consideration was the forbearance of legal proceedings against Southern Estate Sendirian Berhad was in fact not given by the Plaintiffs."

10

That fact is not within the competence of Messrs. Sharikat S.K. Lee.

SWORN at Kota Kinabalu by the said THOMAS JAYASURIYA this 10th day of March, 1972.) (SGD.) THOMAS JAYASURIYA

20

Before me,

(SGD.) CHOW SHEE SENG COMMISSIONER FOR OATHS

This affidavit was filed on behalf of the said Thomas Jayasuriya by Messrs. Thomas Jayasuriya & Co., Advocates for the Plaintiffs, whose address for service is at Great Eastern Life Building, 2nd Floor, Kota Kinabalu, Sabah.

EXHIBIT "T.J.5" ORDER IN CIVIL SUIT NO. 190 OF 1969

In the High Court in Borneo

C O P Y

Exhibit "T.J.5"
Order in Civil
Suit No. 190
of 1969
13th March 1972

M A L A Y S I A

STATE OF SABAH

IN THE HIGH COURT IN BORNEO

KOTA KINABALU REGISTRY

Civil Suit No.190 of 1969

Between

TRACTORS MALAYSIA BERHAD ... Plaintiffs

10 And

TIO CHEE HING ... Defendant

BEFORE THE HONOURABLE MR. JUSTICE LEE HUN HOE
SENIOR PUISNE JUDGE

IN CHAMBERS
THE 13TH DAY OF MARCH, 1972

O R D E R

20 UPON READING the Summons in Chambers dated the 6th day of March, 1972 and the Supporting Affidavit of Tio Chee Hing sworn to on the 1st day of March, 1972 and the Affidavit of Thomas Jayasuriya Esq. sworn to on the 10th day of March, 1972 and filed herein AND UPON HEARING Shelley Yap Esq. of Counsel for the Defendant and W.K. Loo Esq. of Counsel for the Plaintiffs IT IS HEREBY ORDERED that the Application of the Defendant dated the 6th day of March, 1972 be dismissed with costs to be paid by the Defendant to the Plaintiffs.

GIVEN under my hand and the Seal of the Court this 13th day of March, 1972.

30 (SEAL)

(Sgd.) ROLAND CHIN

DEPUTY REGISTRAR,
HIGH COURT IN BORNEO,
KOTA KINABALU.

In the High
Court in Borneo

No. 4

AFFIDAVIT OF TIO CHEE HING

No. 4

Affidavit of
Tio Chee Hing
27th June 1972

I, TIO CHEE HING (NRIC NO.302083) of No. 20 Neil Malcolm Street, 1st Floor, Kampong Ayer, Kota Kinabalu, hereby affirm and say as follows:-

1. I am the Plaintiff in this Suit, in which the Defendant has filed a Summons in Chambers to set aside the Writ of Summons and to dismiss the action.

2. The Affidavit of Mr. Thomas Jayasuriya sworn and filed herein on the 20th June, 1972 (hereinafter referred to as the T.J.'s affidavit) has been read over and explained to me. 10

3. I am advised and verily believe that my statement of claim contains sufficient particulars and is in accordance with the Rules of Supreme Court, 1957, that I am not estopped from taking the present action because my previous application made under Suit No. 190 of 1969 was merely interlocutory in nature and could not strictly be held as res judicata, and that because I have valid grounds for legal and/or equitable redress, my present action is not frivolous or vexatious. 20

4. In regard to paragraph 4, 6, 7, 8, 9, 10 and 11 of T.J.'s affidavit, Mr. Thomas Jayasuriya has all along been the solicitor for the Defendant. As such, he could only be protecting and furthering the interests of the Defendant. I crave leave to refer to paragraphs 7, 8, 9, 10, 11 and 12 of my Statement of Claim, and deny that the facts and circumstances were as alleged by the Defendant. I was not represented by Counsel at the meeting, was not given the opportunity to seeking legal advice, and was persuaded to sign the Agreement on the oral assurances given to me by Mr. Thomas Jayasuriya, and in particular the assurance that my condition that under no circumstances should any of my lands comprised in my Lahad Datu New Town project be utilised to pay the debts of Southern Estate Sendirian Berhad (hereinafter referred to as my company) was incorporated in equivocal terms in the Agreement. 30 40

5. I am not literate in English. I can however speak a few words of colloquial English. During the one and only meeting I had with the Defendant's representative Mr. J.S. Eakin, I spoke principally in Hakka, and that was why Mr. Eakin brought along with him Mr. Edward Chan who acted as interpreter for me. I also spoke in mixed Malay and English, especially to Mr. Thomas Jayasuriya. I did not and am unable to conduct such a serious conversation or any conversation at all entirely in the English language.

In the High
Court in Borneo

No. 4

Affidavit of
Tio Chee Hing
27th June 1972
(continued)

6. As regards the allegation of Mr. Thomas Jayasuriya that he prepared a draft after the first meeting and gave a copy of his draft to each party the next day, and that the parties discussed amendments to his draft with him at a subsequent meeting, etc. I say that he is not telling the truth because:-

- (i) I received a trunk call from Mr. Thomas Jayasuriya in Kota Kinabalu at my home in Lahad Datu on telephone No. 672, and flew to Kota Kinabalu to meet Mr. Eakin at the office of Mr. Thomas Jayasuriya the next day, the 21st November, 1968. Such telephone trunk call and my air passage bookings can easily be verified; and
- (ii) Mr. Eakin's movements from Singapore to Kota Kinabalu and back can also be verified easily both with M.S.A., and the Immigration Department.

7. Far from protecting my interest, Mr. Thomas Jayasuriya over-reached me at the meeting on the 21st November, 1969. I frankly declared my intention to repay the debts of my company although I had no legal duty to do so. His object was to trap me into signing an agreement whereby the Defendant would be saved from a heavy financial loss due to their own negligence in that they had not obtained the signature of any guarantors at all to their Hire Purchase Agreements with my company, which had by then become insolvent. No mention at all was made about taking action against my Company at any time at the meeting. Being a person of high standing in our society, I respected and trusted Mr. Thomas Jayasuriya and accepted his assurances.

In the High
Court in Borneo

No. 4

Affidavit of
Tio Chee Hing
27th June 1972
(continued)

8. Because I felt merely obliged to pay my Company's debts, I was ready to sign an agreement to bind myself so long as my Lahad Datu New Town project was not jeopardised. This is a multi-million dollar project which when completed would realise for me vast profits from which I could easily pay my Company's debts. I needed, however, much financial assistance while work was in progress. At the request of Mr. Thomas Jayasuriya I returned to my office at Kota Kinabalu directly after signing the agreement on the 21st November, 1968, and wrote out a list of my lands comprised under the said New Town project, and delivered the same to him at his office by messenger. That is why when he requested me to charge my lands in May, 1969 (as set out in paragraph 13 of my Statement of Claim), he excluded my lands comprised in the New Town project, which are as follows:-

10

1. Lease 10789
2. Lease 10784
3. Lease 10785
4. Lease 30809
5. Lease 10792
6. Lease 10790
7. Provisional Lease 16185.

20

9. Paragraph 11 of T.J.'s Affidavit is contradicted by paragraphs 3 and 31 of the same. I was prepared to allow the Defendant to do what they pleased with my properties since they had a judgment against me, but was compelled to protect my New Town project when the Defendant went too far in ruining me. They had already done me much harm and caused me much loss and damage in getting my lands charged in obtaining prohibitory orders against them and advertising to hold auctions of the same. It became impossible for me to raise more loans and my banks and creditors demanded earlier payment. When the Defendant refused my repeated entreaties not to go ahead with the auction of Lease 10789, I was then compelled to seek legal advice, and that was why I had not acted earlier to seek redress against the Agreement.

30

40

10. Lease 10789 clearly forms part of my New Town project and this fact is known to the Defendant and Mr. Thomas Jayasuriya. The plan for my New

Town project was submitted by Messrs. Gregory Chin & Associates in April, 1963, and a copy of the same had been given to Mr. Thomas Jayasuriya. The certificate of my surveyors showing Lease 10789 to be comprised in the said New Town project is now produced and marked as "TCH 1". Yet in paragraph 19 of T.J.'s affidavit, he now denies that this lease forms part of the said project.

In the High
Court in Borneo

—
No. 4

Affidavit of
Tio Chee Hing
27th June 1972
(continued)

10 11. I crave leave to refer to paragraphs 13, 15
and 16 of my Statement of Claim. The conduct of
the Defendant is such as to lead me to believe
that their intention to destroy me mercilessly
and completely. I refer in particular to
paragraph 13, where my lands held in Leases 10786,
10793, 10795, 10797, 10801 and 10806 (not
comprised in the New Town project) have been
charged in favour of the Defendant to secure the
sum of \$1,000,000-00. The said lands are worth
20 several million dollars. This is much in excess
of the actual sum of \$718,266.85 owed by me under
the Judgment in Suit 190 of 1969.

30 12. In regard to paragraph 23 of T.J.'s affidavit
I confirm that I did make a last desperate attempt
to dissuade the Defendant from auctioning away
Lease No. 10789. I offered to sacrifice the said
4 choice pieces of land in my New Town project to
sell on my own in order to prevent my reputation
from being tarnished by the fact that my property
had been auctioned by the Defendant to satisfy
the Judgment. Another reason for my offer is that
no building construction has yet been commenced on
them and no bookings made whereas on Lease 10789,
construction has been in progress and booking fees
and progress payments received from members of the
public on the majority of the houses thereon. The
Defendant refused to agree to my offer and insisted
on going ahead with the auction thereby manifesting
their true evil intention to ruin my name as well
as financially.

40 13. In regard to paragraphs 14, 15 and 16 of
T.J.'s affidavit, I did not inform my former
solicitor Mr. Chong Thain Vun about the existence
of the agreement at all, let alone consult him on
the merits. At that time I felt morally obliged
to pay my company's debts, I therefore instructed
Mr. Chong Thain Vun not to defend the Suits against
my Company and myself but to formally appear, admit

In the High Court in Borneo

No. 4

Affidavit of Tio Chee Hing 27th June 1972 (continued)

my liability and consent to Judgment on the reduced and agreed sum of \$718,266.85. I strongly felt that as a gentleman, I would honour my word once given. I therefore had no thought of evading my responsibility. That is why I did not instruct Mr. Chong to oppose any of the subsequent actions of the Defendant as I knew that I could finally discharge my obligations, all the encumbrances will automatically fall apart. I still intend to keep my word if the Defendant would keep their part of the bargain not to inflict any injury to my New Town project.

10

14. In these premises, I humbly pray that this Honourable Court would dismiss the Defendant's Application with costs.

AFFIRMED at Kota Kinabalu)
by the said TIO CHEE HING) Su. Tio Chee Hing
this 27th day of June, 1972.)

Before me,

Sd. Wong Yau Kei

Court of the Magistrate
of the First Class.

This affidavit is filed by Messrs. Shelley Yap, Advocates & Solicitors, 121, Gaya Street, P.O. Box No. 980, Kota Kinabalu, Sabah.

Exhibit "T.C.H.1"
Sketch of
Gregory Ching
Associates

EXHIBIT "T.C.H.1" SKETCH OF GREGORY CHING ASSOCIATES

(Separately reproduced)

No. 5AFFIDAVIT OF CHONG THAIN VUNIn the High
Court in BorneoNo. 5Affidavit of
Chong Thain Vun
27th June 1972

I, CHONG THAIN VUN of 135, Gaya Street, Kota Kinabalu, Sabah, make oath/affirmation and say as follows:-

1. I am the sole proprietor of the legal firm of Chong Thain Vun & Co., Advocates & Solicitors at the above mentioned address.

