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ON APPEAL

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FROM THE FEDERAL COURT OF MALAYSIA

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B E T W E E N :

(1) DATUK JAGINDAR SINGH  
(2) DATUK P. SUPPIAH  
(3) ARUL CHANDRAN

Appellants  
(Defendants)

- and -

TARA RAJARATNAM (m.w.)

Respondent  
(Plaintiff)

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CASE FOR THE FIRST AND SECOND APPELLANTS

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1. This is an appeal from a judgment dated the 16th May 1983 of The Federal Court of Malaysia (Lee Hun Hoe C.J. (Borneo) Salleh Abbas C.J. (Malaysia) and Eusoffe Abdoolcader F.J.) dismissing an appeal from the judgments dated 17th July 1982 and the 21st November 1982 of the High Court of Malaysia (Razak J.) whereby the Appellants were ordered to pay the Respondent the sum of \$973,000 with interest at 6% per annum on the sum of \$370,260 from 1975 till July 1982 and interest at 8% per annum on the judgment sum from the 21st November 1982.

RECORD

p.714-716

p.522-523

p.590-591

2. This appeal raises the following main issues :-

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- (i) Whether a claim lies for damages for "fraud" within Section 340 of the National Land Code;
- (ii) Whether there was any evidence capable of sustaining the judgments of the Courts below against all or any of the Appellants in respect of the pleaded allegations of "fraud" either within Section 340 of the National Land Code (if relevant)

RECORD

or as fraudulent misrepresentations  
actionable at common law;

- (iii) Whether there was a breach of contract between the Respondent and the Second Appellant created by a Memorandum dated the 30th March 1974 for the sale of land registered in the Respondent's name, by reason of the transfer of the said land by the Second Appellant to the Third Appellant on the 31st July 1975, or by reason of the late and incomplete payment of sums payable under the said Memorandum. This raises a question of whether the terms of the Memorandum were varied. If so, there was no breach of contract. If not, the question of a breach by reason of the transfer raises an issue of the true construction of the said Memorandum. If there was no variation the Second Appellant accepts there was a breach by reason of payment being delayed and incomplete. 10 20
- (iv) Whether the Second Appellant was acting as the agent of the First Appellant in respect of the said Memorandum and whether the Courts below ought to have entertained an allegation that he was when no such claim was pleaded;
- (v) Whether the Memorandum was procured by the undue influence of the First and Second Appellants or either of them; this issue raises the question of the relationship between the Respondent and the First and Second Appellants, and the questions of whether these Appellants obtained an unfair advantage through the bargain created by the said Memorandum or whether the bargain was unconscionable so as to shift the burden of proof under the Contracts Act 1950; 30 40
- (vi) Whether the First and Second Appellants held the transfer executed by the Respondent as trustees and, if so, whether the transfer to the Third Appellant was a breach of trust. The latter question raises the same point of construction as arises under the claim for breach of contract. 50

(vii) Whether the learned judge and the Federal Court erred in principle in the award of damages in the following respects :-

RECORD

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- (a) by awarding one sum in respect of the claims for fraud and/or breach of contract;
- (b) in determining the market value of the property as at July 1975 without regard to comparable properties;
- (c) by adding any sum to the said market value as at July 1975 so as to reflect the change in value up to the time the action should have reasonably been brought to judgment;
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- (d) if entitled to add some sum under (c), by adding 140% without any evidence of change in value;
- (e) if entitled to add some sum under (c) by awarding interest from July 1975 on the market value as well;
- (f) by adding the value of the house when the market value had been assessed on a development basis;
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- (g) by failing to give credit to the Appellants for the sums paid by them under the said Memorandum.

### The Salient Facts and History of Proceedings

3. The background to the material events can be taken from the opening passage of the judgment of the Federal Court:

p.678 1.30  
- p.679  
1.21

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"The respondent (Tara) was the registered proprietor of a piece of land of some 5 acres (the property) at Kulai, Johore. There was a house on it. She lived there with her late husband (Devan) and their five daughters. Dr. Das was the brother of Devan. The three appellants are advocates and solicitors. The 1st appellant (Jagindar) and the 2nd appellant (Suppiah) are partners practising under the style of Suppiah &

RECORD

p. 751	Singh in Johore. The 3rd appellant (Arul) was a partner in the Singapore firm of Rodyk & Davidson. The story began with the financial difficulty of Dr. Das after starting a computer medical centre in Singapore called Medidata. He and Jagindar knew one another in their student days in London. So with Jagindar as guarantor he managed in October 1973 to obtain overdraft facilities from the Hongkong & Shanghai Banking Corporation in Singapore (HKBC) up to a limit of \$120,000.00. He gave Jagindar to understand it was for a short period. In January 1974 to protect himself Jagindar pressed Dr.Das to put up certain security in the event that he was called to honour the guarantee. The HKBC did not press Dr.Das for payment. Jagindar refused the offer of a second mortgage on Dr. Das's property in Johore. But he showed interest in Tara's property. Dr. Das consulted Devan who persuaded Tara to put up the property as security. At that time Tara and Devan had an overdraft with the Chung Khiaw Bank (CKB) in respect of which the property was charged."	10
p.115 11.26-32		
p.1186 11.20-24 p.1195 11.20 -22 p.259 11.1-3 p.697 11.31-32 p.99 1.33 - p.100 1.2 p.76 11.10-12	4. Although the property was registered in the Respondent's name, her husband ("Devan") was beneficially interested in it. It was common ground that Devan was acting as the Respondent's agent during all negotiations leading up to the execution of the transfer of the property, and that the Respondent herself was not involved in such negotiations and did not meet the First and Second Appellants until the 30th March 1974.	30
	5. As a result of the negotiations with Devan the Second Appellant prepared documents for signature by the Respondent. These were:	40
p.770-771	(i) A transfer of the property under the National Land Code in Form 14A (Transfer of Land Share or Lease) in consideration of the sum of \$220,000;	
p.769	(ii) A confirmation that the building standing on the land was included in the transfer (there was a dispute as to whether or not this was only a blank paper when signed by the	50

Respondent); and

RECORD

(iii) A memorandum ("the Memorandum") that the consideration of \$220,000 referred to in the transfer was arrived at as follows :-

p.753-754

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"(a) in consideration of the [Second Appellant] paying the sum of Dollars \$103,658.44 which is the amount due from [the Respondent] to the CHUNG KHIAM BANK Kulai Branch, as at 8.3.74 as stated in their letter dated 14.3.74 which is attached herewith and marked "A" on the Charges executed by [the Respondent] in their favour and a further sum of \$6,341.56 (making in all \$110,000.00) part of which is for additional interest payable to the said Bank as from 9.3.74 to the date of transfer and the balance is to be received by [the Respondent].

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(b) a further sum of \$110,000.00 is in consideration of the [Second Appellant] paying [the First Appellant] of No.41 Jalan Waspada, Johore Bahru, being the amount payable by [the Respondent's] brother-in-law D.C.Krishna Shivadas (also known as Dr. Das) of No.25 Jalan Waspada, Johore Bahru, to the [First Appellant] who will be paying to the HONG KONG & SHANGHAI BANK, Collyer Quay, Singapore, the sum of \$110,000, (which [the Respondent] hereby agree[s] being the loan granted to [the Respondent's] said brother-in-law by the said Bank on the guarantee given by the [First Appellant]."

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An appointment was made for a meeting at the property on the 30th March 1974.

p.259 11.10-12

6. That meeting took place, and the events at that meeting give rise to the only conflict of direct oral evidence between the Respondent and the First and Second Appellants. An account of the meeting as held by the Judge and accepted by the Federal Court can be taken from the judgment of the Federal Court:

p.679 1.22-1.32

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"On 30th March 1974 Suppiah, Jagindar

RECORD

and Sivanathan came to Tara's house. She was asked to sign various documents. Before signing she read through part of the agreement and was not happy with the matter as nothing was said of the fact that the property was to be used as security for the payment of two sums of \$110,000 each. She questioned Suppiah about the use of the word "transfer" when the transaction was going to be a security. In answer Suppiah said the security was by way of transfer. As a result of her inquiry Suppiah inserted the manuscript to the agreement."

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p.190 1.28 - The Appellants' evidence was that the manuscript  
p.191 1.15 was inserted as a result of Devan saying that  
p.225 1.19- the Respondent wanted a right of re-purchase  
p.226 1.4 within one year.

p.259 1.4-

p.260. 1.9

p.280 1.13 -

p.281 1.2

7. The "manuscript" referred to was an addition to the second page of the Memorandum and was in the following terms :-

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p.754

"I, the above named Pakrisamy Suppiah hereby confirm, agree, and undertake not to sell the said land and house to anyone for one year without the consent of the said Tara Rajaratnam (f) and further undertake to transfer the said land and house to her within one year in the event of her paying to me the sum of \$220,000.00 (Dollars two hundred and twenty thousand only) the consideration mentioned as above.

