

IN THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL

44/85  
No. 39 of 1983

ON APPEAL FROM THE  
FEDERAL COURT OF MALAYSIA

---

BETWEEN

1. DATUK JAGINDAR SINGH

2. DATUK P. SUPPIAH

3. ARUL CHANDRAN (Defendants)

Appellants

- AND -

TARA RAJARATNAM (M.W.) (Plaintiff)

Respondent

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~~CONFIDENTIAL~~  
~~CONFIDENTIAL~~  
RECORD OF PROCEEDINGS

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~~CONFIDENTIAL~~  
VOLUME ~~CONFIDENTIAL~~

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ON APPEAL FROM THE  
FEDERAL COURT OF MALAYSIA

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BETWEEN

1. DATUK JAGINDAR SINGH

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- AND -

TARA RAJARATNAM (M.W.) (Plaintiff)

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RECORD OF PROCEEDINGS

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JUDGMENT OF RAZAK J.

IN THE HIGH COURT IN MALAYA AT JOHOR BAHRU

CIVIL SUIT NO.284 OF 1979

BETWEEN

Tara Rajaratnam

... Plaintiff

AND

Datuk Jagindar Singh }  
Datuk P. Suppiah }  
Arul Chandran }

... Defendants

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1982

JUDGMENT OF RAZAK, J

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A Dr. Dass was one person who seemed to have embarked in life resigned to the inevitability that however hard he tries its many hazards would somehow sometime involve himself in some form of financial strait or another. That in retrospect seems somewhat to be the circumstance in which this case story began, because one day in 1973 he was driven into the novel idea of starting a computer medical centre in Singapore called medidata. But no sooner had his project been launched, when he began to encounter with difficulties. The undertaking required a lot of funds to get it started and to keep it going; it soon became clear to him that he had not sufficient means to finance it alone. He was rendered impecunious. He had to borrow and borrowed he did. He sought his friends for assistance and one of his friends (at least he though he was) was Datuk Jagindar Singh, an Advocate & Solicitor, the first defendant in this case. He knew him sincetheir student days in England. Without much ado, the 1st. defendant agreed to back him.

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...2/-



He would stand as his guarantor to the Hongkong and Shanghai Bank Singapore (henceforth referred to as HKB) for an overdraft of up to a ceiling of \$120,000/-. There was no time limit set on the repayment by the Bank, but the understanding between Dass who gave evidence, P.W.(2) and the 1st. defendant was that it was for a short period only. P.W.(2) drew on the overdraft but later the 1st. defendant called upon P.W.(2) to clear it but he was unable to do so. That briefly was the background against which the present action was brought because following in the wake of that overdraft, P.W.(2) sis-in-law one T.Rajaratnam, the plaintiff in this action, whose husband was P.W.(2)'s brother, in circumstances which will be related to shortly, was later to transfer her land to Datuk Suppliah, the 2nd. defendant the 1st defendant's legal firm's partner and the former later transferred it to one Arul Chandran, another Advocate & Solicitor practising in Singapore, the 3rd. defendant in this case. According to the writ filed by the plaintiff, the land was to be used as a security for an advance of \$220,000/- to the plaintiff or her account. For this purpose she signed a number of blank and undated transfer and other related forms. Although the manner in which this was done, was in the form of a sale, she was assured by the defendant that the land would always remain as a security. He also assured her that although the period of repayment was limited to one year.

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...3/-

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the property would be restored to her, nevertheless, even after it. There was a memorandum which she signed accompanying the transfer forms. Under the memorandum (P.30 and 31) the 2nd. defendant was to pay Chung Khiaw Bank hereinafter called CKB \$103,000/- to discharge the plaintiff's debt and was to pay \$110,000/- to the 1st. defendant who will pay HKB to discharge P.W.(2)'s debt. The 2nd. defendant was also to pay \$6,341.50 to the Bank for interest and the balance if any, to be paid to the plaintiff, making a total payment of \$220,000/-. The memorandum P.30 and 31 are as follows:-

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P.30

I, TARA RAJARATNAM (f) NRIC  
No. 2317344 of No.76, Main Road,  
Kulai Johore, proprietor of the land  
described in the Schedule below and  
the house erected thereon and known  
as KLBSK 681, Kulai Besar, Kulai,  
Johore, confirm that the considera-  
tion of \$220,000.00 referred to in  
the Transfer executed by me in respect  
of the said land in favour of PAKRISAMY  
SUPPLAH of No.33, Jalan Keruing, Kebun  
Teh Park, Johore Bahru is arrived at

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...4/-

as follows:-

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(a) in consideration of the said  
P.SUPPIAH paying the sum of  
Dollars \$103,658.44 which is  
the amount due from me to the  
CHUNG KHLIAW 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  
executed by me in their favour  
and a further sum of \$6,341.56  
(making in all \$110,000/-)  
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 me;

20

(b) a further sum of \$110,000.00  
is in consideration of the  
said P.SUPPIAH paying Datuk  
JAGINDAR SINGH of No.41,  
Jalan Waspada, Johore Bahru,  
being the amount payable by  
my brother in-law Dr. KRISHNA

...5/-

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SHIVADAS (also known as  
Dr. DAS) of No.25, Jalan  
Waspada, Johore Bahru, to the  
said Datuk JAGINDAR SINGH who  
will be paying to the HONG-  
KONG & SHANGHAI BANK, Collyer  
Quay, Singapore the sum of  
\$110,000.00, (which I hereby  
agree) being the loan granted  
to my said brother-in-law by 10  
the said Bank on the guarantee  
given by the said Datuk JAGINDAR  
SINGH.

P.31

The Schedule referred to above.

Mukim Lot No.	Descrip- tion and No. of Title	Share of land (if any)	Regis- tered No. of lease/ sub- lease (if any)	Regis- tered No. of charge (if any)	20
------------------	---	------------------------------	--	---	----

...6/-

Senai- Kulai-	6025	Certificate of Title No.13817 for area 5A, QR.QQP. or thereabouts	whole	nil	nil
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Dated this 30th. day of March, 1974.

Sgd.

Sgd.

Witnessed by  
by K.V. Devan.

Signed by the above-  
named Tara Rajaratnam

10

I, the above named Pakrisamy Suppiah here-  
by 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 me the sum of \$220,000/- (Dollars two hundred  
and twenty thousand only) the consideration  
mentioned as above.

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Sgd.

Sgd.

C. Sivananthan

P.Suppiah

(The undertaking is in manuscript and will be  
referred to as P.31).

...8/-



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The averment says that the 2nd. defendant had instead with knowledge of these facts, and in complete disregard of the memorandum in collusion with the 1st. defendant, nevertheless unlawfully and inequitably transferred the land to him and later the 2nd. defendant in order to defeat the plaintiff's title in collusion with the 3rd. defendant unlawfully and inequitably transferred it to the latter. She claimed that the defendant had in so doing acted in breach of contract and/or exercised undue influence, committed a breach of trust and/or fraud on her. She asks for a declaration that the transfers were null and void and that the defendants were trustees of the said property for her benefit. She asks for an inquiry into the proceeds of sale of the land from the 3rd. defendant to third parties which had taken place and that such monies be held on trust for her. That any land that had not been transferred and sold to third parties be transferred to her. She also asks for damages for the breach of agreement, trust and/or fraud and interest. Devan died after this action was filed.

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The defendants in their averment said that the land was in fact sold to the 2nd. defendant because F.W.(2) was unable to pay his debt of \$110,000/- to HKB on the \$120,000/- guarantee.

...8/-

P.W.(2) had consequently arranged with his brother Devan when faced with this predicament to sell the land which the deceased Devan said belonged to him but was in his wife's name, at the price which was later agreed at \$220,000/-. A transfer was subsequently executed by the plaintiff with the consideration at \$220,000/-. The defendants were on terms with the plaintiff regarding the one year's grace to repay but said that it was limited, contrary to what the plaintiff said, to one year only and from the 30th. March, 1974. The 1st. defendant said that when the 1st. defendant wanted to pay off the HKB he discovered that the overdraft was not \$110,000/- as mentioned in the memorandum but about \$121,000/-. The 1st. defendant said he informed P.W.(2) and the deceased about this and then the latter said to the 2nd. defendant that he could ask the 1st. defendant to pay off whatever the overdraft was and the consideration would be adjusted accordingly. The deceased said he wanted to continue to operate the account with the CKB for about a year. He would like to stay on the property and would pay compensation and he was looking for buyers, and if he could find one, he wanted to transfer the property direct to the buyers. They denied that the transfer was intended to be a security, and also of the alleged assurances given by them except on the admission that the transfer was undated for the reasons they contended that since there were three

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...9/-



charges on the property in favour of CKB these had to be discharged first before the transfer could be registered. They said that before the expiration of one year from 30th. March, 1974 the 2nd. defendant asked the deceased whether he would be purchasing the property or find a buyer for it. The deceased told him that he and his wife could not find a buyer nor find the means to purchase the property but reiterated he wanted to stay on the land up to the end of 1975 for which he would pay compensation. He also told the 2nd. defendant that he would pay compensation. He also told the 2nd. defendant that he would cease operating the overdraft account in June 1975 with CKB and that when he did so he would bring the overdraft down to \$92,000/- and compensation was agreed at \$6,180/-. Then on the 2nd. February, 1975 he filed a caveat against the land. He said he was told by the plaintiff bank solicitor Yeow & Chin sometime in June 1975 that they were also acting for the plaintiff and that the charges would be discharged on payment of \$92,000/-. He duly paid the amount and later transferred the land to him and subsequently to the 3rd. defendant.

The events that took place subsequent to the transfer would have a bearing on the suit itself. As already stated on the 26th. March 1976 the 3rd. defendant in C.S.146/76 filed an action in

...10/-

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the Sessions Court against the plaintiff for possession of the subject land. The Court gave possession to the defendant. The plaintiff appealed against the decision. It came before Annuar J.C. as he then was. He dismissed the appeal. (P.109). The plaintiff appealed to the Federal Court but, being out for time, her application was dismissed. She then appealed for an extension of time but it was also dismissed. She then in O.M.17/76 made an application to the High Court for a stay of execution pending appeal against the order made by the Sessions Court for possession. This was also dismissed. In the meantime the plaintiff had filed 3 caveats against her land, the third came before Syed Othman J (as he then was) (P.113), on an application by the 3rd. defendant to set aside the caveat. It was allowed. The plaintiff appealed against the decision, but later withdrew her appeal! She then filed an action in the High Court in 261/77 against the defendant. The appeal was dismissed by the High Court. There was no appeal against the decision. The plaintiff then filed the present action 284/79. The matter was again dismissed on ground of res judication. But the Federal Court allowed the appeal. It is also to be noted that on the 6th. day of the trial the 3rd. defendant amended his defence to say that he was a nominee of the 1st. defendant. At the initial stage Mr. Chin acted as his Counsel. He discharged

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...11/-

Mr. Chin. He then acted on his own behalf until Mr. Ronald Khoo was retained. Mr. Ronald Khoo was acting as his Counsel at the time of the amendment.

There are, as evident, three claims against the defendant for breach of contract, with undue influence, for breach of trust, and for fraud. The facts bearing on each claim are basically the same. They would thus tend to overlap in some instances. However, the need to identify the points raised would only require them, where necessary, to be repeated, in the course of my judgement.

The plaintiff in her evidence recounted the events and the circumstances which led to her signing the memorandum. She said that on the 30th. March, 1974 three people came to her house which was situated on the land the subject of the present dispute. She said the three were the first, second defendants and another one, Sivanandan, D.W.(4). They were introduced to her by the deceased. She knew they were lawyers. Before that time she had come to know that P.W.(2) was indebted to the Hongkong Bank in the sum of \$110,000/-; that the 1st. defendant had to pay Hongkong Bank also about \$110,000/-. Also, that she was to put up her land for security for the two sums. When she was handed P.30 she read it and she saw the word "transfer" in it. She asked the 2nd. defendant why it was a transfer when it was going to be a security. The

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2nd. defendant said the security was by way of a transfer. Then she asked how she was going to get the land back once transferred. He replied that P.W.(2) would pay the debt to him (the 2nd. defendant) and she would get back the land. He did not say when she was going to get the land back. She asked if P.W.(2) could not pay, what would happen. He said he could sell the land, pay off the debt and the balance could be used to buy some property nearby. She was still not happy. She told him she had five daughters and she was holding the land for them. Then, he asked P.W.(4) to write something on P.30, in manuscript (P.31). It was then signed by the 2nd. defendant and P.W.(4). She saw the one year in the manuscript, the period she was to repay and get her land back. She asked him why one year had been specified. He told her she could get back the land anytime she liked. He did not want her land. But she expected then, or in a day or two that the sum stated in the memorandum would be paid. He did not tell her when he was going to pay. She signed P.30 and 31 after he had asked the questions. There were also transfer forms which were not filled up; also some typed papers with empty spaces which she signed. There were 2 or 3 blank sheets of paper. She asked the 2nd. defendant about the blank papers. He told her that some type-written letters must accompany the transfer forms which she signed.

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...13/-

After signing the memorandum and the manuscript she still received demands from the CKB for payment. The interest was at 11%. It was something under \$1,000/- p.m. By the end of 1974 the \$110,000/- had not been paid. By 1975 the CKB kept pressing. On the 28th. March, 1975 she made payment of \$40,000/- to CKB and the Bank's debt was consequently reduced to \$90,000/- to \$91,000/-. She said the deceased borrowed the \$40,000/- balance from one Anandan, P.W.10). She said P.W.(2) saw him after <sup>the</sup> filing of this writ; he never told her that the debt to the 1st. defendant had in part or at all been paid by the 2nd. defendant. She came to know that the land had been transferred to the defendant in 1975 when her husband brought home the returns from the tax office. The deceased said to her that he would go and see the 1st. and 2nd. defendants. Later the deceased recounted that the 1st. and 2nd. defendants told him they were keeping the land for security. At that time the deceased did not tell her that the 1st. and 2nd. defendants had said that they had sold the land to someone else. She still thought that she would be able to get back her land in any event. Subsequently, she came to know by letter in March 1976 from the defendant (Page 65) that the land had been transferred to the 3rd. defendant.

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Shortly after receiving the letter she was served with the summons from the 3rd. defendant to vacate the land. She said she had not received any balance as stated in P.30 Para A of \$6,000/-. She denied also having confirmed on 5th. July, 1975 as stated in P.56 that the building on the land was also included in the transaction. She said in answer to the 2nd. defendant that P.56 could have been one of the blank papers she signed because her signature was there. She had not gone before the 1st. defendant as advocate & solicitor to sign it. She had never seen the 3rd. defendant. There was no arrangement between P.W.(2) and her that P.W.(2) was to pay her \$110,000/-. Neither did she know whether P.W.(2) had any arrangement with the deceased to pay the money. She said that in the early part of 1965 her property was given to one H.L. Tan as security. At that time the land was registered in her husband's name. The deceased borrowed from H.L. Tan for \$40,000/- without interest. The debt was paid in 1965, and it was retransferred to her instead because she paid for most of the money. She sold her jewellery; she borrowed \$11,000/- from her sisters. The deceased only paid \$4,000/-. She built a house on the land in 1965.

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...15/-

The 1st. defendant restated the circumstances mentioned in the averment by which P.W.(2) came to borrow from him. He gave a long story about how after the loan P.W.(2) was evading payment and the several excuses P.W.(2) allegedly gave for not clearing the loan. Then there was the suggestion by P.W.(2) to sell his brother's land. He did not say as he did in his defence that P.W.(2) arranged for his brother to sell the land. He merely said that P.W.(2) only said he would ask the deceased to get in touch with him. He said that on the 10th. March, 1974 the deceased came to his office. The 2nd. defendant was present. He was prepared to sell the land but suggested that if a higher mortgage could be obtained then the extra money could be used to clear the overdrafts of P.W.(2) as well as his. The letter P.27 was therefore written to CKB asking for the title deeds, with a view to getting an increased overdraft. It reads as follows:-

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P.27

SUPPIAH & SINGH  
Advocates & Solicitors,  
Commissioner For Oaths  
and Notary Public.

TEL: 2254

No.2-D, Jalan  
Ah Fook,  
Johor Bahru,  
West Malaysia.

P.SUPPIAH, S.M.J  
DATUK JAGINDAR SINGH

Our Ref. No.(134)F.1074 SU.

Date: 12th. March  
1974.

...16/-



Messrs. Chung Khiaw Bank Limited,  
Kulai,  
Johore.

Dear Sirs,

In the High  
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We act for Madam Tara Rajaratnam who had  
been given overdraft facilities up to a maximum of  
\$110,000.00 by your Bank in 1966 on a Charge of her  
property. The overdraft account is being operated  
by her husband Mr. K.V. Devan (Account No. 146) of  
681 Kulai Besar, Kulai.

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As our client wishes to pay off the Charge  
by charging the said property for an increased  
amount, we would appreciate it very much if you could  
let us have a statement showing the amount due to  
your Bank and the title deeds to the property on our  
usual undertaking for the above purpose.

Yours faithfully,

Sgd.

c.c.

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Madam Tara Rajaratnam,  
Kulai Besar, Kulai,  
Johore.

Mr. K.V. Devan,  
Kulai Besar, Kulai,  
Johore.

...17/-

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Then he obtained the deeds from CKB. He approached the HKB but his attempt was abortive. He told the deceased and the latter said he would sell the property and he could call at his office. The deceased came on the 23rd. March. After negotiations it was agreed by the deceased to sell the land at \$220,000/- and the terms and the method of payment were agreed to. The 2nd. defendant was interested in buying the land. D.(1) the valuer's report was therefore produced by the deceased. 2nd. defendant told the deceased that the valuer valued the property at \$48,000/-. He said that the house should not be considered because the land would be developed and it would be demolished. The deceased said what was 2nd. defendant prepared to offer. He said \$220,000/-. That was agreed. The deceased asked the 2nd. defendant to prepare the necessary documents to give effect to the arrangement. The 2nd. defendant was to pay \$110,000/- to HKB and \$103,000/- to CKB. This was later embodied in P.30. He and the 2nd. defendant came back on the 30th. of March to the house and the 2nd. defendant showed to the plaintiff the transfer and other related documents. The plaintiff went through them. Then the plaintiff asked the deceased to go outside. Later they came back and the deceased said the plaintiff wanted the option to repurchase and that the Medidata was picking up business and within a year the property could be repurchased. As a result the 2nd. defendant dictated the manuscript P.31 to Sivanandan

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...18/-

D.W.4. What 2nd. defendant dictated was in the hearing of everyone also. The plaintiff then signed P.30 and 31. She had also signed the confirmation P.56. He did not act for plaintiff or the deceased in respect of P.27. This was merely to assist the deceased to obtain a bigger mortgage. The \$92,000/- due to CKB was paid by the 2nd. defendant and he paid \$121,890.80 to HKB on 27.4.74. He said later however it was he and not the 2nd. defendant who paid the \$92,000/- to CKB. He also paid the \$121,000/- to HKB. But both were on the direction of 2nd. defendant. He denied pressing P.W.(2) for the payment of the judgement obtained against P.W.(2) by the 2nd. defendant. He also denied that he did not press P.W.(2) to clear his overdrafts.

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The 2nd. defendant reaffirmed what the 1st. defendant said. He denied all the allegations made by the plaintiff which incriminated him. He also repeated in essential terms as in the averment as to the circumstances in which the land became his and later was transferred to the 3rd. defendant. He said he imposed a caveat on the land on the 2nd. of April 1975 but at no time did the plaintiff seek to remove it till the time the land was registered in his name. He said the caveat was to protect his interest because the certificate of title was returned to the bank. He added that the \$121,000/- paid by the 1st. defendant to HKB and the \$92,000/- was paid by the 1st. defendant at

...19/-

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his direction. He borrowed from the 1st. defendant the \$220,000/- arising from a discussion he had with the 1st. defendant what to do with the property. The latter had told him to transfer it to the 3rd. defendant. He had the money to pay, but he had decided against developing it himself. It was his own decision. It was cumbersome to develop the land. The Session's Court action was taken to ask the plaintiff vacate the land after notice was sent to her and not complied with. The letters written by him to CKB for the title deeds was not done as acting as solicitors for the plaintiff but because the deceased said there was a buyef for the land. He filed a writ against P.W.(2) in Singapore for \$149,000/-. P.W.(2) gave him the cheque for that amount which bounced. P.W.(2) told him to issue a writ against him so that with the judgement he could obtain money from the Moscow Bank. P.W.(2) told him if he was made a bankrupt, the Moscow Bank would assist him in granting the additional facilities. He did not however proceed with the judgement. He asked the deceased about the \$140,000/- which the Chung Khiaw Bank had asked him to pay in order to discharge the charges, but the deceased just smiled. The latter said he needed the money.

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The 3rd. defendant testified that in July 1975 the 1st. defendant approached him to assist him to act as his trustee or nominee in respect of the land he was buying in Johore. He agreed. The 1st. defendant told

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him it was for sub-division and development. The latter already knew that he was a Malaysian citizen. He did not make further enquiries after so agreeing because he knew the 1st. defendant well and trusted him. He had no beneficial interest in the property. He never saw the property. He did not consider the 1st. defendant's request abnormal. He was told that the tenants refused to leave. He agreed to commence proceedings against them because it had to be in his name. He signed the memorandum of retainer for Suppiah & Singh. He attended the court hearing in Kuala Lumpur in connection with this suit where he saw the plaintiff. He did not attend the court proceedings at Johor Bahru in the eviction. He was never asked to attend. He said the record was incorrect which said he was in court on the 12th. May, 1976. Majid, Counsel for the plaintiff had confirmed this to him, and his Counsel. He was in Singapore on that day but he did not know what he did. He checked with his Secretary's diary and confirmed that he was in Singapore. He was informed of the outcome of the proceedings in January 1977. He was a partner of Rodyk and Davidson in late 1976. There was at that time a serious partnership dispute in the firm of which Coomarasamy P.W.(4) and S.K. Tan were on one side and apparently he and the others, the otherside. He had a luncheon meeting with his group at his house on the 15th. January, 1977. He was told

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by a partner one Selvadurai that a senior partner, Coomarasamy P.W.(4) had accused him of being involved in some scandalous land transaction in Johore Bahru. He was shocked. S.K. Tan and P.W.(4) did not see him personally about this. He denied it since he was the registered owner of the land in Johor Bahru and there was nothing scandalous. He said P.W.(4) had used the allegation to expel him from the partnership. To cut the long story short, the little storm erupted over the admission of <sup>I imagine</sup> a beautiful lady <sup>Miss Murugesu</sup> who was P.W.(4)'s assistant. The 3rd. defendant had for reason best known to him strenuously objected to her admission. It would appear from the bundle that Rodyk & Davidson broke up after sometime. It would imagine that love and jealousy had its little story to tell in bringing it to a close. He went and made enquiries from the 1st. and 2nd. defendants about the land. They told him the history of land and recounted the transaction. That was the first time he came to know. Two letters P.49 and D.6 were brought back by him after seeing the 1st. and 2nd. defendants and he gave them to his partners. There was subsequently an enquiry held of him by the firm and by the law society. He made a reference to the law society on the advice of his firm but before he could do that S.K. Tan and Coomarasamy had filed their complaint, contrary to agreement, first. ~~Potts~~ one of the senior partners name was blotted out by S.K. Tan and Coomarasamy. ~~Potts~~ was supposed to be in the complaint. (The complaint to the Law

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Society, the defendants reference to it, and the reply to the complaint were admitted (D 29A, D 29B, D 29C). He said that he had never at any time stated or asserted that he was a bonafide purchaser of the land for value. It is a defence available to the owner of the property whose title is to be defeated. He did not see any of the documents that had been filed in court by Suppiah & Singh except the memorandum of retainer which he signed. He told the partners of his firm he was a trustee or nominee orally. He was asked by Potts one of the partners of his firm to make a representation to the Law Society Singapore regarding the episode but he did not set out in it or the reply to the complaint the fact that he was a trustee or nominee, because it would fall into the hands of P.W.(4) and S.K.Tan the complainant. He presented the counterclaim to the plaintiff claim as trustee for the 1st. defendant.