10 2. I have read a copy of the affidavit of Mr. Thomas Jayasuriya filed herein on the 20th June, 1972, and a copy of the affidavit of Mr. Tio Chee Hing, the Plaintiff herein, that is being filed in reply.

20 3. The Plaintiff herein first came to see me in the month of November, 1969, after he and his company had been served with Civil Suits No. 190 and No. 189 of 1969 respectively. He informed me that he had personally agreed to pay the debt of Southern Estates Sendirian Berhad and that I was merely to enter formal appearances. He said that since he had given his word of honour as a gentleman, he and his company would not want to defend those actions.

4. Such being the stand taken by the Plaintiff, I proceeded to file appearance in Suit No. 190 of 1969, to admit on his behalf liability for the sum claimed, which was reduced from \$2,298,617.75 less payments, etc., to \$718,266.85.

30 5. The Plaintiff did not at any time inform me of the existence of the Agreement dated on the 21st November, 1968, and did not tell me anything at all about the facts and circumstances of the meeting which resulted in the signing of that Agreement. He never consulted me on that matter and I never gave him any advice thereon. He took the view that since he had given his word, he would not go back on it and did not want to evade his responsibility to pay the debts of his company.

40 6. Accordingly, he instructed me not to oppose the Defendant's subsequent actions to obtain prohibitory orders against his lands or any other actions since he said he had already consented to

In the High Court in Borneo

Judgment and felt sure that he could pay.

No. 5

Affidavit of Chong Thain Vun 27th June 1972 (continued)

SWORN AFFIRMED at Kota Kinabalu by the said CHONG THAIN VUN this 27th day of June, 1972. Sd. Chong Thain Vun

Before me,

Sd. Leong Funk Chiew COMMISSIONER FOR OATHS.

This affidavit is filed by M/s. Shelley Yap, Advocates & Solicitors, 121 Gaya Street, P.O. Box 980, Kota Kinabalu, Sabah.

10

No. 6

Further Affidavit of Thomas Jayasuriya 29th June 1972

No. 6

FURTHER AFFIDAVIT OF THOMAS JAYASURIYA

I, THOMAS JAYASURIYA, of Great Eastern Life Building, 2nd Floor, Kota Kinabalu, a partner in the firm of Thomas Jayasuriya & Co., Advocates for the abovenamed Defendant, make oath and say as follows:-

1. I crave leave to submit a further affidavit in answer to certain allegations made by the Plaintiff in his affidavit affirmed on the 27th day of June, 1972 and filed herein.

20

2. The Plaintiff has resorted to attacks touching on my professional integrity which are quite unwarranted and unjustified. He has adduced no evidence to support his bare allegations. There is no justification for suggesting that I had acted otherwise than on purely professional interest. In my affidavit sworn on the 20th day of June, 1972 I recounted the circumstances and the manner in which the Agreement was prepared and signed. It is preposterous to suggest that the Agreement by its very nature and length could have been prepared within the short time made out by the Plaintiff.

30

3. With reference to paragraph 6 of his affidavit, I telephoned the Area Manager of Malaysia-Singapore Airlines Sendirian Berhad, Mr. Teo Geok Siang, on the 27th day of June, 1972 to enquire if the passenger lists for the 21st November, 1968 were available but he said they were not as such lists were only retained for 6 months after their respective journeys. I made a similar enquiry to the Accounting Officer of the Telecommunications Department on the 29th day of June, 1972, Mr. Augustine Ho, in respect of telephone calls and I was told also that the Department did not retain records for that length of time.

In the High
Court in Borneo

No. 6

Further
Affidavit of
Thomas
Jayasuriya
29th June 1972
(continued)

4. There is also no justification for his attacks on the Defendant or for blaming the Defendant for his misfortunes. The history of the case as set out in my affidavit of the 20th June, clearly shows that the Defendant has acted with restraint and reasonableness to the Plaintiff.

5. The Plaintiff seeks to blame the Defendant for his inability to obtain loans by reason of the Defendant obtaining prohibitory orders against his lands and "advertising to hold auctions of the same" (para 9 of this affidavit). The prohibitory order obtained on the 26th day of January, 1970 in respect of 5 pieces of his lands and referred to in paragraph 17 of my affidavit of the 20th June was in respect of lands which were already charged to Chung Khiaw Bank Ltd. to secure a large sum of money as the Plaintiff well know, and if the Plaintiff was really at any time able to obtain further loans on the security of the lands he could have made arrangements with the Defendant to release the lands. The only other land in respect of which a prohibitory order was obtained, apart from renewals, was in respect of Lease No. 10789, and this is the only land which has been advertised for sale by auction. It is not correct to suggest that there have been other lands advertised for sale by auction.

6. The Plaintiff also well know that the lands referred to in paragraph 11 of his affidavit are at all material times the subject of a previous charge to Chung Khiaw Bank Limited to secure a large sum of money, and if the lands are really worth "several million dollars" he should have been able to settle his debt and avoid the action

In the High Court in Borneo

No. 6

Further Affidavit of Thomas Jayasuriya 29th June 1972 (continued)

being taken against him. In fact, a valuation of those lands together with 6 other titles obtained by the Defendant and given by the Government Land Valuer in his letter L.S.4015.3/Temp/1 dated the 26th March, 1970 addressed to my firm gave a total of only \$850,000-00.

7. With regard to paragraph 13 of his affidavit, the Statement of Claim filed in Civil Suit No. 190 of 1969 sets out in clear and plain language the basis of the Plaintiff's liability and the consideration of forbearance to sue now complained of. A copy of the said Statement of Claim is now produced and shown to me and marked "TJ-6".

10

8. I also refer to the last preamble to the Agreement dated the 26th day of November, 1968, attached to exhibit marked "TJ-3B" filed with my affidavit of the 20th June, which sets out in clear and plain language the consideration now complained of.

9. It is unbelievable that the Plaintiff could have missed the clear and plain language of those two documents and had not sought advice if the consideration was not true. Paragraph 13 of his affidavit and the affidavit of Mr. Chong Thain Vun made it quite clear that he gave express instructions to admit liability and consent to the judgment and would be prepared to accept the Judgment if his New Town project would not be interfered with. I maintain that his present action is frivolous and vexatious.

20

30

SWORN at Kota Kinabalu)
by the said Thomas)
Jayasuriya this 29th) Sd. Thomas Jayasuriya
day of June, 1972.)

Before me,

Sd. E.L.B. Hawkin

COMMISSIONER FOR OATHS.

This Affidavit is filed by Messrs. Thomas Jayasuriya & Co. Advocates for the Defendant, whose address for service is Great Eastern Life Building, 2nd Floor, Kota Kinabalu, Sabah.

EXHIBIT "T.J.6" STATEMENT OF CLAIM IN CIVIL SUIT
NO. 190 OF 1969

In the High
Court of Borneo

Exhibit "T.J.6"
Statement of
Claim in Civil
Suit No. 190
of 1969
28th October
1969

STATEMENT OF CLAIM

1. The Plaintiff's claim is for the sum of
\$2,052,976.68 against the Defendant as guarantor
under an Agreement dated the 21st day of November,
1968 and made between the Plaintiff and Defendant
and for the sum of \$4,011.00 for stamp duty paid
for by the Plaintiff and agreed to be repaid by
the Defendant.

2. On the 21st day of November, 1968 Southern
Estate Sendirian Berhad was indebted to the
Plaintiff in the sum of \$1,978,933.36 in respect
of hire of tractors together with interest on hire
rents due and unpaid and costs of re-possession
of tractors.

3. On the said date, in consideration of the
Plaintiff giving time to the said Southern Estate
Sendirian Berhad to pay the said debt and for-
bearing from suing the Southern Estate Sendirian
Berhad for the same, the Defendant agreed by
written agreement made with the Plaintiff to
guarantee payment of the said debt.

4. The Plaintiff gave time and forebore from
suing the said Southern Estate Sendirian Berhad.

5. Neither the said Southern Estate Sendirian
Berhad nor the Defendant has paid the said debt
or any part thereof, and the amount due is
\$2,052,976.68.

PARTICULARS

Amount stated in Agreement	\$1,978,933.36
Interest on rents due and unpaid at 12% per annum till date of re-possession of tractors	\$ 51,830.35
Costs of re-possession of tractors	<u>\$ 22,212.97</u>
	<u>\$2,052,976.68</u>

10

20

30

In the High
Court in Borneo

Exhibit "T.J.6"
Statement of
Claim in Civil
Suit No. 190
of 1969
28th October
1969
(continued)

6. On the 1st day of May, 1969 in pursuance of the agreement as aforesaid, the Defendant executed a memorandum of charge in respect of certain of his lands in favour of the Plaintiff, and upon the request of the Defendant and upon the agreement of the Defendant to repay, the Plaintiff paid the stamp duty on the said memorandum of charge in the sum of \$4,011.00. The Plaintiff paid the said stamp duty but the Defendant has not repaid the said sum or part thereof to the Plaintiff despite repeated promises to do so by the Defendant and requests by the Plaintiff.

10

AND the Plaintiff claims:-

- (1) the sum of \$2,052,976.68 as in paragraph 5;
- (2) the sum of \$4,011.00 as in paragraph 6;
- (3) Interest at the statutory rate of 6% per annum from date of Judgment to date of payment;
- (4) Costs.

20

Dated this 28th day of October, 1969.

(Sd.) Thomas Jayasuriya
Advocate for Plaintiff.

No. 7

NOTES OF PROCEEDINGS OF LEE HUN HOE J.

IN THE HIGH COURT IN BORNEO

IN CHAMBERS AT KOTA KINABALU

CIVIL SUIT NO. 199 OF 1972

In the High
Court in Borneo

No. 7

Notes of
Proceedings of
Lee Hun Hoe J.

TIO CHEE HING ... Plaintiff

versus

TRACTORS MALAYSIA BHD. ... Defendant

Coram: Lee Hun Hoe J.

10 For Plaintiff: Mr. Shelley Yap
For Defendant: Mr. W.K. Loo and Thomas Jayasuriya

9.00 a.m.

Loo: Apart from this summons there is a motion on another case. Believe once summons is dealt with it would also dispose of the motion. I have some authorities to cite.

Court: Would adjourn to open Court.

Signed: Lee Hun Hoe

Judge.

20 9.45 a.m.

Shelley Yap for Plaintiff

W.K. Loo & Thomas Jayasuriya for Defendant

Loo: Application to set aside Writ in Civil Suit No. 199/72 on three main grounds.

(1) Writ not endorsed in accordance with O. 3 r. 3.

(2) Action frivolous or vexatious Thomas Jayasuriya filed affidavit. Affidavit in reply by Plaintiff. Reply to

In the High
Court in Borneo

No. 7

Notes of
Proceedings of
Lee Hun Hoe J.
(continued)

Plaintiff's affidavit by Thomas
Jayasuriya.

Read Affidavit of Thomas Jayasuriya
dated 20.6.72.

Read 2nd Affidavit of Thomas Jayasuriya
dated 29.6.72 in reply to Plaintiff's
Affidavit.

I will make my submission after my
learned friend read his Affidavit.

Yap: Read Affidavit of Tio Chee Hing dated 10
27.6.72. This affidavit is in answer to
Thomas Jayasuriya's affidavit dated 20.6.72.