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Witnessed by  
C. Sivanathan

Signed by  
P.Suppiah. "

p.100 1.22 -

p.101 1.15

8. After the insertion of the manuscript the Respondent signed the documents, a copy of the Memorandum was given to her and the meeting ended.

p.679 11.32-33

9. On the 27th April 1974, the First Appellant paid the Hongkong & Shanghai Bank \$121,819.80 in discharge of Dr. Das' overdraft. In view of the actual amount of the overdraft as opposed to the amount stated in the Memorandum, the object of clearing the First Appellant's liability on his guarantee of the overdraft could not be carried out within the terms of the transfer and Memorandum. Devan's overdraft at the Chung Khiaw Bank ("CKB") as at the 30th March 1974 was \$106,630.27.

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p.814

		RECORD
		p.261 1.30 -
		p.262 1.21
10	10. The Second Appellant's evidence was that a few days after the meeting the First Appellant told him of the amount of Dr. Das' overdraft. He then had a meeting with Devan and it was agreed (i) that the First Appellant should pay off Dr. Das' overdraft and the consideration set out in the Memorandum should be adjusted, (ii) that if Devan found a buyer for the property the Second Appellant should transfer the property direct to the buyer, (iii) that Devan should be entitled to operate his CKB account for about a year and (iv) that Devan should be entitled to stay on in the property for which he would pay compensation. The Second Appellant gave evidence of a further meeting between himself and Devan on or about the 1st February 1975 at which Devan said that he and the Respondent did not have the money to re-purchase and could not get any buyers. He said that he would like to stay in the property until the end of 1975. He said he wanted to continue operating the CKB account until the end of June 1975 at which time the overdraft would be brought down to \$92,000. The Second Appellant agreed to these proposals and it was also agreed that the difference between the total amount which would then have been paid up (i.e. \$121,819.80 + \$92,000 = \$213,819.80) and the amount of \$220,000 due, that is to say, \$6,180.20 would be the sum to be paid as compensation. The Respondent's evidence in relation to these conversations was that she did not know of them.	p.262 1.26 - p.263 1.9
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	11. (i) Devan operated the CKB account and by the end of June 1975 had reduced his overdraft to \$91,127.62.	p.101 1.16 - p.102 1.36
		p.814-815
40	(ii) In the meantime, on the 25th March 1975, Dr. Das gave the Second Appellant a cheque for \$149,520 in exercise of the Respondent's right of re-purchase but the cheque was dishonoured.	p.1109 1.11 - p.1110 1.9 p.1112 1.28 - p.1113 1.5
	(iii) Devan and the Respondent continued to occupy the property during 1975 and were not asked to vacate until service of a notice dated the 4th March 1976.	p.897
50	(iv) Following correspondence and telephone calls at the end of June and beginning of July 1975, between solicitors (Messrs. Yeow & Chin), acting for	

RECORD

p.885-888 p.890-895 p.768	CKB and the Respondent, on the one hand and the Second Appellant on the other hand - during which Messrs. Yeow & Chin first sought payment of \$140,000 - the sum of \$92,000 was paid to Messrs. Yeow & Chin on the 5th July 1975, as to \$91,127.62 in discharge of CKB's charges on the property and as to the balance (after deduction of solicitors' costs and disbursements) for the credit of Devan's account.	10
p.789 p.770	(iv) Consequent on the discharge of the charges, the title deeds were released to the Second Appellant and he was registered as the proprietor of the land on the 26th July 1975. The transfer was referred for valuation and valued by the Director of Valuation District Johore Bahru under Section 12A of the Stamp Ordinance 1949 at \$220,000.	20
p.686 11.17-26 p.693 11.7-13 p.701 1.39 - p.702 1.4 p.703 11.11-27	12. The Appellants' case was and is that the delay in completing the sale and the alteration in the terms of completion were by reason of the matters set forth in Paragraphs 9 and 10 hereof. The Respondent's case accepted by the courts below was that the First and Second Appellants fraudulently never had any intention of fulfilling the conditions of the Memorandum.	30
p.792 p.799-802  p.365 11.14-15 p.896	13. Under cover of a letter dated the 31st July 1975 the Inland Revenue sent the Respondent Form CST1 under The Land Speculation Tax Act 1974 in respect of her transfer of the property. The Form was returned to the Inland Revenue on the 24th September 1975 and the Inland Revenue raised enquiries thereon on the 30th October 1975.	
p.790   p.789A-790	14. By a transfer dated the 31st July 1975 and registered on the 10th August 1975 the Second Appellant in consideration of the sum of \$220,000 transferred the property to the Third Appellant as trustee for the First Appellant. The transfer was again valued by the Director of Valuation District Johore Bahru under Section 12A of the Stamp Ordinance 1949 at \$220,000.	40
p.169 11.5-9	15. On 28th January 1976 the Third Appellant applied for sub-division of the land for development.	50



16. By a letter dated 4th March 1976 the Third Appellant gave the Respondent and Devan notice to vacate the land and on the 20th March 1976 the Third Appellant commenced an action for possession against the Respondent and Devan in Johore Bahru Sessions Court (Action 146 of 1976). p.1026-1027
- 10 17. On the 30th March 1976 a lay-out plan for development was submitted to Johore Town and Country Planning Department and was approved on the 3rd May 1976. p.843-844
- 20 18. On the 8th May 1976 the Respondent and Devan served a Defence in Action 146/1976 claiming that the Third Appellant's title was defeasible (under Section 340(2)(b) of the National Land Code) by reason of the transfer to the Second Appellant taking place by means of an insufficient and void instrument of which the Third Appellant had notice. No allegation of fraud, under Section 340(2)(a) of the National Land Code or otherwise, was made. p.1032-1034
- 30 19. On the 9th August 1976 an order for possession was made against the Respondent and Devan. The action was also transferred to the High Court for the purpose of trying the allegation relating to the title. Both the order for possession and the order transferring the action to the High Court were appealed by the Respondent and Devan, and the latter order was appealed by the Third Appellant. On the 6th June 1978 the appeal by the Respondent and Devan was dismissed and the appeal by the Third Appellant was allowed. In the meantime stays of execution had been applied for by the Respondent and Devan but had been dismissed and on the 20th September 1976 they vacated the property. p.1063  
p.1065-1088  
p.1090-1094  
p.919 11.9-10
- 40 20. During the course of the action No. 146/1976, the Respondent made a number of applications, with and without Devan, and in the course of such applications and on other occasions swore, or relied upon, a number of affidavits and made a number of statutory declarations. The following are the details of the affidavits and declarations :-

<u>RECORD</u>	<u>Date</u>	<u>Application of other occasion</u>	<u>Document</u>	
p.1104-1105	15.5.1976	For entry of caveat	Statutory Declaration by Respondent	
p.1107-1111	26.7.1976	Summons (No.95/1976) for extension of time in respect of caveat	Affidavit by Respondent	
p.1065-1067	29.8.1976	Motion in High Court (No.17/1976) for stay of execution of judgment for possession	Affidavit by Respondent's Solicitor	10
p.1090-1094	13.9.1976	To Sessions Court for stay of execution	Affidavit by Respondent	
p.1180-1182	25.1.1977	Visit to Singapore solicitors	Statutory Declarations by Respondent and Devan	20
p.1195-1197	2. 2.1977	Visit to Singapore solicitors	Statutory Declaration by Respondent	
p.1121	2. 2.1977	For entry of caveat	Statutory Declaration by Respondent	
p.1196 1.28 - p.1197 1.4	In all the documents until the first mentioned Statutory Declaration of the 2nd February 1977, the Respondent's complaint was based on breaches of the manuscript undertaking in the Memorandum with no reference to any oral representations by the First or Second Appellants. In that Statutory Declaration the Respondent added an allegation of an oral statement by the Second Appellant to the effect that the period of one year mentioned in the manuscript undertaking was merely nominal and that he did not intend to keep her to one year in which to repay. The Respondent changed her solicitors in the action in Johore Bahru for the second time on the 13th September 1976, and the solicitors concerned with drafting the Statutory Declaration, in January and February 1977 were a fourth firm of solicitors in Singapore.			30
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p.1031 p.1034 p.1089				
p.1184				