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Having set out the facts let us first deal with the question whether there was a contract between the plaintiff and the 2nd. defendant. In the memorandum P.30 and the manuscript P.31, the 2nd. defendant had undertaken not to sell the land within a year and to return it within a year of the repayment of the sums specified therein. There was consideration for that undertaking because it was on it being given only was the plaintiff prepared to sign the memorandum and the undated transfer. The undertaking had thereby become

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a promise. The defendant contended that the 1 year not to sell should date from the date of the execution of P.30, whereas the plaintiff says it should date from the time the defendant paid all the money as stated in it. The repayment can date from the 30th. provided payment had been made on that date. The defendant said the transaction was a sale with a right of re-purchase but even in a jual janji transaction (See Appendix) which is alike, the payment must be simultaneous with the transfer, when the repayment shall begin, as only 10 to be expected from the date of the payment. In my judgment, there can be only one construction to the manuscript, that is that given by the plaintiff otherwise it would mean that the defendant could forfeit the land before they had paid for it. That would be the height of ludicrousness. The defendant had not cited a single authority to support his proposition. The payment had thus not been paid within a year because the payment was made on the 5th. July, 1975 and the land was registered to the defendant's name on the 22nd. of July 1975, barely 17 days later. The plaintiff also 20 urged and I find there was a breach because the payment was not done in accordance with P.30 since the 2nd. defendant never paid the \$110,000/- to the 1st. defendant or the \$103,000/- to CKB. The 1st. defendant paid the \$120,000/- himself to HKB clearly because he had guaranteed P.W.(2) overdraft. (Page 171). The 2nd. defendant conceded the payments under P.30 should be made on the outside within 1 week. He had not done so because allegedly he or the 1st. defendant discovered that the payment due to the HKB was \$110,000/- but \$120,000/-. 30 But if as he admitted the discovery was a week after the event the relevance of the discovery could hardly be conceived especially since both the defendants said they could have before the 30th. itself or a week after enquired

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from the HKB the amount outstanding against P.W.(2). Besides, it is rather strange to hear that they would accept the deceased word for what was due from P.W.(2) to the 1st. defendant. Afterall it was the 1st. defendant's guarantee and it was his guarantee and not the deceased that was at stake. What would the deceased know what was the state of the account between the 1st. defendant and the Bank? The Bank would not normally divulge the state of their client's account to others. The only other person who would know would, of course, be P.W.(2). Are the defendants therefore saying that instead of the 1st. defendant picking up the phone and ringing up the HKB on the very afternoon of the 30th. March to enquire and getting the answer, no doubt then and there, he would get it through the deceased, who got it through P.W.(2) who the Defendant was loudly telling the Court, by the manner in which P.W.(2) was evading payment, was not to be trusted? That is too tall a story <sup>for me</sup> to accept. Besides I cannot seriously imagine that anyone who is keenly anxious to discharge their banks liability, particularly seeing what sort of person P.W.(2) was, would rely on others information rather than checking on it himself. Where would they be if it was found later that the amount was wrong; they will have problem going against the deceased because he was not a party to the agreement. In my view, if the <sup>2nd. or 1st.</sup> defendant said they did not enquire it was simply because there was no point in finding

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out what they already knew, and they were plainly lying when they said they relied on the deceased for the information. If they knew, then how could the deceased have agreed to vary the agreement. To say therefore the 1st. defendant had allegedly discovered the variation only after signing of P.30 was hardly to be believed.

In any event what business had the 2nd. defendant not to pay the 1st. defendant the \$110,000/- and the CKB the \$103,000/- despite what happened afterwards? His contract was with the plaintiff not with the 1st. defendant or P.W.(2), especially since the 1st. defendant said he had no quarrel with P.W.(2) that he went up to \$120,000/- (Page 128). If P.W.(2) had exceeded the \$110,000/- that was strictly a matter between P.W.(2) and the 1st. defendant, but there was no reason for the 2nd. defendant not to pay the 1st. defendant. Indeed one does not see how the 1st. defendant must imminently be concerned to pay HKB at all since there was no evidence that HKB was pressing P.W.(2) or the 1st. defendant to pay. Not a single letter from the Bank was produced for instance to show the Bank's extreme anxiety on the matter. To say therefore that after the supposed discovery the deceased had agreed with the 1st. defendant to vary the agreement and fundamentally alter his position to deny himself the benefit of P.30, is hardly believable

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because on the defendant's own evidence there was no cause for the deceased or the plaintiff to have expressively or impliedly agreed to do so. The 2nd. defendant nevertheless disregarding P.30 sued P.W.(2) for \$110,000/- in Singapore clearly in breach of it. The 1st. defendant said 2nd. defendant sued P.W.(2)

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10 in order to help him because that would enable P.W.(2) to get the necessary loan from his bank. But this is absurdly suggesting that Moscow Bank, without any security from P.W.(2) would help him merely because he was in trouble. Why would a Bank want to do that for? He said the judgement for the \$149,000/- was to be paid to the plaintiff (P.171) but that would mean that he would be giving a gift to her, and he admitted this, since they said that would not alter the memorandum, because even if the money was paid to the defendant, she would not be able to get her land back. Why would P.W.(2) then being impecunious himself would wish to be so magnanimous.

20 It would be necessary to consider the question of privity. It is clear from what has been stated, that the 2nd. defendant would be liable under the contract to the plaintiff. It is also clear that there is no privity of contract between the plaintiff and the 3rd. defendant. But was there a privity between the plaintiff and the 1st. defendant? In my view the answer is in the affirmative if a relationship of agent and principle existed between the 1st. and 2nd. defendants. Whether there was

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such a relationship could be inferred from the circumstances and the parties conduct. If it could be inferred that the 1st. defendant was the undisclosed principle and the 2nd. defendant was his agent, then the latter may personally be held liable or alternatively, the former, as principal may be held liable, for the act of the letter as agent within the scope of his (2nd. defendant) expressed or implied authority. (Cheshire & Fifoot 6th. Edition Page 415). And the 1st. defendant as principal would be estopped from saying that the 2nd. defendant was not his nominee or agent. As Lord Cranworth in Pole v. Leask said

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(1863-33 L.J. (Ch) 155) "No one can become the agent of another except by the will of that person. His will may be manifested in writing, or orally or simply by placing another in a situation in which according to the ordinary rules of law or perhaps it would be more correct to say, according to the ordinary usages of mankind the other is understood to represent and act for the person who has so placed him. This proposition is not at variance, with the doctrine that where one has so acted as from his conduct to lead another to believe that he has appointed someone to act as his agent and knows that that other person is about to act on that behalf, then, unless he interposes, he will in general be estopped from disputing the agency, though in fact no agency really existed. (See also

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Cheshire & Fifoot at Page 402 - Agency by Estoppel).

Let's therefore examine the evidence.

Under P.30 the 2nd. defendant was to pay \$110,000/- to the HKB and \$103,000/- to CKB. These sums, by the defendant's own admission, were never paid by the 2nd. defendant, but by the 1st. defendant according to him at his direction (2nd. defendant)

because the land was bought by the 1st. defendant.

This fact was confirmed by the 2nd. defendant. We also knew that the 3rd. defendant was the nominee of the 1st. defendant, when the land was transferred to him. This fact was also admitted. In my view the 2nd. defendant was also the nominee and therefore agent of the 1st. defendant when P.30 and the transfer were transacted, as can be gathered from the circumstances. The 2nd. defendant said after he bought the land he saw the 1st. defendant and had discussion with him and asked him what he should do with it. The 1st. defendant told him to transfer it to the 3rd. defendant. He did not say it in so many words, but what he meant was he wanted the 1st.

defendant to buy it and if the latter decided not to, then he would, he said, have to carry it himself.

He had however the money to pay for the property but decided against developing it himself, because it was cumbersome. He had however borrowed from the 1st. defendant to pay for the land in the first place,

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in order to develop it, since the land had development potential, and make a profit. But he had nevertheless not looked into the cost of developing it or considered a scheme for development (Page 212), nor had he ever inspected the land. Why then would a person who had money to pay unnecessarily borrow in the first place? He might have to incur interest on the loan. In fact he said he could have, if he wanted, paid the \$220,000/- on the 30th. P.201). And then why would a person suddenly decides to sell a land barely 3 weeks 10 after he had supposedly bought it for the same price without making even one cent profit although he had clearly bought it he says to make a profit. Further, it is almost impossible to imagine that a lawyer was going to spend \$220,000/- buying a piece of land without even inspecting it, let alone if he was going to develop it. And who was going to spend that money without making even a rough estimate of the costs. Otherwise how did he arrive at the profit? If there was no costs, then there was no profit and there was 20 clearly no point of buying in the first place. If he bought and sold it to the 1st. defendant because he did not want to develop it then why buy at all? These answers lead one to only one conclusion i.e. that the 2nd. defendant never bought the land in the first place but had done so on behalf of the 1st. defendant and for reasons I shall deal later when

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I deal with fraud, to keep the identity of the 1st. defendant undisclosed. As one can see also from the evidence and the pleading the defendant's story all along was that the 2nd. defendant bought the land and paid the \$220,000/- himself (Pg.123). The 1st. defendant paid the \$121,000/- to HKB also himself. And the 3rd. defendant said he bought the land from the 2nd. defendant. In fact at the Sessions Court on the eviction summons, the 2nd. defendant as Counsel also said the 3rd. defendant bought the land from him. But later the 3rd. defendant changed his story and amended his pleading where he said instead he was at all relevant times the nominee of the 1st. defendant as far as the land was concerned. The 1st. defendant asked him to keep the land for him (1st. defendant). Consequently, the 2nd. defendant had also to change his story to say that he did not sell to the 3rd. defendant but to the 1st. defendant. But if the property was not bought by the 3rd. defendant from the 2nd. defendant and the former did not pay for it and was transferred to 3rd. defendant not directly from the 1st. but through the 2nd., then it simply means that the 2nd. defendant had bought the property on the 1st. defendant's behalf as his nominee in the first place. Otherwise there was absolutely no reason why the 2nd. and 3rd. defendants should be lying and the sole purpose of that lying was clearly to hide the 1st. defendant. But since the 2nd. defendant had all

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along put up the story that he and not the 1st. defendant bought the property in the first place from the plaintiff, he now finds it awkward after the 3rd. defendant's about turn to change his story so he had to say that he bought and sold it to the 1st., but since it had already been said by the 1st. defendant that he paid the CKB and the HKB, the 2nd. defendant had to say now he borrowed initially from the 1st. defendant and the latter paid at his direction. I think this must be the necessary conclusion because if in fact the land had subsequently been sold to the 1st. defendant, it is strikingly odd that it had not been pleaded in the first place, nor the fact that the 1st. defendant had paid the HKB and the CKB at the 2nd. defendant's direction. A little logic is enough to disprove the 1st. defendant's claim. If he said he was liable to HKB on his guarantee then he would be paying the Bank whether the 2nd. defendant directs him or not. In the circumstances, the plaintiff is entitled to hold the 1st. or the 2nd. defendant liable. In any event since P. 30 was entered into between the plaintiff and the 2nd. defendant, the latter could clearly be liable on the contract. The question of amendment might arise. But it has been stated that often the change of front has been anticipated and a postponement is not insisted on. In such cases it often happens that nothing is said about amendment and the case continues as though the issues which are being fought had been duly raised in the pleadings. (Supreme Court Practice 1973 Vol.(1) Para 20/5 - 8/10). I do not think in this case there can be little doubt that the 1st. defendant knew that

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2nd. defendant was his nominee as has been discussed, and therefore he would have anticipated that this point would be raised by Counsel if and when he was able, after the cross examination, to extract it from the defendants answers. The question of amendment would therefore have been quite redundant if not superfluous. I shall deal with the quantum of damages when I deal with the question of fraud.

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10 It is time to deal next with the question of undue influence. A contract is said to be induced by undue influence where the relation between the parties is such that one of the parties is in a position to dominate the will of the other and to use that position to obtain an unfair advantage over the other (S.16(1) Contract Act). One is deemed to be in a position to dominate the will of another where he holds a real or apparent authority over the other or, where he stands in a fiduciary relation to the other. The relationship of solicitor and client is  
20 regarded in equity, as a fiduciary relationship and the rule of equity that a transaction inter vivos is presumed to have been procured by undue influence until the contrary is shown applies to transactions between a solicitor and his client and accordingly the question in each case is not merely whether the client understood but rather how his intention was procured. (Halsbury's 3rd. Ed. Para 118). Section 16(1) 3A of the Contract Act says that where a person in a position to dominate the will of another, enters

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into a contract with him and the transaction appears on the face of it or on the evidence adduced to be unconscionable the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other. Was there undue influence exercised on the plaintiff? This question has two aspects to it. Firstly, whether the defendant was retained by the plaintiff at the relevant time as his solicitors, in which case undue influence would be presumed from their relationship. The other is where there is no such relationship but nevertheless undue influence is presumed.

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It is settled law that the authority of a solicitor to act is constituted by his retainer but the court may imply the existence of a retainer from the acts of the parties in the particular case (Halsbury's Laws of England 3rd. Ed. Page 61). The retainer is necessarily confined to transacting business which the retainer extends or impliedly extends. Contrary to the defendant's contention, whether a solicitor is paid fees or not is thus not essentially the test of a retainer because obviously a lawyer who acquires from his client may not want to charge fees because an unholy deal may more than compensate for the fees. Was the defendant therefore the plaintiff's solicitors at the material time? On the 12th. March, 1974 the defendant wrote to CKB in P.27. (Full text given earlier), and the reply is in P.28 which reads as follows:

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CHUNG KHLAW BANK

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Suppiah & Singh  
Advocates & Solicitors  
2-D Jalan Ah Fook  
Johore Bahru.

(134)F 1C/74 SU      12-3-74      AC 146      14/3/74

Subject: Mr. K.V. Devan - C/A 146 - Legal Charge  
on C.T. 13817 Lot 6025 Mukim of Senai-  
Kulai in the name of Mdm. Tara Rajaratnam

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Dear Sirs

With reference to your letter of 12th March 1974, we  
are to advise that the balance of subject account with  
us as at 8.3.74 was \$103,658.44 (Dr.) with interest @  
11.5% per annum. The above title deed and duplicate  
charges are enclosed for your preparing of discharge of  
charge.

Please acknowledge receipt of this letter and the  
enclosures.

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Yours faithfully

For CHUNG KHLAW  
KULAI BRANCH

Sgd.  
Officer-in-Charge

Encl.

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I think the letter P.27 speaks for itself that the defendant in saying that "We act for Madam Tara, our client wishes to pay off the charge" and "On our usual understanding" that the defendants were in lucid terms acting for the plaintiff when P.27 was written. But if the letter says the defendants were acting for the plaintiff for the purpose of getting an increased loan, then it must follow they were also acting for the plaintiff when the land was transferred to them for the purpose of getting a loan. In both the situation it was for the purpose of getting a loan to discharge P.W.(2)'s debt to the HKB. This was all more so, since in the latter case, the defendants were transferring the land to them and they had not advised the plaintiff to engage another Counsel to act for them and they were told by the deceased to prepare the necessary documents to give effect to their arrangement to transfer the land. The defendant said they were merely acting as solicitors to assist the plaintiff when they wrote P.27 and were solicitors assisting the plaintiff when they received the reply P.28, but were nevertheless not the plaintiff's solicitors, as if stating that as solicitors, they were not supposed to assist. But what are solicitors for then, supposedly getting fees for not assisting? I wonder. I think this deplorable display at quibbling to say the least, is enough to show whether the defendants were acting for the plaintiff at the material time. But once a person

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is expressly or impliedly retained as a solicitor, which the defendants by the circumstances clearly were, then, it follows it cannot alter their position as solicitors that they assist or does not assist the client, although it cannot be seen how when acting as such, a solicitor can escape from assisting one's client, in some form or another. But once a person acts as a solicitor then the presumption of undue influence arises, and unless they can rebut it the property they acquired from their client cannot be allowed to remain in their hands. Acting as a solicitor intrinsically creates a fiduciary relationship between a solicitor and his client which the solicitor cannot take advantage of since it imposes an obligation on its part to act with strict-fairness and openness towards them. (Halsbury's Para 131). But a person need not be having fiduciary relationship with another for undue influence to arise if the relation between the parties are such that one of the parties is in a position to dominate the will of the other (S.16(2) Contract Act). I shall deal with the question of whether Yeow & Chin were at relevant times acting for the plaintiff when I deal with the question of fraud.

The evidence led showed that the plaintiff had been asked to sign P.30, 31 in circumstances, if not in terms clearly unfavourable to her when between her, a lay person and the defendants, very senior lawyers and State Dato', position of respect and dignity in

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the State, they were clearly in a position to dominate her will to their advantage. The defendants must be well aware of the fact that in the position thus held by them they were in fact holding out to the plaintiff, that they were men of trust and confidence and of the utmost honesty and integrity and therefore she would have tended to accept without much ado what they represented to her. And bearing in mind, that P.30 and 31 were construed by the defendants in a manner clearly favourable to them and unfavourable to her, that in the circumstances, they should have refused to proceed without her getting the benefit of independent advice. And yet she had not been so advised when in a position held by them there was a conflict between their interest (as they alleged) as buyer, and their interest as solicitor. Thus, the memorandum did not state when the consideration was to be paid and yet they did not explain to her, they (the defendants) as they alleged, could pay anytime they liked. It seemed to me that any solicitor would have insisted on a date of payment to be inserted especially since despite their idea of a reasonable period of payment to be one week at the outside, the term had never been complied with.

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The defendant had sought to nullify the effect of their dominance on the plaintiff by suggesting that the manuscript P.31 was inserted in the memorandum at the plaintiff's own request. But if she had

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said so clearly it was only because she said, the memorandum the defendants had prepared did not satisfy her that it was a security, and she had therefore expressed her dissatisfaction of it. But the precise terms of that security was certainly not her own making, since it was dictated word for word by the 2nd. defendant himself to his friend, D.W.5. If the defendants are going to construe that manuscript at this instant in a manner other than that of security which would safely protect her interest, she certainly cannot be blamed for it now especially since the manuscript was never explained to her. The terms of P.30, the 2nd. defendant says was supposed to have been fundamentally varied by the deceased because of what the defendant termed as the "subsequent events" that took place. But the agreement P.30 was entered into with the plaintiff and yet she herself was never informed of this supposed variation by the defendant although it clearly had greatly prejudiced her. One would have thought that if they were acting in the best interest of the plaintiff that the defendants would have had the variation reduced into writing as a supplementary agreement, as any lawyer, would, I imagine have done. It was said by them that the husband was entitled to vary the agreement made by the wife orally, depending on the circumstances but there was no authority cited or the circumstances given for such justification and yet the defendants

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said it was not prudent to have the varied agreement reduced into writing. They said that despite the manuscript P.31, P.30 was supposed to be an out and out transfer and P.31 was not a clog on their dealing with the land (Page 200). In view of this seemingly very conflicting interpretations, I thought, it was only fair that the terms and implications were fully explained to her but were not. If explained in all probability the defendants would not have agreed to enter into the transaction in the first 10 place. May be that was the reason why it was not done, at all. Again under the terms of P.30 according to the defendant, the plaintiff had to vacate the land even before they (the defendants) had paid the full consideration of \$220,000/-. Even if that was correct, it must have been at least explained to her and she must be given the opportunity to say whether she still wished to proceed with the transfer. I do not think there can be any doubt that the terms do appear to be manifestly harsh and unconsonable to say the least, 20 which would only justify asking her to engage Counsel, to vouch the reasonableness of the terms she had to sign. It is not, of course in every Case that independent advice is necessary, provided that it is shown that the transaction was manifestly fair to the client. (Vaughan William in Wright v Carter). But I have no doubt that from the evidence, that the transaction P.30 in the way it was construed by the defendant was highly unfair to the plaintiff. It was submitted by the

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defendant that no action could lie against them because the security was not in proper form citing Hj. Abd. Rahman versus Mohd. Hassan (1970 AC Pt. 209). But if the defendant knew that the manuscript was of no effect and unenforceable it was for them to have the security done in proper form. If they conveniently kept silent and nevertheless allowed the title to pass, they should not be estopped from being found to have committed fraud. That would not be Equity itself. Their fraudulent act would only justify a court of equity to enforce the terms as a contractual liability.

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As earlier stated, the burden of proving that the contract was not induced by undue influence was on the person in a position to dominate the will of the other that is the 1st. and 2nd. defendants. It is clear from what has been said they had not discharged that burden. Indeed what they said was an admission of their failure to discharge that burden.

Under Section 20 of the Contract Act, any consent to a contract entered into under undue influence is voidable at the option of the party whose consent was so caused but plaintiff must return whatever benefit he has received from the defendant under the contract. It has been urged that the contract being voidable, it is for the plaintiff to set it aside by repudiating the contract, failing which she must be deemed to have affirmed it, and at no time has the plaintiff given notice to the defendant to do so.

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But the rules seems clear that she need not do so since the writ itself is sufficient act of repudiation.

(Halsbury Para 1600).

Let us proceed with the claim for the breach of trust. A person acting as solicitor is not necessarily a trustee in relation to his clients but special circumstances, as where money is paid by the client to his solicitor for a particular purpose may constitute the solicitor as trustee of that money in relation to the client. (Halsbury Vol.36 Para 65).

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It seems clear where the 1st. and 2nd. defendants as solicitors had been entrusted by the plaintiff with the holding of the document of transfer as a security, they were by virtue of the above principle constructive trustees of that property and if they had used it to transfer it to the one with the concurrence or condonation of the other, then both of them must necessarily have committed a breach of trust. In every case where the person in whom real or personal property is vested at law has not the whole equitable interest therein, he is trusted pro tunc of that property for the persons having such equitable interest (Underhill on Trusts 11th. Ed. P.210). It is clear therefore that by virtue of the above principle that where the 1st. and 2nd. defendants as solicitors had been entrusted by the plaintiff with the holding of the document of transfer as a security, or until such time as there had been proper compliance with P.30.they were,

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since only the equitable interest was with them, a /  
at least  
trustee/ of that property and if they had used it  
instead to transfer the land to themselves, they had  
committed a breach of trust. But whether in fact  
the transaction is a security or not, is a matter  
which will be discussed later in conjunction with the  
allegation of fraud. The 3rd. defendant however, not  
being in a fiduciary relationship with the plaintiff  
could not be guilty of undue influence.

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Let us lastly deal with the question of  
fraud. But first, it is essential to know what fraud  
means. The fraud which is being alleged arises from  
the transfer of the land from the plaintiff as the  
registered proprietor to the 2nd. defendant and sub-  
sequently from the 2nd. defendant to the 3rd. defen-  
dant. The plaintiff is asking the Court to declare,  
among other things that the transfers to the defendant  
were fraudulent and null and void. It inevitably  
therefore brings into play the operation of S.340 of  
the National Land Code because in order to claim  
damages which is one of the remedies sought, it is  
only implicit that she must first be able to set  
aside the land in the hands of the defendant if it had  
not been transferred to 3rd. parties. I say this  
because a contrary view would only mean that the  
plaintiff can absurdly obtain damages although she  
would not be able to recover the land in the first  
place. As far as the 3rd. defendant was concerned

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it must be shown that he was at the material time a bona fide purchaser for value from the 2nd. defendant. For ease of reference Section 340 of the National Land Code is reproduced. It states:-

Registra- 340. (1) The title or interest of any  
tion to  
confer in- person or body for the time being registered  
defeasi-  
ble title as proprietor of any land, or in whose name  
or inte-  
rest, any lease, charge or easement is for the time  
except  
in being registered, shall, subject to the  
certain following provisions of this section, be  
circum-  
stance. indefeasible.

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(2) The title or interest of any such person or body shall not be indefeasible -

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

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(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) -

(a) it shall be liable to be set  
aside in the hands of any person  
or body to whom it may sub-  
sequently be transferred; and

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(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser. "

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It is clear therefore that fraud is one of the instances when a title can be set aside or defeated. But as one can see sub-section (2)(a) talks of fraud or misrepresentation. In other words one or the other ingredient need only be proved to defeat a title. Judicial thoughts seem to be of the same view. (David Wong & Tanier and Land dealings in the Malay State, 1073 and Judith Siongbing). There must be actual fraud which is dishonesty of some sort not constructive or equitable fraud (Lord Lindley in Assets Co. Ltd. v Mere Roichi 1905 A.C. P.176) or some moral turpitude (Griffith C.J. in Butler v Fair-clough<sup>23</sup> 1917/C.L.R. P.79). His Lordship had not incidentally in that case propounded what dishonesty meant. There is no known definition of dishonesty in civil liability. In criminal law to act dishonestly is to do anything with the intention of causing wrongful gain to one person or

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wrongful loss to another (S.24 Penal Code). Since the standard of proof of a criminal act is higher, it can safely be said that proof of the former would safely satisfy proof of the other. Chambers dictionary says "dishonest" means wanting integrity, disposed to cheat, insincere, unchaste. Section 17 of the Contract Act says:

"17. "Fraud" includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

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- (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
- (b) the active concealment of a fact by one having knowledge of belief of the fact;
- (c) a promise made without any intention of performing it;
- (d) any other act fitted to deceive; and
- (e) any such act or omission as the law specially declares to be fraudulent.

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Explanation - Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, equivalent to speech,"

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10 It would follow therefore that in committing any of the acts or omission in para (a - e) above of fraud an act of dishonesty defined earlier would clearly because of its wider ambit also have been committed although the reverse may not necessarily be true. One would note that S.340 only refers to misrepresentation; it does not say whether it is innocent or fraudulent misrepresentation. Snell in Equity (2nd. Edition, Page 493) defines fraudulent misrepresentation as a false statement of fact made knowingly by the representer or without belief in its truth or recklessly without caring whether it is true or  
20 falses, with intent that it should be acted upon and which is in fact acted upon by the representee. Since there need first be an innocent misrepresentation before a fraudulent situation could arise it would follow that once the latter is proved, the former must necessarily be presumed. It has also been decided that fraud must be proved beyond reasonable doubt.

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(Saminathan v Papa 1981 MLJ Page 121). A representation is a statement of present or past fact. Therefore a statement of intention is not a representation of fact because it relates to the future. But a statement of intention also involves a representation as to the existence of the intention which is itself a present fact. Thus the non-fulfilment of the intention, may be some evidence strong or weak, according to the circumstances of the individual case that the intention never existed at all. (Halsbury's Vol.26 10 Para 1517). This is in effect stated in S.17(c) of the Act above.

Let us look at the evidence. According to the plaintiff she learnt before the 30th. of March 1974 that P.W.(2) her brother-in-law was indebted to the HKB. She also learnt that the 1st. defendant had to pay the HKB \$110,000/-; that the 2nd. defendant had to pay the 1st. defendant the sum of \$110,000/-. She also knew before the 30th. that she was to put up the land for a security for the two sums mentioned in P.30. 20

I think there can be no question from the facts above that when she signed P.30 and the transfer forms which were undated (not disputed), the plaintiff was under the impression that the land was transferred to the defendant as a security for the purpose of securing P.W.(2)'s debt to HKB vis-a-vis the 1st. defendant, reinforced by the assurance given by the defendants that although it was a transfer the security

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was by way of a transfer; that P.W.(2) would pay back the money and she would get back her land, and if he could not do so, the land would be sold and the debt paid and the balance be used to buy some property nearby, coupled with the assurance given in P.31 that the land would not be sold within one year and that she would be able to recover it within a year when she paid the \$220,000/-; that she would be able to get her land even after the year was over.