Para 4 "equal" should read "unequal" -
typing error. Have informed my learned
friend. Ask leave for amendment.

Para 8 "merely" should read "morally" -
another typing error. Have informed my
learned friend. Ask leave for amendment.

Para 11. To insert "is" between the
words "intention" and "to". 20

Loo: No objection to amendments.

Court: Leave granted to amend.

Yap: Read Chong Thain Vun's affidavit dated
27.6.72.

There are the two affidavits in reply to
Thomas Jayasuriya's affidavit. The defence
consisted of two paragraphs only.

Loo: The action commenced by Plaintiff by
Specially Indorsed Writ.

I say that it is a Specially Endorsed
Writ and not a General Writ of Summons
because: 30

(1) a statement of claim is stated in the
Writ;

(2) there is no endorsement of claim:

In general Writ there should be an endorsement of claim. And statement of claim separate. You either file statement of claim with the Writ of file it at a later date.

In the High Court in Borneo

No. 7

In case of fraud, libel or slender Writ must be general. Not by specially endorsed Writ.

Notes of Proceedings of Lee Hun Hoe J. (continued)

O. 3. r. 6.

Mallal's Supreme Court Practice Page 27.

10 White Book 1960 page 21.

"Endorsement of Claim ... if Writ is not specially endorsed
.....endorsed."

Mallal's page 24 on O. 3. r. 3.

20 My contention is that this Writ is a specially endorsed Writ which should not be used in case of allegation of fraud. In this case fraud is alleged. If fraud is alleged and a wrong Writ issued I submit it is fatal. Submit Writ is an nullity.

Two question of irregularity which can be cured arises.

In other words, if it is nullity it just cannot be cured.

Para 11 of Statement of Claim.

"In fact the assurance was false and was made fraudulently"

Also in his affidavit.

Referred to C.S. No. of 1971.

30 An Ipoh High Court Case Unreported.

Judgment of Chang Mun Tat.

Learned friend took great pain in that case to trace the procedure.

In the High Court in Borneo

No. 7

Notes of Proceedings of Lee Hun Hoe J. (continued)

Page 12 of Judgment - last para.

"I must come practice. It is tolerated."

Page 14 of judgment.

"I find irregularity."

2nd ground - Estoppel.

Law of estoppel and res judicata

Judgment obtained in Civil Suit No. 190/69. Defendant admitted liability on reduced sum.

10

Judgment entered for that reduced sum.

Plaintiff was represented. Consent judgment.

Mallal's page 260.

"A judgment by consent or by default operates as an estoppel between parties and their privies."

Clear Law.

Mallal's Digest Vol. II page 646 para 4743

20

"Estoppel is limited to parties to the proceedings and their privies in estate."

Mallal's Supreme Court Practice page 261.

"Res Judicate. The objectioncause."

Mallal's Digest Vol. II Page 653 para 4790 -

Estoppel - Res judicata

30

Plaintiff said order dismissing Plaintiff

application to set aside judgment. No appeal.
That judgment is final.

In the High
Court in Borneo

Writ of Plaintiff.

No. 7

(1) Agreement is unenforceable for lack of
consideration.

Notes of
Proceedings of
Lee Hun Hoe J.
(continued)

(2) Land comprised in Lahad Datu New Town
Project should be utilised to pay off
his company's debt.

10

(3) That he himself should not be made a
principal debtor.

These grounds were raised. Nothing new
except allegation of fraud was raised for
1st time.

Wanted to delay execution of judgment.
Definition of "fraud".

Chitty on Contract Vol. I 23rd Edition
page 135 para. 279.

"The common law plaintiff".

Also at page 134 para. 278.

20

"Whereas in an action in fraud it
is for the representative affirmatively
to prove the fraud and the burden is no
light one."

See Footnote.

Also at page 305 para 654

"Extrinsic evidence duress."

Mallal's Supreme Court Practice page 258

"It has long been high
standard of proof alleged."

30

"It was held that an allegation of
fraud could only succeed if it could be
shown that the alleged fraud was not
before the Court in the previous action
or could not with reasonable allegation

In the High Court in Borneo

No. 7

Notes of Proceedings of Lee Hun Hoe J. (continued)

on the part of the present Plaintiff have been before the Court.

Submit this is important.

Sarkar on Evidence 11th Edition page 893 - Fraud.

"A person who charges another with fraud grounds."

Plaintiff said he did not understand English well. Would refer to law.

Chitty on Contract Vol. 1 23rd Edition page 273 para 582. Proof of Terms. 10

"Where agreement legal effect".

After so long he could not come out and say he did not understand it.

Also page 286 para 612.

Adoption of Popular meaning of words.

Agreement in simple language.

Page 2 of Agreement "TJ 3".

Preamble:

If you committed breach of the agreement I would sue you. 20

Plaintiff said no consideration.

Refer.

Chitty on Contract. Vol. 1 23rd Edition page 62 para. 124.

"Forbearance to sue. It is now settled benefitted."

Submit there is consideration.

No solid basis for charging fraud by Plaintiff. 30

White Book 1960 page 577 and 578.
O. 25 r. 4.

"Interest jurisdiction
..... abuse of its process."

Page 578 1st para.

"So too any actionsolid
basis frivolous or
vexatious."

In the High
Court in Borneo

No. 7

Notes of
Proceedings of
Lee Hun Hoe J.
(continued)

10

Submit this Writ must be set aside and
ask for costs.

Yap: This is attempt by summons in chambers
to wreck the Writ.

Writ filed by Plaintiff in person. I
came in later on.

Refer to O. 3 r. 6.

No mention in Writ whether it is
"specially" or "General" Writ. Is my learned
friend right to say it is a specially
endorsed Writ. O. 70 - Effect of Non Compliance.

20

If nullity cannot be cured. But is it
such a nullity that it cannot be cured. O. 3.
r. 3.

Sufficient partiality in Writ. Has
Defendant been misled by the Writ. Submit no.
Fraudulent misrepresentation not fraud alleged.
2nd ground.

30

Sum reduced from one two million to one
\$7000,000-00. Defence only two paragraph.
Civil Suit No. 190/69.
3rd ground.

Plaintiff felt aggrieved that Defendant
wanted to auction his land.

Res judicata does not apply.

Submit not frivolous or vexatious.

In the High
Court in Borneo

Court: Adjourned till 6.7.72 at 10 a.m. for
judgment.

No. 7

Signed: Lee Hun Hoe

Notes of
Proceedings of
Lee Hun Hoe J.
(continued)

Judge

CERTIFIED TRUE COPY

(SGD) DEPUTY REGISTRAR,
HIGH COURT,
KOTA KINABALU.

No. 8

No. 8

Judgment of
Lee Hun Hoe J.
6th July 1972

JUDGMENT OF LEE HUN HOE, J.

10

On 16th May, 1972 Plaintiff filed a Writ in Civil Suit No. 199 of 1972 against Defendant and sought, inter alia, to set aside, first, an order of the Court giving leave to Defendant to enter final judgment under O. 14 r. 1 in Civil Suit No. 190 of 1969 and, secondly a prohibitory order. He also prayed for two declarations, namely, that the judgment entered pursuant to the said order be set aside and that an agreement entered by the parties is null and void for lack of consideration. Further he claimed for damage for fraudulent misrepresentation. On 16th June, 1972 Defendant entered conditional appearance. By summons in Chambers on 21st June, 1972 Defendant applied to have the Writ, service thereof and all subsequent proceedings set aside on three grounds. First, that the Writ is not indorsed in accordance with O.3.r.3. Secondly, that the Plaintiff is estopped from taking the present action. Thirdly, that the present action is frivolous or vexatious. On 17th June, 1972 Plaintiff filed a notice of motion seeking an order that all further proceedings in Civil Suit No. 190 of 1969 be stayed pending the trial of Civil Suit No. 199 of 1972. Both the summons and motion were set down for hearing on the same day. Parties are agreed that I should deal with the Summons first as my decision would also dispose of the motion one way or another.

20

30

Before I go into the grounds, it is necessary to set out certain events which have occurred

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culminating in the present litigation. At Plaintiff's request Defendant hired tractors to Southern Estate Sdn. Bhd. (hereinafter referred to as the Company), which was wholly owned by Plaintiff and his wife. As a result the company owed Defendant a large sum of money for tractors hired. In 1968 Mr. J.S. Eakin, the Singapore Finance Manager of Defendant firm and Plaintiff went to see Mr. Thomas Jayasuriya and discussion took place. At that time the company was undertaking a grandiose project, the construction of a satellite town at Lahad Datu. Not unnaturally Plaintiff wanted to avoid Court action which would wreck the project and dash all his hope of raising loan for the project. He was confident he could raise the necessary money to pay off the debt. Consequently he and Mr. Eakin entered into an agreement dated 21st November, 1968 (which is attached to Defendant's affidavit as an exhibit).

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No. 8

Judgment of
Lee Hun Hoe J.
6th July 1972
(continued)

By this agreement Plaintiff guaranteed the payment of the Company's debt and Defendant gave the Company time and forebore from suing the company. The terms of the forbearance are clearly defined under Clause 2 of the agreement. I need only refer to Clause 2(3) and (5).

"2. No demand to the Guarantor for the immediate full payment of the debt shall be made so long as the Guarantor complies with each and every one of the following conditions:-

(3) At the request of the Company the Guarantor shall execute a charge or a second charge as the case may be in respect of all lands owned by the Guarantor and shall cause the Hirer to execute a charge or a second charge as the case may be in respect of all lands owned by the Hirer subject in every case to any consent that may be required of any charges and pending the execution of such charges the Guarantor shall not and undertakes to ensure that the Hirer shall not create new or further charges in respect of the lands owned by them respectively without the consent of the company provided that the provisions of this paragraph shall not apply to the lands comprised in the Guarantor's New Town Project at Lahad Datu.

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Lee Hun Hoe J.
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(continued)

(4) The Guarantor shall pay monthly to the company towards the discharge of the debt as aforesaid the sum of \$50,000 (fifty thousand dollars), the first payment to be made on the 15th day of March, 1969 and thereafter on the 1st day of each succeeding month."

on 1st May, 1969, as Plaintiff failed to make payment, Defendant requested Plaintiff to execute a charge in respect of seven pieces of land. On 28th October, 1969, as a result of continual failure on the part of Plaintiff to make any payment under the agreement despite repeated demand Defendant sued Plaintiff in Civil Suit No. 190 of 1969 for the sum of \$2,052,976.58. A separate Writ was also taken out against the company on the same day in Civil Suit No. 189 of 1969.

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The Statement of Claim expressly referred to the agreement and the forbearance to sue the company and the failure to pay off the debt. On 14th November, 1969, Plaintiff, through his solicitor, Messrs. Chong Thain Vun & Co., entered an appearance. On 5th December, 1969, they filed a defence containing two short paragraphs admitting liabilities to the extent of \$718,266.85. It would appear that this figure was agreed by the parties after allowing certain rebates and payments made.

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I pause here to commend that nothing was said about the agreement anywhere in the defence. O.19 deals with pleading generally. Every allegation of fact if not denied is deemed to be admitted except as against an infant or person of unsound mind. See O. 19 r. 3. Defence must deal specifically with each allegation of fact which is not admitted except with regard to damages. A general denial is not permitted. See O. 19 r. 17.