21. On the 26th January 1977 the Third Appellant's application for sub-division was approved. RECORD  
p. 691 11.13-14
22. By a Statement of Claim served on the 30th April 1977 (Civil Suit No.261/1977) the Respondent claimed against the Appellants a declaration that the transfer to the Second Appellant was defeasible on the grounds of misrepresentation or fraud or on the ground that the registration was obtained by a void instrument. The claim was based upon (i) breach of contract (including a collateral agreement based on the alleged statement by the Second Appellant that he did not intend to limit the Respondent to one year for repayment) - Paragraphs 12-22 and 26; (ii) inducing the Respondent to sign the transfer well knowing that the Second Defendant did not have any intention of making any payment in pursuance of the Memorandum save to the Hongkong & Shanghai Bank - Paragraph 23; (iii) undue influence - Paragraph 27; and (iv) the Third Appellant having knowledge of the pleaded facts and not being a purchaser for value - Paragraphs 28 and 32 and 33. p.911-920  
  
p.913-916  
p.917  
  
p.916  
p.918  
p.918-920
23. On the 26th November 1978 the Statement of Claim in C.S.261/1977 was struck out as against the First Appellant and on 19th March 1979, the Statement of Claim was struck out against the Second and Third Appellants. On the 25th April 1979, the action against the Second and Third Appellants was dismissed with costs. p.931  
  
p.938  
p.941
24. In the meantime, the Respondent had entered caveats against the 70 titles into which the property had been divided. In her affidavit in support dated the 10th October 1977 the Respondent alleged breach of contract and referred to her action C.S.Suit 261/1977. On the 22nd December 1977 the Third Appellant applied for the removal of the caveat (Originating Motion 46/1977). In her affidavit in opposition, sworn on the 19th January 1978, the Respondent repeated the allegations made by her in her action, but added an "implied representation" that the transaction was in effect a security transaction to the extent that she had the stated period of one year within which to re-purchase or redeem her land. In Paragraph 18 she stated that she had been informed and advised by her solicitors (which were a different firm from those earlier advising p.1123-1125  
  
p.1126-1127  
p.1135-1136  
p.1137-1150  
  
p.1143 11.23-27  
  
p.1149 11.11-20

<u>RECORD</u>	her) that the transaction was a security transaction in which the equity of redemption was never lost fettered or clogged without the sanction of the Court. The Third Appellant's application was on the basis that the surrender of the land had freed it from any claims by the Respondent, and that the Respondent's failure to apply for an extension of time in respect of her earlier caveat, and its consequent removal, meant that she could not properly enter another caveat. The Court rejected the Third Appellant's first submission but upheld the second submission. The Court took into account the fact that the land was being developed into a housing estate and that damages would be the appropriate remedy, if the Respondent could establish her claims. The Court ordered the removal of the caveats:	
p.1128-1132		
p.1151-1152		10
p.1156 l.h.c. A-C		
p.1156 l.h.c. C-I p.1156 11.55-59		
	<u>1979 2 M.L.J. 172</u>	20
p.169 11.19-25	25. On the 16th May 1978 the Third Appellant at the direction of the First Appellant transferred 10 plots to Jet Age Construction Co., and on the 30th May 1978 the balance of 60 plots was transferred to that company. The total consideration paid by Jet Age Construction Co. was \$361,113, which was accepted by the Inland Revenue under Section 12A of the Stamp Ordinance and for the purposes of computing real property gains tax payable on the disposition. The chargeable gains arising on the transfer were \$116,425 on which tax of \$46,570 was payable. The First Appellant was the majority shareholder in the company.	30
p.837		
p.160 11.5-15		
p. 1-20	26. On the 30th August 1979 the Writ and Statement of Claim in this action were issued, the principal claims being for damages for fraud and breach of agreement.	
p.381-523		40
p.520 11.7-23 p.563-588	27. On the 17th July 1982 Abdul Rajak J. gave judgment for the Respondent on liability, and committed the Appellants to prison for 2 years for contempt of Court. On the 21st November 1982 the Judge gave judgment on damages. He ordered the Appellants to pay \$973,000 together with interest at 6% p.a. on \$370,210 from 1975 until July 1982 and interest at 8% p.a. on the judgment sum from the 21st November 1982.	
p.590-591		
	28. On the 24th September 1982 the Federal Court of Malaysia (Raja Azlan Shah Ag.L.P. Abdul Hamid F.J. and Abdoolcader J.) allowed the Appellants' appeal against their committal	50

and set aside the order for contempt made against them: 1983 1 M.L.J. 71.

RECORD

29. On the 16th May 1983 the Federal Court of Malaysia (Lee Hun Hoe C.J. Borneo Salieh Abbas C.J. Malaysia and Eusoffe Abdoolcader F.J.) dismissed the Appellants' appeal against the Judge's judgment on liability and on damages.

p.678-713

p.714-715

10 30. On the 15th August 1983 the Federal Court (Abdul Hamid Omar F.J. Mohammed Azri F.J. and Eusoffe Abdoolcader F.J.) granted the Appellants leave to appeal to His Majesty the Yang di-Pertuan Agong.

p.717-718

CASE FOR THE FIRST AND SECOND APPELLANTS

31. Does a claim lie for damages for fraud within Section 340 of the National Land Code?

20 32. The Respondent's claim for damages for fraud was based on "actual fraud as laid down under Section 340 of the National Land Code". The Respondent did not rely on common law fraud.

p.686 11.1-3

30 33. Section 340 of the National Land Code is a provision conferring an indefeasible title upon a registered proprietor. Such provisions are found in most, if not all, systems of land registration - cf. Section 8 2(3) of the Land Registration Act 1925. Such provisions contain an exception in the case of fraud, inter alia. Where fraud within the Section is established, the title is not indefeasible and the register can be rectified. The Section does not create a substantive right to damages, whether or not the title of the registered proprietor is being challenged, but certainly not if the title is not being challenged: which is the case here.

p.181 11.10-11

40 34. The learned judge and the Federal Court proceeded on the basis that the Section could found a claim for damages and held that such a claim arose if there was "dishonesty".

p.427 1.12 -  
p.430 1.12  
p.686 1.1 -  
p.694 1.29

35. The Appellants contend that the Section creates no rights to damages, and that a claim to damages for fraud can only lie under the general law, that is to say, for fraudulent misrepresentation: Barclays Bank Ltd. v. Cole 1967 2 Q.B. 738; Barton v

RECORD

Armstrong 1976 A.C. 104 at p.118D-119A.

p.687-691  
p.427-429

36. The authorities relied upon by the Federal Court and the learned judge as to the meaning of fraud in Section 340 or in similar statutory provisions in other jurisdictions are of no assistance in a claim for damages for fraud, nor is Section 17 of the Contracts Act which was relied upon by the learned judge. These Appellants accept that if Section 340 is relevant, then "fraud" within that Section means either actual fraud (importing personal dishonesty or moral turpitude as opposed to constructive or equitable fraud) or fraudulent misrepresentation or both.

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37. Was there any evidence capable of sustaining the judgment of the Courts below in respect of the pleaded allegations of fraud either within Section 340 of the National Land Code (if relevant) or as fraudulent misrepresentations actionable at common law?

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p.425 11.10-16 The primary finding of fraud by the learned  
p.439 11.13-23 judge, upheld by the Federal Court, was that  
p.468 11.3-17 the First and Second Appellants never intended  
p.684 11.12-19 to fulfil the terms of the agreement dated the  
11.31-32 30th March 1974.

p.686 11.17-22  
p.693 11.7-13 38. This finding is in no way dependent upon  
p.694 11.27-29 conflicting oral testimony. In so far as the  
p.697 11.20-27 point is pleaded at all, it appears in Paragraph  
p.701 1.39 - 12(a)(ii) and (iv) of the Statement of Claim and  
p.702 1.4 is particularised under Request Nos.58 and 69.  
p.703 11.17-27 Under Request No.58 it is alleged that the  
p.13 11.1-7 fraudulent knowledge and intention is "to be  
21-25 inferred from the subsequent conduct of the 1st  
p.14 11.5-13 and 2nd Defendants when neither of them did  
p.61 11.7-13 anything to comply with the terms of the Written  
p.61 11.29-36 Memorandum dated 30.3.74." Under Request No.61,  
particulars of an oral statement are alleged  
but no evidence was led in support of such  
particulars.

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39. In making that finding of fraud under Paragraph 12 the learned judge drew inferences that could not properly be drawn and wholly ignored contemporaneous documentary evidence.

40. The alleged fraudulent intention involved the First and Second Appellants, after a meeting and agreement with Devan, taking a transfer and memorandum to the Respondent, whom they had not met, with the intention of getting her to execute it, but with no intention of paying the sums mentioned in the transfer and memorandum,

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and with the intention of registering the transfer at some future date and thereby obtaining possession of the land.