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10                   The plaintiff had impressed me as a witness of truth. If there were discrepancies in her evidence, these were only to be expected, if human frailties are what they are. She was in Court for the better part of almost 5 days and subject to cross-examinations by three senior lawyers. She was not a lawyer herself. and yet her case quite definitely had involved the use of a multitude of documents and the effect which the Court was to give effect to them. These documents strictly speaking should, as<sup>a</sup> registered proprietor, have been served on her but except for P.27 and F.67  
20                   none were served on her by the defendants, and nevertheless these documents were sought to be used against her although nowhere was it established that she had agreed to waive her right to be served. But it seems to me that the way the questions were put to her as if she had been served and what was more to answer them as if her reaction to them would be that of a lawyer.

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I have no doubt that the reason they did not see fit to serve her, except in P.27 when they wanted her title deeds and in P.67 when they wanted to evict her out of her land, was because, considering her somewhat explosive reaction in regard to P.30 and 31, they had to avoid her altogether so that there could be no stumbling block to their mischief, and not because the deceased told them the land was his. I had also to bear in mind that the defendants at the time when the transfer was effected were not only lawyers but people of high social standing. It was natural to expect that generally being solicitors and State dignitaries, that whatever they did others would expect they would have done them in the best interest of those whom they deal with. Under those circumstances one's reaction in life may sometime appear to be contradictory when in fact they result from being unsuspectingly led by the complete trust which one places in others and thus being the victim of one's own circumstances rather than otherwise the case. I had no cause to disbelieve her that the transfer of the property to the defendant was as a security for a loan to help P.W.(2), her brother-in-law, nor to suspect why she would want to lie against the defendants. I believe in the final analysis she might have believed that the transaction on the 30th. was because the 2nd. defendant told her that the security was in the form of a transfer, only in form a sale and made to believe so, but in substance she knew and believed in her heart that it was a security. The defendant said the plaintiff wanted to sell the land because

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P.W.(2) was in a financial difficulty, but that could hardly be a compelling reason for her to sell especially since the defendant never in the first place said that they were not prepared to assist P.W.(2) if she was not prepared to sell the land. Indeed on the contrary the evidence all along by the defendants (which the plaintiff deny) was that it was the deceased and the plaintiff who offered to sell. Besides, the 1st. defendant said he had no quarrel with P.W.(2) that he went up to the limit of \$120,000/-; he should know. If he had been pressed by the bank, he would have hastened to produce letters or documents to highlight the bank's anxiety. On the other hand I cannot honestly imagine that a housewife would sell her land and rent a house and stay out if necessary just to help a brother-in-law as if her brother-in-law's life was more precious than her's and her own children. It is just not true to life. Unless of course, if she was financially indebted to P.W.(2) or the latter had an interest in the land. Or, unless she was such a wealthy lady that she could well afford to give away her property, at the slightest suggestion of it. But if she was, I do not see why she had to get a loan at all in the first place. If in fact she had made an outright sale to the 2nd. defendant, then it may be wondered why it was necessary for the manuscript to mention that the defendant was not to sell to anyone within one year suggesting that it had not been finally sold to the defendant. And why

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the manuscript itself made no mention of a sale to the defendant. The manuscript itself seeks to restrict the defendant's right to sell the land which is a direct opposite to an outright sale and to absolute ownership. It seems to me to be rather strange that if in fact the land had been sold to the defendant outright that it had not been so expressively and specifically stated in the memorandum. After all, the defendants were very senior lawyers; with their years of experience and skill, they certainly could not be heard to say that they were incapable of giving effect to their true intention and meaning. But there was no reference in P.30 and 31 to "selling" or "purchasing", or "vendor" or "purchaser" as would necessarily suggest that it was an outright sale transaction. But whatever the defendants had in mind, I do not think there could be any doubt that because of the manuscript the defendant knew the plaintiff and the deceased intended the transaction to be a security. The plaintiff said she had in another previous occasion transferred her land to one H.L. Tan and was retransferred to her, also for a loan. H.L. Tan was not available as a witness as he was not in the country at the date of the trial. But I do not think even without his evidence it would affect the credibility and merit of the plaintiff's case in any way. In any event it cannot be denied that the respective transfers were made by the deceased to H.L. Tan (D.17) and one from H.L. Tan to the plaintiff - (D.16).

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The defendant said the sale was an outright sale which had effect as a complete and final transfer (Page 199) with an option to purchase. But then it was hardly possible for there to be an option to purchase at the same time as an outright sale because one is a form of security, the other is not. It simply does not make sense; One must cancel the other out, because they were in direct conflict. But the defendants, were understandably, in a dilemma. They had perforce to say that P.30 was an out and out transfer otherwise, they might be questioned why, if it was not, they had nevertheless effected a transfer under Form 14A of the National Land Code which is the form for an out and out transfer. On the other hand, if they maintained it was not an out and out transfer then they would be at a loss to explain the existence of the manuscript which by their own admission fetters, their right "as owner to sell, within one year." (Pg.200). So the best thing they could do, rather dismally I thought, under those awkward circumstances, was to attempt to mix some diabolical concoction and said that both transactions could be created at the same time. But quite obviously in trying to juggle it, the drink took toll of its own master. Because, if the transaction was to their knowledge an outright sale and intended it to be so, which was by their own admission an out and out transfer, then they had, by the manuscript P.31, fraudulently misrepresented it to the

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plaintiff that it was a transfer with a right to retransfer which was a form of security by reason of which she agreed and was induced to sign the undated transfer, an act of self-execution de grace on their part. We remember also that at a later stage the defendant filed a caveat after the plaintiff sought to make a 4th. Charge on the land. Thus there could not have been a sale, because if there was in fact one we would have expected the defendant to have filed their caveat in April, soon after the transfer, 10 to protect their interest but as we knew it, they only did so on the 2nd. February, 1975, because that was the first time they came to know about the 4th. Charge (Page 209), and clearly they caveated it to prevent the plaintiff from creating further charges. They said that they did so in order to protect their interest, because by that time they had returned the title deeds to the Bank, but it does not seem to me to make any difference even if the title deeds were with them, because unless 20 they caveat it, no one would be prevented from dealing with the land. In any case, what interest were they going to protect? All along, they have not said one word about the plaintiff committing any fraud, or acting in an improper manner. In fact, it was just the other way round. What were they afraid of? To me there is no other explanation for their conduct except that the caveat was imposed because the plaintiff's 4th. Charge was in the way of their plan to make the deceased reduce

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the overdraft, which they felt must be stopped if they were to succeed, in their adventure. How could the defendant say that in P.30 there was a sale and transfer when he contradicted himself in his own sworn testimony (See P.99) in support of his application for a caveat that in P.30 the plaintiff had agreed she "would" transfer the land to him. That suggests there was no transfer and no sale yet.

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10 I think the most atrocious act of fraud on the part of the defendants, if they had ever intended the manuscript to have any effect at all, was in not disclosing to the plaintiff, which I think any person, let alone a lawyer in his right frame of mind would have done, as they had made it known before this Court, that the date of the one year when the repayment should take effect was not from the date the \$220,000/- was paid by the defendant but from the 30th. March itself, which clearly had the effect of defeating the very purpose for which the transfer was made in the first place which was essentially to use the money from the deal to overcome P.W.(2)'s financial problem with the Bank. If the money cannot be had despite the fact that the land had been transferred to the defendant since the plaintiff has to repay even before she got her money, then there was no point in the transfer to be made in the first place. 20 The effect was clearly thus that the defendant got the land, paid it in anyway they liked, the plaintiff was left without a roof on her head, P.W.(2) was, still in

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the status quo position of not having his debt cleared, leaving the defendant in the reversed position of being solely the beneficiary of the whole episode. That must be very nice and wholesome from the defendant's point of view, but considering how disastrous that would be on the plaintiff, she certainly, I reckon, would have the right to be so informed, as to have the choice of retracting her somewhat injudicious step. But I suppose, the defendant did not want the plaintiff to retract her step, otherwise I do not see why they had not felt it necessary to let her know what was in their mind, other than merely saying it was not necessary to explain. 10

The defendant was also guilty of fraudulent misrepresentation, if not of fraud, when they represented to the plaintiff that if P.M (2) was unable to pay the debt, the land would be sold and the balance could be used to buy some property nearby, an assurance which I feel sure any housewife in her proper state of mind would have insisted upon under these circumstances, but which representations defendants knew to be false since it never existed because the opportunity was never given to her, and since they maintained it was an outright sale, they could not have intended to give her that opportunity. 20

They had also been guilty of fraudulent misrepresentation because although they represented that the transfer to them was subject to paying in accordance with the terms as stated in the memorandum P.30

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and the manuscript P.31, not for one moment had they ever complied with the terms and, as will be seen shortly, the reasons they gave for not complying only goes to substantiate the non-existence of that intention. In the first place how could the defendant ever say that they had every intention of fulfilling the terms of P.30 and P.31, when before the plaintiff knew it the 2nd. defendant had filed a suit against P.W.(2) for \$149,000/-, which 1st. defendant said included the \$110,000/- in P.30, when the latter was agreed upon essentially to pay off P.W.(2)'s debt (Pg. 171). The suit had really extinguished P.30 and yet the land had already been transferred to the defendant. In fact it was evident that P.30, 31 were only used as the dangling carrot, a false device to induce the plaintiff to sign the undated transfer so as to enable them to effect the transfer of the land to them, eventually. The defendants could not have had any intention of enforcing the manuscript because even before they came to see the plaintiff on the 30th. March at her house, they had already prepared the memorandum P.30 and the undated transfer which looking at its format would have completely and finally transferred the property to them. The manuscript P.31 on the other hand would have completely repudiated that status from one of absolute owner to that of a mortgage. It would have drastically changed their original <sup>allegedly</sup> intention / to buy, (so they say). How could they ever have complied with the manuscript. If therefore there was already an

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unequivocal complete and unconditional sale they could hardly have given effect to the outright sale without in other words ignoring the manuscript altogether. If the manuscript was inserted nevertheless, it plainly means that it was just for the sake of satisfying the plaintiff's whimwish fancy but was never intended by them to have any effect, because a lawyer in the normal course would have in the circumstances prepared a mortgage or charge in proper form. The defendants said that it was a jual janji transaction but if it was, it is rather surprising that it did not carry with it at least, the right to some beneficial interest, otherwise what benefit does it accrue to the mortgagee. But none of these minimum rights form part of the manuscript. The only way I can see why they had been omitted is because the defendants had given no thought to it at all since they had no intention whatsoever of giving effect to the manuscript. The fact that they had willy-nilly accepted the plaintiff's suggestion at the spur of the moment to include P.31 with evidently no question asked although clearly this would, to their knowledge, instantly nullify the outright sale, merely point to the absence of that intention, because since they knew they were of no effect, it makes no difference whether it was part of the transaction or not. The transfer being left undated from the outset is also evidence of their intention to pay in accordance with those terms, <sup>because</sup> there was no need for the transfer to be made first and the payment

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to be made later, when both could be done at the same time. The defendant said this was necessary because the Charge had not been discharged yet. But this was obviously a deliberate falsehood designed to cover up their evil act because the defendant themselves had presented the transfer and the discharge to the land office for registration at the same time after they had paid the CKB (Page 186). It merely exposes the defendant's lie why they had effected an undated transfer to themselves. The defendants had plainly shown they had never intended to give effect to P.31 because in their submission they said that P.31 was a jual janji transaction which by the principle laid down in Haji Abd. Rahman v Mohd.Hassan (1970 AC) could not in any event be given effect to. But by accepting the terms of P.31 they were also acknowledging and representing to the plaintiff that it was a security, but the form of which they categorically knew to be unenforceable, but they were nevertheless not bound to accept. They could even on the 30th. March had withdrawn the memorandum and the manuscript and advised the plaintiff to execute a proper form of security, but which they refrained from, but chose instead to mislead her. They could hardly plead now the illegality of the security. They are from their own fraudulent conduct estopped from invoking the plea. The reason the defendant gave for not paying the \$220,000/- and thus not complying with the terms of P.30 and 31 was death

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with briefly by me in reference to the defendant's contractual liability. These facts have bearing also on the defendant's liability in fraud. We will recall the 2nd. defendant said he had not paid the sums specified in P.30 because he discovered a week after the event that the amount owed by P.W.(2) at HKB was in fact more than \$110,000/-. But he also conceded that since no time was specified as to payment that he should ordinarily pay at the outside within a week of the 30th. March. He was naturally asked of the relevance of the subsequent event (Page 201). His reply was "It is relevant. One of the many subsequent events was the overdrafts of P.W.(2) with the HKB was \$121,000/-". But it does not answer the question. If he knew he was required to pay within a week at the outside but did not pay nevertheless, then it plainly means he had deliberately avoided paying, and had no intention of paying in the first place. They said they could have easily asked HKB on the 1st. April if they wanted to, but instead relied on the deceased's information which as mentioned earlier could hardly be true. 10 20

The 2nd. defendant said after the discovery he saw the deceased and the latter told him to tell the 1st. defendant to pay whatever was due to the HKB and the adjustments could be accounted for later. The deceased told him also that as far as his liability to CKB was concerned, he wanted to continue to

keep the account at the bank opened for about a year. He also said if he had any buyer he wanted to transfer the land direct to him and in the meantime to stay on the property for which he would pay compensation. It will be recalled he said that sometime before the one year from the 30th. March was out, he saw the deceased and the latter told him that he could not get any buyers and he could not buy it, but nevertheless he wishes to keep his account open till the end of June 1975 but would like to stay in the house till the end of 1975 and pay compensation for it and when he did so close his account, he would bring his debt down to \$92,000/- and the compensation was agreed at \$6,180/-. Quite obviously as will be seen shortly, all these assertions were without any basis whatever and were completely untrue, because as gathered from the evidence, the plaintiff herself knew nothing about these assertions because if in fact they were true the defendants would have told her and contacted her as they had done in P.30 and 31 when they executed the transfer of the land to them. They had for reasons only known to them allegedly only dealt with the deceased although it was never shown by them that she had ever authorised the deceased to represent her. I suppose the defendants are urging the Court to say that the husband must always be assumed to be the attorney of the wife's property. That, I submit, would end us up in husbands marrying rich wives and

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cheating them of their property with the connivance and condonation of their solicitors. If this is what happened, which I have not the slightest doubt the plaintiff will deny, the defendants cannot say they are exculpated. It only makes their fraud even more damnable, and on this ground alone I think the defendant's story must be rejected and judgement be entered for the plaintiff. Be that as it may, let us follow the defendant's line of story. In the first place, if there was such a discovery and variation of the agreement, it is difficult to believe that the deceased was not able to pay the difference in the amount which was only about \$11,000/- if the deceased was able to borrow from his friend Anandan (P.W.10) \$40,000/- to pay the same debt. In the second place if it is true that there was such a discovery and a subsequent variation that it was very odd indeed and very much unlike the conduct consistent with honesty let, alone that of a lawyer, that he had not reverted to the plaintiff to draw up a supplementary agreement or even for that matter, a fresh agreement to incorporate the new term. If the defendant had considered that in law her consent was required to draw up P.30, because they said she was the registered proprietor, I cannot see why in law, her consent was also not required to vary it. The defendant's reason was, it can be varied by the husband in

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certain circumstances. But he had not given the court the benefit of knowing such circumstances. In fact it is not known when legally that could be done in the absence of any evidence that the plaintiff herself was actually aware of the fact and circumstances and had orally agreed to the varied terms as alleged. Even in such a case, to protect their position, lawyers would normally follow it with a letter confirming the oral agreement or arrangement as would show the consistency. There was however no such letter. The defendants had been sending a number of letters to CKB telling them about why they were holding back the title deeds, but not one word was said to the Bank about the supposed new agreement, to show their bonafide and to put the Bank at ease by giving them the right picture.

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It was suggested that the deceased could act on his own without getting his wife's consent because the deceased told the 2nd. defendant the land was his but was in his wife's name. But if this was true then it was surprisingly pointed out that the land was not in the deceased's name. There was nothing to show that the deceased was subject to any restriction as to owning property, and to put it in his own name. In fact the property earlier (and this was not denied by the defendant) was in the deceased's name before it was transferred to H.L. Tan and subsequently retransferred into the plaintiff's name. If the property

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was the deceased's, then anyone would expect that on the retransfer it would be restored to the deceased; on the contrary it was retransferred to the plaintiff. This was very unlike a property which was said to be the deceased's but in his wife's name.

It seems to me to be rather strange also that the defendant did not confirm with the plaintiff herself whether it was true in fact that the property was the deceased's, and that he could act as he pleased, in which case we would expect that they would advise her, if only in order to protect their own interest, to confer a power of attorney on the deceased. Or, the deceased himself, should be asked to produce a power of attorney or authority from the plaintiff to the effect that the deceased was the beneficial owner and that he was empowered to deal with the land. The defendant must explain why these steps were not taken which I think were the least to be expected from lawyers acting honestly especially since the defendants themselves had felt it necessary to caveat the land at some stage or another in order they said to protect their interest. Because it seems rather inconceivable to me that any right thinking lawyer would seriously embark to purchase a land, let alone for himself, from another without first ascertaining from the registered proprietor whether the person had the authority to act on her behalf knowing he might find himself later after sitting pretty on it served

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...64/-

with a nice writ for eviction or damages by the registered proprietor as the 3rd. defendant himself as the supposed registered proprietor had effected on the plaintiff in this case. There was no reason for the plaintiff to lie that the land was hers as well as the husband's but it was put in her name because she said she had furnished the greater part of the purchase price. The defendant could not find her at fault in the manner in which she had acquired the means to repurchase the land. She said that she sold her jewelleries and she borrowed from her sisters for the means to repurchase. I think I may be justified in saying that our housewives are no more contented nowadays with depending solely on their husbands for all and sundries, especially if she has children to look after. It may be a matter of self pride or a question of necessity; but it is no more unlike them to acquire property of their own on their own initiative or saving. Next, the deceased had purportedly said that he wished to keep his account open at the CKB after he was told of the variance. But this assertion is so absurd as it is inconceivable because what cause has the <sup>plaintiff or Devan</sup> / to do so, if as the defendant said the 1st. defendant nevertheless was willing to pay the difference between the amount in P.30 and the amount they said was found at HKB and the 1st. defendant had not minded P.W.(2) exceeding the limit of \$120,000/-, and she had not

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committed a breach of contract nor was alleged to have committed one. But nevertheless we are told that on keeping her account open the plaintiff had to incur additional interest liability at the Bank which at one time was to the tune of \$30,000/- or more, at the rate of \$30/- or \$40/- per day up to \$1,000/- per month and she had also agreed to pay compensation to stay on her land. Who had to bear all this great financial burden according to the defendants because the deceased was looking for 10 buyers, despite the fact that according to them they had bought the land. Surely, the defendant or plaintiff was not going to be so naive and indifferent that they would not turn to the defendant and said to the effect, "You have bought the land, it's your duty to pay the interest." In fact, it is also very odd besides to hear the defendant saying that the reason why they told the Bank they were about to discharge the charge was because the deceased told them there were buyers, when at the same time the deceased was seen 20 creating an additional charge to secure his debt. (See P.81, 82, 83). That was very contradictory in terms, so contradictory that the idea of the buyer could not possibly exist. If there was a buyer why must she create a further charge? In fact it is very peculiar indeed that the defendant should have allowed the plaintiff to charge the property at all, since it had ceased to be hers. The defendant said

...66/-

that was the arrangement. But how could there be such an arrangement, when he did not even know that the plaintiff was going to create the 4th. Charge in the first place since he admitted that was the first time he had sight of P.81, 82, 83 (Full texts in Appendices attached) i.e. in Court which mention about creating the 4th. Charge and the first time he knew about the 4th. Charge was, he agreed, in February 1975. And although he denies it, it was clearly because he filed his caveat on that date (Page 209). He said the deceased told him there were buyers when there was not a single piece of evidence to support that fact and yet letters were written by the Bank (See P.32, 34, 38, 39 - Full texts in Appendices) for a period of 6 months asking the defendant when to pay up and discharge the charge. Anyone in the defendant's shoes would have written to the Bank to say that a buyer was forthcoming because the deceased told them so. But none of the letters (See P.33, 35, 36, 40 - Full texts in Appendices) gave the slightest indication that there was a buyer. All they said was "We are in the process of discharging the charge" although according to them whenever they wrote to the Bank saying "We are preparing the discharge" it was because the deceased had indicated he had buyers - (Page 207). But suddenly P.43 the letter to the Bank from them emerged, and the defendant now told the whole world there was a buyer and the person happened to be they themselves. P.43 is

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of great importance. It says as follows:-

SUPPIAH & SINGH      TEL: 2254      No.20, Jalan Ah Fook  
Johore Bahru,  
West Malaysia.  
2nd. February, 1975.

M/s Chung Khiaw Bank Ltd.,  
No.4, Kulai Besar,  
Kulai,  
Johor.

Dear Sirs,

Re: Mr. K.V. Devan - Legal Charge on CT 13817  
Lot 6025 Mukim of Senai-Kulai in the name  
of Mdm. Tara Rajaratnam (f).

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We act for Mr. Suppiah to whom the owner of the  
above land Tara Rajaratnam had sold the property subject  
to the three charges namely:- Presentation No.3060/67,  
Charge BK.126 Folio 72 (2) Presentation No.4686/67  
Charge BK 127 Folio 89 and (3) Presentation No.5731/  
72 Charge Bk. 10 Folio 97 made by the said Tara  
Rajaratnam in your favour.

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We would therefore appreciate it very much if  
you could be good enough to send us the documents  
returned to you under our letter to you dated the  
30th of January 1975 in order to prepare the necessary  
transfer and have it registered. We undertake to  
return the said documents to you.

...68

Our Mr. Suppiah is also making arrangements to raise a loan to pay off the amount due to you on the said three charges and interest and if he is successful in raising the said loan then we would send you all monies due to you under the said three charges and the Draft Discharge of Charge for your approval and execution in due course.

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Yours faithfully,

Sgd.

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c.c.

Mr. K.V. Devan,  
No.681 Main Road,  
Kulai Besar,  
Kulai.

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But this is to be noted - if there was a buyer before, surely the defendant would have mentioned it before they wrote P.43 as he had done in P.43. In fact earlier in P.40 there was a real need to mention about the buyer, because in that letter they wrote to the Bank, saying that they had written to the defendant, asking when they (the plaintiff) were going to discharge their liability. But still no mention was made of any buyer. P.40 says:

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SUPPIAH & SINGH

TEL: 2254

No.20, Jalan Ah Fook,  
Johore Bahru,  
West Malaysia.

29th. Dec., 1974.

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M/s. Chung Khiaw Bank Ltd.,  
No.4, Kulai Besar,  
Kulai,  
Johor.

Dear Sirs,

Re: Mr. K.V. Devan - Legal Charge on CT 13817  
Lot 6025 Mukim of Senai-Kulai in the name  
of Mdm. Tara Rajaratnam.  
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We thank you for your letter dated 26th.  
December, 1974 and we are very sorry for the delay in  
settling the matter.

We have, however, written to our client to give  
us instructions whether they would pay the balance due  
to you on the charge and if we did not hear from them  
we will return all the title deeds within the next  
10 days.

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Yours faithfully,

Sgd.

c.c. to

Mr. Devan.

Please let us know the position on this matter.