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On 16th December, 1969, Defendant took out a Summons in Chambers for leave to enter final judgment against Plaintiff for the sum of \$718,266-85. Leave was duly granted on 27th December, 1969 and judgment entered. On 26th January, 1970 Defendant obtained a prohibitory order in respect of five pieces of land which included four pieces of land in the satellite town project. No action was taken to set aside the prohibitory order. Plaintiff probably realised that he could claim no protection under the

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agreement by reason of his own breaches of the agreement and by reason of his own admission of the judgment sum. On 16th June, 1970, Plaintiff was examined on a judgment debtor summons as to his ability to pay the debt. He referred again to loan he hoped to raise to pay off the debt. On 28th August, 1971, Defendant obtained a further prohibitory order in respect of Plaintiff's land described as Lease No. 10789. This land was the subject of previous orders of sale obtained against Plaintiff by the Chartered Bank (Civil Suit No. 37 of 1970) and Lawrence Chin and Associates (Civil Suit No. 115 of 1971). As the debts were subsequently satisfied the land was released.

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(continued)

On 18th September, 1971 Defendant obtained an order of sale of the said land by public auction which was to take place on 16th October, 1971. At the request of Plaintiff to enable him to raise funds to satisfy the judgment debt Defendant obtained an order for the postponement of the sale to 30th October, 1971. Further time was given to Plaintiff and the auction was further postponed until 27th November, 1971. It transpired that on 18th November, 1971 Plaintiff sought Defendant's agreement not to proceed with the auction but to allow him to sell the four pieces of land comprised in the satellite town by tender. Defendant did not agree to the proposal. Nevertheless the auction did not take place at Lahad Datu as scheduled on 27th November, 1971 because the Court bailiff was unable to obtain a seat on the plane to Lahad Datu. As a result the auction was rescheduled for 8th January, 1972.

Two days before the auction, that is, on 6th January, 1972, on the application of Plaintiff the Court granted the postponement of the auction for a period of two months to enable Plaintiff to raise funds. Upon the expiry of the period of two months Plaintiff applied to set aside the Judgment which was obtained on 27th December, 1969. Having read the Affidavit of both parties the Court dismissed the application on 13th March, 1972. Plaintiff never appealed against the dismissal as there was no ground he could justifiably succeed. At the same time he applied for further postponement of the auction sale for a period of six months on reasonable grounds of obtaining financial

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(continued)

assistance. Again the Court in the exercise of its discretion, in view of reasonable prospect of his obtaining the loan, granted him postponement for a period of four months. One of the terms of the postponement was that Plaintiff was to keep Defendant informed of the progress of the negotiations for the loan. In his affidavit Mr. Thomas Jayasuriya stated that Plaintiff did not keep Defendant so informed. On 16th May, 1972, Plaintiff began the present action.

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The first ground is that the Writ is not indorsed in accordance with O. 3. r. 3 which reads:-

"The indorsement of claim shall be to the effect of such of the prescribed forms as shall be applicable to the case, or, if none be found applicable, then such other similarly concise form as the nature of the case may require."

Mr. W. K. Loo for Defendant pointed out that all matters, except allegation of fraud, were raised in previous proceedings. It is contended that in alleging fraud Plaintiff should not have used a specially indorsed Writ. It is only necessary to refer to O. 3r. 6(1) which reads:-

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"6(1) In any action other than one which includes:-

(a) a claim by the Plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage; or

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(b) a claim by the Plaintiff base on an allegation of fraud

the Writ of Summons may, at the option of the Plaintiff, be specially indorsed with or accompanied by a Statement of his claim."

Mr. Loo maintains that it is a specially indorsed Writ because the Statement of Claim is stated in the Writ and there is no indorsement of Claim.

Mr. Shelley Yap for Plaintiff says that Plaintiff does not allege fraud but fraudulent misrepresentation.

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He says the Writ was not prepared by him. He came into the picture later. The Writ was signed by Plaintiff himself and filed by him. The Writ was clearly drafted by someone with legal knowledge. Normally when a Specially Indorsed Writ is used it is so stated. When the Writ is meant to be general it is merely stated as Writ of Summons. In the present case Writ of Summons is used.

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(continued)

10 Odgers on Pleading and Practice, 19th Edition
at page 7 on the subject of the Writ observes that:-

"The Writ states the name and address of the Plaintiff and the name and the usual or last known address of the Defendant and it must be indorsed either with a full "statement of claim" or with a short indication of the general nature of the claim. The former used to be called a "Special Indorsement" and the latter a "General Indorsement", but these expressions no longer appear in the rules."

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What Plaintiff should have done was to have the indorsements made on the Writ instead of the Statement of claim. The question is whether the present Writ is a Specially Indorsed Writ or a General Writ. If it is the former then Defendant will succeed in his application on the first ground. Forms No.2 and No.3 under the First Schedule to the Rules of the Supreme Court, 1957 shows the different formats of the General and Specially Indorsed Writ. I may be wrong but I consider the present Writ is a General Writ. I hold it to be so because the following paragraph:

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"If the Defendant enters an appearance he must also deliver a defence within fourteen days from the last day of the time limited for appearance, unless such time is extended by the Court or a Judge, otherwise Judgment may be entered against him without notice, unless he has in the meantime been served with a Summons for Judgment."

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is absent from the Writ. This paragraph is always included in a specially endorsed Writ but not a General Writ. Accordingly Defendant fails in the first ground.

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(continued)

On the question of estoppel it was pointed out that Defendant obtained Judgment on 27th December, 1969 in Civil Suit No. 190 of 1969 on the sum admitted by Plaintiff in his Defence. On 13th March, 1972 the application of Plaintiff to set aside the judgment was dismissed. He never appealed against the dismissal. Instead by the present action he seeks again to have the said judgment set aside. Mallal's Supreme Court Practice at page 261 on the subject of res judicata observes that:-

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"The object of the rule of res judicata is always put upon two grounds - the one of public policy, that it is in the interest of the state that there should be an end of litigation, and the other, the hardship of the individual, that he should be vexed twice for the same cause."

So long as the judgment stands, no one who was a party in those proceedings can re-open the matter. See Hill v. Hill (1) That is what Plaintiff is trying to do in this case. I can see no ground for his doing so since the Judgment was the result of his admission. He was fully cognizant of the proceedings and clearly bound by estoppel from litigating the same matter in a different form or guise. A judgment by consent or by default, operates as an estoppel between the parties (1) (1954) P 261; (1954) 1 All E.R. 491 and their privies; Shaik Sahied bin Abdullah Bajarie v. Mootoo Carpen Chitty.

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In his affidavit Plaintiff tried to attack the professional integrity of Mr. Thomas Jayasuriya who rightly and properly replied to the attack. The attack was unwarranted and unjustified in the circumstances. Had Plaintiff not breached the agreement he would not find himself in this position today. The agreement was to give him and the company time to raise sufficient funds to pay off the debts. He was unable to do so despite the length of time given not only under the agreement by the Court.

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For the first time in his affidavit Plaintiff stated he did not understand English well. He could have raised this matter in his Defence in previous proceeding. Chitty on Contract, General

Principles, 23rd Edition at page 273 paragraph 582 states:-

In the High
Court in Borneo

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Lee Hun Hoe J.
6th July 1972
(continued)

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"Where the Agreement of the parties had been reduced to writing and the document containing the agreement has been signed by one or both of them, it is well established that the party signing will be bound by the terms of the written agreement whether or not he has read them and whether or not he is ignorant of their precise legal effect."

No action was taken by Defendant until Plaintiff continued to breach Clause 2(5) of the agreement on 28th October, 1969 by failing to continue to pay the monthly instalment of \$50,000-00.

On the question of consideration it is sufficient to refer to Chitty on Contract, General Principles, 23rd (1) (1910) 2 M.C.16 Edition page 62, paragraph 24 under the heading of forbearance to sue which states:-

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"It is now settled that a forbearance to sue a debtor or a third person may be sufficient consideration for a promise by a debtor or third person to pay the debt or to do any other act. This is justifiable in that by such forbearance the creditor is delayed and the debtor or third party is or may be benefitted. The promise to forbear may be made absolutely, or for a certain time or for no specified time at all."

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Whether the proceedings are frivolous or vexatious is a matter for the exercise of judicial discretion for the Court must not prevent a person from exercising his undoubted rights on any vague or indefinite principle. The Annual Practice, 1960 at page 577 contains this passage:-

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"So, if a party seeks to raise a new a question which has already been decided between the parties by the Court of competent jurisdiction, this fact may be brought before the Court by Affidavit and the Statement of Claim, though good on the face of it, may be struck out, and the action dismissed; even though a plea of res judicata might not strictly be an answer to the action;

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(continued)

it is enough if substantially the same point
has been decided in a prior proceeding."

At page 578 it is stated:-

"So, too, any action which the Plaintiff
clearly cannot prove and which is without
any solid basis, may be stayed under this
inherent jurisdiction as frivolous and
vexatious (Lawrence v. Lord Norreys, 15 App.
Cas 210; Willie v. Earl How (1893) 2 Ch.545.)"

Mr. Chong Thain Vun who acted for plaintiff
in Civil Suit No. 190 of 1969 in his affidavit
stated quite clearly that Plaintiff had personally
agreed to pay the debt of the company and instruc-
ted him to enter formal appearance. He understood
that Plaintiff and the Company would not want to
defend the actions. Subsequently he proceeded to
admit liability to the extent of \$718,266.85. He
also affirmed that Plaintiff instructed him not
to oppose the Defendant's subsequent actions to
obtain prohibitory orders against his lands or
any other actions since he said he had already
consented to judgment and felt sure he could pay.
By his affidavit Mr. Thomas Jayasuriya has
affirmed that there is no truth that Plaintiff
made it clear that his lands comprised in his
Lahad Datu New Town Project would under no
circumstances be utilized to repay the company's
debt. The forbearance to sue is subject to
certain conditions which are clearly stated in
the agreement. Under Clause 2 of the Agreement
it is provided that no demand for immediate full
payment of the debt will be made so long as
Plaintiff complies with the conditions specified
in that clause. It is too late in the day to go
into the question of extrinsic evidence relating
to the agreement which Plaintiff attested
willingly and without compulsion as he was
confident of raising the necessary fund and thus
saving his project. That has always been his
attitude in the various proceedings particularly
when applying for postponements of sale. The
crux of the whole matter which compels him to
initiate this action lies in his failure to raise
the necessary fund to satisfy the Judgment debt.

All the matters in this action could have
been raised by Plaintiff previously in his

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10 Defence but he elected not to do so. There is no question of new evidence being discovered which could not have been obtained in the previous proceeding. This action is nothing but merely a new twist to overcome his difficulty in raising the loan and to delay the execution of judgment against him. Every opportunity was given to him to save his satellite town project. No successful party should be deprived of the fruit of his victory by frivolous and vexatious proceedings. His action is misconceived and an abuse of the process of the court. The Court will not allow itself to be used as a vehicle to defeat the course of justice in the hope of delaying the execution of a judgment and saving a gradiose project.

20 In my view Defendant succeeds in his objection on the second and third grounds. Accordingly Defendant is entitled to an order in terms of the Summons and costs.

Sgd: LEE HUN HOE
Judge

Kota Kinabalu

Dated this 6th day of July, 1972.

Mr. Shelley Yap for Plaintiff.

Mr. Thomas Jayasuriya }
Mr. W. K. Loo } for Defendant.

In the High
Court of Borneo

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Judgment of
Lee Hun Hoe J.
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(continued)

62.