RECORD

10 41. To infer such an intention ignores the fact that the land was charged to CKB, so that not only would the sums due to it by Devan, have to be paid before the First and Second Appellants could deal with the land, but there could be no surreptitious dealing with the land, as the Second Appellant could not obtain the title deeds without the Respondent knowing of the payment to CKB and authorising their release. It also ignores the fact that because the Respondent and Devan were in possession, then, unless they left voluntarily, there would have to be Court proceedings to obtain possession in which any available defence would be taken by the Respondent.

20 42. As to subsequent conduct, the overdraft at HKSB was, in fact, paid off on 27th April 1974 when it stood at \$121,819.80. On the 30th March 1974 when the Memorandum was signed the overdraft was \$120,717.75. The learned judge held that the First and Second Appellants knew that the overdraft was \$120,000 at the date of the Memorandum. Such a finding was perverse. Given that the overdraft exceeded \$120,000 and that  
30 "the whole exercise was initially to assist Dr. Das financially by arranging payment to Jagindar of the money he paid the HKBC as a guarantor", the Memorandum became unworkable unless it was varied, so as to reduce or adjust the payment to CKB. The learned Judge's finding that the delay in payment until the 27th April 1974 "plainly means [the Second Appellant] had deliberately avoided paying and had no intention of paying in the first place" is an unsustainable inference from the facts.  
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p.89 11.5-8

p.755  
p.406 1.24-  
p.408 1.8  
p.441 1.26-  
p.442 1.22

p.696 11.33-35

p.442 11.15-19

43. As to the sum due to CKB, the learned judge's finding is summarised in the following passage:

50 "it was manifest that the [Appellant's] modus operandi was to obtain the title deeds, ignore the memorandum, refrain from paying CKB and thus forcing the [Respondent - ? Devan] to reduce the overdraft himself and when the opportune moment came for them to pay the Bank, discharge the charges and register the land in their names, while all the time the [Respondent] was kept in the dark."

p.468 11.9-17

RECORD

- p.261 1.30 -  
p.262 1.21  
p.262 1.26 -  
p.263 1.9  
p.35; p.40  
p.101 1.16 -  
p.102 1.36
44. The First and Second Appellants' case was that the Second Appellant and Devan (who throughout negotiated with third parties on behalf of himself and the Respondent) agreed the variations set out in Paragraph 10 hereof and in Paragraphs 3 (j) and 14 of the Defence. The Respondent's evidence was that she did not know about any of these matters.
45. The learned judge dealt with the First and Second Appellants' case as follows :- 10
- p.442 1.23 -  
p.447 1.18
- (i) It was untrue because the Respondent knew nothing about it and there was no supplemental agreement in writing nor had the First or Second Appellant sought to confirm any variation with the Respondent; these Appellants will deal with this later in the Case.
- p.447 11.21-22
- (ii) That the assertion that Devan wished to keep his account open at CKB was as absurd as it was inconceivable, and the learned judge went on to give reasons for his view. However, the learned judge ignored that Devan did go on operating his account at CKB after the 30th March 1974 until he reached his overdraft limit of \$110,000. Although the Respondent knew of the position in respect of the CKB account she did not complain to Devan or to these Appellants, nor did she suggest in her evidence or otherwise that Devan complained to them. 20
- p.447 1.22 -  
p.448 1.16
- p.814  
p.179 1.19-21
- p.761 11.19-27  
p.97 11.5-10
- (iii) That the idea of Devan seeking a buyer during the period could not exist and that there was not a single piece of evidence to support the fact that there were buyers. The Respondent's evidence was that she could not remember if Devan tried to get buyers after the 30th March 1974 but that she was not looking for any buyers. Dr. Das (P.W.2) gave evidence that Devan wanted to sell the property when the pressure to repay the money was on Dr. Das, and that Devan advertised in the papers. Dr. Das put this in 1975 and said he did not think Devan made an attempt to sell in 1974. Dr. Das also stated that after April 1974 the First Appellant 30
- p.448 1.16 -  
p.449 1.15
- p.86 11.22-27
- p.122 11.5-17
- p.119 11.24-26
- 40
- 50



	continued to press for payment.	<u>RECORD</u>
	The learned judge also held that	
	that idea of a buyer during the	
	second half of 1974 and the	
	beginning of 1975 could not exist	p.448 11.20-
	because Devan and the Respondent	25
	agreed to create a further charge	
	to CKB in September 1974, and	p.860
10	such further charge was executed	
	on the 10th March 1975. Such a	p.756-766
	finding does not follow from those	
	facts. The overdraft at CKB	
	exceeded the amount secured by the	p.815
	existing charges and CKB insisted	
	upon a further charge. Devan's	
	attempts to find a buyer would	
	not influence CKB's insistence	
	upon increasing security in the	
20	meantime. The learned judge then	
	drew inferences of fraud, and	p.448 1.25 -
	inferences that there was no	p.458 1.6
	attempt by Devan to find a buyer	
	and no variation of the Memorandum.	p.854-872
	These inferences were drawn from	
	correspondence and from the	
	evidence of an officer from CKB who	p.152 1.20 -
	stated that Devan had also charged	p.153 1.13
	shares to CKB. Such inferences	
	are unsustainable.	
30	(iv) That there was not a scrap of	
	evidence that the Respondent had	p.458 1.6 -
	agreed to pay compensation for	p.459 1.21
	the occupation of the property up	
	until the end of 1975. The	
	learned judge relied on Paragraph 2	p.1027
	of the Third Appellant's Statement	
	of Claim in the Sessions Court	
	action in which it was alleged	
40	that after the sale in July 1975	
	Devan and the Respondent "continued	
	to remain and occupy the said land	
	and premises free from any rents."	
	The learned judge failed to take	
	into account that the compensation	
	for occupation until the end of	
	1975 had been agreed and paid by	
	set-off to the Second Appellant	
	as at the 5th July 1975. So far as	
50	the Third Appellant (as nominee	
	of the First Appellant) was	
	concerned he never had any money	
	claim against the Respondent or	
	Devan and by March 1976 they were	
	merely gratuitous licencees until	
	the service of the notice to vacate.	
	The learned judge also overlooked	

RECORD  
p.1060 11.18-20

the Respondent's counsel's submissions on the 9th August 1976 in the Sessions Court action in which he stated "no rent paid no rent demanded because of certain understanding".

p.459 1.22 -  
p.461 1.9

(v) The learned judge then rejected a submission that the reduction in the sum to be paid to CKB - i.e. \$11,000 - was consistent with the increase in the sum paid to Hongkong & Shanghai Banking Co., and held that there was no reason for the Respondent and Devan to agree to pay over \$6,000 in compensation, rather than having it applied in discharge of overdraft interest with the balance payable to the Respondent as originally agreed. The learned judge overlooked that the original agreement with Devan involved an immediate sale. The addition of the manuscript undertaking and the first variation meant that the obtaining by the Second Appellant of a clear title and of possession would be delayed for a year, during which period the manuscript made no provision for interest. The second variation increased the delay

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p.460 11.23-26

before possession until the end of 1975. There is nothing "preposterous" in the Respondent agreeing that the difference between the sums payable to the two banks and the total price of \$220,000 - i.e. nearly \$7,000 - should be retained by the Second Appellant as compensation for the delay instead of being paid to her as originally agreed on the basis of an immediate sale. The learned judge also overlooked that in the absence of some agreement between Devan and the Second Appellant as to the sum of \$92,000, there is no explanation of why that sum was demanded by Messrs. Yeow & Chin by their letter of the 1st July 1975, and the learned judge also overlooked that the Respondent and Devan in their Defence in the Sessions Court action accepted that \$220,000, not some lesser sum, was repayable by them (Paragraphs 4 and 6).