...70/-

Nor has that letter mentioned in P.40 allegedly written to the deceased produced. I can only infer that the letter was never sent or there was no buyer because the production of that letter would have been highly prejudicial to the defendant. But I am sure any lawyer with any sense of propriety would be concern to let the Bank know, if in fact there was a buyer, the real reason why they were holding back the deeds in view of the undertaking they gave in P.27, because their bonafide might be questioned by the Bank, sometime or another. It will be noted that the letter P.40 was also copied to the deceased supposedly reminding him about payment, but again there was no mention of any buyer. It is seen therefore that there was actually no buyer and the only reason why the defendant had refrained from paying the Bank was clearly because they wanted while they held the title deeds to delay the payment until such time as they chose to pay. But this situation was changed because after persistent insistence from the Bank they had to return the title deeds, which they did in P.42. But two days later in P.43 they asked for its return and if we follow the defendants reasons for writing their letters it was I suppose again because there was a buyer, but they had to say they had bought the property this time as this was obviously the only way,

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they could compel the Bank to return them as P.27 would bear testimony. One will at once notice from P.43 that the defendant is telling the Bank that they are the owners subject only to the charges, which the Bank already knew. Which means that they were representing to the Bank that they were the absolute and unqualified owner. It at once becomes evident that P.43 itself is a fraud and this time the victim was the Bank, because if we follow the defendants contention they said their sale was still, 10 despite what happened after the 30th. March, subject to P.30 which required them to pay both the CKB and the HKB but P.43 however says they had to pay CKB' only. P.30 also says that they had to pay the CKB \$103,000/- which they knew had to be done on the outside within a week, which they had not done. Thus, in saying in P.43 that they had bought the property subject only to the 3 charges, they had fraudulently said they had bought when they had not and also they had not disclosed the fact also that they were bound by the 20 terms of P.30 and had not satisfied them, but nevertheless they maintained their disguise in P.46, 48, 50, 54, 55 (Full texts in Appendices) until the deed was released and using the undated transfer in their possession effected the registration of the title in their name while at the same time they kept matters in confidence by not sending the plaintiff the aforesaid letters. All this was evidently done

...72/-

in order to get the title deeds. That would however be fraud. But if the defendants had such audacity to deceive the Bank, despite all the lawyers at its disposal, can it be doubted that the plaintiff, as the subject of their deception, was just a small fry to them? But like the deceased, evidently no report was made by the bank of this incident to the Police. May be the Bank was afraid, considering the defendants high social position. Or, may be, acting quite irresponsibly, they could not care less what happened because they were not directly affected. But it seems to me that a clear case of cheating would appear to have been committed against the Bank. Unless of course, the Bank knew what was afoot and was a party to the fraud and an agent in passing the title to the defendant, which then would merely make out, even more so the plaintiff's allegation against them. I think I need only to remind myself of the principle which says that a representer must not merely abstain from positive falsehood, he must knowingly or willingly emit anything which is required to render completely true that which without it is not completely true. A statement which emits such matters is a lie in one of its most dangerous and insidious form. (Halsbury's Vol. 26, Para 1563). Three things have emerged from the disclosures made in P.43, that firstly, there was no buyer before the date. Secondly that there could

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not have been any variation of P.30, and the alleged promise by the deceased to reduce the overdraft to \$92,000/- because otherwise the defendants would have disclosed them in P.43 itself, since they would certainly not like to be told later by the Bank and not get their title deeds, simply because they had to pay \$116,000/- which was the amount due at the date of P.43 (See P.39 in Appendix) instead of \$92,000/-. The alleged promise by the deceased to reduce the overdraft to \$92,000/- was clearly false because if the 2nd. defendant says in P.43 that he had bought the property and that he, instead of the deceased was finding the loan to pay off the debt, then how could he also at same time be saying earlier that the deceased himself was going to pay the debt instead by reducing the overdraft to \$92,000/-. But apparently both the statements were false and a lie because the 2nd. defendant admitted it was not true even that he was going to raise a loan. Hence the alleged agreement by the deceased to reduce the overdraft to \$92,000/- could not be true. It follows the allegation that the deceased told the defendants that he and his wife could not find a buyer and did not have the means to repurchase the property themselves cannot also be true since the alleged agreement to reduce to \$92,000/- came about because the plaintiff allegedly could not buy the property. P.30 obviously had never been varied. All these allegations of the plaintiff were nevertheless made

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...74/-

because the defendants had never fulfilled its terms and had never intended to, and the \$92,000/- they paid was without regard to P.30 but purely in order to get the title deeds. <sup>But</sup> I think it soon became pretty obvious to the <sup>2nd.</sup> defendant in the course of the trial that his bogus "buyer" story was not selling <sup>well</sup> because, when P.W.(5), the officer from CKB gave evidence he seized the opportunity, to say that the deceased wanted to keep the account open in anticipation of the shares going up. But it was plain this was an afterthought because it had not been mentioned anywhere before. It was not pleaded as the "buyer" excuse was pleaded, but since, the "buyer" was pleaded as a defence, we would expect this would too have been pleaded. But the new excuse was even more self-effacing, because if the deceased was keeping the account open in anticipation of the shares going up, he could hardly also be anxiously wanting to sell the land at the same time. But even then the "shares" theory was no more plausible. The matter came about when D.W.(5) was asked why at one stage the plaintiff's account appeared to show the deceased was owing the Bank \$140,000/- and not \$90,000/- as the Bank's account shown earlier stated. He said that it was probably due to the shares being part of the property charged, which was valued at about \$30,000/-. It would appear after deducting, the amount would be about \$92,000/- which was what was asked for by the Bank of the

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defendant for the purpose of discharging the charge. In other words, the land could still have been discharged without discharging the shares and therefore the defendant's contention that the plaintiff wanted to retain the shares in anticipation of the shares going up, could hardly be conceivable. It was also alleged that the plaintiff had agreed to pay compensation to stay on her land. But that would be saying that she had agreed to pay, although she was not obliged to. Because it must necessarily follow if P.31 says that the defendant was not to sell the land for one year, then in the absence of any clause regarding vacant possession, that the plaintiff would still be allowed to continue to stay on the land. In any event, it would be extremely harsh and unjust if not ridiculous that she should in theory be asked to vacate even before the defendants had paid one cent of the \$220,000/-. Which person in this world would agree to such a term? Anyway, there was not a scrap of evidence by the defendants that she had agreed to it. How absurd this assertion is can be seen from the answer given by the 2nd. defendant, himself. He said that she would have to vacate only if she had paid the \$220,000/-. He was asked "It follows if you do not pay the \$220,000/- she does not have to vacate?".  
Answer: "Yes, I agree". But when it was put to him "that the plaintiff and her family were entitled to

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...76/-

stay on the property at least until you paid the \$220,000/-", his answer was "I disagree". But in the light of the earlier answer, the latter's reply was clearly meaningless. The allegation is in fact false as one will observe. In the Sessions court action No.146/76 for eviction (P.109 - See Appendix), the 3rd. defendant in their statement of claim at para (2) said "The first defendant who is the wife of the 2nd. defendant was the owner of same until she sold same sometime in July 1975. Both the defendants after the said sale continued to remain and occupy the said land and premises free from any rent". But the point is if the occupation was free, how could the defendants say the plaintiff had agreed to pay compensation. They said there was a difference between a rent and compensation, but how could there be <sup>one</sup> if they also admitted that the compensation was also in respect of occupation of the premises and nothing else (Page 237). In any event, if there was a difference, anyone would expect them to mention it in the said Para (3).

There was an attempt by Counsel for the 3rd. defendant to say that there is a great deal of consistency in the defendant's case in saying that there was a variation of the agreement because the \$92,000/- is actually the marking after the deduction of \$11,000/- from the \$103,000/-, to be paid to the

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CKB under P.30, the \$11,000/- being the amount of the overpayment which the 1st defendant had to make to the HKB. But that only prompts me to say this: Why then did the 1st. and 2nd. defendants not come out and say so, in the witness box? Why have they to hide behind the back of Counsel for the 3rd. defendant's submission which is not evidence. What were they afraid of? After all, he was only defending from the side, effect of their own initial ill-doing. Perhaps they were afraid that if they stood up in the box they might be strenuously attacked and may be groping for an answer, as they had clearly displayed from time to time in the course of the trial. Their silence to me is merely a mute acceptance that Counsel's argument has no validity. Secondly, we have no evidence anywhere that Counsel's calculation as "to how the defendant and the deceased worked out the \$92,000/-. Thirdly, the \$92,000/- would only be the calculation based on the \$103,000/-. It does not take into account the sum of \$6,000/- or so, which the defendant had to pay for the interest and the balance to be paid to the plaintiff which she says had not been paid to her. Is Counsel saying that the deceased was prepared to forge the \$6,000/- for nothing, that would be preposterous. Why should she? Counsel had not given the reason. Conveniently, of course the defendant says the \$6,000/- has gone towards payment of the compensation for staying on

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the land. But, I have already dealt with this point earlier, where the reason given by the defendant in charging compensation was shown to be a mockery of his own sense of reasoning. And last but not least the idea of the \$92,000/- being agreed upon by the deceased could hardly be true in the face of the conclusion which I have come to and discussed in connection with P.43 which is directly opposite the very idea of there being such an agreement.

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The defendant's intention to defraud the plaintiff was clearly evident by their deliberate act of transferring the land to them without first informing the plaintiff. The very fact that they were found contradicting as to the duty to inform only point to that guilty intention. The 1st. defendant said (Page 155) there was a duty to inform but it was the 2nd. defendant's responsibility not his. And he added also because Yeow & Chin represented her. But if there was a duty to inform, what difference

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does it make whether she was represented by Yeow & Chin or not unless they had told Yeow & Chin to tell her on their behalf. There was no such evidence. But if they knew there was a duty but nevertheless refrained from informing her it simply meant that they were dishonestly disposing her of her property, which was plain fraud. In any event was Yeow & Chin representing the plaintiff at the material time? It does not appear

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to be so. Two letters P.49 and 52 were brought into focus by Counsel in highlighting this point. P.49 reads as follows:-

YEOW & CHIN  
ADVOCATES & SOLICITORS

16-B, 2ND FLOOR,  
JALAN STATION,  
JOHORE BAHRU.

28th. June, 1975.

Ms. Suppiah & Singh,  
Advocates & Solicitors,  
Johore Bahru.

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Dear Sirs,

Re: K.V. Devan - C.T. 13017, Lot 6025, Mukim Senai-Kulai in the name of Md. Tara Rajaratnam.

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We act for M/s Chung Khiaw Bank Limited, Kulai Branch and the registered owner of the above mentioned-property.

We are instructed that upon your payment to us Solicitors for our clients the sum of \$140,000/- within two weeks from the date hereof we undertake to discharge the charge from the Bank and forward the said title to you to enable you to prepare the transfer of the said property. 20

Kindly let us hear from you soon.

Yours faithfully,

Sgd.

c.c. CKB Kulai  
Madam Tara.

...80/-

P.52 reads as follows:-

YEOH & CHIN  
ADVOCATES & SOLICITORS

Our Ref: YHC/WRM/0869/72  
Your Ref: (26)F.10/74.kjp

Messrs. Suppiah & Singh,  
Advocates & Solicitors;  
Johore Bahru.

16-B, 2ND FLOOR,  
JALAN STATION,  
JOHOR BAHRU.

1st July, 1975.

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Dear Sirs,

Re: K.V. Devan - C.T. 13917, Lot 6025, Mukim Senai-  
Kulai in the name of Md. Tara Rajaratnam

We thank you for your letter of the 29th.

ultimo and the contents therein noted.

Further to the telephone conversation between  
your Datuk Jagindar Singh and our Mr. Yeow this morning  
on the subject we are instructed that our client will  
discharge the Charge on the above property and deliver  
the said title to you upon your payment to us as  
Solicitors the sum of \$92,000.00.

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We hope to hear from you soon.

Yours faithfully,

Sgd.

RECEIVED  
DATE 1 JUL 1975  
TIME 2.40 p.m.

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The 1st. defendant said (Page 155) that in P.49 and P.52 (Full texts in Appendices) Yeow & Chin was clearly representing the plaintiff. P.52 is really, as can be seen an explanation of P.49. But one thing will strike one as being quite evident, that in P.49 the legal firm is using the word "clients" in the plural as clearly referring to both the Bank and the registered proprietor, whereas in P.52, it refers to the word "client" in the singular. It is plain that "our clients" in P.52, the solicitors were referring to the Bank as having asked for their \$92,000/- and not the registered proprietor, so when they spoke of "our clients" in P.49, asking for the \$140,000/-, they must be referring to the Bank only. This conclusion must be true because the 1st. defendant himself conceded that where solicitors are acting for a bank in the discharge of a charge, the normal practice is that they would also be acting for the owners of the property for the purposes of the discharge only, (Page 155) but he added that in these circumstances they would only be asking for the money actually due to the Bank. My only comment on the last bit of the defendant's answer is that I cannot agree with him more that that is what the Bank normally does. But his answer speaks for itself also that the Yeow & Chin at all relevant times were not acting for the plaintiff. If they did it was only for the purpose of the discharge. The plaintiff

...82/-

was asked by the defendant to sign several documents  
at the house on the 30th., <sup>without</sup> explaining the contents  
of each document. The transfer shows the considera-  
tion of \$220,000/- to have been paid and acknowledged  
as having been received, but not one cent of that sum  
had in fact been received. But the document reads  
as if she had received. Anyone would have expected  
that the sum would be paid almost immediately, other-  
wise why would she be stupid enough to sign the form;  
she had <sup>trusted</sup> the 2nd. defendant to do the needful, but he  
flouted it instead. The 1st. defendant's act of  
attestation on the form <sup>was</sup> also indicative of fraud.  
He was supposed to have attested the plaintiff's signa-  
ture in his presence on the 5th. of July but which  
never happened, to everyone's knowledge. He could  
easily have come back for her signature after they  
have paid the money, which obviously they would not  
do without bringing <sup>to ruin</sup> down the house of evil which  
they were steadily building. Their method of doing  
things was so baffling that evidently even Syed  
Othman J (as he then was) in the 3rd. defendant's appli-  
cation for removal of the plaintiff's caveat was mis-  
led. For one thing the learned trial Judge thought  
as I would have expected him to, that the 3rd. defen-  
dant was a bonafide purchaser for value because he  
said at Page 8 (P.113) <sup>(Judgment)</sup> "unless there is cogent evidence  
I would presume the applicant is a bonafide purchaser,  
for value." But of course the cogent evidence was

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not forthcoming from the 3rd. defendant at least not until the thought of being badgered in this very court had loomed before him. Second, the learned trial Judge also had been completely misled in thinking that the money had in fact been paid because at Page 6 he said "The indications in the transfer document are that performance must have been completed by Dato Suppiah as the material parts in para (a) and (b) in the consideration of sale read "..... in consideration of ..... P.Suppiah paying". As we knew it the money had never been paid at or before the 30th. March and the contract had never been performed in accordance with the agreement. Nevertheless the 2nd. defendant had urged that the one year should date from the 30th. March and not from the date of registration of the transfer. And in doing so he naturally did not hesitate to say that Syed Othman J also had said so. But would the learned trial Judge had said the same thing, if the facts just pointed out been made known to him. I am not very sure. I would be inclined to think he would have said otherwise. Such was the state of ambiguity the defendants have created in everyone's mind. But the use of ambiguous representation is indicative of fraud if the ambiguity was employed for the purpose of misleading the representee - (Halsbury Vol. 26 Para 1561). The contradictory

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...84/-

nature of the statutory declaration of the 2nd.  
defendant (P.99) in support of his caveat also  
speaks well of his demeanour. He mentions in para  
2 therein (See Page 218) that by an agreement on the  
30th. March the plaintiff was to pay interest up to  
the date of actual transfer. It was naturally asked  
(Page 218) why he had not mentioned the oral agree-  
ment and had not reproduced P.30 to which he replied  
there was no necessity. But was not his omission  
because there was no mention of interest in P.30 and  
P.30 indicates the \$220,000/- had been paid, whereas  
the statutory declaration said that it had not been  
paid and he might be in difficulty answering why he  
had not paid. The defendant finally admitted it was  
not true that he said the plaintiff had agreed to pay  
interest. But what credit then can the Court give  
to a solicitor who had no compunction to lie and  
perjure. It should be treated as wholly unworthy  
of credit, on this point alone. He said in the  
statutory declaration that under the agreement the  
plaintiff "would" transfer the land to him; but that  
would be contrary to saying that the land had been  
sold outright to him. He was merely restating P.30,  
he said. But P.30 infact say the land had been trans-  
ferred to him. Thus if he had not paid the money and  
the land had not been transfered how could there be  
a sale. Again if in fact he had sold the land to

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1st. defendant then why did he not say in P.99 that the 1st. defendant paid HKB at his direction.

Since the provisions of P.30 and 31 were not finally renounced until the transfer was effected into the 2nd. defendant's name on the 5th. July, 1975. The events subsequent to the 30th. of March must, contrary to Counsel's argument, be part and parcel of P.30 itself as they would show the state of mind of the defendant on that date (S.8(2) Evidence Act) as it was manifest that the defendant's modus operandi was to obtain the title deeds, ignore the memorandum, refrain from paying CKB and thus forcing the plaintiff 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 name, while all the time the plaintiff was kept completely in the dark. 10

I shall now deal with the subject of Collusion. As can be seen I have referred to the defendant as a whole or singly, as the situation may arise. But it does not make any difference, that I have mentioned one and not the other since the allegation is one of collusion to commit fraud. It will necessarily cover all the defendants except where it is otherwise stated or unless the circumstances will clearly indicate it refers only to the one and not the other or it refers only to the 1st. and 2nd. defendants and not the 3rd. I think in this 20

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connection it is relevant to cite S.10 of the Evidence Act which says:

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" Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of these persons, in reference to their common intention after the time when the intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

10

The act of colluding is in effect the act of conspiring with one another to commit an actionable wrong. The nature of the evidence which implicates the parties concerned would of course vary from one to the other.

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I shall deal with the 3rd. defendant's evidence in due course. I think as far as the 2nd. defendant is concerned the evidence that had been adduced affected him directly. The oral representations to the plaintiff on the 30th. March, the

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preparation of P.30 and the inclusion of 31, and the letters to the Bank and the Collector of Land Revenue, the registration of the title deeds, were evidently positive acts of the 2nd. defendant. The transfer was by him to the 3rd. defendant. It had been urged that the 1st. defendant was not involved, since he said nothing and did nothing and only came into the picture on the 30th. March as an innocent bystander and coincidentally only to attest to the plaintiff's signature. All the rest it was urged were done by the 2nd. defendant and he had nothing to do with it. But I do not think the 1st. defendant could so simply absolve himself. His visit to the plaintiff on the 30th. was prompted by P.W.(2) being in difficulty with him in regard to his overdraft at the HKB. His firm had already written P.27 earlier to the Bank asking for the deeds with a view to charging it for an increased amount. He had also a meeting with the deceased and the 2nd. defendant from which P.30 was later prepared by his firm and later produced at the house, which was essentially to get over his and P.W.(2)'s problem. P.30 itself expressly requires that one of the payment under it be made to him. Whatever the reasons may be for which the parties met on the 30th., one thing is thus clear, the 1st. defendant was directly interested in the outcome of the meeting on that day because whether

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the transfer was a purchase by the 2nd. defendant or merely given as a security it directly or indirectly affect his commitment to MKB. He was therefore far from being just as uninterested party. He was, as I said, the principal and the 2nd. defendant his as he claimed to be. / Whatever representations nominee. were made by the 2nd. defendant in effect were direct representations made by him also because in my humble view, he was for the reasons given an inalienable part of that representation.

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In any event the 1st. defendant cannot deny that if the property was bought by him either initially or subsequently from the 2nd. defendant, he cannot hold it without being tainted by the fraud committed against it by the latter. In this respect I need only cite what the Privy Council said in *Assets v Reichi* (1905 A.C. Page 210) that "Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents."

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The 1st. defendant cannot extricate himself from the fact that he was present at the meeting on the 30th. March. He heard what were said by the 2nd. defendant, what representations were made. He saw what took place and what did not take place. If the 2nd. defendant had falsely represented to the plaintiff the facts then since he knew that they were false and chose to remain silent instead then he must be guilty of fraud too. The very fact that the land was

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acquired by him but surreptitiously kept with the  
3rd. defendant is enough to show his participation  
in the fraud. He said this was done to enable it  
to be sub-divided and converted, it being more  
expedient since he did not enjoy good relationship  
with the authorities. But the letter written by  
his firm to the Collector of Land Revenue Johor  
Bahru seemed to say otherwise. The letter P.100  
reads as follows:-

SUPPIAH & SINGH  
ADVOCATES & SOLICITORS

10

Ref.No. JS/KT/11  
Ref. No.PT.19/76.

No.20, Jln. Ah Fook,  
Johore Bahru,  
West Malaysia.  
Tel.22254.

Date: 31st. Jan. 1977.

Pemungut Hasil Tanah,  
Kerajaan Johore,  
JOHORE BAHRU.

Dear Sir,

20

Serahbalik dan Kurnia Semula Tanah Lot 6025 (C.T.13817)  
Mukim Senai/Kulai, Johor kerana Rancangan Perumahan.---

We act for Mr. Arul Chandran who is the owner of the  
above land. Our client understands that his application  
for sub-division of the above land has already been appro-  
ved by the State Government subject to certain conditions.  
He instructs us to inform you that he accepts all the  
conditions the Government has imposed on the land for  
purposes of sub-division and will abide by all the con-  
ditions. He further instructs us to surrender the title  
deeds of the above land to you for purposes of surrender  
and realienation to be done by the Government. Title  
deed no. CT 13817 Lot 6025 is hereby enclosed for your  
necessary action. Kindly acknowledge receipt of same.

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Yours faithfully

Sgd.

Pengarah Tanah dan Galian, Johore.  
Fail tuan 9/76-55.

...90/-

It seems clear that he did, despite what he said, enjoyed good relationship with the authorities otherwise it does seem strange that he had confidently expected the authorities to approve his subdivision even before they had approved it. He said that the P.100 was written by his firm and not by the 2nd defendant and him and when they wrote they were acting in their personal capacity. He was naturally asked rather gleefully by Mr. Cashin whether the authorities had liked his firm but not him in his personal capacity, to which he said he did not know (Pg.159). But if he did not know, it obviously meant that there was no truth in saying that he did not enjoy good relationship with the authorities and the property would have been registered in the 3rd. defendant's name only to hide it from the plaintiff having fraudulently obtained it from her. The Court must also draw the necessary inference against him from the letters written by his firm, although written by the 2nd. defendant. He had not disassociated himself from these letters as would necessarily exclude him from the effect to be given to them. He merely said that in some of the letters that he did know them. But whether he knew or not, is a matter of assessing the evidence, although it is difficult to see how he would not know. His demeanour in respect of just one letter would prove otherwise. This

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is in connection with P.33. The letter says:-

(363)F.10/74.kjp.

AC 146

13th June, 1974.

M/s. Chung Khiaw Bank Ltd.,  
No.4, Kulai Besar,  
Kulai,  
Johore

Dear Sirs,

re: Mr. K.V. Devan - A/C 146 - Legal  
Charge on C.T. 13817 Lot 6025  
Mukim of Senai - Kulai in the  
name of Madam Tara Rajaratnam  
-----

10

We refer to your letter dated 10th  
June, 1974.

We are in the course of preparing the dis-  
charge of the charges and we will send them to you  
for execution.

In the meantime please let us have parti-  
culars of the person who has powers to execute the  
discharges and also a statement showing the amount  
due including interest as at the 30th of this month.

20

Yours faithfully,

Sgd.

...92/-

He was asked whether he knew about P.33. He said he did not know, yet P.33 was written in reply to CKB's query in P.32 asking when they were going to discharge the charge as the defendant on behalf of the deceased and the plaintiff had indicated that they would do so in P.27. In my judgment that since he said he knew about P.27 and 28 that he would also know about P.33 which was merely pursuance to his letter in P.27. He had evaded the issue because evidently he would, although he knew, rather leave them to the 2nd. defendant to answer. If he knew about P.33, he must also have known about all the other letters. Infact he <sup>must</sup> be deemed to know. It would be a very dangerous precedent indeed if the Court is to say that Counsels are not bound by their own words as expressed in their firm's letters when their letters are the very means by which they act and conduct themselves in relation to the public, in particular their client. For the Court not to act strictly and firmly in this matter would necessarily incur the public in suffering a loss without a remedy and may uncompromisingly placed them in a situation of great jeopardy. A lawyer cannot be heard to say that he has left his firm in the hands of others who has miserably defaulted, or failed. He must equally suffer that default or failure otherwise he will be lending his name only to commit wrong. The choice is his to throw up his brief and his firm or to accept the consequence

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of being a part of one. The necessary assumption is there-  
fore that the letters were known to him and it was  
advent to  
upon him if necessary to them in the agreed bundle to  
say that he had no knowledge of them, of which he had  
not done. I have discussed on the significance of  
these letters earlier, where my analysis then <sup>was, it</sup> would not  
carry the defendant's assertion any further than what I  
had said that there were no buyers for the land and were  
merely sent from time to time because CKB was anxious to  
know why the defendant were keeping the title deeds and  
as promised not discharging the charge. The 1st. defen-  
dant cannot excuse himself particularly from P.43 and  
the false representation made therein by his firm. In  
saying at the outset that "We act for one Mr. Suppiah  
....." he had categorically associated himself with its  
contents.

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I shall now deal with the 3rd. defendant's  
case. I have set out the facts bearing on his case  
earlier and I do not propose to repeat them. As I have  
said earlier the 3rd. defendant can exonerate himself  
only by stating that he was a bonafide purchaser for  
value of the land. This is the defence afforded to  
him under S.340 of the National Land Code, which gives  
him the immunity of title, by virtue of being such.  
The argument that the plaintiff must in theory be  
able to set aside the land in his hands first apply  
here also. The stand taken by the 3rd. defendant

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initially was that he was a bonafide purchaser for value. This must necessarily to be construed from his defence at the time when the trial began. Para 12 of the statement of claim says that the transfer of the property into the name of the 2nd. defendant and later into the name of the 3rd. defendant were procured and effected fraudulently by all the 3 defendants. Particulars of fraud of the 3rd. defendant

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Colluding with the 1st. and 2nd. defendants and causing the said property to be registered into his name,

Para (d) (iii) with knowledge that he was not a bonafide purchaser of the said property for value and

(iv) with knowledge that he was accepting the transfer of the said property into his name only as the nominee or agent of the first and second defendants, and only for the purposes of posing and projecting

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himself as a bonafide purchaser for value so as to attempt to defeat the plaintiff's right to redeem and recover the said property.

In his defence in para 22 the defendant says the defendants repeat para 3 and 9 above and deny each and every allegation

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contained in para 12 of the statement  
of claim including the allegation of  
fraud and the defendant put the plain-  
tiff to strict proof thereof.