In the High
Court in Borneo

No. 9

ORDER

No. 9

Order
6th July 1972

BEFORE THE HONOURABLE MR. JUSTICE
LEE HUN HOE, SENIOR PUISNE JUDGE
IN BORNEO

IN OPEN COURT
THIS 6TH DAY OF JULY, 1972

O R D E R

UPON READING the Summons in Chambers dated the 22nd day of June, 1972 and the Supporting Affidavit of Thomas Jayasuriya, Esq. sworn to on the 20th day of June, 1972 and the Affidavit in reply of Tio Chee Hing sworn to on the 27th day of June, 1972 and a further Affidavit of Thomas Jayasuriya Esq. sworn to on the 29th day of June, 1972 and filed herein AND UPON HEARING W.K. Loo Esq. of Counsel for the Defendant and Shelley Yap Esq. of Counsel for the Plaintiff IT IS HEREBY ORDERED that the Writ of Summons herein and the service thereof and all subsequent proceedings herein be set aside with costs to be paid by the Plaintiff to the Defendant.

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GIVEN under my hand and the Seal of the Court this 6th day of July, 1972.

(SEAL)

(SGD.) Deputy Registrar,
High Court in Borneo,
Kota Kinabalu.

No.10

No. 10

Notice of
Appeal
7th July 1972

NOTICE OF APPEAL

Take notice that Tio Chee Hing being dissatisfied with the decision of the Honourable Mr. Justice Lee Hun Hoe given at Kota Kinabalu on the 6th day of July, 1972, appeals to the Federal Court against the whole of the said decision.

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Dated this 7th day of July, 1972.

(Sgd.) Shelley Yap
Advocates for the Appellant.

To:

1. The Registrar,
The Federal Court,
Kuala Lumpur.
2. The Registrar,
High Court in Borneo,
Kota Kinabalu.
3. The abovenamed Respondent
and their Solicitors,
Messrs. Thomas Jayasuriya & Co.,
Kota Kinabalu, and
Messrs. W.K. Loo & Co.,
Kota Kinabalu.

In the Federal
Court of
Malaysia

No.10

Notice of
Appeal
7th July 1972
(continued)

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The address for service for the Appellant is c/o
Messrs. Shelley Yap of No.121 Gaya Street, P.O. Box
No.980, Kota Kinabalu, Sabah, Malaysia.

No.11

Memorandum
of Appeal
17th August
1972

No.11

MEMORANDUM OF APPEAL

M A L A Y S I A

IN THE FEDERAL COURT OF MALAYSIA

HOLDEN AT KOTA KINABALU
(Appellate Jurisdiction)

CIVIL APPEAL NO. 73 OF 1972

BETWEEN

TIO CHEE HING ... Appellant

AND

TRACTORS MALAYSIA BERHAD ... Respondent

(In the matter of Civil Suit No.199 of 1972 in
the High Court of Borneo at Kota Kinabalu)

BETWEEN

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TIO CHEE HING ... Plaintiff

In the Federal
Court of
Malaysia

AND

TRACTORS MALAYSIA BERHAD . Defendant

No.11

MEMORANDUM OF APPEAL

Memorandum
of Appeal
17th August
1972
(continued)

Tio Chee Hing, the Appellant abovenamed
appeals to the Federal Court against the whole of
the decision of the Honourable Mr. Justice Lee Hun
Hoe given at Kota Kinabalu on the 6th day of July,
1972, on the following grounds:-

1. The learned Judge erred in upholding the
Application to set aside the action in Civil Suit
No.199 of 1972 on the grounds:-

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(i) That the Plaintiff is estopped from
bringing the said action, and

(ii) That the said action is frivolous and
vexatious.

The learned Judge erred in holding that the
Plaintiff's attack on Mr. Thomas Jayasuriya was
unwarranted and unjustified.

Dated this 17th day of August, 1972.

SGD. SHELLEY YAP

Advocate for the Appellant.

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To:

The Registrar,
The Federal Court,
Kuala Lumpur.

and to

The abovenamed Respondent,
and their Solicitors,
Messrs. Thomas Jayasuriya & Co.,
Kota Kinabalu, and
Messrs. W.K. Loo & Co., Kota Kinabalu.

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The address for service of the Appellant is c/o
Messrs. Shelley Yap of No.121, Gaya Street,
P.O. Box 980, Kota Kinabalu, Sabah, Malaysia.

No.12

NOTES OF PROCEEDINGS OF ISMAIL KHAN C.J.IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KOTA
KINABALU (Appellate Jurisdiction)FEDERAL COURT CIVIL APPEAL NO. 73 OF 1972In the Federal
Court of
MalaysiaNo.12Notes of
Proceedings of
Ismail Khan CJ.

Between

Tio Chee Hing ... Appellant

And

Tractors Malaysia Berhad ... Respondents

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(In the matter of Civil Suit No.199 of 1972
in the High Court in Borneo at Kota Kinabalu

Between

Tio Chee Hing ... Plaintiff

And

Tractors Malaysia Berhad ... Defendants)

Cor: Ismail Khan, Chief Justice, Borneo
Gill, Federal Judge.
Pawan Ahmad, Judge.Tuesday 21st September, 1972NOTES OF SUBMISSION

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Mr. S. S. Lee (Mr. Shelley Yap with him) for
appellant.

Mr. W. K. Loo for respondents.

Lee hands in written submission. Reads.

Judge allowed application to set aside suit on
grounds 2 and 3.I submit as general rule consent judgment is
an estoppel.

In the Federal
Court of
Malaysia

No.12

Notes of
Proceedings of
Ismail Khan C.J.
(continued)

Exceptions: (1) Attorney-General v. Tomline
(1877-78) 7 Ch. 388. See list of authorities.

In Civil Suit No. 199 of 1972 out of which
this appeal arises, an agreement to be set aside
or revoked and upon that agreement judgment was
obtained in earlier suit.

Huddersfield Banking Co. Ltd. v. Henry Lister
& Son Ltd. (1895) 2 Ch. 273.

Judge thought in no circumstances could a
consent order be set aside.

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Wilding v. Sanderson (1897) 2 Ch. 534.

Neale v. Gordon Lennox (1902) A.C. 465.

Au Yuan Chee v. Lim Leong Thiam & Ors.
2 M.C.260.

Ground not raised in Civil Suit No.199 of
1972. Procedure by way of application to set
aside consent order in Chambers in that suit is a
nullity.

Paragraph 6 of submission.

Paragraph 7.

20

That being so res judicata does not apply.
Refusal of application to set aside consent
judgment, a nullity, does not preclude present
action.

In Civil Suit No. 199 of 1972, ground that
action was frivolous and vexatious.

Claim is not obviously unsustainable. Triable
issues raised.

See cases in "submission".

Mr. Loo asks for adjournment to 3 p.m.
I.K.

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3 p.m. Court Resumes.

Mr. Loo concedes to points:

(1) Consent judgment may be set aside by fresh action.

(2) May be set aside on grounds of fraud and mistakes.

Halsbury Volume 22 (3rd Edition) p.792 paragraph 1672.

Delay may deprive of right to question consent order. Order in earlier action dismissing Defendants' application to set aside consent judgment is not a nullity.

2nd ground frivolous and vexatious.

See judgment p. 72.

Judgment obtained 27.12.61. In March 1972 application to set aside dismissed. Following judgment order obtained. He was even produced on judgment debtor summons. See p.39 para.16. No quarrel about judgment. On ground of fraud, want of consideration and counterclaim. He filed a defence in the earlier action, giving a sum of \$718,266/-. Took no steps to set aside until three years later.

It is clear it was a desperate attempt to delay execution.

Res Judicata.

See Mallal's Supreme Court Practice Vol. 1, 260, 261.

The point about delay even though not expressly taken arises out of the affidavit filed by Defendants.

Mallal's Digest Vol. II 646, paragraph 4743 and p. 653 paragraph 4790.

Hill v. Hill (1954) 1 A.E.R. p.491. 493.

Lee Sock Goh vs. Straits Cabaret (1953) 1 M.L.J. 98 (C).

On ground of action being vexatious and frivolous.

In the Federal Court of Malaysia

No.12

Notes of Proceedings of Ismail Khan C.J. (continued)

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In the Federal
Court of
Malaysia

No.12

Notes of
Proceedings of
Ismail Khan C.J.
(continued)

Annual Practice (1960) Vol. 1 p. 577.

Court has discretion to dismiss action.

Dow Hager Lawrence v. Lord Norreys & Ors.
(1890) A.C.D.210.

Willis v. Earl Howe (1893) 2 Ch. 545.

Annual Practice (1960) 577, 578.

Remington v. Scoles (1897) 2 Ch. p.1.

Case of Attorney-General of the Duchy of
Lancaster v. L. & N.W.Rly (1892) 3 Ch. 274 has no
bearing. Three grounds urged in points of law. 10

(1) Court has no jurisdiction.

(2) Wrong parties.

(3) Wrong procedure.

Court did not consider it vexatious as
points of law involved.

As to Young v. Holloway & Anor (1895) p.87
here fact relief on came to light after the action.

In instant case all facts relied on were
known to Plaintiff when he signed the agreement
as from the beginning. 20

The same applies to Lovell v. Williams
(Lloyd's Reports) p. 249 and Gugeheim v. Ladbroke
(1947) 1 A.E.R. p.292. All these could be dis-
tinguished p.43 of the record, paragraph 4.

As to p.44 paragraph 6 see p.35 paragraph 3.

There two allegations were made for first
time. Page 45(a). Company referred to is a public
company. One other ground relied on by the learned
Judge, he considered Plaintiff could not prove his
case p.75 (A & B). 30

In instant case court can look at whole
background and consider.

(1) Lapse of time since judgment.

- (2) No new facts alleged.
- (3) Agreement itself clearly sets out consideration and Plaintiff signed agreement.
- (4) Statement of Claim sets out consideration forbearance admitted in defence to first action.
- (5) Consent judgment. So there can be mistake on part of Defendants.
- 10 (6) Throughout all stages of these proceedings including judgment debtor summons no allegation made until the time he filed action.
- (7) Clear all the proceedings to set aside Judgment were commenced because he failed to obtain postponement of action.
- (8) Appellant was represented by counsel.
- (9) There is no evidence except his bare allegations.
- 20 (10) The judge knew the facts and exercised his discretion and decided that leave to appellant to proceed is not warranted.
- (11) Clear that all he is concerned is to save this piece of land or lands in the new town.

In the Federal
Court of
Malaysia

No.12

Notes of
Proceedings of
Ismail Khan C.J.
(continued)

Lee in reply.

Not true appellant was represented throughout proceedings in earlier action.

30 As to delay, appellant has given good explanation for it (in the affidavit) and when asked to sign agreement he signed.

All along his attitude was that respondent could do anything if he left alone the Lahad Datu property. When property was attached he raised all the points now pleaded.

Reason given there is triable issue. Judge had all the facts, but Judge did what he should not have done. Decided on affidavits. Judge referred to project, but there was no such project.

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C.A.V.

I.K.

In Suit No.199/72, out of which this appeal arises, the Plaintiff was asking for the agreement to be varied or annulled. It was upon that agreement that the Judgment on the earlier suit was obtained by consent. Refer to Attorney-General v. Tomline (1877-8) Ch.388; Huddersfield Banking Co. Ltd. v. Henry Lister & Son Ltd.(1895) 2 Ch. 273; Wilding v. Sanderson (1897) 2 Ch. 534; Neale v. Gordon Lennox (1902) A.C. 465; Au Yuan Chee v. Lim Leong Thiam & Ors. 2 M.C. 260.