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p.890

p.1033-1034  
p.90-91

p.461 11.10-13 46. The learned judge then held that these

	Appellants' intention to defraud was clearly evident by their deliberate act of transferring the land to them without informing the Respondent. In this connection he held that Messrs. Yeow & Chin were not acting for the Respondent from February to July 1975 or if they were it was only for the purpose of the discharge of the charges in favour of CKB. That finding was supported by the Federal Court. Such a finding is wholly inconsistent with the correspondence between CKB, Messrs. Yeow & Chin and Messrs. Suppiah & Singh, and, in particular, with letters in June and July 1975, in which Messrs. Yeow & Chin were told the sum required by CKB for the discharge of its charges (\$90,893.49), but, having stated that they acted for CKB and the Respondent, demanded first \$140,000, and then \$92,000, having in the meantime asked Devan to call in to see them.	<u>RECORD</u>  p.461 1.13 - p.464 1.28  p.684 11.33-38 p.873-895  p.884 p.886 p.888 p.890
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20		
30	47. Even if Messrs. Yeow & Chin had only been acting for the Respondent in the discharge of the charge, such discharge and subsequent registration of the transfer could never have been effected "while all the time the [Respondent] was kept completely in the dark", nor "in such haste as to prevent [the Respondent] from recovering her property". The learned judge and the Federal Court in ascribing that intention to these Appellants wholly ignored:	p.468 11.9-17 p.686 11.17-22
40	(i) that even if Messrs. Yeow & Chin were only acting for the Respondent on the discharge they could not release the title deeds to the Second Appellant without her consent;	
	(ii) that she would inevitably know of the discharge of the overdraft at CKB;	
	(iii) that she would receive, as she did, a demand for tax in respect of the disposition, and	p.90 11.1-7 p.792 p.799-802
50	(iv) that the reason the Respondent did not recover her property was that neither she nor Devan were able to repay the sum of \$220,000, as was accepted by them in their Defence dated the 8th May 1976, and before	p.1033-1034 p.90-91

RECORD

p.1155 r.h.c.  
B-E

Syed Othman J. on the 9th September 1976 on an application by them for a stay of execution of the Sessions Court judgment - see reference to this in the judgment of Syed Othman J. in Originating Motion 46 of 1977. By that date more than a year had elapsed since the payment off of the CKB overdraft even if the right of repayment continued for a year after such payment off.

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p.90-91  
p.97 11.19-20

p.1060 11.18-20

p.76 11.19-27

p.875

p.879-880

p.697 11.31-32  
p.99 1.33 -  
p.100 1.2  
p.76 11.10-12  
p.858-860

p.873-874  
p.877

48. As appears from the preceding three paragraphs (i) the Respondent was represented by Messrs. Yeow & Chin who demanded \$140,000 and then \$92,000 on her behalf; (ii) in her Defence in the Sessions Court action she accepted that \$220,000 was repayable knowing that only \$92,000 had been paid to CKB; (iii) before the Court in the Sessions Court action her counsel accepted that no rent was payable because of an "understanding"; (iv) the Respondent knew that the CKB account had not been paid off in March or April 1974 and did not complain; (v) she created the further charge dated the 10th March 1975 but such charge was not registered because of the caveat entered by the Second Appellant. Messrs. Yeow & Chin acting for CKB and the Respondent took no steps to remove the caveat and register the charge; (vi) Devan, being beneficially interested in the property acted for himself and the Respondent in all negotiations and all third parties dealt with Devan alone save in respect of the execution of the deeds. In the circumstances the learned judge's findings referred to in paragraph 45(i) above are without foundation.

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49. In addition to rejecting these Appellants' case as to the reasons for the delay and alteration in payment, the learned judge also relied upon other matters as showing their fraudulent intention not to fulfil the conditions of the Memorandum.

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p.439 11.5-13

p.409 11.3-19

p.1109 1.11 -  
p.1110 1.9

50. The first such matter was the Second Appellant's action in Singapore upon Dr.Das' cheque for \$149,520. The learned judge had also held earlier that this was a breach of contract. The learned judge wholly ignored or misunderstood the evidence of the Respondent and Devan in relation to the cheque given to the Second Appellant by Dr. Das. The cheque was dated the 25th March

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	1975. The sum was made up (i) as to	<u>RECORD</u>
	\$110,000 overdraft capital paid off to	
	Hongkong & Shanghai Bank Co., (ii) as to	
	\$32,520 interest thereon and (iii) as to	
	\$7,000 amount of loss incurred by the	
	First Appellant in breaking a fixed	
	deposit to repay the bank. The sum due	p.119 1.13 -
	was worked out by Devan and Dr. Das, and	p.120 1.7
10	the First Appellant did not ask for the	
	sum of \$7,000 compensation. The purpose	
	of the cheque was to exercise the	
	Respondent's right of re-purchase, the	p.1112 1.28 -
	position at that date being that only	p.1113 1.5
	the Hongkong & Shanghai Bank Co. moneys	
	had been paid off. The cheque was	
	dishonoured and the sum never paid,	
	nor was any other sum ever paid in	
	exercise of the right of re-purchase.	
20	The Federal Court also wrongly ignored	
	the Respondent's evidence as to the	
	purpose of the attempted payment by	
	Dr. Das and misunderstood the evidence	p.701 11.26-39
	in respect of it.	
	51. The second such matter relied upon	
	by the learned judge was his view that	
	the manuscript undertaking "would have	p.439 1.23 -
	completely repudiated that status from	p.440 1.3
	one of absolute owner to that of a	
30	mortgage. It would have drastically	
	changed their original intention	
	allegedly to buy (so they say). How	
	could they ever have complied with	
	the manuscript. If therefore there was	
	already an unequivocal complete and	
	unconditional sale they would hardly	
	have given effect to the outright sale	
	without in other words ignoring the	
	manuscript altogether". The learned	p.440 1.4 -
40	judge went on to hold that the trans-	1.25
	action of sale and option of re-purchase	
	could not be given effect to and that	
	the Respondent had been misled. However,	p.441 11.10-26
	jual janji is a Malay customary trans-	
	action which is enforceable and these	
	Appellants have never alleged the	
	contrary. Further the Respondent was	p.434 11.15-21
	familiar with such a transaction as the	
	learned judge had already held. She would	p.695 1.31 -
50	not have been misled by it, and did not	p.696 1.13
	allege that she was so misled. This	
	finding that these Appellants had no	
	intention of giving effect to the right	
	of re-purchase is wholly unpleaded but	
	was upheld in the Federal Court. Neither	p.697 11.20-27
	Court should have made such a finding of	

RECORD

unpleaded fraud but, in any event, the finding is completely untenable in the light of the attempted redemption in March 1975 referred to in Paragraph 50 above.

p.440 1.25 -  
p.441 1.10

52. The learned judge also relied on the fact that the transfer was left undated as being evidence of an intention not to pay. The learned judge misunderstood conveyancing practice. The execution of a transfer or any other document prior to payment of sums to be paid under it, and in some cases, yet to be ascertained, is common form and not indicative of a fraudulent intention.

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53. In Malaysia fraud has to be proved beyond reasonable doubt. Saminathan v. Pappa 1981 1 M.L.J. 121. The finding by the learned judge, upheld by the Federal Court, of a fraudulent intention by these Appellants not to fulfil the terms of the Memorandum rests merely upon inferences drawn by the Courts. Such inferences are wholly contrary to contemporaneous documentary evidence, viewed in the light of uncontested oral evidence, and are wrong.

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54. In any event, the obligation to fulfil the terms of the Memorandum was contractual. The registration of a transfer by a purchaser who has not paid the purchase price in full and punctually cannot in law amount to fraud within Section 340 of the National Land Code: Saminathan v. Pappa (supra). Nor could the failure to pay found a claim for fraudulent misrepresentation at common law, as any representation as to payment became embodied in the contract and did not induce the contract: George Wimpey & Co.Ltd. v Sohn 1968 Ch.417 at pp.502 D-F 509 B-D.

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55. The learned judge made certain other findings of fraud, which were not in terms referred to by the Federal Court.

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p.435 1.1 -  
p.436 1.5

56. The learned judge held that these Appellants knowing that the Memorandum and transfer effected an outright sale, had by the manuscript undertaking, fraudulently misrepresented that it was a transfer with a right of re-transfer which was a form of security. This finding appears to stem from the learned judge's view, expressed in the preceding two pages, that the option to purchase could not exist at the same time as the sale. This is a misconception. The right of re-purchase created a valid and

p.433 1.24  
p.434 1.15

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10 enforceable contractual right, so that the Respondent had one year in which to repay the money and redeem the property. The transfer by way of security (or jual janji) differs from a true mortgage in that the borrower has no equity of redemption: Haji Abdul Rahman v Mahomed Hassan 1917 A.C. 209; Wong See Leng v Sarawathy Amal 20 M.L.J. 141. In any event, the Respondent has rightly never suggested that the transfer and right of re-purchase did not create a valid form of security and no such misrepresentation as found by the learned judge was pleaded or relied upon by the Respondent.