The denial that he was not a bonafide purchaser, simply means that he was a bonafide purchaser, and it would have been a good a defence as any and if the 3rd. defendant could prove it, then there would be no case against him. But that was not to be. On the 7th. day of the trial as related earlier he made a dramatic round about turn. He asked, and with no objection from all sides was allowed to amend his defence, to say that now instead that he was in fact the nominee of the 1st. defendant and was holding the property on trust for him. So, we got a situation where after disguising his true identity through the Courts from the lowest up to the highest, through Rodyk & Davidson, his own partners, the Law Society and the Collector of Land Revenue, and half way through this Court he now says he was a pure simple lamb who knew nothing and heard nothing and because his friend the 1st. defendant told him he wanted to use his name for the purpose of applying for conversation or subdivision of the property, so he accepted, just as a pure andsimple lamb would. But that was all very nice and sweet to say after all the damage that had happened to the plaintiff in particular and the Courts in

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10 general. But is he really now saying he is at last  
a lamb not a wolf under the lamb's wool. To me  
that he is not a lamb but a fraud. He is a most  
vicious and dangerous fraud, because he now says  
he wants to come up with his true colours, since  
the one that he wore earlier was false and fictitious;  
but the danger is that the Court does not know whether  
he is not also a Chameleon changing his colour as  
suits him, otherwise it's hard to explain why he also  
said that he wears the colour that the 1st. defendant  
wears legally, which means that if the 1st. defendant's  
later was found out to be wearing an illegal colour  
he would abandon him and goes back to the colour that  
he chooses to wear and say I never intended to wear  
the 1st. defendant's colour in the 1st. place.  
But of course the 1st. defendant had no other  
colour to change to, like him. He had only one  
colour. If infact he is that simpleton of a trustee  
then why has he lied all these years that he was a  
20 bonafide purchaser, and not said it before? He said  
he had never stated or asserted at anytime that he  
was a bonafide purchaser for value (Page 257) almost  
saying he would seal his fate on proof that he had  
said it. But is not the assertion made by him in  
this <sup>®</sup>very case in his pleading, as just pointed out,  
not such an assertion? Was not his plea at the  
Sessions Court that he was a registered

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(See Statement of claim).  
owner not such an assertion? (P.109)./ Because how  
would anyone become a registered owner, properly and  
legally constituted, save of course, it was for love  
and affection, without having been first a bonafide  
purchaser for value. It is plainly implicit in being  
a registered owner. That is the way everybody knows  
it, and it is the only way it has to be done, other-  
wise the whole system of land registration and  
administration will become a mockery and a farce, and  
the subject of deception and ridicule by people as  
the 3rd. defendant. It will in fact be put to a stand-  
still. He says he can register himself as the owner  
and lay hidden behind it as a trustee but that would  
defeat the very purpose of Section 340 of the National  
Land Code; how are the Courts in this country, let alone  
the Collectors, going to protect the interest of the  
genuine registered proprietor when an imposter like  
the 3rd. defendant can bandy the term about and find  
shelter under it. It would uproot altogether, if  
I may<sup>say</sup>/so, the whole object of what I consider is the  
most important feature in land registration, that is  
to give the person on the register, as owner, the  
immunity of title which cannot be defeated except  
in the cases given in the exception mentioned under  
Section 340, unlike the English system of land tenure,  
purely by virtue of registration. If any Arul  
Chandran can come along and for some devilish scheme  
of his own which he keeps to himself, register himself

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as owner when he knows he is not, then there is no point anymore in having the system of land registration. By a stroke of the pen the said Arul Chandran has changed that because he says it could be done and he need not say anything since the burden is on the plaintiff to prove that he is not a bonafide purchaser.

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But he could not run away also from the fact that he <sup>in so</sup> doing he is also deceiving.  
~~had-deceived-the-court~~. He cannot have it both ways.

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But I have no doubt that with his wide experience of the law, the 3rd. defendant did not mean what he said but understandably he had to pretend he did not know, as long as he thought he could hoodwink everyone by the magic word "registered owner" and "bonafide purchaser", because everyone knows it is not easy to dislodge a registered owner especially if a fraud had been executed with such subtlety by people who are least expected to commit them.

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But now that matters have surfaced he tries to say that he was not a party to the preparation of the pleadings at the Sessions Court, nor seen or been a party in the preparation of any pleadings in any of the courts pertaining to this episode except the one prepared by Mr. Ronald Khoo, as if saying he does not trust Ronald Khoo but trusted the other Counsels; I wonder therefore why he had discharged Mr. Chin, caused himself to abscond for a day from this court, went high and low looking for Mr. Ronald Khoo to be his new Counsel instead. His change of stand meant

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also that since the arrival of Mr. Ronald Khoo, he has suddenly woken up to look at the pleadings and given his personal attention and approval, which he said he had not done before. But he has not told the cause for his sudden change of attitude. That is very important to me because in the absence of any cogent reason I would conclude that he would also have found it necessary to see and approve the other pleadings in the care of the 2nd. defendant in the Sessions Court right up to the Federal Court and the caveat proceedings before the High Court, unless of course he says the 2nd. defendant and Mr. Chin possessed such vastly superior knowledge of the law to Mr. Ronald Khoo that he could even afford not to look at the pleadings. But he has not said so. I am also incidentally somewhat advised by the agreed bundle that the defendant was at some stage to lead a Queen Counsel in some notable case in Singapore. Is he seriously saying therefore that some eminent Counsel in England was going to be persuaded by him to descend in Singapore to be led by him whose sense of efficiency, preparation, general awareness and concern were such, unless he was lying<sup>and</sup>/I feel certain he was, that he was prepared to leave his own pleadings, that would decide his own fate, entirely in the hands of others however competent those others may be. What would I wonder be the fate then of others' pleadings left in his supposedly safe hands, leave alone that of that notable case in Singapore. He said he had to give his stamp of approval to the suit being filed

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10 against the plaintiff at the Sessions Court because  
it had to be in his name, meaning that his name was  
of no consequence and could be bandied about that  
it did not matter what happened to it. But if he  
name and  
had any/reputation ~~or integrity~~ at all surely his  
name would be very much at stake at the Sessions  
Court because if he lost, the whole of Singapore,  
let alone the legal fraternity, would descend upon  
him with accusing fingers pointing at his integrity  
and honesty in acquiring it in the first place. They  
would wonder why a lawyer, who should know better,  
should lose a case against a lady, who says she owns  
the land unless they say he had improperly acquired  
it from the start. Then of course they would  
exclaim with horror and disgust that a lawyer like  
him could be so dishonest. It would be followed by  
his whole career and reputation being in jeopardy  
and not the least his name being smeared and put to  
shame. Is he saying that under those circumstances  
20 he would, nevertheless in an air of absolute abandon  
just leave things in the 2nd. defendant's lap and  
ceased to look back. I think he is being plainly dis-  
honest. I believe he would not only have looked at  
the pleadings, he would have left no stones unturned  
to see that it gets through the scrutiny of the  
Courts, because whatever happened <sup>he knows</sup> people would think,  
because he puts his name down as the registered  
truly  
proprietor, that he was the owner of the land, and

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since he wanted to be in disguise, people would not know he was a great pretender. If he did not tread carefully therefore, the whole scandal would be exposed.

But the strange thing was, however, he adopted the pleadings in this suit sometime in June 1981 when he first saw it although he said he had never seen his statement of claim at the Sessions Court and he had never said he was a bonafide purchaser for value although it does appear in evidence (Page 267) that he said he saw the statement of claim and the defence at the Sessions Court. It does show how contradictory he can be. The reason it seems why he says he adopts this suit but not the other and has never seen it is because in the Sessions Court he positively said he was a registered owner and by necessary implication a bonafide purchaser for value whereas in the other he did not although it does not seem to me to make any difference because the effect of denying in this suit to the allegation that you are not a bonafide purchaser for value implicitly means you are affirming the fact that you are. But needless to say, desperation can drive one to do things which one does not normally do and therefore he had urged that he was not at the Sessions Court on the 12th. of May, 1976 clearly avoiding being told he was present when his case was being heard although the record showed that

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10 he was present. This was prompted by Mr. Majid, Counsel  
for the plaintiff having, on the record on the 30th.  
said that the defendant was present on the 12th. of  
May. But we are not concerned with what Mr. Majid  
said. We are concerned with what the Court recorded.  
And the way the Court had recorded it showed that when  
he was absent as on the 30th. of May and the 24th. of  
June he would be recorded as being absent, but on the  
other occasions, the court was silent. It must be  
assumed therefore that when the Court does not record  
that he was absent it must be intended to mean that he  
was present, otherwise there was no point in the  
presiding officer recording only when the parties were  
absent. He might just thus as well have not said it leaving  
it to conjecture whether the parties were absent or not.  
An officer with some experience would normally have his  
mind drawn to whether the parties were absent because  
the question of striking off the action might arise and  
he would specifically record that fact. The presiding  
20 officer from the 6th. till the 30th. May when this  
incident took place was Encik Ahmad Fairuz, the Senior  
President who is currently the State Legal Adviser,  
Johore. I cannot foresee why he would have recorded  
that the plaintiff was present, on the 12th. of May  
if in fact he was absent or for that matter on the  
6th. or the 10th. where the President had been silent  
when likewise it must be assumed the defendant was  
present. If therefore Mr. Majid had also said that

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the 3rd. defendant was present on the 12th. of May he was merely echoing what the President himself had recorded. Nevertheless the defendant was not going to be dismayed or discouraged. He was determined to defy the record; <sup>he</sup> embarked on a journey during the adjournment to see Mr. Majid and apparently Mr. Majid despite of what he had said now says he was wrong. But why has he not called Mr. Majid to give evidence? Since all I have is the evidence of what Mr. Majid said on record and what the President recorded where between Mr. Majid and the record it is clear which one must prevail. Mr. Majid's absence meant that Majid had said what he said at the Sessions Court. The defendant said he checked with his Secretary's diary but the diary was never produced. But more significant however is how was it that he had nevertheless made that long journey to K.L. to hear the plaintiff's appeal in this suit, if he had not made that comparatively short journey to Johor Bahru just across the causeway to hear it also at the Sessions Court, unless he was lying. Because whether it was at Johor Bahru or at Kuala Lumpur his fate was still in the balance and he has to see it through at least because the thought of being scandalised would still hang over his head. In any event why must he be at the Court in Kuala Lumpur at all if he said he had left matters in the hands of his Counsel if not because he was interested in the fate of his case in the same way that he would be present in Court when his case was being tried in

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Johore Bahru. He is certainly not going to say he went to K.L. just to see the plaintiff as he seemed to have said.

The defendant said his conduct at the Law Society would show the consistency of his innocence. But to me it has merely helped to disprove instead that consistency, as the facts would bear out. In the complaint (D29A) by S.K.Tan and P.W.4 Page 253 it was alleged that "The complainan<sup>ts</sup> were aware that Arul was not possessed of funds which would have enabled him to buy for a price of \$220,000/- or to raise funds of \$220,000/- and that he was a very close friend of both Suppiah and Jagindar and that it was most unlikely that he could be an actual purchaser from Suppiah" and his reply was "The complainants were not in a position to know of my financial standing and their speculation whether I was an actual purchaser was unfounded and malicious, to say the least". But if there was no reason to speculate that he was the actual purchaser then it simply means he must be the actual purchaser. The complaint says (Page 259) "It is known that Arul was a close friend of Suppiah and Jagindar and it becomes obvious that Suppiah and Jagindar needed to have a friend so that there could be a bonafide purchaser for value behind which any fraud which might later come to light could be sheltered. Hence it became vitally necessary to have a further sale to such a bonafide purchaser for value and this was provided in the

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person of Arul". And his reply was (Pg. 273) (P.29C)  
"I cannot comment on para 1 to 10 though in my view  
the critique is wholly unfounded and slanted". In  
other words he was in effect saying to the Law Society  
that he was a bonafide purchaser for value. The  
complaint says "It is practically unbelievable that  
such close friends would not enquire one of the other  
the reason why Suppiah should want to sell 26 days  
after he himself had bought the property and at  
exactly the same price. The complaints feel that  
it is hardly necessary to stress the host of obvious  
deductions which can be made from this transaction  
once the larger picture is seen. However in order to  
assist the Counsel the following are pointed out:  
"The defendant's reply was (Page 273)." With regard to  
para 11 the complainants belief are in my submission  
un-warranted and has no place in the complaint. In  
my submission no deductions can be rightly made in  
view of the complainants having got their facts wrong  
and in wanting to believe Madam Rajaratnam and Mr.  
Devan who are not even (so far as is known to me) the  
clients of either Mr. Cooma or Mr. S.K. Tan and who  
it would seem clear has contradicted herself in her  
several affidavits statutory declarations and other  
documents." In other words the defendant is saying  
there is nothing improper or unwarranted in the 2nd.  
defendant selling the property only 26 days after he  
himself had bought the property at the same price.

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That is certainly most extraordinary.

The complainant say (Page 257) "M/s Rodyx & Davidson have themselves a very competent conveyancing department. Why did Arul not use his own firm?" The defendant's answer was (Page 274) "I did not use Rodyx & Davidson as we do not have a branch" (or for that matter a proper office in Malaya), and I was happy to use the firm M/s Suppiah & Singh. In fact M/s Suppiah & Singh (and their predecessors) had been agents of Rodyx & Davidson as long as I have been with Rodyx & Davidson and moreover Rodyx and Davidson still use M/s Suppiah & Singh as their agent in Johor. I do not wish to comment whether Rodyx & Davidson have a very competent conveyancing department to deal with land transaction in Johor or the rest of Malaya as alleged in the complaint. As far as I am aware the firm does not handle any land transactions in Malaya." But I do not see why if the defendant was in Singapore Rodyx & Davidson his own firm could not have conveniently handled the conveyancing in Singapore. There appears to be nothing to prevent it. Query No. 2 was, "why did Arul not view the property?" And his answer was (Page 274) "I do not know how they have come to the conclusion that I did not view the property". But, to me if in fact he had viewed the property all he had to say was "I viewed the property". That he did not say so simply meant that he did not view it. Query No. 3 - "Why did he not enquire of

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Suppiah why the consideration should be the same even though 26 days earlier Suppiah had paid stamp fees of \$3,400/-. His answer was (Page 274) "This is a matter entirely for Dato Suppiah, that is, at what price he chose to sell the land." This clearly suggests that the defendant had paid for the land which he knew was not true. Query No. 4 - "Looking at the transcript of the meetings with Arul it becomes clear that Arul in fact did not provide the consideration. Who did?" And the defendant's answer was (Page 274)- "It is up to me to find<sup>the</sup>/financing in any way open to me within the law." Here again he is suggesting that he paid for the land which is completely false. The next question No. 5 by the complainant was: "Why was Arul so reluctant to disclose the name of the person who provided the money and the defendant's reply was (Page 274) - "I have stated my reasons in the minutes. I told the meeting that I felt there was an "enemy" within our midst and this has been borne out in the complaint. I had heard that Mr. Cooma had already approached my opponents solicitors in Johor Bahru behind my back in what would seem to me very suspicious and incorrect circumstances." But the question is why should he be afraid of anyone if he had not done any wrong. The "enemy" is just a figment of his own imagination. Query No. 6 - "Why did he not use his own address on his transfer form instead of that of Suppiah & Singh (Suppiah being the

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vendor)?" And his answer was "It was open<sup>to me</sup> to use the address of my solicitors". But surely it would have been more convenient if one was honest, to use one's address. Question No. 7 - "Why did he not make full enquiries as an ordinary person would have done in regard to the purchase? And his answer was - "Whether I made any enquiries is irrelevant in my submission". But it would also mean that he had not make any enquiries otherwise there was no reason for him to evade the issue. Query No. 16 - "The execution of Form 14A by Arul without there passing any consideration between him and Suppiah would appear to disclose an offence under Section 423 of the Singapore Penal Code (Cap 103) if the signing by Arul took place in Singapore or Section 423 of the Malayan Penal Code (Cap 45) if the signing took place in Johor Bahru." And the defendant's answer was (Page 276) - "It is not true that no consideration has passed to Dato' Suppiah See Para 7 of Mdm. Rajaratnam's Affidavit in which Madam Rajaratnam had deposed "Pursuant to the agreement dated the 30th. day of March 1974 the said Suppiah had paid the money to the Dato' Jagindar Singh. ...." Where is the evidence that no consideration has passed to Dato' Suppiah?". This is clearly a blatant lie to the knowledge of the defendant because he knew he had not paid one cent to the 2nd. defendant.

Thus we see that he had time and again said he was a bonafide purchaser for the value of the land

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although in his pleadings he said he never said so and time and again he maintained he paid for the land when he knew it was not true and he maintained his silence about the reasons why the 1st. and 2nd. defendants wanted to keep the land with him, as the registered owner. Those were hardly conduct's consistent with innocence. He said that he had orally stated that he was a trustee of the property to the Law Society; but he had not stated it in his Reply to the complainants because he was afraid it might fall into the hands of P.W.4 and S.K. Tan. But why should he be afraid of them if he had not done anything wrong. But, anyway what if it should fall into their hands, frame up a case against him - to whom and for what? Why should these two be framing him for? Over a girl, and get entangled with the police themselves for fraud? I think it needs quite a lot of imagination to see the logic of that conclusion. Anyway, whatever little war he had with P.W.4 over Miss Murugesu what had that got to do with S.K. Tan. The defendant apparently had no grudge against S.K. Tan. S.K. Tan was not involved in the tug of war over Miss Murugesu. He did not seem to show any passion for her. Why should he therefore unnecessarily make things difficult for the defendant. But from the record it showed that Potts inquiry in which S.K. Tan was present was held before the complaint was made to the Law Society. In Potts inquiry P.78 (Potts inquiry)

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the defendants had directly or in-  
directly said he was "in a manner of speaking" a  
trustee so does it make any difference whether the  
defendant's Reply to the Law Society fell into the  
hands of S.K.Tan or not since S.K.Tan already knew  
about it. So he kept disguise that he was the regis-  
tered owner of land until the 7th. day of the trial,  
safe into the thought that as long as the Potts  
enquiry proceedings did not go in he could continue  
to wear his mask and be secure. But as soon as Potts  
records went in on the 7th. he had no choice but to  
unmask himself since he knew his game was up and he  
had to tell that he was not the registered owner but  
try as best as he could to save himself before it was  
too late. That must the inevitable inference from his  
previous stand and the sudden round about  
turn he has now taken. Thus whatever his reason for  
being supposedly a trustee he cannot run away from  
the fact that he had been lying that he was a regis-  
tered proprietor and the obvious reason and the only  
reason for that lie not to disclose it until now,  
after all these years, was to conceal the 1st.  
defendant's fraud. He seems to say the reason is  
because Mr. Ronald Khoo has advised him to change  
his stand. But surely he is not going to say that  
Mr. Ronald Khoo also told him to lie that he was a  
registered owner when he was not. And surely he is  
not also going to say that Mr. Ronald Khoo has just

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told him, and only now he realises, that he had been lying all these years. The simple fact is he had not given any explanation why he had been lying. Be that as it may, let's see why he said he innocently kept the 1st. defendant's property with him. The 1st. defendant told him he wanted to keep it with him for sub-division and development; he therefore accepted with no question further being asked. But it's most strange that although he knew the 1st. defendant as a recognised developer that he did not ask him why he could not do these things himself. 10 It is also strange that although he knew later the property was transferred from the 2nd. defendant to him he did not ask the 2nd. defendant why the latter should not remain on the register himself. Neither did he ask the 1st. defendant why he himself should not be on the register. It is also most strange that it did not occur to him that since the 1st. and 2nd. defendants were his good friends they might in fact find him a convenient place to keep their ill gotten 20 property. At first he said it did not occur to him to put himself down on the register as a trustee because he did not direct his mind then to the system, but considering his 20 over years experience as a practicing barrister, and what is more significant and ironical that he had previously also been a Public trustee himself, that answer is extremely difficult to accept. Then he said he would not go on the register,

even if his attention had to be drawn to it unless it is mandatory and unless it is directed by the beneficial owner since it would defeat the trust. But obviously it would have defeated the trust because it was meant to conceal the 1st. defendant and his fraud and to reveal it would have broken that secret but unlawful trust.

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I think it is enough from these answers for anyone to say that under these circumstances that it should have at least aroused a suspicion in his mind as to make an enquiry. As the Privy Council said in *Assets Co. v Reihl* (cited earlier) "The mere fact that he might have found out fraud if he had been more vigilant and had made further enquiries which he omitted to make does not itself prove fraud on his part. But if it be shown that his suspicions were aroused and he abstained from making enquiries for fear of learning the truth, the case is very different and fraud may be properly ascribed to him."

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I think the very fact that the 1st. defendant told the 3rd. defendant that he wanted the 3rd. defendant to sub-divide and develop the land when there was no question that the undertaking could have been performed by the 1st. defendant himself since he was a developer, should alone be sufficient to arouse suspicion in the 3rd. defendant's mind as to put himself on an enquiry but he did not. Instead he accepted the 1st. defendant's word without more and clearly abstained from making further enquiry for

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fear of learning the truth about the defendant's fraud or, because he already knew, and therefore fraud must be properly ascribed to him.

But once he had made the admission that he was not the registered owner and had lied to say that he was, it would only go intrinsically to confirm the allegation of fraud against the 1st and 2nd. defendants because the 3rd. defendant could only have done so in order to conceal that fraud.

I should like now to touch on various points raised by the parties on the evidence.

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One would notice that the letters written by the defendant were copied to the deceased Devan when they should have been sent to the plaintiff. It seems clear that for these letters to bind the plaintiff it must be shown that she had actual knowledge of them. Suspected or constructive notice is not sufficient - (Halsbury's Pg. 868 Para 8611 Vol. 26.) One must appreciate the difficulty on the deceased's part, if at all he had bothered on whether to act or not to act in a positive manner. As I said the transaction was in form a sale because it was a transfer but in substance it was intended to be a security. As far as the deceased Devan was concerned he might well have ignored these letters especially since they were merely copied to him. Anyway, considering how ghastly the construction of P.30 and 31 had been made to mean to this court by

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the defendant we do not know how they were actually made to represent to the deceased.

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10 The effect of the imposition of the defendant's caveat is, as Counsel for the plaintiff said, neither here nor there. Clearly the caveat is for the purpose of preventing the plaintiff from creating further charges which should not therefore be considered as an affirmation of the contract itself by her. In any event, her attention was never drawn to the purpose of the caveat, so no necessary inference could be drawn against her. She must still be secure in the thought that she would keep her land back.

20 The defendant had urged that the plaintiff's defence at the Session Court was consistent with the sale because the plaintiff said she was unable to pay for the land but this again is utterly misleading. Clearly reading between the lines of the defence this was not what the plaintiff meant. The plaintiff said at para 4 - "the defendants for business reason were unable to repay the sum of \$220,000/- within the period." (The underlining is mine). Surely in the context of the plaintiff's assertion in para 3 "that the adjustments were not carried out entirely within the stipulated time..." that the plaintiff were not contending in para 4, that they were not able to pay but they were not able to do so within the period as construed by the defendants, which they did not accept. That paragraph is as good therefore as

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saying "we are not bound to pay even if we can pay."

Since the averment in para 4 is repeated in para 6

it must therefore be read together.

The value of the land seemed to have  
overshadowed the real issue. We are really not  
concerned with what the value of the land was.

We are concerned with whether fraud had been committed  
on the plaintiff of her land whatever the value of

Except on the question of damages  
the land may be. / I think the issue was unnecessarily

raised. The plaintiff said it was worth \$1 million.

She relied on Kepol's evidence, <sup>thus</sup> / however unjustified

that may be, she was not without any basis.

But valuation is something which even Government

valuers are found to be at variance and at odds with

the proper market value. What the plaintiff meant

probably was the land would be worth about \$1 million

after the houses were built and sold. She may be

right, I do not know. Judging <sup>from</sup> / what the defendant

had done to develop the land, I think she may not

be far from the mark.

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The plaintiff was supposed to have confirmed

in P.56 that she had transferred the land with the

house on it. A copy of P.56A the original was

produced, P.56B. The plaintiff had denied she made

the confirmation in P.56 although she admitted sign-

ing it because her signature is on it. I recalled

SubraNaikar Counsel leading Mr. Caishin said that

he had agreed to P.56 to be admitted on being told

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by the 2nd. defendant that this was one of the documents filed with the Town Council Kulai. It did not occur to him then of the authenticity of it. In my view, although documents are in the agreed bundle the court is nevertheless entitled to exclude <sup>them</sup> / if there are reasons to doubt as to <sup>their</sup> / authenticity, otherwise it will be prevented from excluding <sup>a</sup> / document which the parties may have <sup>in theory</sup> / forged but the other had been misled to believe it was not and had been induced to include it in the bundle. I have reasons to doubt on the authenticity of P.56 because the date on the original appeared to have been erased. Another, the copy does not seem to be the exact copy. The figures "5th. July 1975" the signature, "Tara" and the signature of the 1st. defendant on comparison do not appear to me to be same. The two signatures of the plaintiff clearly differ in appearance. The plaintiff said she had signed a number of blank papers. Bearing that in mind and in the light of the discrepancies in the writing in them, the authenticity is P.56 is very much in doubt. I would therefore reject it.

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She had also denied she signed the Income Tax documents CST 1 (D.6). Unlike P.56, she had denied she signed CST 1 at all. D6 is supposed to be the return by her of her income to the Income Tax Department. Since she had denied her signature and this was not in the bundle it was for the defendant to prove her signature. The document was produced thorough the

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officer from the Department of Inland Revenue one Silvarajah Arasu D.W.6. He said he received D.6 on on the 24th. September 1975 but rather shockingly he did not say from whom he received it. And yet he said after receiving it he sent a letter to the plaintiff D.31 but he did not receive a reply to it surprisingly enough. I have reasons to believe that CST 1 was sent to the Income Tax Department not by the plaintiff herself but by some other person because the facts as alleged in D.6 is completely contrary to the evidence in no uncertain terms as had been established in this case. D.6 inter alia said in para C(iii) that she had received \$220,000/- for disposing of the land to the 2nd. defendant. But considering what had been said in evidence, especially on the alleged payment of compensation by the plaintiff of \$6,000/- for staying on her land which I said had no foundation whatsoever and does not stand to reason, I cannot imagine for one moment why the plaintiff would have nevertheless said she had accepted the \$220,000/- and had willingly and gladly asked the Income Tax Department to charge her for something which she had not received, when she had clearly not received the \$6,000/- out of the \$220,000/-. I have a strong suspicion that D.6 is a forgery and bearing in mind that the plaintiff said she had not signed it, it must be expunged from the record. Someone who is interested in proving that the plaintiff had sold the land to the 2nd. defendant would evidently be interested to.