In the Federal
Court of
Malaysia

No.13

Notes of
Proceedings of
Gill F.J.
(continued)

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Come to paragraph 6 of my written submission. Refer to statement of claim.

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I now come to the question of res judicata. The attempt to set aside the final judgment in the former Suit (even though it was by consent) was bad and any order made on it would be a nullity. That order refusing to set aside the final judgment being a nullity, it therefore does not prevent this separate action to have the judgment in the earlier action set aside. Refer to Ainsworth v. Wilding (1896) 1 Ch. 673. The whole thing being a nullity, as far as the application for the setting aside of the order was concerned, there is no question of res judicata. Refer to Huddersfield's case and Wilding's case. Refer to Kinch v. Walcott (1929) A.C. 482; Firm R.M.K. R.M. v. Firm M.R.M.V.L. (1926) A.C.761. It is therefore my respectful submission that res judicata does not apply to the present case.

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That brings me to the question as to whether the action was frivolous and vexatious. The present action is not obviously unsustainable. Refer to A.G. of the Duchy of Lancaster v. L. & N.W.Rly (1892) 3 Ch. 274; Young v. Holloway & Anor (1895) P. 87; Gugenheim v. Ladbrooke (1947) 1 A.E.R. 292, Lovell v. Williams 62 Lloyd's Report 249. Read para 13 of my written submission.

Adjourned until 3 p.m.

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S.S. Gill.

In the Federal
Court of
Malaysia

Court resumed at 3 p.m.

Loo:

No.13
Notes of
Proceedings of
Gill F.J.
(continued)

I concede two points. First, that a fresh action may be brought to set aside a final judgment. Second, that a consent judgment may be set aside on the ground of mistake and fraud.

On the question of setting aside a consent judgment, I refer to 22 Halsbury's Laws of England (3rd Edition) page 792, para 1672. Delay on the part of the Plaintiff in the present action to set aside the Judgment against him in the earlier action is fatal. 10

The Order made in the earlier action dismissing the Defendant's application to set aside the consent judgment is not a nullity. It has not been set aside. It is still there.

I will now deal with res judicata. The setting aside of a judgment is limited to certain principles. On res judicata, I first refer to the Judge's Judgment appealed from at page 72 line B. Judgment was obtained as long ago as 27.12.69. Following the judgment several prohibitory orders were obtained. He was even produced before the Court on a Judgment Debtor Summons. Refer to page 39. On none of these occasions did the Plaintiff as Defendant in the earlier suit complain about the judgment. He filed a Defence in the earlier action agreeing that a sum of more than seven hundred thousand dollars was owing. He took no steps to have the judgment set aside until 6th March, 1971. Refer to page 21 of record. So, it is quite clear that it was a desperate attempt to delay execution. 20 30

On estoppel, refer to Mallal's Practice Volume 1 page 261. The point about delay, even though it was not expressly taken before the learned Judge, does arise from the Affidavits which were filed.

Plaintiff was represented all the time.

Refer to Mallal's Digest, Volume 2, page 646, para 4743, page 653, para 4790. Refer to Hill v. 40

Hill (1954) 1 A.E.R. 491, 493; Lee Sock Goh v. Straits Cabaret (1953) Ltd. (1965) 1 M.L.J. 98.

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No.13

Notes of
Proceedings of
Gill F.J.
(continued)

The next question is whether the action is sustainable. The Court has inherent jurisdiction to dismiss an action which is frivolous and vexatious. Refer to Annual Practice 1960, Volume 1, p.577. Refer to Lawrance v. Lord Norris (1890) A.C.210; Willis v. Earl Howe (1893) 2 Ch. 545.

10 Refer to 1 Annual Practice 1960, page 577 under inherent jurisdiction. Refer to Remington v. Scoles (1897) 2 Ch. 1; Annual Practice, page 578.. Refer to judgment of learned Judge stated at page 75 line B4 and ending at page 76.

20 I submit that the case of A.G. of the Duchy of Lancaster v. L. & N.W.Rly (1892) 3 Ch. 274, on which the other side relies, has no bearing on this case. There the application was made on the grounds (a) that the Court had no jurisdiction (b) that wrong parties were before the Court, and (c) that wrong procedure was adopted.

facts relied on came to the knowledge of the party concerned long after the previous action had been concluded. In this case all the facts relied on were known to the Plaintiff from the very beginning. The same applied to the case of Lovell v. Williams 62 Lloyd's Reports 249. So all those cases can be easily distinguished from the present case.

30 The case of Gugenheim v. Ladbrooke & Co. Ltd. (1947) 1 A.E.R. 292 also has no bearing on this case.

Refer to affidavit of Tio Chee Hing at page 43 of records, para 4, page 44, para 6. These two allegations were made for the first time. They were not true. Refer to affidavit of Jayasuria, page 35, para 3. The allegation of appellant in para 7 of this affidavit at page 45 is a serious allegation.

40 The other ground that the learned Judge relied on in allowing the application is stated at the top of page 75 of the record.

In the Federal
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Notes of
Proceedings of
Gill F.J.
(continued)

I submit that in the present case the Court is entitled to look into the whole background and take the following points into account:

1. Lapse of time in failing action to set aside judgment.
2. No new facts.
3. Agreement itself clearly sets out consideration, and the appellant signed the Agreement.
4. Statement of Claim also sets out consideration. It was admitted in the Defence to the first action. 10
5. Consent to judgment.
In those circumstances the Appellant cannot be said to have been mistaken.
6. Throughout all the stages of execution proceedings including judgment debtor summons, no allegations were made until 6.3.1972, and other allegations have since been added.
7. It would seem clear that the action to set aside judgment was commenced because the appellant failed to obtain any postponement of auction of his properties. 20
8. The Appellant was represented by Counsel throughout the proceedings.
9. There is no evidence except for his bare allegations.
10. The Judge directed himself properly. He exercised his discretion and came to the conclusion that to let the Appellant proceed with his action would be an abuse of the process of the Court. 30
11. It is clear that all that the Appellant is concerned with is to save this piece of land or lands in the new town project rather than to have the judgment set aside as a whole. The present action therefore is not a bona fide action. So, the Court should not give any assistance to a mala fide action.

Lee:

It is not true that the Appellant was represented throughout the proceedings in the earlier action.

The Appellant has given a good reason for the delay. He took no action, so long as the Tractors Malaysia did nothing about his Lahad Datu properties. His attitude all along was that he was morally bound to pay. That is a good and acceptable reason for the delay. He is likely to elaborate on it when the time comes for the trial of the action.

The learned Judge decided the Application on the affidavits of the parties, which he was not entitled to do.

On all the circumstances of the case, there are triable issues which can only disposed of at the trial of the action.

C.A.V.

S.S. GILL.

In the Federal Court of Malaysia

No.13

Notes of Proceedings of Gill F.J. (continued)

10

20

No. 14

NOTES OF PROCEEDINGS OF PAWAN AHMAD J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KOTA KINABALU

FEDERAL COURT CIVIL APPEAL NO. 73 OF 1972

BETWEEN

Tio Chee Hing ... Appellant

AND

Tractors Malaysia Bhd. ... Respondents

(In the matter of Civil Suit No.199 of 1972 in the High Court in Borneo at Kota Kinabalu)

BETWEEN

No.14

Notes of Proceedings of Pawan Ahmad J.

In the Federal
Court of
Malaysia

No.14

Notes of
Proceedings of
Pawan Ahmad J.
(continued)

Tio Chee Hing ... Plaintiff

AND

Tractors Malaysia Bhd. ... Defendants

NOTES OF ARGUMENT

21st September, 1972

Mr. Shelley Yap Yeok Siew with Mr. Lee for
Appellant.

Mr. Loo for Respondent.

Mr. Lee hands in written submission and reads
it. Submits that as a general rule, order by
consent would amount to an estoppel but there are
certain exceptions and the present case is an
exception.

10

Attorney-General v. Tomlins, 7 Ch.D., p.388.

Huddersfield Banking Co. Ltd. v. Henry Lister
& Son Ltd. (1895) 2 Ch. 273.

The Judge was under the impression that there
can be no leave at all in the case of a consent
order. This is not so as stated in the above two
cases. The Court is entitled to put right if
there is fraud or mistake.

20

Wilding v. Sanderson (1897) 2 Ch. 534.

Neale v. Gordon Lennox (1902) A.C. 465.

Au Yuan Chee v. Lim Leong Thian & Ors.
2 M.C. 260.

I shall now deal with para. 6 of written
submission.

Refers to page 5 of record.

I next deal with para. 7 of written
submission. States that application is a nullity
and therefore the order made under it is also a
nullity. In the circumstances the Appellant is
right in bringing a fresh action.

30

Ainsworth v. Wilding (1896) 1 Ch. 673.

Deals with para. 9 of written submission.

Kinch v. Walcott (1929) A.C. 482. Submits that res judicata does not apply to the present suit.

I shall now deal with para. 10 of written submission regarding frivolous and vexatious action.

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Notes of
Proceedings of
Pawan Ahmad J.
(continued)

10 A-G of the Duchy of Lancaster v. L. & N.W.Rly
(1892) 3 Ch. 274.

Young v. Holloway & Anor. (1895) P. p.87.

Gugenheim v. Ladbrooke (1947) 1 A.E.R. 292.

Lovell v. Williams Lloyd's Reports, Vol. 64,
p.249.

Deals with para 13 of written submission.

Deals with para 14 of written submission.

Mr. Loo replies:

I concede to two points, namely:-

- 20 (1) To set aside consent order by a fresh action.
(2) Consent order may be set aside on grounds of mistake or fraud.

On the question of setting aside by a fresh action refers to:

Halsbury's Laws, 3rd Edition, Vol.22, page 792, para.1672.

Delay on the part of the Plaintiff in the action, judgment may not be set aside.

Order made in the earlier action dismissing the Defendant's application to set aside the consent judgment is not a nullity because it has not been set aside.

In the Federal
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Notes of
Proceedings of
Pawan Ahmad J.
(continued)

On the question of res judicata of judgment by consent, it has not been set aside.

Refers to judgment at p.72 of the record between letters B and D.

Consent judgment was obtained on 27th December, 1969. Draft was even produced of a J.D.S. Refers to p.39 para.16 and 17. In none of those actions the Defendant did raise any objection on the ground of fraud or mistake. In his defence he admitted liability to the extent of \$718,266.85¢.

10

This application is filed three years later in order to delay execution.

Mallal's Practice p.260-261.

The point about delay even not expressly taken before the Judge does arise in the affidavit.

Mallal's Digest, Volume 2, page 646, para. 4743, p.653, para. 4790.

Hill v. Hill (1954) 1 A.E.R. P.491 at p.493.

20

Lee Sock Goh v. Straits Cabaret (1953) Ltd. (1965) 1 M.L.J. p.98 at letter C second column. Quotes question of frivolous and vexatious applications.

Annual Practice (1960) Vol. 1, p.577.

Lawrance v. Norreys (1890) A.C.210.

Willis v. Earl Howe (1893) 2 Ch.545.

Remington v. Scoles (1897) 2 Ch. 1.

On written submission by Counsel for Appellant, states that the Duchy of Lancaster's case has no bearing on the present case. The application was based on three grounds:

30

- (1) That the Court has no jurisdiction.
- (2) Wrong parties were before the Court.
- (3) Wrong procedure was adopted.

This is different from our present case and each of those grounds was rejected.

In *Young v. Holloway* (1895) P.87, the facts relied on came to the knowledge of the party concerned long after the action. In the present case all the facts relied on were known to the Plaintiff from the very beginning.