20 57. The learned judge also held that if these Appellants had intended the manuscript to have any effect their "most atrocious act of fraud" was in not disclosing to the Respondent that the one year for her right of re-purchase would commence from the date of the Memorandum. No such fraud was, or could be, pleaded or relied on by the Respondent. p.437 1.9 - p.438 1.12

30 58. The learned judge also held that these Appellants were guilty of fraudulent misrepresentation when they represented that if Dr. Das was unable to pay the debt the land would be sold and the balance could be used to buy some property nearby. No such representation was pleaded by the Respondent. p.438 11.13-24

40 59. The learned judge held that these Appellants were also guilty of fraudulent misrepresentation because "they represented" the transfer to them was subject to paying in accordance with the terms as stated in the Memorandum. If this was intended as a finding of fact as to an express representation (as pleaded in Paragraph 12 (a)(iv) and Further and Better Particulars thereunder) there was no evidence in support of it. It was in any event a contractual term and, even if supported by evidence, could not have induced the contract. p.438 1.25 - p.439 1.5 p.14 11.5-13 p.61 11.29-36

50 60. The learned judge was wrong to make any of these findings in respect of fraud which, as to the first three, were unpleaded and misconceived, and as to the last-named unsupported by any evidence and misconceived.

RECORD

61. These Appellants therefore submit that there was no evidence capable of sustaining the judgments of the Courts below in respect of the pleaded allegations of fraud against them, either within Section 340 of the National Land Code (if relevant) or as fraudulent misrepresentation at common law.

62. In any event the First Appellant could not be liable for any misrepresentation made by the Second Appellant unless the Second Appellant was his agent, which these Appellants will deal with after dealing with the claim in breach of contract. The learned judge held that the First Appellant was also liable because of "collusion". The learned judge referred to an allegation of collusion to commit fraud. No such allegation was pleaded against the First Appellant and the learned judge's findings in relation to the liability of the First Appellant are unsustainable, save in so far as they are based on agency.

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Breach of Contract

63. The learned judge held that these Appellants were in breach of contract in that (i) the Second Appellant transferred the land to the Third Appellant on the 31st July 1975 and (ii) that payment was not done in accordance with the Memorandum. The learned judge also held there was a breach because the payments were made by the First Appellant. This finding is unsustainable if, as the judge held, the First Appellant was the Second Appellant's principal. It is also unsustainable if, as the Second Appellant stated, the payments were made at his direction: Sections 41 and 42 of the Contracts Act 1950. The Federal Court upheld the learned judge's construction of the Memorandum and his conclusions as to a breach of contract.

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64. If there was a variation of the Memorandum as submitted by these Appellants, then there was no breach of contract (as was accepted by the Federal Court). Even if there was no variation these Appellants submit that the Courts below erred in their construction of the Memorandum. The periods of one year in the manuscript undertaking refer to periods running from the day the Memorandum was signed. These Appellants accept that the sums payable by the Second Appellant were payable as soon as practicable after the date thereof. If the sums were paid late, as they were, the Second

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Appellant was in breach of contract, but that breach did not alter the true construction of the Memorandum. The Respondent could make time of the essence, treat the Second Appellant's breach as a repudiation, and call for a re-transfer of the property or if she did not elect for repudiation she could call for the re-transfer of the property within the year upon repayment only of the sums actually paid by the Second Appellant. The point of construction has no practical importance, as even if the year ran from the date of full payment - that is the 5th July 1975 - the Respondent was unable to repay the money within the year. Further on the learned judge's finding, that the First Appellant was the principal of both the Second and Third Appellants, the transfer of the 31st July 1975 would not be a breach of the Memorandum. On that view, no sale took place until May 1978.

p.1033-1034  
p.90-91  
p.1155 r.h.c.  
B-E

65. These Appellants accept that if there was no variation, then the Second Appellant was in breach of contract in respect of the late payments, and the lesser payment in respect of CKB.

66. Agency

The learned judge then held that the Second Appellant was, at all material times, the agent of the First Appellant so that both these Appellants were liable to the Respondent for the breaches of contract that he found. The Federal Court upheld this finding.

p.409 1.20 -  
p.415 1.8  
  
p.698 11.5-6

67. The evidence on which the learned judge made his finding was (i) that both sums were actually paid by the First Appellant (the learned judge mistakenly supposed that the Second Appellant was to pay the Hongkong & Shanghai Bank Co.) and (ii) that the Third Appellant was admittedly the First Appellant's nominee. The learned judge also relied on the fact that the Second Appellant had not inspected the land, and had not made a profit on the transfer to the Third Appellant. The learned judge questioned why the Second Appellant would borrow the sums paid from the First Appellant, if he could have paid the sums himself. The learned judge overlooked (i) that the Respondent's evidence was that throughout the meeting of the 30th March 1974 it was

p.411 1.9  
  
p.411 11.10-12  
p.411 1.26 -  
p.413 1.2

RECORD

p.74 1.22 - the Second Appellant alone who dealt with  
p.76 1.12 her and, in particular, agreed to and  
dictated the manuscript undertaking without  
any reference to the First Appellant;  
(ii) that the First Appellant had not  
inspected the land; and (iii) that as by  
July 1975 no steps had been taken with a view  
to development of the land there was no  
reason to suppose that the Second Appellant  
ought to have sought to make a profit. 10

p.414 1.20 - 68. The inference of agency made by the  
p.415 1.8 learned judge, and by the Federal Court,  
from the facts found by the learned judge  
is unsustainable. In any event the  
allegation was not pleaded and no amendment  
of the pleadings was sought. Had such an  
amendment been sought it ought not to have  
been allowed as a claim against the First  
Defendant as principal for breach of  
contract would have been statute-barred. 20  
The learned judge was wrong to entertain  
such claim at all.

p.413 1.8 - 69. While dealing with agency, the learned  
1.28 judge, in commenting on the Amended Defence  
of the Third Appellant, referred to a  
submission in the Sessions Court made by  
p.1057 1.29 - the Second Appellant to the effect that  
p.1058 1.7 the Third Appellant had bought the land from  
him. This submission was in the context  
of a submission, made upon an interlocutory  
application, that any question of the Third  
Appellant's title could only arise in a  
High Court action for rectification of the  
title under Section 340 of the National  
Land Code, and in such an action, the Second  
Appellant as the predecessor in title would  
have to be a party. The submission was not  
an assertion that the Third Appellant was a  
bona fide purchaser and neither then nor  
at any other time did the Second Appellant  
make such an assertion - as the Respondent  
accepted and averred in her Memoranda of  
Appeal in the Sessions Court action and in  
Originating Motion 46/77 for the removal  
of the caveat. The learned judge misunderstood  
the position, and his comments apparently  
stem from a suggestion by the Respondent's  
counsel that the Amended Defence of the Third  
Appellant disclosed further acts of fraud  
which would be pleaded but never were. 40

p.1056 1.38 -  
p.1058 1.38  
  
p.1167 11.2-10  
  
p.243 1.10 -  
p.246 1.29

Undue Influence

70. Although the Respondent abandoned any claim

		RECORD
	for an account of profit, both the learned judge and the Federal Court dealt with the question of undue influence.	p.415 1.9 - p.423 1.18 p.682 1.27 - p.685 1.7
	71. Both Courts erred in law in assuming that every solicitor and client retainer gives rise to a fiduciary relationship so as to be within Section 16 of the Contracts Act.	p.697 1.28 - p.700 1.7
10	The question is one of fact and degree: <u>Edwards v. Williams</u> 32 L.J. Ch.763. Prior to the 30th March 1974, these Appellants wrote the letters of the 12th and 16th March 1974 on behalf of Devan and the Respondent. On the 30th March itself the Respondent did not know that these Appellants were acting for her as solicitors. The first occasion on which Devan or the Respondent alleged a solicitor and client relationship was in Devan's Statutory Declaration made on the 25th January 1977.	p.851-853  p.76 11.10-16 p.77 1.17 - p.78 1.4 p.85 1.26 - p.86 1.9 p.1191 11.23-28
20.	72. Subsequent to the 30th March 1974, until January 1975, these Appellants wrote further letters on behalf of Devan and the Respondent, but during this period Devan and the Respondent consulted another solicitor, Mr. A.L.Looi, in connection with a further charge, and by the time of the completion of the transfer to the Second Appellant, Devan and the Respondent were represented by Messrs. Yeow & Chin as has been submitted in Paragraph 46 hereof.	p.855, 863, 864, 868, 870  p.860
30	73. Despite the allegation in the Particulars of Paragraph 11 of the Statement of Claim, the Respondent accepted that she entered into the transaction and executed the transfer and the Memorandum at the request of Devan. The learned judge found that the Respondent was aware that the document she signed was a transfer and that "because of the manuscript the [Second Appellant] knew [the Respondent and Devan] intended the transaction to be a security ...." As already submitted in relation to the claim in fraud the concept of a security by way of a transfer with a right of re-purchase is a Malay customary transaction and the Respondent was familiar with such transactions.	p.10 11.23-26  p.679 11.15-21 p.1121 11.11-14  p.430 1.20 - p.431 1.1  p.434 1.15-19
40	74. It was not suggested that the price of	p.696 11.8-12 p.434 11.19-21