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tamper with the document. I think D.6 must be looked at in the light of the same comment by me on P.56A and 56B and the blank papers.

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10 The defendant had touched on the variation on the amount paid by the plaintiff to H.L. Tan on the recovery of the land. The amount stated on the transfer was \$10,200/- selling price and \$10,900/- buying price whereas she stated in evidence the deceased Devan sold it to H.L. Tan for \$30,000/- and she repurchased it from H.L. Tan for \$30,000/-.

20 This point was raised by the defendant to cloud the issue that the transfer was essentially a form of security. But the fact that she said she paid \$30,000/- and sold it for the same amount, is not necessarily untrue. It is not an unknown practice for two people for their own reason not to state the real consideration on the transfer. But if the \$30,000/- was according to the defendant a concoction then the \$10,000/- must be true, because one has to be true, but even then there was only a difference of \$700/- between the selling and the buying price. Would any-one be selling 5 acres of land at Kulai about 10 miles at Johor Bahru in 1965 for \$700/- only? The defendant's valuer has not said this was the market price then. That would be the lowest ever recorded sale price anywhere. It merely bears out the fact that it was not intended to be a sale but a security.

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Sivanandan D.W.5 was called to confirm the defendant's story because we will recall he took down the dictation in manuscript P.31. There is a distinct similarity between the 3 witnesses in respect of one event, i.e. the 1st., 2nd. and D.W.5 all said that the deceased Devan went out with the plaintiff and had a little discussion and a little while later they came back, and it was the deceased who said that the wife wanted to have a year's grace to repurchase it to suggest that they were at all material times dealing with the deceased Devan and not the plaintiff. Otherwise D.W.5 said he was not interested in what was going on. He was not a party to it. He did not hear any introductions being made. He was browsing through the magazines. He was not apying real attention to what was going on. He was flipping through the papers. The impression he wanted conveyed was that he was in a stupor generally, but half a stupor sometimes; but what worried me was that he fell into half a stupor only to remember those matters which seemed to favour the defendant but fell into a full stupor when they seemed to favour the plaintiff. It's the usual evidence that we often hear - I was not interested in what was going on but I was also interested. I was reading the papers but I was also not reading the papers. He did not hear the introductions, but nevertheless heard the instruction given by the deceased to the 2nd. defendant. But it is extraordinary to hear that there was no introduction by the deceased when the plaintiff said

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he had never met the 1st. and 2nd. defendants before In the High  
and this apparently had not been disputed or Court  
challenged. That is extremely odd so odd that I am No. 35  
of the view that there was in fact an introduction Judgment of  
as the plaintiff said. It is almost our everyday Razak J.  
custom especially if the husband and wife are English (Liability)  
educated. But there was a definite purpose in saying 17th July  
there was no introduction as will be seen. So, the 1982 (Cont'd)

10 or they could not remember. Nevertheless the witness  
could take time off from browsing the papers to  
see the plaintiff indicating to the deceased to go to  
and have a little discussion. In this respect he  
recalled and remembered. He however did not hear what  
was discussed although he was about 10 feet away and  
evidently within earshot. He had to say naturally he  
did not see or hear otherwise he would be queried what  
he heard and since this never happened he would be  
flabbergasted. The usual catch-phrase was therefore  
20 used - they were whispering. But if the plaintiff and  
the deceased Devan really wanted to have a very  
confidential discussion which is the impression given,  
then it was very odd that they must be whispering in  
the midst of their guests, when they could have left  
the room altogether and gone somewhere for a little  
privacy where they could talk quietly without caus-  
ing any embarrassment to anyone. The witness said he

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remembered distinctly that it was the deceased who asked for the one year's grace because he had to write it down. That may be so, but it was odd that quite contrary to the general picture given the deceased had suddenly taken the initiative from the plaintiff. Although she was the one according to them who suggested to the deceased to have a side discussion. She was the one who did the reading of P.30 although apparently this was the first time the deceased had seen it and he had not read it himself and would be content to pass them on to his wife.

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In the little side discussion it was also the plaintiff who seemed to be doing the talking. Indeed according to this witness it was possible that there was a lot of discussion between the plaintiff and the 2nd. defendant. And yet when it came to making the suggestion about the one year's grace it was the deceased who did it. The impression was that she was talkative and inquisitive, as most housewives are, as between herself and the deceased but that she suddenly lost her voice when it came to talking to the defendant, suggesting that since there was no introduction the plaintiff was too shy to speak herself and left it to the deceased to do the talking and the needful or else that the dealing were done only with the deceased. I have already said why the idea of there being no introduction is a sheer fantasy island story. If she was the quiet little introvert they were trying to picture of her then perhaps that was the reason why she had easily been

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the victim of their deception. But I do not think, having seen and heard her in the witness box, she was that simpleton and shy. And being English educated with a school certificate background, I think she would have the necessary confidence to talk on equal terms with her husband and the 1st. and 2nd. defendants, with introduction or no introduction, although she was only a housewife as P.31 itself would bear testimony. The fact that after the event they never saw her again and never sent her any letter except when to kick her out of her land only showed that she would have done a lot of talking on that day and had taken them to task that they had wished that that was the last they ever saw her again which from the evidence was precisely what they did. In my judgement D.W.3 was only an incidental part of the conspiracy between the defendant to defraud the plaintiff as his evidence amply show. Contradictory and bias his testimony was unreliable and could not be depended upon.

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The question of res judicata had been raised. I do not think it is proper for the defendant to raise the question before me again since it had already been dealt with by the Federal Court comprising of Wan Sulaiman FJ, late Ibrahim Manan FJ and Hashim Sani J. They had decided that the question of res judicata did not apply as far as this suit is concerned. I need only say one thing regarding res judicata - how could there ever be such a question when

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the evidence that had been disclosed before me had never been disclosed before Anuar J and had by the fraud of the defendant been prevented from being disclosed before him and he had never had the opportunity to try the issue on the merits.

There is one last thing I should like to say on the evidence before I proceed to the next point.

There has been a mischievous and treacherous attempt by the <sup>2nd.</sup> defendant to discredit the plaintiff by seeking to produce the letter D.15 which she wrote to the Bar

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Council regarding this case as to suggest that she was wholly incapable of telling the truth since they say she was capable of accusing anyone including the Court for her own ends. I do not think I need to say more than this - That D.15 speaks for itself. I

cannot conceive that the suggestion of improper motive was her aim in writing it otherwise she would not have

made it public by sending it to the Bar Council who might eventually send it to the Courts. Since the

letter was written by her to the Bar it was really a complaint by her to the Bar regarding the conduct of

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the 2nd. defendant, at the hearing before the appeal, where 2nd.defendant had appeared as Counsel on

behalf of himself and the other defendants. But if

she had been seen to be acting in a somewhat ill advised manner I do not think she was entirely to be

blamed. If the defendant had not acted in the way

they did in this case and in all the other cases in

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completely misleading everyone including the Courts and the latter had been taken offguard by their deception, she would not have found herself in a position, where I am sure, she felt and acted as if the whole world, including the Courts, had unjustly fallen down on her. I would say, nevertheless, that if she now feels in the light of what I have said that her letter could be misinterpreted in the worst form against her, it would not be inappropriate for her if she makes a full and unqualified apology to the right places. But that fact apart, I do not think my judgement should be clouded in any way except by the evidence and the issue that were before me as I found them, but it is most unfortunate that in attempting to detract the Court's attention from the real issue the defendant had sought to exploit this incident, clearly with the intention of swaying my judgement in their favour. But whatever one may say about the plaintiff, the many and persistent attempt she made in the Courts to save her land, despite the many failures and disappointments she had would only go to show the strength of her conviction and the truthfulness of her story.

I would therefore enter judgement for the plaintiff as prayed and costs. As agreed, by the parties, I shall deal with the question of damages in due course. I should like to deal next with the 3rd. defendant's counter-claim.

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The 3rd. defendant had countclaimed for compensation under Section 329 of the National Land Code for the reason that the plaintiff had wrongfully caveated his land. But in the light of my judgment that he is not entitled to the land and had fraudulently made himself the registered proprietor, there is therefore no merit in the claim. I would therefore dismiss the counterclaim with costs.

I should like to deal next with the question of contempt. In my view there has been a very grave and abominable act of contempt committed against the Courts by the three defendants that in my view a proper punishment should be metted out to them. The 3rd. defendant with the knowledge and connivance of the 1st. and 2nd. defendants had attempted to deceive the Court that he was the rightful owner of the land when he was not and thereby to induce the Court to order to evict the plaintiff in the Sessions Court Case 146/76. (P.109) He had with the knowledge and connivance of the 1st. and 2nd. defendants also in C.M. 46/77 (P.113) in his affidavit dated the 23rd. January 1978, affirmed to the same effect in order to get the plaintiff's caveat removed (P.113 Page 42). In the present suit the 3rd. defendant with the connivance and knowledge of the 1st. and 2nd. defendants asserted, by way of his rebuttal, that he was a bonafide purchaser for value, when to his knowledge he was not. The President at

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...126/-

Page 2 of his judgement on the eviction proceedings in 146/76 (P.109) said "I decided that vacant possession ought to be given bearing in mind that the Torren System recognises only a registered owner, such registration carried with it an indefeasible title until proven otherwise as enunciated in Sec. 304 of the National Land Code". Annuar J.C(as he then was) on appeal said "The plaintiff became registered owner of the piece of land on execution of memorandum of transfer for valuable consideration. The plaintiff is a bonafide purchaser for value", conclusions which must necessarily be drawn from being the registered proprietor. I have already discussed Syed Othman J's (as he then was) judgement of this matter in O.M. 46/77 (P.113) <sup>(Pg.53 - 63)</sup> where he clearly also has been misled. In this judgement he said "The affidavit supporting the application may be stated briefly thus. On the 10th. of October 1975 by transfer the applicant became the registered proprietor of the land, Unless there is a cogent reason I would presume the applicant was a bonafide purchaser for value." The 3rd. defendant in the said sworn affidavit said "The Registrar of Titles Johor served on me as the registered proprietor of the land a notice ....", when this was clearly not true. The 1st. defendant had categorically said (Pg. 146) "The 3rd. defendant was not a bonafide purchaser. He was my nominee. He was acting

In the High Court.

No. 35  
Judgment of  
Razak J.  
(Liability)  
17th July  
1982 (Cont'd)

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...127/-

In the High  
Court

No. 35  
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under my instructions." The statement of claim by the 3rd. defendant in 146/76 stated that he was a registered owner of the land. In so saying, being the 1st. defendants' nominee, it was also thus an emphatic statement to the Court by the 1st. defendant of the same fact. It would also be the 1st. defendant's assertion in C.M. 46/77 (P.113) and in this suit because he was the 1st. defendant's nominee. The pleadings in C.S. 146/76 (P.109), and this suit, the affidavit in O.M.46/77 were prepared by the 2nd. defendant. In his written submission (P.111) the 2nd. defendant emphatically said the 3rd. defendant bought the land from him. In view of the 3rd. defendant's disclosure that he was never the registered owner of the land, therefore the 2nd. had falsely prepared the pleadings and the affidavit and the submission with knowledge that the 3rd. defendant was not a registered owner or a bonafide purchaser, attempting to deceive the Court into believing that he was, for the purpose of those actions and motion.

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It has been held in 2 cases that a barrister becoming a party to a fraud and conducting its case so as intentionally to deceive the Court and a solicitor deceiving the Court, was acting in contempt in the face of the Court. In Rex v Weisz (1951 2 KB Pg. 500) a solicitor was instructed by his client to bring an action against book makers for

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money alleged to be owed by them to the client on bet. In the High Court

The client insisted on the action being brought

against the book makers although knowing that it was

not maintainable in law in the hope that the threat

of publicity would induce the book makers to pay or.

if they did not, for the purpose of showing them up.

Accordingly, a Specially indorsed writ was issued

against the book makers by which the money was

claimed to be due on an account stated. No account

10 had been stated as the solicitor knew. The client

did not know the terms of the indorsement. It was

held that the solicitor had committed a contempt of

court because the indorsement on the writ was ficti-

tious and was designed to conceal from the court the

true nature of the claim. As Lord Geddard said in

the case "But to attempt to deceive the court by dis-

guising the true nature of the claim is a contempt.

It is putting forward what the old cases called a

feigned issue that is to say, not the truth but a

20 fictitious cause of action. We do not think it

necessary to go through the many cases cited in

argument dealing with contempt of different kinds,

nor is it necessary to remind the court that the

summary jurisdiction to punish contempt is one to be

exercised with caution. It is in our opinion beyond

question that to disguise a cause of action so as

to conceal its true nature when in truth it is one

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prohibited by a statute is a contempt and as the indorsement was signed in the name of the respondent's solicitor's firm and he admits he was the partner having charge<sup>of</sup> the proceedings he must take responsibility and be held guilty of a contempt". I need only say that there is a great similarity between that case and our cases, because in both cases they were false claims made by barristers by attempting to deceive the Court. In Linwood v Andrews & Moore (1888 Chancery Division Pg. 618) the plaintiff Linwood a very young man sued his aunt Louise Andrews and one Campbell both of whom had great influence on him to recover certain property consisting of bonds alleged to have been made away with by them. The Court granted an interim injunction to restrain Louisa from parting with the bonds and was ordered to bring them or the proceeds of them if sold into court. Later Louisa moved to discharge the order. The plaintiff countered this by a cross motion to attach Louisa for contempt in not bringing the bonds. Kay J refused Louisa's application and ordered her committal. The defendant Moore appeared as Counsel for Louisa at the hearings; he was joined by the plaintiff in his action against Louisa where the plaintiff moved the Court to commit Moore to prison for alleged contempt of court - (i) in attempting to obstruct

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...130/-

the course of justice by concealing the fact that he had in his possession the bond in question on the date of the service of the writ and injunction against Louisa; (ii) by secretly parting with the bonds to one Watkin deceased, Louisa's solicitor who instructed Moore to appear as Counsel; (iii) by being a party to the reading on the 1st. April when Louisa moved to discharge the order against her of affidavits which she knew to be untrue; (iv) by inducting Louisa to make an affidavit containing statements which she knew to be untrue and (v) by endeavouring to prevent the plaintiff deriving any benefit from the order directing Louisa to bring the bonds or proceeds into court. It transpired that in Louisa's motion to set aside the order, ordering her to bring the bonds into court she had made an affidavit stating that she did not know what had become of the bonds and that "neither her solicitor, agent, trustees nor anyone else held the same on her behalf" which affirmation was completely false and untrue but were made on the advice of Moore, when the bonds were in fact kept in Moore's house, deposited there by Louisa with his concurrence. The Court found Moore guilty of contempt and this is what Kay J said "I must express my deep regret to have to deal with a case of this kind and to find it unnecessary to call for any reply from the plaintiff's Counsel.

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I have no doubt that Moore conspired with Watkin & Campbell who had done their utmost to baffle the court, and although he denied it, I believe that he knows a great deal more about these affidavits than he has yet told the court and he is quite as guilty of the fraud that has been practiced on the court as Watkin. This was the impression conveyed to my mind when Moore was in the box, and a more barefaced attempt to impose upon the court by fraud and suborned perjury I have never seen. I should be wanting in the duty I owe to society if I did not mark my disapprobation of such conduct in the strongest manner. It is my painful duty - I say with great pain and reluctance - to order the defendant Moore to be imprisoned for contempt. In my opinion, he knows more than he has disclosed and if he will take a word of advice from the court, I should advise him to make known all the facts he knows in connection with this extraordinary case. The result of three such men as Campbell, Watkin and Moore acting together is that the Argentine bonds have been sold by Watkin and the other bonds are not forthcoming. Watkin has died since the commencement of this action. Nothing has been obtained from his estate except an order for payment of £500/-. The loss of the plaintiff is of everything except this £500/-. That loss had been brought about to a great extent by Moore's

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conduct. Had he behaved like an honest man - not to say as a barrister and a gentleman - when he knew that affidavits were going to be used containing matter amounting to chicanery, he would have disclosed the facts to the court. He has not done so. I was told that the arm of the court was so short that it could not reach him and that all that he had been guilty of was in not having thrown up his brief. This is not my opinion of the law. The fault lies, not in not having thrown up his brief, but in having made himself a party to a fraud by conspiring with Watkin in inducing the defendant Andrew to make the affidavits which were used to delude the Court. I accordingly order Moore to pay the cost of the motion and to be committed to prison till further order and the documents to be impounded." I need only to echo what Kay J had said in that case that Moore's act of preparing the false and untrue affidavit and reading of it in court is similar to the affidavit of the 3rd. defendant prepared by the 2nd. defendant and reading his submission in court, falsely stating that the 3rd. defendant bought the land.

Under Order 52 Rule 1(1) of the High Court Rules 1980 it is provided that the power of the High Court to punish for contempt of court may be exercised by an order of committal in Form 110(2) where contempt of court (a) is committed in connection with (i) any proceedings before the High Court

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or (ii) criminal proceedings, except where the contempt is committed in the face of the court or consist of disobedience to an order of the court or breach of an undertaking to the court or (iii) proceedings in a subordinate court or (b) is committed otherwise than in connection with any proceedings, then subject to para (4) an order of committal may be made by the High Court. Rule (4) says that "Nothing in the foregoing provision on this order shall be taken as affecting the power of the High Court to make an order of committal of its own motion against a person guilty of contempt of court." Rule (8) says "Nothing in the foregoing provision of this order shall be taken as affecting the power of the court to make an order requiring a person guilty of contempt of court, or a person punishable by virtue of any written law in like manner as if he had been guilty of contempt of the High Court, to pay a fine or to give security for his good behaviour, and those provisions, so far as applicable, and with the necessary modifications, shall apply in relation to an application for such an order as they apply in relation to an application for an order of committal."

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Oswald on contempt (Para 3rd. Ed. at Pg.22) says "In cases of assaulting or abusing a process server or speaking scandalous words of the court an order was made for immediate committal upon ex parte motion supported by an affidavit of the facts, and

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upon contempt in the face of the court an order of committal was made instanter as at present". The Supreme Court practice (1979 Vol. 1 para 52) which is pari material with our High Court Rule 1980 cited the two cases above of Weisz & Andrews as contempt in the face of the court which are treated as criminal as distinguished from civil contempt punishable summarily. Hitherto a criminal contempt must be for a fixed term and the court has no jurisdiction to discharge the prisoner before its expiry (commentory therein in para 52/1/2) but this is no longer the rule. Under English law there was previously no right of appeal to a criminal contempt but this has been abolished by statute under Section 13 of the Administration of Justice Act 1960 (See Appendix). I am not aware however of the existence of any similar statute in our law. It would appear therefore that the defendant have no right of appeal. The distinction still lies in the fact that in criminal, as distinguished from civil contempt, it cannot be waived by the parties. That to act in contempt "in the face of the court" is the same as contempt which the court can punish "of its own motion" is stated in Lord Denning's Judgement in Balogh v St. Albans (1975 1 QBD Pg. 81). He explained "Gathering together the experience of the past, then whatever expression is used, a Judge

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of one of the superior court or Judge of Assize could always summarily, of its own motion, for contempt of court whenever there was gross interference with the course of justice in a case that was being tried or about to be tried, or just over, no matter whether the Judge saw it with his own eyes or it was reported to him by the officers of the court or by others - whenever it was urgent or imperative to act at once. This power has been inherited by the Judges of the High Court and in turn by the Judges of the Crown court. To show the extent of it I will give some instances. He then cited "in the sight of the court" as an example. He then went on "The power of summary punishment is a great power but it is a necessary power. It is given so as to maintain the dignity and authority of the court and to ensure a fair trial. It is to be exercised by the Judge of his own motion only when it is urgent and imperative to act immediately so as to maintain the authority of the court, to prevent disorder, to enable witnesses to be free from fear and jurors from being improperly influenced and the like. It is of course to be exercised with scrupulous care and only when the case is clear and beyond reasonable doubt but properly exercised it is a power of the utmost value and importance which should not be curtailed". I need only say this regarding what Lord Denning had just said. If the court had not acted urgently it is only because the

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offence, in so far as the Sessions Court is concerned, it only became known after this trial began, and as far as this court is concerned, it was felt that to deal with the question of contempt first might adversely affect the prior disposal of the suit itself. The two above cited cases of Linwood and Weisz are certainly authority for saying that the question of urgency is relative to the event, because even in those cases, from the circumstances, the offence could not have been discovered until well after the case was over when the order of committal was nevertheless made.

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The defendants misdeeds are acts of contempt of the worst kind that the court can possibly think of, because in seeking to achieve their evil end and insatiable greed they made the court the subject of their deception and mischief. The extreme culpability of their ill-doing lay in the fact that the trust and confidence which the court places on them as lawyers had been used only to defile that trust by acting to deceive the court thereby becoming the subject of their mockery ridicule and contempt. The court can dispense with justice only if counsel will not mislead, otherwise justice will suffer from the infirmity of the court itself being devoid of justice. People seldom pause to ask sometimes what safety the ordinary individual has in the hands of lawyers if the court itself, in which he seeks redress is no longer safe to be in the same hands. To me the defendants act is even more despicable because it is an

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expressed advocate & solicitors rule that counsel shall not practice deception on the court (Rule 17). They have by falsely representing that the 3rd. defendant was the owner of the land acted in utter defiance and disregard of the court and the rules of their own profession.

In my view for the extremely grievous crime which they have committed against the court the defendants must duly suffer the extreme punishment of imprisonment which I do, by committing them to prison for a period of 2 years. I do not see if a term of 2 years had in a recent case been imposed on a barrister for committing a breach of trust, against a member of the public, on a plea of guilty, the same term should not be imposed on the defendant who have committed a much more serious offence of deceiving, or attempting to deceive the Court. I shall nevertheless by virtue of Sec. 6(1) of the High Court rules, suspend the order till after the final disposal of this suit, on sufficient security being furnished by them to the S.A.R. for their appearance in this Court to abide by the order of committal.

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I should like in passing to record my appreciation of the invaluable assistance which has been rendered by Counsels on both sides in this case. I would particularly like to mention Mr. Cashin for whose tireless and tenacious effort this case would never have seen the light of day. It is

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regretable if my decision had revealed itself rather later than what had been reasonably expected but I can assure all concerned that no harm was intended. The voluminous documents I had to go through and the lengthy submissions I had to pore at, not to mention that my present task takes me constantly to everywhere but in fact to nowhere, that it seems to me that delay is somewhat just possible and inevitable.

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1982 (Cont'd)

Signed ABDUL RAZAK J.  
( RAZAK J )  
HIGH COURT  
KUALA LUMPUR.

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Kuala Lumpur  
17th. July, 1982.

Mr. H.E. Cashin for Plaintiff  
assisted by Subra Naicker,  
Subra Naicker & Co.,  
45, Jalan Ibrahim (Tkt. 1),  
Johor Bahru.

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Mr. Chin Yew Meng for 1st. defendant,  
Allen & Gledhill,  
Advocates & Solicitors,  
Bangunan UMBC (24th. Floor),  
Jalan Sulaimen,  
Kuala Lumpur.

Mr. Ronald Khoo for 3rd. defendant,  
Shearn & Delamore,  
No.2, Benteng,  
Kuala Lumpur.

30

2nd. defendant in person  
assisted by Mr. C. Paramjothy,  
Wong & Paramjothy,  
Bangunan Koperasi Melayu Johor,  
5Cc-5, Jalan Segget,  
P.O. Box 108,  
Johor Bahru.

Certified true copy  
(sd)  
Secretary to Judge  
Kuala Lumpur.

ORDER

In the High  
Court

IN THE HIGH COURT OF MALAYA AT JOHORE BAHRU

CIVIL SUIT NO. 284 OF 1979

No. 36  
Order (Liability)  
17th July  
1982

Between

Tara Rajaratnam (m.w.) .. Plaintiff

And

1. Datuk Jagindar Singh

2. Datuk P. Suppiah

3. Arul Chandran .. Defendants

CORAM: BEFORE THE HONOURABLE  
MR. JUSTICE ABDUL RAZAK BIN  
DATO' ABU SAMAH, HIGH COURT,  
MALAYA, JOHORE BAHRU.

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In Open Court  
This 17th day of July, 1982

O R D E R

This Action coming on for hearing before the Honourable Mr. Justice Abdul Razak bin Dato' Abu Samah on the 12th of August 1981 in the presence of Mr. Howard Edmund Cashin of Counsel for the Plaintiff assisted by Mr. Subra Maicker and Mr. Chin Yew Meng of Counsel for the First and Third Defendants and the Second Defendant in person and assisted by Mr. Paramjothy and the Action continuing on the 13th, 15th and 16th of August 1981 and the 13th of September 1981 and when the Action came on for further hearing on the 14th of September 1981 the parties were as before except that the Third Defendant now acting in person and the Action continuing on the 15th, 16th, 17th, 19th, 20th, 21st, 22nd, 23rd and the 24th of September 1981 and when it came on for further hearing on the 17th of October 1981 the parties were as before except that Mr. Ronald Khoo now appearing as Counsel for the Third Defendant and the Action continuing on the 18th, 19th, 20th, 21st, 22nd, 24th, 25th, 26th, 27th, 28th and the 31st of October and

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the 1st of November 1981 when Judgment was reserved to a date to be fixed and that the parties do put in their Written Submissions AND THIS ACTION coming on for Judgment on the 17th day of July 1982 in the presence of the parties as before except that the Second Defendant being absent and Mr. Chin Yow Meng receiving Judgment on his behalf IT IS ORDERED that Judgment be granted to the Plaintiff with costs and that the Counterclaim of the Third Defendant against the Plaintiff be dismissed with costs AND IT IS FURTHER ORDERED that the Action be adjourned to a date to be fixed and that the Plaintiff's Counsel put in his Submissions on the question of damages by the 17th of August, 1982, and that the Defendants are to reply by the 17th of September 1982, and that the Plaintiff's Counsel's Final Reply be submitted into Court by the 30th of September 1982.