The same applies in the case of *Lovell v. Williams*.

10 The case of *Gugenheim v. Ladbroke* can equally be easily distinguished from the present case.

Refers to p.43 at F of record.

Refers to p.44 at D.

These two allegations were made for the first time and they were not true.

Refers to p.35 para. 3.

Refers to P.45 at A.

20 One other ground which the learned Judge relied on in allowing the application is stated at the top of p.75.

Lastly submits that the Court is entitled to look into the whole background and take the following points into account:

- (1) Lapse of time in filling action to set aside judgment.
- (2) No new facts.
- (3) The agreement itself clearly sets out the consideration and Appellant signed the agreement.
- 30 (4) Consent: In these circumstances Appellant could not have been mistaken.
- (5) Throughout the proceeding including J.D.S. no allegation were made at any time.
- (6) Appellant has failed to get postponement of

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Notes of
Proceedings of
Pawan Ahmad J.
(continued)

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Notes of
Proceedings of
Pawan Ahmad J.
(continued)

 auction and has commenced this action.

- (7) Appellant was represented by Counsel throughout.
- (8) No evidence except for his bare allegations.
- (9) Judge knew the facts and he exercised his discretion and came to the conclusion that to let the appellant to go on with the case would lead to an abuse.
- (10) He wants to save the lands rather than against the judgment as a whole. 10

 Submit that present action is therefore not bona fide. The Court should therefore give no assistance. Asks that the appeal be dismissed with costs.

Mr. Lee replies:

 It is not true that Appellant was represented in the last two proceedings.

 The Appellant has given a good reason for the delay as disclosed in his affidavit. 20

 His attitude all along was that he was morally bound to pay and he was willing to pay so long as his Lahad Datu Property was not touched. Once his Lahad Datu property was seized he now feels that he was not legally bound to pay and so he applies to set aside the consent judgment.

C.A.V.

Sd. Pawan Ahmad

20.9.72

30

No. 15

JUDGMENT OF GILL, F.J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KOTA
KINABALU (Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO.73 OF 1972

In the Federal
Court of
Malaysia

No.15

Judgment of
Gill F.J.
20th November
1972

Between

Tio Chee Hing ... Appellant

And

Tractors Malaysia Berhad ... Respondents

10 (In the matter of Civil Suit No. 199 of 1972
in the High Court in Borneo at Kota Kinabalu

Between

Tio Chee Hing ... Plaintiff

And

Tractors Malaysia Berhad ... Defendants)

Cor: Ismail Khan, Chief Justice, Borneo
Gill, Federal Judge.
Pawan Ahmad, Judge.

JUDGMENT OF GILL, F.J.

20 This is an appeal by the Plaintiff from an
Order of Lee Hun Hoe J in Civil Suit No.199 of 1972
in the High Court in Borneo at Kota Kinabalu,
setting aside the Writ of Summons and all subse-
quent proceedings in the action on the grounds
that the Plaintiff was estopped from bringing the
action and that the action was frivolous and
vexatious. Another ground on which the Defendants
sought to set aside the action was that the writ
was not indorsed in accordance with Order 3, Rule 3
30 of the Rules of the Supreme Court, 1957, but this
ground was rejected.

The action by the Plaintiff was brought to
set aside a consent judgment in a former action in

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the same Court, being Civil Suit No.190 of 1969, in which the present Defendants, Tractors Malaysia Berhad (hereinafter referred to as the "respondents") were the Plaintiffs referred to as (sic) the "Respondents"), were the Plaintiffs and the present Plaintiff, Tio Chee Hing (hereinafter referred to as "appellant"), was the Defendant.

For this judgment to be intelligible, it is necessary to state briefly the facts leading to the former action. On October 1st, 1967, at the Appellant's request, the Respondents hired a number of tractors to Southern Estate Sendirian Berhad, a Company which was wholly owned by the Appellant and his wife. The said company was at that time undertaking the construction of a satellite town at Lahad Datu. By November, 1968 the company was owing about two million dollars to the Respondents in respect of the hiring of such tractors. By an agreement dated November 21, 1968 the Appellant guaranteed payment of the company's debt and the Respondents agreed not to take legal proceedings for the recovery of such debt on the conditions, inter alia, that the guarantor would pay \$50,000/- a month towards the discharge of the debt and execute a charge or a second charge in favour of the Respondents over all the lands owned by him. The Appellant having failed to make payment in terms of the Agreement, the Respondents on October 28, 1969 brought the former action against the Plaintiff for the recovery of a sum of \$2,052,976.68. The Respondents also brought a separate action against the Company on the same day, but that action is of no consequence in so far as these proceedings are concerned.

The Statement of Claim in the former action against the Appellant expressly referred to the forbearance by the Respondents under the Agreement to sue the Company and the failure on the part of the Appellant to pay the debt. The Appellant duly entered an appearance on November 14, 1969, and on December 5, 1969 he filed a Statement of Defence containing two short paragraphs admitting liabilities to the extent of \$718,266.85. On December 16, 1969 the Respondents took out a Summons in Chambers for leave to enter final Judgment against the Appellant for the sum admitted. Leave was duly granted on December 27, 1969 and Judgment entered for the amount.

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40

On January 26, 1970 the Respondents, with a view to executing the consent Judgment, obtained a prohibitory order in respect of five pieces of land belonging to the Appellant which included four pieces of land in the satellite town project. On June 16, 1970 the Appellant was examined on a Judgment Debtor Summons as to his ability to pay the debt. On August 28, 1971 the Respondents obtained a further prohibitory order in respect of the Appellant's land described as Lease No.10789, and on September 18, 1971 an Order was made for that land to be sold by public auction on October 16, 1971. For various reasons the sale was postponed from time to time, and on January 6, 1972, the Court granted a further postponement of the auction for two months to enable the Appellant to raise funds. Just before the date of sale the Appellant applied to have the Judgment of December 27, 1969 set aside but the application was dismissed on March 13, 1972.

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The present action by the Appellant was commenced on May 16, 1972. The Order appealed from was made on July 6, 1972. Before coming to the grounds on which the Writ and all subsequent proceedings in the present action were set aside, I must refer to the observation which the learned Judge has made regarding the Application in the earlier suit itself to have the consent Judgment set aside. That observation is to the effect that the Appellant never appealed against the dismissal of that Application as there was no ground on which he could justifiably succeed. With that observation of the learned Judge I agree, but only to the extent that the appeal would have failed solely on the ground that after a judgment has been passed and entered, even though it may have been taken by consent and under a mistake, the Court cannot set it aside otherwise than in a fresh action brought for the purpose, unless, there has been a clerical mistake or an error arising from an accidental slip or omission in the judgment, or the judgment as drawn up does not correctly state what the Court actually decided and intended to decide, in either of which cases an application under Order 28, Rule 11 of the Rules of the Supreme Court, 1957 for the rectification of the Judgment can be made in the same action. (See Ainsworth v. Wilding (1)).

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As neither of the cases to which I have just referred applied to the judgment in the former suit, the application in that suit was rightly dismissed. It has been argued by counsel for the appellant that as the application in the former suit was made wrongly, the order made on it was a nullity and therefore cannot operate as a bar to the present action. I do not think it would be correct to call that order a nullity. As I have attempted to show, that order was rightly made, even though it may have been made for a wrong reason, but I would agree that the present suit is not res judicata merely because of that order.

10

(1) (1896) 1 Ch. 673

To put it in other words, where a final judgment in an action can be set aside only by means of a fresh action, such fresh action is not res judicata merely because the attempt to set it aside in the same action failed, as it was bound to fail.

20

On the question of estoppel, which was one of the reasons for the setting aside of the Writ in the present action, the learned Judge in his judgment says:-

"So long as the judgment stands, no one who was a party in these proceedings can re-open the matter. See Hill v. Hill (2). That is what Plaintiff is trying to do in this case. I can see no ground for his doing so since the judgment was the result of his admission. He was fully cognizant of the proceedings and clearly bound by estoppel from litigating the same matter in a different form or guise. A judgment by consent or by default, operates as an estoppel between the parties and their privies; Shaik Sahied bin Abdullah Bajarie v. Mootoo Carpen Chitty (3)".

30

Now, although as a general rule a consent judgment would operate as an estoppel, yet there are clear exceptions to this rule. Thus, it was held in Attorney-General v. Tomline (4) that after a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement.

40

In Huddersfield Banking Co. Ltd. v. Henry Lister & Son Ltd. (5) Lopes L.J. said:

"The law seems to be that a consent order may be set aside for the same reasons as those on which an agreement may be set aside."

10 In Wilding v. Sanderson (6) the Court of Appeal held, inter alia, that an order made in an action by consent and based upon, and intended to carry out, an agreement come to between the parties, can be set aside on any ground on which an agreement in the terms of the order could be set aside, and one of such grounds is mistake. Pretheroe J followed these last two cases in Au Yuan Chee v. Lim Leong Thiam & Ors (7) to hold that where it is established that a judgment has been obtained fraudulently or by reason of mutual mistake of the parties regarding a material fact, the Court has power to set aside the judgment.

20 Having disposed of the question of estoppel, I have now to deal with the other ground on which the order appealed from was made, namely, that the said actin was frivolous and vexatious. It is clear that the application to set aside the Writ in the present action was made under Order 25, Rule 4 of the Rules of the Supreme Court, 1957 which reads as follows:-

30 "The Court or a Judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

The Appellant's Statement of Claim in the present action sets out facts in support of his

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- (2) (1954) P.261; (1954) 1 All E.R. 491
 (3) (1910) 2 M.C.16
 (4) (1877-8) 7 Ch. 388
 (5) (1895) 2 Ch. 273, 283
 (6) (1897) 2 Ch. 534
 (7) 2 Malayan Cases 260

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1972
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case that he is entitled to have the agreement which he entered into with the respondents on November 21, 1968 rescinded or rectified on the ground of lack of consideration and fraudulent misrepresentation. Those facts are verified in his affidavit which he filed to counter the allegation in the Respondents Affidavit in support of their application to have the Writ and all subsequent proceedings set aside. Since those facts, if proved, would entitle the Appellant to set aside the agreement, he would also be entitled to have the judgment which was founded on that agreement to be set aside. Thus, it would seem clear that the Statement of Claim raises issues which can only be adjudicated upon at the trial of the action and not decided on the Affidavits of the parties to the action. It follows, therefore, that the action should have been allowed to proceed to trial.

10

I need hardly repeat that once a final judgment has been passed and entered, the Court cannot set it aside except in a fresh action brought for that purpose. It is for that express purpose that the present action has been brought. It would be wrong to pre-judge the action on the allegations contained in the Affidavits of the parties. For that reason it would be wrong for this Court to express an opinion on the merits of the case, and I deliberately refrain from doing so. Suffice it to say that the Appellant's Statement of Claim raises triable issues which are prima facie sustainable. It, therefore, cannot be said that it discloses no reasonable cause of action.

20

30

As regards the second limb of Rule 4, Order 25, Lindley L.J. said in Attorney-General of the Duchy of Lancaster v. London and North Western Railway Co. (8):-

"To what extent is the Court to go on inquiring into difficult questions of fact or law in the exercise of the power which is given it under Order XXV, rule 4. It appears to me that the object of the rule is to stop cases which ought not to be launched - cases which are obviously

frivolous or vexatious, or obviously unsustainable, and if it will take a long time, as is suggested, to satisfy the Court by historical research or otherwise that the County Palatine has no Jurisdiction, I am clearly of opinion that such a motion as this ought not to be made. There may be an application in Chambers to get rid of vexatious actions; but to apply the rule to a case like this appears to me to misapply it altogether."