<u>RECORD</u>		
p.366,11.13-16	\$220,000 was an undervalue for the transfer of the land in its state at the date of the Memorandum. The Respondent's case accepted by the learned judge was that the value of the property was not relevant except on the question of damages. So far as the right of re-purchase was concerned, it was exercisable for one year, without any provision for interest or other compensation, until the oral variations were made.	10
p.498 11.4-10		
p.682-685	75. The Federal Court, having held that a relevant solicitor and client relationship existed, held that these Appellants obtained an unfair advantage (within Section 16 of the Contracts Act 1950) because the Second Appellant never intended to fulfil the conditions of the Memorandum. The Federal Court erred in finding that a fiduciary relationship existed in the present case whether at the date of the bargain or at the date of completion in July 1975. Even if right in so finding the Federal Court erred in holding that the Second Appellant never intended to fulfil the conditions - as already submitted in relation to the claim in fraud. Even if that were right, the Federal Court erred in holding that a fair bargain can be said to be induced by undue influence if it is shown that the dominant party did not intend to carry it out.	20
p.698 11.30-32		
p.698 1.34 - p.700 1.7	76. The Federal Court then upheld the learned judge's finding that the bargain was unconscionable so that the burden shifted under Section 16(3) of the Contracts Act.	30
p.419 1.24 - p.422 1.29	77. The learned judge had mentioned a number of matters before concluding that the bargain was unconscionable. Such matters related to the construction the learned judge mistakenly thought these Appellants were advancing and to the variation of the bargain alleged by these Appellants, but rejected by the learned judge. The learned judge also stated that these Appellants submitted that the manuscript undertaking was of no effect and unenforceable, but these Appellants have never made any such submission. The learned judge erred in holding that such matters or any of them made the transaction unconscionable so as to shift the burden under Section 16(3) and the Federal Court erred in upholding the learned judge.	40
p.422 1.29 - p.423 1.18		50

Breach of Trust

RECORD

78. The claim as pleaded appears in particulars under Paragraph 11 of the Statement of Claim and Further and Better Particulars thereof. No special circumstances were pleaded and none proved.

p.12 11.6-25  
p.58 11.18-24  
p.59 1.25 -  
p.60 1.21

79. The transfer was in the possession of the Second Appellant as purchaser and not as the Respondent's solicitor.

10 80. The learned judge erred in holding that these Appellants "had been entrusted by the Respondent with the holding of the document of transfer as a security" and were thereby constructive trustees of the property, so that registration of the transfer to the Second Appellant and the subsequent transfer by him were in breach of trust.

p.424 11.11-18

20 81. If the learned judge's view was right every solicitor/mortgagee would be a trustee of the mortgaged property.

82. The law is correctly stated in Cordery on Solicitors 7th Ed. p.106: "Special circumstances are needed to raise the relation of trustee and cestui que trust between solicitor and client....."

30 83. In any event even if these Appellants held the transfer as trustees, the registration of the transfer to the Second Appellant and the subsequent transfer by the Second Appellant were not in breach of the terms of the Memorandum for the reasons already submitted in relation to the claim for breach of contract.

Damages

40 84. The learned judge in a judgment on damages given on the 21st November 1982 awarded the Respondent \$973,000 with interest at 6% p.a. on the sum of \$370,260 from 1975 till July 1982 and interest at 8% p.a. on the judgment sum. The Federal Court upheld the judgment in its entirety.

p.590-591

85. The Respondent's claim was for breach of contract, undue influence, breach of trust and fraud. The learned judge stated that he had found the First and Second Appellants liable in respect of each separate cause

p.563 11.12-13

<p>RECORD</p> <p>p.563 11.14-17</p> <p>p.563 11.18-27</p> <p>p.565 1.1 -</p> <p>p.567 1.8</p>	<p>of action and the Third Appellant liable for fraud. The learned judge then stated that in respect of undue influence and breach of trust the remedy would be restitution or an account of the proceeds, and that the Respondent had abandoned the claim for an account of any profits. That left a claim for damages for breach of contract and fraud. The learned judge then correctly set out the measure of damages in each case, but proceeded to consider the fraudulent measure only, as that would "necessarily cover the claim for breach of contract and trust as well".</p>	<p>10</p>
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86. The sum of \$973,000 was made up as follows :-

<p>p.567 1.21 -</p> <p>p.579 1.27</p> <p>p.579 1.27 -</p> <p>p.580 1.19</p> <p>p.580 1.20 -</p> <p>p.581 1.10</p>	<p>(i) \$370,260 value of land in July 1975</p> <p>(ii) \$518,364 increase of 140% in respect of period 1975 to 1982</p> <p>(iii) \$ 84,000 value of house in July 1975</p> <p style="text-align: center;"><u>\$972,624</u></p>	<p>20</p>
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<p>p.781-785</p> <p>p.784 11.7-13</p> <p>p.135 11.2-17</p> <p>p.135 1.30-</p> <p>p.136 1.16</p> <p>p.136 1.20 -</p> <p>p.137 1.3</p>	<p>87. The Respondent called two witnesses on value. The first, Mohammed Kepol, prepared a written valuation dated the 7th July 1975. In it he valued the land at \$980,100 and the house at \$126,000. He stated that the value of the land was determined by the comparative approach, and quoted transactions between \$4.00 to \$5.00 p.s.f. In evidence he admitted that he had not used transactions for comparison, and at first stated that the figures quoted by him were obtained from neighbouring landowners and represented what they said was the price at which they were prepared to sell. He later said he had asked a few developer friends and they said they were prepared to accept \$4 to \$4.50 p.s.f.</p>	<p>30</p>
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<p>p.735-736</p> <p>p.831-836</p> <p>p.834 11.31-34</p>	<p>88. The second witness was Chong Kim Seng who had prepared a valuation dated the 26th February 1972 used by Devan in the negotiations leading up to the Memorandum. This valued the land at \$210,000 (including the site of the house) and the house at \$48,000. He also prepared a valuation in October 1979 in which he valued the land as at the 31st July 1975 at \$653,400 (\$3.00 p.s.f.) and the house at \$48,000. In that valuation he asserted comparable transactions at around \$2.00 to</p>	<p>40</p>
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\$4.00 p.s.f. In evidence he admitted that he had no comparables. The figures he had referred to were taken from another valuation made by him of a completed development. He could not remember the value of the land in that case before sub-division.

RECORD  
p.158 1.20  
p.159 11.9-19  
p.157 1.14 -  
p.158 1.15

10 89. The Appellants called one expert witness, a qualified chartered surveyor. He prepared a report dated the 12th September 1981. He was asked to report if the price of \$220,000 paid for the land was a fair and reasonable attribute of its market value as at the 30th March 1974 and the 5th July 1975. He used comparables. He found that in the period 1973-1977 comparable properties with development prospects were being recorded in the region \$24,000 - \$37,000 per acre. He concluded  
20 that the value of \$220,000 (\$44,000 p.a.) for the land was not unreasonable at 30th March 1974 and that the value for the 5th July 1975 would be no different. The learned judge therefore had before him two witnesses for the Respondent who, having stated that their valuations rested on comparables, accepted that they had not used comparables and gave no real data in support of their opinions. He also  
30 had the expert witness for the Appellants who gave evidence as to comparable transactions. The Respondent's witnesses did not challenge the suitability of the comparables. The learned judge also had before him the fact that the consideration of \$220,000 had been accepted as the value of the land under the Stamp Ordinance 1949 on the transfers dated the 5th July and  
40 the 31st July 1975 when the land was agricultural land, and that the consideration of \$361,113 was accepted by the Revenue under the Stamp Ordinance 1949 and for computing real property gains tax on the transfers dated the 16th May and the 30th May 1978 after sub-division and planning approval. In such circumstances the learned judge ought to have rejected the evidence for the Respondent and accepted the evidence for the Appellants: Nanyang Manufacturing Co. v The Collector of Land Revenue Johore 20 M.L.J.69; Pribhu Dyal v Secretary of State 135 I.C. 183.

p.846-849  
p.795-798  
p.848 11.18-20  
p.849 11.7-16  
p.770  
p.789A-790  
p.837