Given under my hand and the Seal of the Court,  
this 17th day of July, 1982.

In the High  
Court

No. 36  
Order  
(Liability)  
17th July  
1982 (Cont'd)

  
Senior Assistant Registrar,  
High Court, Malaya,  
Johore Bahru



ONE OF THE APPENDICES  
TO THE JUDGMENT OF RAZAK J.



KANTAR HAKIM, MAHKAMAH TINGGI  
JUDGES OF THE HIGH COURT  
MALAYSIA  
KUALA LUMPUR

In the High  
Court

No. 37  
Appendix to  
Judgment of  
Razak J.  
29th July  
1982

29th. July, 1982.

Secretary to  
Y.A.A. Lord President.

Secretary to  
Y.A.M. Chief Justice.

Civil Suit No. 284 of 1979 at Johor Bahru.

... "Administration of Justice Act 1960, S.13" as quoted  
at Page 134 of the Judgment is enclosed, which was  
omitted from the Appendix. The inconvenience is  
regretted.

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Thank you.

*J. A. Samah*

Secretary to

Mr. Justice Abdul Razak Bin Dato' Abu Samah

c.c. : M/s Shearn & Delmore,  
No. 2, Benteng,  
Kuala Lumpur  
(U.P.: Mr. Ronald Khoo).

✓ M/s Allen & Gledhill,  
Bangunan UMBC (24th. Floor),  
Jalan Suleiman,  
Kuala Lumpur.  
(U.P.: Mr. Chin Yew Meng).

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M/s Subra Naicker & Co.,  
45, Jalan Ibrahim (Tkt. 1),  
Johor Bahru,  
Johor.

*Recd 31/7/82  
12.20 pm*

Administration of Justice Act 1960, S.13.

In the High  
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No. 37  
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13. Appeal in cases of contempt of court

(1) Subject to the provisions of this section, an appeal shall lie under this section from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt); and in relation to any such order or decision the provisions of this section shall have effect in substitution for any other enactment relating to appeals in civil or criminal proceedings.

(2) An appeal under this section shall lie in any case at the instance of the defendant and, in the case of an application for committal or attachment, at the instance of the applicant, and the appeal shall lie

- (a) from an order or decision of any inferior court not referred to in the next following paragraph, to a Divisional Court of the High Court;
- (b) from an order or decision of a county court or any other inferior court from which appeals generally lie to the Court of Appeal, and from an order or decision of the Chancery Court of a County Palatine, of a single judge of the High Court, or of any court having the powers of the High Court or of a judge of that court, to the Court of Appeal;
- (c) from an order or decision of a Divisional Court or the Court of Appeal (including a decision of either of those courts on an appeal under this section), and from an order or decision of the Court of Criminal Appeal or the Courts-Martial Appeal Court, to the House of Lords.

(3) The court to which an appeal is brought under this section may reverse or vary the order or decision of the court below, and make such other order as may be just; and without prejudice to the inherent powers of any court referred to in subsection (2) of this section, provision may be made by rules of court for authorising the release on bail of an appellant under this section.

NOTICE OF APPEAL OF 3RD DEFENDANT

In the Federal  
Court

IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

No. 38

CIVIL APPEAL NO:215 OF 1982

Notice of

Appeal of

3rd Defendant

(Liability)

12th

August

1982

Between

1. Datuk Jagindar Singh

2. Datuk P. Suppiah

3. Arul Chandran

... Appellants

And

Tara Rajaratnam (m.w.)

... Respondent

(In the Matter of Johore Bahru High  
Court Civil Suit No:284 of 1979)

10

Between

Tara Rajaratnam (m.w.)

... Plaintiff

And

1. Datuk Jagindar Singh

2. Datuk P. Suppiah

3. Arul Chandran

... Defendants)

NOTICE OF APPEAL

TAKE NOTICE that the 3rd Appellant abovenamed  
being dissatisfied with the decision of the Honourable  
Mr. Justice Abdul Razak bin Datuk Abu Samah given at  
Johore Bahru on the 17th day of July 1982 appeals to  
the Federal Court against the whole of the said decision.

20

Dated this 12th day of August 1982.

Sd. Shearn Delamore & Co.  
Solicitors for the 3rd Appellant

To:-

In the Federal  
Court

1. The Chief Registrar,  
Federal Court,  
Kuala Lumpur.

No. 38  
Notice of  
Appeal of  
3rd. Defendant  
(Liability)

2. Senior Assistant Registrar,  
High Court,  
Johore Bahru.

12th August  
1982 (Cont'd)

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3. The Respondent abovenamed  
and/or her Solicitors,  
Messrs Subra Naicker & Co.,  
No.45, 1st Floor,  
Jalan Ibrahim,  
Johore Bahru.

4. The 1st Appellant abovenamed  
and/or his Solicitors,  
Messrs Allen & Gledhill,  
24th Floor, Bangunan UMBC,  
Jalan Sulaiman,  
Kuala Lumpur 01-33.

20

5. The 2nd Appellant abovenamed,  
c/o Messrs Suppiah & Singh,  
No.2-D, Jalan Ah Fook,  
Johore Bahru.

The address for service of the 3rd Appellant  
is Shearn Delamore & Co., No.2 Benteng, Kuala Lumpur  
01-19.

NOTICE OF APPEAL OF 1ST AND 2ND  
DEFENDANTS

In the Federal  
Court

IN THE FEDERAL COURT OF MALAYSIA  
(Appellate Jurisdiction)

No. 39

FEDERAL COURT CIVIL APPEAL NO.216 OF 1982

Notice of  
Appeal of  
1st & 2nd  
Defendants  
(Liability)  
14th August  
1982

Between

1. Datuk Jagindar Singh  
2. Datuk P. Suppiah  
3. Arul Chandran ... Appellant

And

Tara Rajaratnam (m.w.) ... Respondent

(In the Matter of Civil Suit No.284  
of 1979 in the High Court in Malaya  
at Johore Bahru

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Between

Tara Rajaratnam (m.w.) ... Plaintiff

And

1. Datuk Jagindar Singh  
2. Datuk P. Suppiah  
3. Arul Chandran ... Defendants)

NOTICE OF APPEAL

TAKE NOTICE that Jagindar Singh and P. Suppiah  
the First and Second Defendants respectively, being  
dissatisfied with the decision of the Honourable Mr.  
Justice Abdul Razak bin Dato' Abu Samah given at Johore  
Bahru on 17th day of July, 1982, appeals to the Federal  
Court against the whole of the said decision.

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Dated this 14th day of August, 1982.

Sd: Jagindar Singh  
First Defendant

Sd: P. Suppiah  
Second Defendant

Sd: Suppiah & Singh  
Solicitors for the First  
and Second Defendants

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To:

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

In the Federal  
Court

No. 39  
Notice of  
Appeal of  
1st & 2nd  
Defendants  
(Liability)  
14th August  
1982 (Cont'd)

And to:

The Sr. Assistant Registrar,  
High Court,  
Malaya,  
Johore Bahru.

And to:

The abovenamed Respondent,  
and/or her Solicitors,  
Messrs. Subra Naicker & Co.,  
No.45, 1st Floor, Jalan Ibrahim,  
Johore Bahru.

And to:

The abovenamed Third Defendant  
and/or his Solicitors Messrs.  
Shearn, Delamore & Co.,  
No.2, Benteng, Kuala Lumpur.

The address for service for the First and Second  
Defendant is Messrs. Suppiah & Singh, 2-D, Jalan Ah Fook,  
Johore Bahru.

MEMORANDUM OF APPEAL OF 1ST AND 2ND  
DEFENDANTS

In the Federal  
Court

IN THE FEDERAL COURT OF MALAYSIA  
(Appellate Jurisdiction)

No. 40

FEDERAL COURT CIVIL APPEAL NO.216 OF 1982

Memorandum  
of Appeal

1st & 2nd

Defendants  
(Liability)

21st September  
1982

Between

1. Datuk Jagindar Singh
2. Datuk P. Suppiah
3. Arul Chandran ... Appellants

And

Tara Rajaratnam (m.w.) ... Respondent

(In the Matter of Civil Suit No. 284  
of 1979 in the High Court in Malaya  
at Johore Bahru

10

Between

Tara Rajaratnam (m.w.) ... Plaintiff

And

1. Datuk Jagindar Singh
2. Datuk P. Suppiah
3. Arul Chandran ... Defendants)

MEMORANDUM OF APPEAL

Jagindar Singh and P. Suppiah, the First and  
Second appellants abovenamed appeal to the Federal  
Court against the whole of the decision of the  
Honourable Mr. Justice Abdul Razak bin Dato' Abu Samah  
given at Johore Bahru on the 17th day of July 1982 on  
the following grounds:

20

1. The learned Judge erred in law and in fact in  
holding that the Second Defendant's undertaking  
not to sell the property for one year ran from  
the 5th July 1975:

2. The learned Judge erred in law and in  
fact in holding that there was a breach of  
contract because the payment was not done in  
accordance with the Agreement dated the 30th  
March 1974:

30

..2/-

3. The learned Judge erred in fact in holding that the original Agreement was not varied so as to take account of the fact that 121,819.80 Dollars was owing to the HongKong and Shanghai Bank:

4. The learned Judge erred in law and in fact in holding that the action by the Second Defendant against Dr. Das in respect of a dishonoured cheque was breach of the memorandum:

5. The learned Judge erred in law in considering the unpleaded and unargued question of whether the Second Defendant was acting as agent for the First Defendant as undisclosed principal:

6. If the learned Judge did not so err then he erred in fact in finding that the Second Defendant was acting as such agent:

7. The learned Judge erred in law in holding as he appears to have done that if there was such an agency then both the First Defendant and the Second Defendant would be liable to the Plaintiff for breach of contract:

8. The learned Judge erred in law in considering the question of undue influence in circumstances when the transaction was not capable of being set aside and where the Plaintiff had not made and had never been in a position to make a tender of monies for the property by the First and Second Defendants:

In the Federal Court

No. 40  
Memorandum  
of Appeal  
1st & 2nd  
Defendant  
(Liability)  
21st September  
1982 (Cont'd)

..3/-



In the Federal  
Court

No. 40

Memorandum

of Appeal

1st & 2nd

Defendants

(Liability)

21st September

1982 (Cont'd)

- 3 -

9. The learned Judge erred in law in holding that any transaction inter vivos between a solicitor and client is presumed to have been procured by undue influence:

10. The learned Judge erred in law in considering that Section 16(1) of the Contracts Act was applicable:

11. The learned Judge's finding that the Second Defendant was the Plaintiff's solicitor at the material time was against the weight of evidence:

10

12. The learned Judge erred in law and in fact in holding that in the circumstances of this case a presumption of undue influence arose in the Plaintiff's favour:

13. If Section 16(1) of the Contracts Act was applicable the learned Judge erred in law in applying it in the absence of evidence of undervalue:

14. The learned Judge erred in law and in fact in holding that the terms of the Memorandum were harsh and unconscionable and unfair to the Plaintiff:

20

15. The learned Judge erred in law and in fact in holding that the First and Second Defendants had not rebutted the presumption of undue influence even if there was one or discharged the burden on them under Section 16 of the Contracts Act even if there was one:

..4/-

16. The learned Judge's finding that the Plaintiff was never informed of the variation of the original Agreement was made in the absence of any evidence in support of it or was against the weight of evidence:
17. If the learned Judge was at P.40C making a finding of fraud such a finding was wrong in law and in fact:
18. The learned Judge erred in law in considering that Section 20 of the Contracts Act was applicable:
19. The learned Judge erred in law and in fact in holding that the First and Second Defendants as solicitors had been entrusted with the holding of the Document of Transfer as security:
20. The learned Judge erred in law and in fact in holding that the First and Second Defendants were constructive trustees of the property:
21. The learned Judge erred in law and in fact in considering that the Plaintiff was asking the Court to declare that the Transfers to the Defendants were fraudulent and null and void:
22. The learned Judge erred in law in considering that Section 340 of the National Land Code was brought into play because in order to claim damages it was only implicit that the Plaintiff must first be able to set aside the land in the hands of the Defendants if it had not been transferred to 3rd parties:

In the Federal Court

No. 40  
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1st & 2nd  
Defendants  
(Liability)  
21st September  
1982 (Cont'd)

..5/-

In the Federal  
Court

No. 40  
Memorandum  
of Appeal  
1st & 2nd  
Defendants  
(Liability)  
21st September  
1982 (Cont'd)

23. If the learned Judge was right to consider Section 340 he erred in law in construing the word "fraud" in that Section by reference to the Criminal Law or by reference to Section 17 of the Contracts Act:

24. The learned Judge's finding that the Plaintiff was under the impression that the land was transferred to the Second Defendant as a security was against the weight of evidence:

10

25. There was no evidence on which the learned Judge could find that the Defendants had failed to serve the Plaintiff with documents because "they had to avoid her so that there could be no stumbling block to their mischief":

26. The learned Judge erred in law and in fact in holding that the Memorandum and Transfer were not consistent with a sale coupled with a right of repurchase for one year and that the sale and such right were in direct conflict:

20

27. The learned Judge erred in law in holding that there could not have been a sale because the Second Defendant did not file a caveat until February 1975:

28. The learned Judge erred in law and in fact in holding that the Second Defendant's Statutory Declaration in support of the caveat contradicted an assertion that there had been a sale:

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..6/-

29. The learned Judge erred in law in holding that the failure to disclose that the time for re-purchase would run from the 30th March 1974 and not from the date when the 220,000 Dollars was paid was an act of fraud:

In the Federal Court

No. 40  
Memorandum  
of Appeal  
1st & 2nd  
Defendants  
(Liability)  
21st September

30. The learned Judge erred in law and in 1982 (Cont'd)

10

fact in holding the Second Defendant was guilty of fraudulent misrepresentation when he represented to the Plaintiff 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 allegation of such fraud was pleaded and in any event the finding of facts relied on was against the weight of evidence:

20

31. The learned Judge erred in law in holding that the Second Defendant represented that the Transfer to him was subject to buying in accordance with the terms of the Memorandum:

32. The learned Judge erred in law and in fact in holding that the Memorandum was a false device to induce the Plaintiff to sign the Transfer:

33. The learned Judge erred in law and in fact in holding that the action against Dr. Das for the dishonoured cheque extinguished the Memorandum:

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34. The learned Judge erred in law and in fact in holding that the manuscript addition to the Memorandum repudiated the status of

..7/-

In the Federal  
Court

No. 40  
Memorandum  
of Appeal  
1st & 2nd  
Defendants  
(Liability)  
21st September  
1982 (Cont'd)

the Second Defendant from one of absolute owner to that of a mortgage and in holding that it was never intended to have any effect and in holding that it could not have any effect:

35. The learned Judge erred in law in holding that the fact that the Transfer was left undated was evidence of an intention not to comply with the Memorandum:

36. The learned Judge erred in law in holding that by accepting the said manuscript addition the Second Defendant was acknowledging and representing that it was a security:

10

37. The learned Judge erred in law and in fact by holding that the Second Defendant in not withdrawing the Memorandum and manuscript chose to mislead the Plaintiff and that he was estopped from his own fraudulent conduct from asserting the true construction of the documents:

20

38. There was no evidence on which the learned Judge could find that the Second Defendant deliberately avoided payment of the amount owed by Dr. Das:

39. There was no evidence to support the learned Judge's finding that the terms of the Memorandum were not varied or alternatively such finding was against the weight of evidence:

40. There was no evidence to support the learned Judge's finding that it was not shown by the Defendants that the Plaintiff had

30

..8/-

authorised her husband to represent her  
in connection with the Memorandum and matters  
arising out of it or alternatively such find-  
ing was against the weight of evidence:

In the  
Federal  
Court  
No. 40  
Memorandum  
of Appeal  
1st & 2nd  
Defendants  
(Lability)  
21<sup>st</sup>  
September  
1982 (Cont'd)

41. The learned Judge erred in law in  
holding that by dealing with the Plaintiff's  
husband the Defendants' fraud was made "Even  
more damnable and on this fraud alone .....

the Defendant's story must be refuted and  
judgment be entered for the Plaintiff":

42. The learned Judge erred in law and  
in fact in holding that the First and Second  
Defendants by their letter dated the 2nd  
February 1975 were representing to the Chung  
Khiaw Bank Ltd. that the Second Defendant  
was the absolute and unqualified owner of  
the property and in holding that such letter  
was a fraud on the said Bank:

43. The learned Judge erred in law in  
holding that the Defendant evinced an inten-  
tion to defraud the Plaintiff by their  
deliberate act of transferring the land to  
them without first informing the Plaintiff:

44. The learned Judge erred in fact in  
holding that there was no evidence that  
Messrs. Yeow and Chin were informed of the  
proposed Transfer:

45. The learned Judge erred in fact in  
holding that Messrs. Yeow and Chin were not  
acting for the Plaintiff in connection with  
the said Transfer:

..9/-

In the Federal  
Court

No. 40  
Memorandum  
of Appeal  
1st & 2nd  
Defendants  
(Liability)  
21st September  
1982 (Cont'd)

- 9 -

46. The learned Judge erred in law in holding that the First Defendant's attestation of the Transfer was indicative of fraud:

47. There was no evidence to support the learned Judge's finding that "the Defendant's modus operandi was to obtain the Title Deeds ignore the Memorandum refrain from paying CKB and thus forcing the Plaintiff 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 name while all the time the Plaintiff was kept completely in the dark":

10

48. The learned Judge erred in considering that the allegation as against the First and Second Defendants was of collusion to commit fraud or that there was any allegation of conspiracy against any Defendants and erred in law in considering that Section 10 of the Evidence Act was applicable:

20

49. The learned Judge erred in law and in fact in holding that "If the 2nd Defendant had falsely represented to the Plaintiff the facts then since (the 1st Defendant) knew that they were false and chose to remain silent instead then he must be guilty of fraud too":

50. There was no evidence to support the learned Judge's finding that the Transfer to the 3rd Defendant at the 1st Defendant's direction was to hide it from the Plaintiff having fraudulently obtained it from her:

30

..10/-

51. The learned Judge erred in law in holding that in considering fraud the Court can draw inferences against the 1st Defendant from letters written by his firm and that the 1st Defendant must be deemed to know about all the letters written by his firm:

In the  
Federal  
Court  
No. 40  
Memorandum  
of Appeal  
1st & 2nd  
Defendants  
(Liability)  
21st September  
1982 (Cont'd)

52. The learned Judge erred in law in holding that the 3rd Defendant could only exonerate himself by stating that he was a bona fide purchaser for value:

10

53. The learned Judge erred in law and in fact in holding that the stand initially or at any time taken by the 3rd Defendant in these or any other proceedings was that he was a bona fide purchaser for value:

54. The learned Judge erred in law in holding that it was implicit in being a registered owner that one was a bona fide purchaser for value:

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55. There was no evidence to support the learned Judge's finding that the 3rd Defendant knew the contents of the pleadings and other documents in the Sessions Court case prior to January 1977:

56. There was no evidence to support the learned Judge's finding that the 3rd Defendant was present in the Sessions Court case on the 12th May 1976:

57. The learned Judge erred in fact in inferring that the 3rd Defendant said in effect, or time and again to the Law Society that he was a bona fide purchaser for value:

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..11/-



In the  
Federal  
Court

No.40  
Memorandum  
of Appeal  
1st & 2nd  
Defendants  
(Liability)  
21st September  
1982 (Cont'd)

58. The learned Judge erred in fact in finding or inferring that the 3rd Defendant had been lying that he was a registered proprietor and the only reason for that lie not to disclose it until now was to conceal the 1st Defendant's fraud:

59. The learned Judge erred in law and in fact in holding that the fact that the 1st Defendant told the 3rd Defendant that he wanted the 3rd Defendant to subdivide and develop the land ..... should alone be sufficient to arouse suspicion in the 3rd Defendant's mind as to put himself on an enquiry and as he did not enquire fraud must be ascribed to him:

10

60. The learned Judge erred in law in holding that for letters written to or copied to the Plaintiff's husband to bind the Plaintiff it must be shown that she had actual knowledge of them:

20

61. The learned Judge erred in law and in fact in holding that the 2nd Defendant's caveat was for the purpose of preventing the Plaintiff from creating further charges if by that he meant that that was its only purpose or the actual reason for lodging the caveat:

62. The learned Judge erred in law and in fact in holding that no necessary inference as to the Plaintiff's knowledge of the continued existence of the agreement could be drawn

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..12/-

against the Plaintiff by reason of the lodging of the caveat and her being notified of such lodging:

In the  
Federal  
Court

No. 40

63. The learned Judge erred in law in construing the Plaintiff's Defence in the Sessions Court case:

Memorandum  
of Appeal  
1st & 2nd  
Defendants  
(Liability)

64. The learned Judge erred in law in holding that the Court was not concerned

21st September  
1982 (Cont'd)

10

with what the value of the land was but was concerned with whether fraud had been committed whatever the value of the land might be:

65. There was no evidence to support the learned Judge's finding that the Plaintiff probably meant that the land would be worth about 1M. Dollars after the houses were built and sold:

66. The learned Judge erred in law and in fact in rejecting P.56, P. 56A and P. 56B:

20

67. There was no evidence to support the learned Judge's belief that the original of D6 was sent to the Income Tax Department not by the Plaintiff herself but by some other person or his suspicion that the said document was a forgery and the learned Judge erred in law in expunging it from the record:

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68. The learned Judge erred in finding that the evidence of Sivanandan (D.W.5) was that the Plaintiff and her husband had a confidential discussion in the midst of their guests or that he said that no introductions were made and there was no evidence to support

..13/-

In the  
Federal  
Court

No. 40  
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1st & 2nd  
Defendants  
(Liability)  
21st September  
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the learned Judge's finding that his evidence was contradictory or biased or that he was an incidental part of the conspiracy between the Defendants to defraud the Plaintiff. The learned Judge was wrong to reject his evidence:

69. The learned Judge erred in law and in fact in rejecting the 3rd Defendant's Counter-claim:

70. If the learned Judge held that his findings entitled the Plaintiff to damages for undue influence, fraud or breach of trust he erred in law.

10

Dated this 21st day of September, 1982.

(sd) Jagindar Singh

First Appellant

(sd) P. Suppiah

Second Appellant

(sd) Allen & Gledhill

Solicitors for the First  
and Second Appellants

20

	To:	The Chief Registrar, Federal Court, Malaysia, Kuala Lumpur.	In the Federal <u>Court</u>
			No. 40
	And to:	The Senior Assistant Registrar, High Court, Malaya, Johore Bahru.	Memorandum of Appeal 1st & 2nd Defendants (Liability)
10			21st September 1982 (Cont'd)
	And to:	The abovenamed Respondent, and/or her Solicitors, Messrs. Subra Naicker & Co., No. 45, 1st Floor, Jalan Ibrahim, Johore Bahru.	
	And to:	The abovenamed Third Appellant, and/or his Solicitors, Messrs. Shearn Delamore & Co., No. 2, Benteng, Kuala Lumpur.	
20			

The address for service for the First and  
Second Defendants is Messrs Allen and Gledhill, Bangunan  
U.M.B.C., (24th Floor) Jalan Sulaiman, Kuala Lumpur 01-33.

In the  
Federal  
Court

No. 40.

Memorandum  
of Appeal  
1st & 2nd  
Defendants  
(Liability)  
21st September  
1982 (Cont'd)

IN THE FEDERAL COURT OF MALAYSIA  
(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO.216 OF 1982

Between

1. Datuk Jagindar Singh  
2. Datuk P. Suppiah  
3. Arul Chandran ... Appellants

And

Tara Rajaratnam (m.w.)... Respondent

(In the Matter of Civil Suit No.284  
of 1979 in the High Court in Malaya  
at Johore Bahru

10

Between

Tara Rajaratnam (m.w.) ... Plaintiff

And

1. Datuk Jagindar Singh  
2. Datuk P. Suppiah  
3. Arul Chandran ... Defendants)

.....

MEMORANDUM OF APPEAL

.....

Filed this 21st day of September, 1982.

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Messrs Allen & Gledhill,  
Advocates & Solicitors,  
Bangunan U.M.B.C.,  
(24th Floor)  
Jalan Sulaiman,  
KUALA LUMPUR 01-33.