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(continued)

10
A.L. Smith L.J. in the same case said at
page 278:

20 "I only want to make one remark about
Order XXV, rule 4. It seems to me that
when there is an application made to strike
out a pleading, and you have to go to
extrinsic evidence to show that the
pleading is bad, that rule does not apply.
It is only when upon the face of it is
shewn that the pleading discloses no cause
of action or defence, or that it is
frivolous and vexatious, that the rule
applies."

30 In Young v. Holloway and Another (9), it was
held that where the Plaintiff was not bound by the
result of a previous action, the action brought by
him ought not to be dismissed as frivolous.
In Gugenheim v. Ladbrooke & Co. Ltd. (10) the
Plaintiff in 1946 made bets in England with the
Defendants, who were bookmakers, and he claimed
to have won from them £8,784. The Defendants
refused to pay this sum to the Plaintiff because
they understood that he had been reported to the
stewards of the Jockey Club as a Defaulter on
bets and had been warned off the course in England.
The Defendants having proposed to hold the
40 Plaintiff's account in abeyance until he had
settled certain alleged liabilities, the parties
entered into negotiations as the result of which
the Plaintiff claimed that the Defendants had
agreed that a final balance of £7,256 was due to

(9) (1895) p.87
(10) (1947) 1 A.E.R. 292

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him from them and he began proceedings against the Defendants founding his action on an account stated. It was held that the action should not be struck out under R.S.C., Order 25, r. 4, as being frivolous and vexatious, but should go to trial.

In Lovell v. Williams (11), the Plaintiff brought an action in the County Court for damages for personal injuries sustained by him in a collision with the Defendant's motor-cycle. He accepted a sum of money in full satisfaction and discharge of all claims including any future claims for injuries sustained by him by reason of the alleged negligent driving of the Defendant. He subsequently discovered upon further medical examination that the injuries sustained by him were much more serious than had been supposed at the time of the settlement. He therefore commenced an action in the High Court. A summons issued by the Defendant that further proceedings be stayed on the ground that they were frivolous and vexatious and an abuse of the process of the Court was dismissed by the Master but upheld on appeal by the Judge. The Court of Appeal restored the Master's order. Mackinnon L.J. said at page 251:

"I say nothing as to the possible results of this litigation. It may well be that when the case is tried the Defendant will establish to the satisfaction of the tribunal that this was a settlement of all claims then existing and known or likely to be ascertained in the future, and that by reason of the agreement by way of accord and satisfaction then come to, the Plaintiff has no claim in this case. That may quite possibly be the result of the hearing of this action, as it was in the case of the North British Railway Company v. Wood. The question we are here concerned with is whether the certainty of that result is so obvious that we ought to prevent the Defendant or his insurers being put to the trouble of contesting this further action on the ground that it is obvious.

"We are not satisfied that anything of that sort is made out in this case. The Master, before whom the summons came first, dismissed the application and thought that the case ought to be allowed to proceed; the learned Judge, on appeal from the Master, thought that it was a case in which he ought to stay the action as being an abuse of the process of the Court. We unfortunately, differ from the learned Judge and agree with the Master. We think it is not made out that these proceedings ought to be stayed, although of course we indicate no possible sort of view as to what is likely to be, or ought to be, the result of the action when it is heard. The only question before us is whether we think the action ought to be heard."

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1972
(continued)

Counsel for the respondents concedes that a fresh action can be brought to set aside a final judgment in a previous action, and that a consent judgment may be set aside on the grounds of mistake and fraud, but he has argued that the delay on the part of the appellant in bringing his present action to set aside the judgment against him is fatal. I do not think I can accept that argument for two reasons. First, there would appear to be a reasonable explanation for the delay. Secondly, the Plaintiff must be given an opportunity to explain the delay at the trial of the action. As I have already said, it is not open to the Court to go into the merits of the case at this stage. It is further argued that the Court is entitled at this stage to look into the whole background of the litigation. I do not agree. A point is also made that there is no evidence in support of the Plaintiff's claim except for his bare allegations. That, to my mind, is the strongest ground for allowing the appeal, because the evidence can only be produced at the trial of the action.

As was said by Fletcher Moulton L.J. in Dyson v. Attorney-General (12):-

"Differences of law, just as
differences of fact, are normally to be

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decided by trial after hearing in Court, and not to be refused a hearing in Court by an Order of the Judge in Chambers."

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Judgment of Gill F.J. 20th November 1972 (continued)

I would, therefore, allow this appeal with costs both here and in the Court below and set aside the Order appealed from.

(S.S.Gill)

JUDGE FEDERAL COURT

Kota Kinabalu. 20th November, 1972.

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Ismail Khan, C.J. Borneo and Pawan Ahmad J concurred.

Encik S.S.Lee with Shelley Yap for Appellant. Solicitors M/s. S.K. Lee & Co.

Encik W.K. Loo for Respondents. Solicitors: M/s. W.K. Loo & Co.

No.16

Order 20th November 1972

No. 16

ORDER

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KOTA KINABALU (Appellate Jurisdiction)

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FEDERAL COURT CIVIL APPEAL NO.73 OF 1972

Between

Tio Chee Hing ... Appellant

And

Tractors Malaysia Berhad ... Respondent

(In the Matter of Civil Suit No.199 of 1972 in the High Court in Borneo at Kota Kinabalu

Between

Tio Chee Hing ... Plaintiff

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AND

Tractors Malaysia Berhad ... Defendant)

In the Federal Court of Malaysia

CORAM: ISMAIL KHAN, CHIEF JUSTICE, HIGH COURT IN BORNEO; GILL, JUDGE, FEDERAL COURT, MALAYSIA: PAWAN AHMAD, JUDGE, HIGH COURT, MALAYA.

No.16

Order 20th November 1972 (continued)

IN OPEN COURT

THE 20TH DAY OF NOVEMBER 1972

O R D E R

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THIS APPEAL coming on for hearing on the 21st day of September, 1972 in the presence of Mr. S.S.Lee (Mr. Shelley Yap Yeok Siew with him) of Counsel for Appellant abovenamed and Mr. W.K. Loo of Counsel for Respondent abovenamed AND UPON READING the Record of Appeal herein AND UPON HEARING Counsel for the parties as aforesaid IT WAS ORDERED that this Appeal do stand adjourned for Judgment AND the same coming on for Judgment this day in the presence of Mr. Shelley Yap Yeok Siew of Counsel for the Appellant and Mr.W.K. Loo of Counsel for the Respondent.

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IT IS ORDERED that the Appeal be and is hereby allowed AND IT IS ORDERED that the Judgment dated the 6th day of July, 1972 be and is hereby set aside AND IT IS FURTHER ORDERED that the Appellant do recover from the Respondent the costs of this Appeal and in the Court below. AND IT IS LASTLY ORDERED that the sum of \$500.00 (Dollars five hundred only) deposited in Court as security for costs of this Appeal be refunded to the Appellant.

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GIVEN under my hand and the Seal of the Court this 20th day of November, 1972.

(Sd.) E.E. SIM

CHIEF REGISTRAR,
FEDERAL COURT,
MALAYSIA.

In the Federal
Court of
Malaysia

No.17

Order giving
conditional
leave to
appeal to
His Majesty
the Yang Di-
pertuan Agong
16 March 1973

No. 17

ORDER GRANTING CONDITIONAL LEAVE TO APPEAL
TO HIS MAJESTY THE YANG DI-PERTUAN AGONG

Coram: Azmi, Lord President, Malaysia.
Ismail Khan, Chief Justice, Borneo.
Raja Azlan Shah, Judge.

IN OPEN COURT

This 16th day of March, 1973.

O R D E R

UPON MOTION made unto this Court this day by Mr. S. Woodhull and Mr. W.K. Loo of Counsel for the Respondents abovenamed in the presence of Mr.S.S.Lee and Mr. Shelley Yap of Counsel for the Appellant abovenamed AND UPON READING the Notice of Motion dated the 2nd day of January, 1973 the Affidavits of Mr. S. Woodhull affirmed on the 2nd day of January, 1973 and the 5th day of March, 1973 and the Affidavit of Mr. Tio Chee Hing affirmed on the 20th day of February, 1973 and filed herein AND UPON HEARING Counsel as aforesaid IT IS ORDERED that leave be and is hereby granted to the Respondents abovenamed to appeal to His Majesty the Yang Di-pertuan Agong against the decision of the Federal Court given on the 20th day of November, 1972, upon the following conditions:

- (a) that the Respondents abovenamed do within three (3) months from the date hereof enter into good and sufficient security to the satisfaction of the Chief Registrar, Federal Court, Malaysia in the sum of \$5,000/- (Dollars Five thousand only) for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the Appellant abovenamed in the event of the Respondents abovenamed not obtaining an Order granting him final leave to appeal or of the Appeal being dismissed for non-prosecution, or of His Majesty the Yang Di-pertuan Agong ordering the Respondents to pay the Appellant costs of the Appeal, as the case may be, and
- (b) that the Respondents abovenamed do within three (3) months from the date hereof take the necessary steps for the purpose of

procuring the preparation of the Record and the despatch thereof to England.

AND IT IS ORDERED the costs of and incidental to this application be costs in the cause.

GIVEN under my hand and the Seal of the Court this 16th day of March, 1973.

(SD.) E.E. SIM

CHIEF REGISTRAR,
FEDERAL COURT,
KUALA LUMPUR

In the Federal Court of Malaysia

No.17

Order giving conditional leave to appeal to His Majesty the Yang Di-pertuan Agong 16 March 1973 (continued)

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No. 18

ORDER GIVING FINAL LEAVE TO APPEAL TO HIS MAJESTY THE YANG DIPERTUAN AGONG

CORAM: ONG, CHIEF JUSTICE, HIGH COURT, MALAYA;
SUFFIAN, JUDGE, FEDERAL COURT, MALAYSIA;
ALI, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT
THIS 25TH DAY OF JUNE, 1973

O R D E R

No.18

Order granting final leave to appeal to His Majesty the Yang Di-pertuan Agong 25th June 1973

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UPON MOTION made unto Court this day by Encik S. Woodhull of Counsel for the Respondents abovenamed and also mentioning on behalf of Messrs. Shelley Yap, Counsel for the Appellant abovenamed AND UPON READING the Notice of Motion dated the 5th day of June, 1973 and the Affidavit of Encik S. Woodhull affirmed on the 5th day of June, 1973 and filed herein AND UPON HEARING Counsel as aforesaid IT IS ORDERED that final leave be and is hereby granted to the Respondents abovenamed to appeal to His Majesty the Yang Dipertuan Agong against the decision of this Honourable Court given on the 20th day of November, 1972.

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AND IT IS ORDERED that the costs of and incidental to this application be cost in the cause.

Given under my hand and the seal of the Court this 25th day of June, 1973.

(SD.) E.E. SIM
CHIEF REGISTRAR,
FEDERAL COURT,
MALAYSIA.

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :-

TRACTORS MALAYSIA BERHAD

Appellants

- and -

TIO CHEE HING

Respondent

RECORD OF PROCEEDINGS

SLAUGHTER AND MAY
35, Basinghall Street,
LONDON, EC2V 5DB
Solicitors for the Appellants.

COWARD CHANCE,
Royex House,
Aldermanbury Square,
LONDON, EC2V 7LD.
Solicitors for the Respondent.