90. However the learned judge rejected the Appellants' evidence. In particular

RECORD		
p.571 11.8-12	the learned judge found that there was a "recognition by the Government itself that there has been a very sharp and steady increase in prices contrary to what DW4 said, even after 1974 and this seemed quite prominent from 1974 to 1977". The basis for this finding was that the Stamp Duty Valuation Office had valued two lots sold in November 1973 at 43% above the stated consideration, and that a third nearby lot had sold a week later at a consideration, accepted by the Valuation Office, but 76% higher than the stated consideration in the earlier sales. The learned judge also relied on a revaluation by the Valuation Office in the case of a sale in January 1977 from \$10,000 p.a. to \$32,000 p.a. as showing an increase in value of 220%. The learned judge referred to these figures again in rejecting the Appellants' witness' view that the enactment of the Land Speculation Tax in March 1974, but effective from the 6th December 1973, checked prices. The learned judge misinterpreted the effect of a revaluation by the Valuation Office of the expressed consideration in a transfer. It provides no evidence of an increase in market values over a period. Having misinterpreted the valuation evidence on that point, the learned judge then substituted his own view of the suitability of the comparables, although suitability had not been challenged by the Respondent's witnesses.	10
p.570 1.15 - p.571 1.8		
p.578 1.4 - p.579 1.24		20
p.571 1.13 - p.574 1.10		30
p.703 1.29 - p.705 1.25	91. The Federal Court erred in principle in upholding the learned judge's award. The Federal Court relied on a passage in <u>Loi Hieng Chiong v Kon Tek Shin 1983 1 M.L.J. 31</u> , but the Court in that case was not concerned with ascertaining the market value for the purposes of an award of damages, but with whether or not one plot of land must have been worth more than another plot. The extract from the judgment should be confined to that circumstance and does not support a general principle that a Court can decide market value through judicial notice.	40
p.567 11.3-20	92. The learned judge erred in law in holding that he should add to the value of the land at the time of the wrong, any change in its value up to the time the action should have reasonably been brought to judgment. The passage in McGregor on Damages relied upon is in the context of claims for conversion or	50



detinue. In damages for fraud subsequent events can be looked at for the purpose of ascertaining the value at the date of the wrong, but a subsequent appreciation or depreciation in the value of the property transferred or received is irrelevant: Peek v. Derry 37 Ch.D. 540.

RECORD

10 93. The Federal Court does not appear to have dealt with this point in terms, but in upholding the whole of the learned judge's judgment they have erred in principle.

20 94. Even if as a matter of law the damages should be assessed at the date of the trial the Respondent called no evidence as to the value of the land at that date. The figure of an increase of 140% was arrived at by the learned judge holding that, in his view, "it had become a matter of public and common knowledge that.....the normal annual rate of increase of land prices has always been generally about 20% p.a. This seems to be confirmed by the 700 or so land reference cases that came before me for the last 11 months or so throughout West Malaysia". In the absence of any evidence as to land prices in 1982 the learned judge's finding is unsustainable, and ought not to have been upheld by the Federal Court.

p.580  
11. 4-12

30 95. The evidence of land values was based on sales for development and not on existing use. In such circumstances to add the value of the house is wrong. The learned judge held that it was not necessarily contradictory because it is done when valuing where the land use is agriculture because the value then is only estimated not exact. He also held that "if the test of reasonableness is to be applied then it should be held more in favour of the [Respondent] because she has lost her house and her land against her will". The Federal Court held that the Court was concerned with "the value to [the Respondent] rather than to the Appellants. To the developer the house might be of no value as it was to be demolished for development. But it was of great value to [the Respondent]. So her loss of the property would include the house." Both Courts erred. The value of the land in July 1975 was either the price a developer would pay, or its existing use

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p.580 1.20 -  
p.581 1.1

p.581 11.1-10

p.705 11.1-5

RECORD

value, which could include the value of the house.

p.581 1.11 -  
p.582 1.20

p.710 11.1-36

96. The learned judge and the Federal Court both rejected these Appellants' submissions that the Respondent must give credit for value received. The Courts relied on Section 24 of the Contracts Act and Palaniappa Chettiar v Arunasolan Chettiar 1962 A.C.294. Section 24 has no relevance. It deals with whether the consideration for an agreement is lawful or unlawful. The case relied upon was concerned with the recovery of property transferred for a fraudulent purpose. The Appellants are not trying to recover property. The Respondent is seeking to establish her loss, and in so doing must give credit for sums paid to her or at her direction: Doyle v Olby (Ironmongers) Ltd. 1969 2QB 158 at p.167 D-E.

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97. It follows that credit must be given in respect of the payments of \$110,000 to Hongkong & Shanghai Banking Co. and \$92,000 to CKB.

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98. These Appellants submit therefore that the judgment of the Courts below were wrong on the quantum of damages. If the learned judge had acted upon the evidence of comparables the Respondent would have established no loss. If the learned judge was entitled to find a value of \$370,260 the sum of \$212,000 must be deducted therefrom. Finally, the Respondent is entitled to interest on damages, if any, assessed as at July 1975, but she is not so entitled if the learned judge was right to assess damages as at the date of the trial, as he did by increasing the 1975 value by 140%.

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p.588 11.15-20

p.586 11.15-27

p.708 1.17 -  
p.709 1.4

99. The learned judge having determined damages as for fraud held he did not have to assess damages for breach of contract and make a separate award. The Federal Court upheld this decision. As the measure of damages is different in contract and tort, the courts below erred in their conclusions.

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100. As to breach of contract, there was none if the Memorandum was varied as these Appellants allege. If there was no variation binding upon the Respondent, then there were breaches of contract by the Second Appellant. The breaches found by the learned judge were the payment of \$92,000 in July 1975 instead

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of \$110,000, on the 30th March 1974 and the transfer to the Third Appellant prior to the expiration of one year from the 5th July 1975. The latter breach caused no loss as the Respondent could not, at any material time, have repaid the sums needed to recover the property - as she stated in her Defence in the Sessions Court action dated the 8th August 1976 and as admitted before Syed Othman J. on the 9th September 1976. The former breach caused a loss of \$18,000. The Federal Court, although upholding the learned judge's single award, dealt with the submissions on damages for breach of contract and rejected these Appellants' submissions by stating that they were unacceptable. The Federal Court gave no reasons for their view. Their conclusion was wrong.

RECORD

p.406 11.17-20  
11.26-30

p.90-91  
p.1155 r.h.c  
B-E

p.707 1.6 -  
p.708 1.16

### CONCLUSION

These Appellants submit that the judgments of the Federal Court and of Mr. Justice Razak were wrong and ought to be reversed wholly or in part and the Respondent's action should be dismissed against either or both of these Appellants or the award of damages should be reduced for the following amongst other

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### R E A S O N S

1. BECAUSE Section 340 of the National Land Code does not create a right to damages for fraud or misrepresentation;
2. BECAUSE the courts below were wrong in inferring an intention on the part of the First and Second Appellants not to fulfil the terms of the Memorandum and there was no other pleaded allegation, supported by evidence, capable of founding a claim to damages for fraud under Section 340 or otherwise;
3. BECAUSE the terms of the Memorandum were varied and there was no breach of contract by the Second Appellant;
4. BECAUSE, as to the First Appellant, even if there was a breach of contract by the Second Appellant, the Courts below were wrong in law in considering whether the Second Appellant was the agent of the

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RECORD

First Appellant, and wrong in fact,  
in finding that he was;

5. BECAUSE the solicitor client relationship between the First and Second Appellants and the Respondent was not such as to give rise to a fiduciary relationship within Section 16 of the Contracts Act;
6. BECAUSE the transaction was not unconscionable, and the Second Appellant did not obtain an unfair advantage over the Respondent through the transaction; 10
7. BECAUSE the First and Second Appellants did not hold the transfer executed by the Respondent as trustees;
8. BECAUSE the registration of the transfer and the subsequent transfer by the Second Appellant were not in breach of trust;
9. BECAUSE the Courts below erred in making one award of damages covering the claims in fraud and in breach of contract; 20
10. BECAUSE the market value of the property in July 1975 was \$220,000 or less;
11. BECAUSE no sum should be added to the market value to reflect any change in value up to the date of judgment, and no sum can be added in the absence of any evidence of value;
12. BECAUSE the value of the house should not be added to a market value based on development value; 30
13. BECAUSE credit should be given for the sums of \$212,000 paid by the Second Appellant;
14. BECAUSE, if the Respondent is compensated by an addition to reflect a change in value she is not entitled to interest on the 1975 market value;
15. BECAUSE the judgments of the Federal Court and Razak J. were wrong.

T.L.G. CULLEN Q.C. 40