MEMORANDUM OF APPEAL OF 3RD  
DEFENDANT

IN THE FEDERAL COURT OF MALAYSIA  
(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO.215 OF 1982

In the  
Federal  
Court

No.41  
Memorandum  
of Appeal  
3rd Defendant  
(Liability)  
21st September  
1982

Between

1. Datuk Jagindar Singh  
2. Datuk P. Suppiah  
3. Arul Chandran ... Appellants

And

Tara Rajaratnam (m.w.) ... Respondent

10

(In the Matter of Civil Suit No.284  
of 1979 in the High Court in Malaya  
at Johore Bahru

Between

Tara Rajaratnam (m.w.) ... Plaintiff

And

1. Datuk Jagindar Singh  
2. Datuk P. Suppiah  
3. Arul Chandran ... Defendants)

MEMORANDUM OF APPEAL

20

Arul Chandran, the Third Appellant abovenamed  
appeals to the Federal Court against the whole of the  
decision of the Honourable Mr. Justice Abdul Razak  
bin Dato' Abu Samah given at Johore Bahru on the 17th  
day of July 1982 on the following grounds:

1. The learned Judge erred in law and in fact  
in holding that the Second Defendant's under-  
taking not to sell the property for one year  
ran from the 5th July 1975:

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2. The learned Judge erred in law and in fact  
in holding that there was a breach of contract  
because the payment was not done in accordance  
with the Agreement dated the 30th March 1974:

..2/-

In the  
Federal  
Court  
          
No. 41  
Memorandum  
of Appeal  
3rd Defendant  
(Liability)  
21st September  
1982 (Cont'd)

3. The learned Judge erred in fact in holding that the original Agreement was not varied so as to take account of the fact that 121,819.80 Dollars was owing to the Hongkong and Shanghai Bank:

4. The learned Judge erred in law and in fact in holding that the action by the Second Defendant against Dr. Das in respect of a dishonoured cheque was breach of the memorandum:

10

5. The learned Judge erred in law in considering the unpleaded and unargued question of whether the Second Defendant was acting as agent for the First Defendant as undisclosed principal:

6. If the learned Judge did not so err then he erred in fact in finding that the Second Defendant was acting as such agent:

7. The learned Judge erred in law in holding as he appears to have done that if there was such an agency then both the First Defendant and the Second Defendant would be liable to the Plaintiff for breach of contract:

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8. The learned Judge erred in law in considering the question of undue influence in circumstances when the transaction was not capable of being set aside and where the Plaintiff had not made and had never been in a position to make a tender of monies for the property by the First and Second Defendants:

30

..3/-

9. The learned Judge erred in law in holding that any transaction inter vivos between a solicitor and client is presumed to have been procured by undue influence:

10. The learned Judge erred in law in considering that Section 16(1) of the Contracts Act was applicable:

11. The learned Judge's finding that the Second Defendant was the Plaintiff's solicitor at the material time was against the weight of evidence:

12. The learned Judge erred in law and in fact in holding that in the circumstances of this case a presumption of undue influence arose in the Plaintiff's favour:

13. If Section 16(1) of the Contracts Act was applicable the learned Judge erred in law in applying it in the absence of evidence of undervalue:

14. The learned Judge erred in law and in fact in holding that the terms of the Memorandum were harsh and unconscionable and unfair to the Plaintiff:

15. The learned Judge erred in law and in fact in holding that the First and Second Defendants had not rebutted the presumption of undue influence even if there was one or discharged the burden on them under Section 16 of the Contracts Act even if there was one:

In the  
Federal  
Court

No. 41  
Memorandum  
of Appeal  
3rd Defendant  
(Liability)  
21st September  
1982 (Cont'd)

..4/-



In the  
Federal  
Court  
  
No. 41  
Memorandum  
of Appeal  
3rd Defendant  
(Liability)  
21st September  
1982 (Cont'd)

16. The learned Judge's finding that the Plaintiff was never informed of the variation of the original Agreement was made in the absence of any evidence in support of it or was against the weight of evidence:

17. If the learned Judge was at P.40C making a finding of fraud such a finding was wrong in law and in fact:

18. The learned Judge erred in law in considering that Section 20 of the Contracts Act was applicable:

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19. The learned Judge erred in law and in fact in holding that the First and Second Defendants as solicitors had been entrusted with the holding of the Document of Transfer as security:

20. The learned Judge erred in law and in fact in holding that the First and Second Defendants were constructive trustees of the property:

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21. The learned Judge erred in law and in fact in considering that the Plaintiff was asking the Court to declare that the Transfers to the Defendants were fraudulent and null and void:

22. The learned Judge erred in law in considering that Section 340 of the National Land Code was brought into play because in order to claim damages it was only implicit that the Plaintiff must first be able to set aside the land in the hands of the Defendants if it had not been transferred to 3rd parties:

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..5/-

23. If the learned Judge was right to consider Section 340 he erred in law in construing the word "fraud" in that Section by reference to the Criminal Law or by reference to Section 17 of the Contracts Act:

24. The learned Judge's finding that the Plaintiff was under the impression that the land was transferred to the Second Defendant as a security was against the weight of evidence:

25. There was no evidence on which the learned Judge could find that the Defendants had failed to serve the Plaintiff with documents because "they had to avoid her so that there could be no stumbling block to their mischief":

26. The learned Judge erred in law and in fact in holding that the Memorandum and Transfer were not consistent with a sale coupled with a right of repurchase for one year and that the sale and such right were in direct conflict:

27. The learned Judge erred in law in holding that there could not have been a sale because the Second Defendant did not file a caveat until February 1975:

28. The learned Judge erred in law and in fact in holding that the Second Defendant's Statutory Declaration in support of the caveat contradicted an assertion that there had been a sale:

In the  
Federal  
Court  
No. 41  
Memorandum  
of Appeal  
3rd Defendant  
(Liability)  
21st September  
1982 (Cont'd)

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..6/-

In the  
Federal  
Court

No. 41  
Memorandum  
of Appeal  
3rd Defendant  
(Liability)  
21st September  
1982 (Cont'd)

29. The learned Judge erred in law in holding that the failure to disclose that the time for repurchase would run from the 30th March 1974 and not from the date when the 220,000 Dollars was paid was an act of fraud:

30. The learned Judge erred in law and in fact in holding the Second Defendant was guilty of fraudulent misrepresentation when he represented to the Plaintiff 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 allegation of such fraud was pleaded and in any event the finding of facts relied on was against the weight of evidence:

10

31. The learned Judge erred in law in holding that the Second Defendant represented that the Transfer to him was subject to buying in accordance with the terms of the Memorandum:

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32. The learned Judge erred in law and in fact in holding that the Memorandum was a false device to induce the Plaintiff to sign the Transfer:

33. The learned Judge erred in law and in fact in holding that the action against Dr. Das for the dishonoured cheque extinguished the Memorandum.

34. The learned Judge erred in law and in fact in holding that the manuscript addition to the Memorandum repudiated the status of the

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..7/-

Second Defendant from one of absolute owner to that of a mortgage and in holding that it was never intended to have any effect and in holding that it could not have any effect:

In the  
Federal  
Court  
No. 41  
Memorandum  
of Appeal  
3rd Defendant  
(Liability)  
21st September  
1982 (Cont'd)

35. The learned Judge erred in law in holding that the fact that the Transfer was left undated was evidence of an intention not to comply with the Memorandum:

10

36. The learned Judge erred in law in holding that by accepting the said manuscript addition the Second Defendant was acknowledging and representing that it was a security:

37. The learned Judge erred in law and in fact by holding that the Second Defendant in not withdrawing the Memorandum and manuscript chose to mislead the Plaintiff and that he was estopped from his own fraudulent conduct from asserting the true construction of the documents:

20

38. There was no evidence on which the learned Judge could find that the Second Defendant deliberately avoided payment of the amount owed by Dr. Das:

39. There was no evidence to support the learned Judge's finding that the terms of the Memorandum were not varied or alternatively such finding was against the weight of evidence:

40. There was no evidence to support the learned Judge's finding that it was not shown by the Defendants that the Plaintiff had

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..8/-

In the  
Federal  
Court

No. 41  
Memorandum  
of Appeal  
3rd Defendant  
(Liability)  
21st September  
1982 (Cont'd)

authorised her husband to represent her in connection with the Memorandum and matters arising out of it or alternatively such finding was against the weight of evidence:

41. The learned Judge erred in law in holding that by dealing with the Plaintiff's husband the Defendant's fraud was made "Even more damnable and on this fraud alone ..... the Defendant's story must be refuted and judgment be entered for the Plaintiff":

10

42. The learned Judge erred in law and in fact in holding that the First and Second Defendants by their letter dated the 2nd February 1975 were representing to the Chung Khiaw Bank Ltd. that the Second Defendant was the absolute and unqualified owner of the property and in holding that such letter was a fraud on the said Bank:

43. The learned Judge erred in law in holding that the Defendant evinced an intention to defraud the Plaintiff by their deliberate act of transferring the land to them without first informing the Plaintiff:

20

44. The learned Judge erred in fact in holding that there was no evidence that Messrs. Yeow and Chin were informed of the proposed Transfer:

45. The learned Judge erred in fact in holding that Messrs. Yeow and Chin were not acting for the Plaintiff in connection with the said Transfer:

30

..9/-

46. The learned Judge erred in law in holding that the First Defendant's attestation of the Transfer was indicative of fraud:

47. There was no evidence to support the learned Judge's finding that "the Defendant's modus operandi was to obtain the Title Deeds ignore the Memorandum refrain from paying CKB and thus forcing the Plaintiff 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 name while all the time the Plaintiff was kept completely in the dark":

48. The learned Judge erred in considering that the allegation as against the First and Second Defendants was of collusion to commit fraud or that there was any allegation of conspiracy against any Defendants and erred in law in considering that Section 10 of the Evidence Act was applicable:

49. The learned Judge erred in law and in fact in holding that "If the 2nd Defendant had falsely represented to the Plaintiff the facts then since (the 1st Defendant) knew that they were false and chose to remain silent instead then he must be guilty of fraud too":

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In the  
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No. 41  
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(Liability)  
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1982 (Cont'd)

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No. 41  
Memorandum  
of Appeal  
3rd Defendant  
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21st September  
1982 (Cont'd)

51. The learned Judge erred in law in holding that in considering fraud the Court can draw inferences against the 1st Defendant from letters written by his firm and that the 1st Defendant must be deemed to know about all the letters written by his firm:

52. The learned Judge erred in law in holding that the 3rd Defendant could only exonerate himself by stating that he was a bona fide purchaser for value:

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53. The learned Judge erred in law and in fact in holding that the stand initially or at any time taken by the 3rd Defendant in these or any other proceedings was that he was a bona fide purchaser for value:

54. The learned Judge erred in law in holding that it was implicit in being a registered owner that one was a bona fide purchaser for value:

55. There was no evidence to support the learned Judge's finding that the 3rd Defendant knew the contents of the pleadings and other documents in the Sessions Court case prior to January 1977:

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56. There was no evidence to support the learned Judge's finding that the 3rd Defendant was present in the Sessions Court case on the 12th May 1976:

57. The learned Judge erred in fact in inferring that the 3rd Defendant said in effect, or time and again to the Law Society that he was a bona fide purchaser for value:

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58. The learned Judge erred in fact in finding or inferring that the 3rd Defendant had been lying that he was a registered proprietor and the only reason for that lie not to disclose it until now was to conceal the 1st Defendant's fraud:

59. The learned Judge erred in law and in fact in holding that the fact that the 1st Defendant told the 3rd Defendant that he wanted the 3rd Defendant to subdivide and develop the land ..... should alone be sufficient to arouse suspicion in the 3rd Defendant's mind as to put himself on an enquiry and as he did not enquire fraud must be ascribed to him:

60. The learned Judge erred in law in holding that for letters written to or copied to the Plaintiff's husband to bind the Plaintiff it must be shown that she had actual knowledge of them:

61. The learned Judge erred in law and in fact in holding that the 2nd Defendant's caveat was for the purpose of preventing the Plaintiff from creating further charges if by that he meant that that was its only purpose or the actual reason for lodging the caveat:

62. The learned Judge erred in law and in fact in holding that no necessary inference as to the Plaintiff's knowledge of the continued existence of the agreement could be drawn

In the  
Federal  
Court

No. 41  
Memorandum  
of Appeal  
3rd Defendant  
(Liability)  
21st September  
1982 (Cont'd)

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In the  
Federal  
Court

No. 41

Memorandum  
of Appeal  
3rd Defendant  
(Liability)  
21st September  
1982 (Cont'd)

against the Plaintiff by reason of the  
lodging of the caveat and her being  
notified of such lodging:

63. The learned Judge erred in law in  
construing the Plaintiff's Defence in the  
Sessions Court case:

64. The learned Judge erred in law in  
holding that the Court was not concerned  
with what the value of the land was but  
was concerned with whether fraud had been  
committed whatever the value of the land  
might be:

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65. There was no evidence to support  
the learned Judge's finding that the  
Plaintiff probably meant that the land  
would be worth about 1M. Dollars after the  
houses were built and sold:

66. The learned Judge erred in law and  
in fact in rejecting P.56, P.56A and P.56B:

67. There was no evidence to support the  
learned Judge's belief that the original of  
D6 was sent to the Income Tax Department not  
by the Plaintiff herself but by some other  
person or his suspicion that the said document  
was a forgery and the learned Judge erred in  
law in expunging it from the record:

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68. The learned Judge erred in finding that  
the evidence of Sivanandan (D.W.5) was that the  
Plaintiff and her husband had a confidential  
discussion in the midst of their guests or  
that he said that no introductions were made  
and there was no evidence to support the learned

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Judge's finding that his evidence was contradictory or biased or that he was an incidental part of the conspiracy between the Defendants to defraud the Plaintiff. The learned Judge was wrong to reject his evidence:

69. The learned Judge erred in law and in fact in rejecting the 3rd Defendant's Counterclaim:

10 70. If the learned Judge held that his findings entitled the Plaintiff to damages for undue influence, fraud or breach of trust he erred in law.

Dated this 21st day of September 1982.

(sd) Shearn Delamore & Co.

Solicitors for the Third  
Defendant/Appellant

To:

20 The Chief Registrar,  
Federal Court,  
Malaysia,  
Kuala Lumpur.

And to:

The Senior Assistant Registrar,  
High Court,  
Malaya,  
Johore Bahru.

And to:

30 The abovenamed Respondent,  
and/or her Solicitors,  
Messrs. Subra Naicker & Co.,  
No.45, 1st Floor, Jalan Ibrahim,  
Johore Bahru.

In the  
Federal  
Court  
No. 41  
Memorandum  
of Appeal  
3rd Defendant  
(Liability)  
21st September  
1982 (Cont'd)

..14/-

In the  
Federal  
Court  
  
No. 41  
Memorandum  
of Appeal  
3rd Defendant  
(Liability)  
21st September  
1982 (Cont'd)

And to:

The abovenamed 1st and 2nd Appellants,  
and/or their Solicitors,  
Messrs. Allen & Gledhill,  
Bangunan U.M.B.C.,  
(24th Floor),  
Jalan Sulaiman,  
Kuala Lumpur 01-33.

The address for service for the Third Appellant  
is Messrs. Shearn Delamore & Co., No.2 Benteng,  
Kuala Lumpur 01-19.

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No. 42  
PROCEEDINGS

A                    IN THE HIGH COURT OF MALAYA AT JOHOR BAHRU  
                         CIVIL SUIT NO. 284/79  
  
                         BETWEEN  
Tara Rajaratnam                    ...    Plaintiff  
  
                         AND  
B                    Jagindar Singh    )  
                         P. Suppiah                    )                    ...    Defendants  
                         Arul Chandran                    )

In the High  
Court  
No. 42  
Proceedings  
21st November  
1982

NOTES OF EVIDENCE

C                    Coram: Y.A. Abdul Razak bin                    In Chambers  
                         Dato' Abu Samah, J  
                         This 21st. November, 1982

Mr. Cecil Abraham for the 3rd. Defendant.

Mr. Chin Yew Meng for the 1st. and 2nd Defendants.

Mr. H.E. Cashin and Mr. Subra Naicker for the Plaintiff.

D                    Mr. Abraham:

Appeal on the 10th. January, 1983. Question of  
liability. There are merits: Saves time and costs.  
Not unusual for assessment of damages to be stayed.  
C.A. 194/80.

E                    Mr. Chin:

My client had made an affidavit on damages.  
The fact that there was an agreement, does not waive  
the right to appeal. Convenience.

F                    Mr. Subra Naicker:

Oppose the application, Law on stay. Halsbury's  
Law of England, Vol. 16, 3rd. Edition, Page 35 (Photocopy).  
There must be special circumstances. Pages 406 - 409.

....2/-

In the High  
Court

No. 42

Proceedings  
21st November  
1982 (Cont'd)

- 2 -

- A Circumstances in which action may be stayed. Ajaib  
Singh v. Jeffrey Fernandez, (1971) 1 M.L.J. Page 139.  
Serious or irreparable injury.

Affidavit of applicant:

- B Not one fact mentioned that it is frivolous,  
prejudice, or injurious. They say stay will save  
costs and time. Appeal successful they say.

Stay saves costs and time.

Mr. Cashin:

- C Two bites, two hearing and twice the cost,  
doubling the costs.

Mr. Abraham:

Stay of proceedings not stay of award.

Order:

Application is disallowed with costs.

- D IN OPEN COURT,  
This 21st. Day of  
November, 1982.

Mr. Abraham for the 3rd. Defendant.

Mr. Chin Yew Meng for the 1st. and 2nd Defendants.

- E Mr. Subra Naicker and Mr. Cashin for the Plaintiff.

Order:

- F • To pay \$973,000/- as general damages to be  
taxed. 6% on \$370,260/- from 1975 till July 1982 and  
at 8% per annum on the judgment sum from date of  
hearing till realization and costs to be taxed.

....3/-

A Mr. Abraham:

I wish to apply for a stay. The appeal is coming up on 10th. January, 1983.

In the High Court

No. 42

Proceedings  
21st November  
1982 (Cont'd)

B Undertaking that appeal on damages will be dealt with at the same time. White Book 1979, Page 909, Wilson v. Church. Stay should be allowed if there is no reasonable probability of getting it back because plaintiff is a person of no sufficient means.

C Mr. Chin:

Asks for a temporary stay to allow the appellant to go to the Federal Court to apply.

Mr. Cashin:

D The defendants to show special circumstances. To pay money in Court, or to pay money to the plaintiff's solicitors until the determination of this matter. We have not made a search of the defendants' assets. It will be a great pity, if by the time the case is over, the judgment is found to be nugatory.

E Mr. Abraham:

There are no evidence to dispose of the assets. I cannot guarantee what my client will do.

Order:

F The defendants to pay the judgment sum with in one month into Court.

Sd. Razak  
( RAZAK, J )

Kuala Lumpur,  
1st. December, 1982.

....4/-

In the High  
Court

No. 42  
Proceedings  
21st November  
1982 (Cont'd)

A

Mr. H.E. Cashin for Plaintiff  
assisted by Subra Naicker,  
Subra Naicker & Co.,  
45, Jalan Ibrahim,  
(Tingkat 1),  
Johor Bahru.

B

Mr. Chin Yew Meng for 1st.  
and 2nd. Defendants,  
Allen & Gledhill,  
Advocates & Solicitors,  
Bangunan UMBC (24th. Floor),  
Jalan Sulaiman,  
Kuala Lumpur.

C

Mr. Cecil Abraham for 3rd. Defendant,  
Shearn & Delamore,  
Advocates & Solicitors,  
No. 2, Benteng,  
Kuala Lumpur.

Certified true copy

sd. Illegible  
.....  
Secretary to Judge,  
Kuala Lumpur.  
1/12/82

GROUPS OF JUDGMENT ON DAMAGES

In the High  
Court

IN THE HIGH COURT IN MALAYA AT JOHOR BAHRU

CIVIL SUIT NO: 284 OF 1979

No. 43

BETWEEN

Grounds of  
Judgment on  
Damages  
21st November  
1982

Tara Rajaratnam .... Plaintiff

AND

Datuk Jagindar Singh )  
Datuk P. Suppiah ) .... Defendants  
Arul Chandran )

GROUPS OF JUDGMENT ON DAMAGES  
OF RAZAK, J

I shall now deal with the question of damages,  
The plaintiff's claim is as already stated for breach  
of contract, undue influence, breach of trust and fraud.  
In my judgment I had found the 1st. and 2nd. defendants  
in breach in respect of each separate causes of action.  
The 3rd. defendant was found to be liable for fraud  
only in conjunction with the 1st. and the 2nd. defendants.  
In so far as the claim for undue influence and breach of  
trust were concerned the remedy is in equity for resti-  
tution if the subject matter was still in specie or for  
an account of the proceeds from its disposal. There is  
no doubt that the subject property in its original state  
had ceased to exist since it had been subdivided and  
transferred to third parties. It follows the remedy of  
restitution cannot lie. Indeed the plaintiff had  
abandoned the claim for an account of any profits  
derived. There is a claim however for exemplary damages.

.. 2/-





Let us deal with the measure of damages in respect of each claim. The object of an award is to give the plaintiff compensation for the damage, loss or injury he had suffered. The loss may be pecuniary or non-pecuniary. In the latter the damages are not compensation for loss and the damages may be nominal or exemplary.

In the High Court  
No. 43  
Judgment of Razak J. (damages)  
21st November 1982 (Cont'd)

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In Contract, the measure of damages is the market value of the benefit which the plaintiff had been deprived through the breach. The plaintiff in other words is entitled to loss of his bargain. The object is to put the plaintiff in the position as if the contract had been performed (Mcgregor on Contract 13th. Edition, Page 21). The common law position had been restated by statute. Section 74 (1) of the Contract Act says:-

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"When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."

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In the High  
Court  
No. 43  
Judgment of  
Razak J.  
(damages)  
21st November  
1982 (Cont'd)

In Fraud, the measure of damages is an award which serves to put the plaintiff in the position he would have been in, if the representation had not been made to him. (Mcgregor Page 907). Salmond on Tort (17th. Edition Page 531) on the other hand says it is to put the person whose rights have been invaded in the same position as if it had been respected. The net result in both, I think, is the same. In other words if the plaintiff is induced by fraud to conclude a contract, he is not entitled as he is in contract to recover in deceit for the loss of the bargain. (Mcgregor Page 907, Para 1357). There has been some doubt however regarding whether the contractual or tortious measure should apply in the tort of deceit; seemingly it was resolved in Doyle v. Olby (1969 2QB Page 158) that the tortious measure would apply. The normal practice in deceit is as stated by Mcgregor to value the property or services transferred less the value received, at the time of the transfer. (Page 913). The plaintiff's claim was for general damages. There was no claim for special damages. If there was any value of the land pleaded, one must necessarily conclude therefore this was merely intended to emphasise that it had great value to both the plaintiff and the defendants. The actual value of the property at the time when the wrong was committed and at the

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date of judgment however will be relevant, as will be seen later, to determine the plaintiff's loss.

In the High Court.

No. 43

Judgment of

Razak J.

(damages)

21st November

1982 (Cont'd)

I think it is sufficient for the purpose of awarding the damages for me to consider them only on the basis of fraud because in my view the award would be the highest attainable and would necessarily cover the claim for the breach of contract and trust as well. It seems agreed, and it must be so, that the measure of damages shall be determined as at the date of the transfer of the land from the plaintiff to the defendant, that is July 1975. That was the time of the wrong. The loss was the loss of the land itself which by the fraud of the defendant, the plaintiff had been deprived of and the plaintiff must thus be given the value of the property which she had lost. But to that value must be added the changes in its value in the intervening period, and the earliest time the action should have reasonably been brought to judgment. (McGregor Page 334).

What was therefore the value of the land in July 1975? Both sides called their valuers to give evidence on the value of the land in July 1975. D.W.4 said he was asked by the defendant to say whether the value at \$220,000/- was reasonable in 1974 and 1975. It seems to me rather strange though why the valuer had not been asked to give the market

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In the High  
Court

No. 43  
Judgment of  
Razak J.  
(damages)  
21st November  
1982 (Cont'd)

value, where it would have implied giving a fair value to both the plaintiff and the defendant.

The 1st., 2nd. and 3rd. defendants cannot say they did not know. They were lawyers. Perhaps they were afraid that the market value would be unfavourable to them. I cannot find any other explanation. True to his brief, D.W.4 said that the price was reasonable, it does not necessarily follow, however, that he was saying that it was reasonable to the plaintiff. This argument is quite significant because if the plaintiff is to be put in the position as if the contract had not been performed, which is the underlying principle, then the reasonableness, if at all, should have been construed more in favour of the plaintiff than the defendant since, if she had known what the defendant was going to do, she could not conceivably have transferred the land to the defendant in the first place. She would not have lost it and she would not find herself now in the position where she could only get the value for it whether she liked it or not. The question of reasonableness particularly comes into focus when the issue arises whether she should be compensated for her house, which will be discussed later.

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The subject property was valued by the Valuation Department for stamp duty in connection

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with the transfer from the plaintiff to the defendant at \$220,000/-. D.J.4 approved the valuation. He said he knew the consideration to be \$220,000/- when he made his report. It would seem to me however that his task would have been easier if he had not made the earlier valuation. It would have been easier still, I feel, if he had been asked to value it on the basis of the proper market value, not on whether it was reasonable. In his report he considered the value of the land around the locality between the period 1973 - 1977. He took into account the development trend in the Kulai area where he said "Newer housing estate were being attracted to the north-west, that is along those parts of Kulai Besar near the 19½ m.s. and Kulai Baru at the 21st. m.s. of Johor Bahru-Kulai Road and north-east along the Kulai-Kota Tinggi Road." He was of the view that property value had reached its peak around the end of 1973 and early 1974 with the property providing for general stabilization thereafter. He therefore considered that the value of the property in July 1975 which was the date of transfer was no different from the value of property at 30th. March, 1974 the date of the agreement, P.30. He valued the property therefore at \$44,000/- per acre. He did not take into account the house standing on the land because he valued the property "not on the basis of agricultural user but on the basis of a more intensive use in

In the High Court

No. 43

Judgment of Razak J. (damages)

21st. Nov. 1982 (Cont'd)

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In the High  
Court

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Judgment of

Razak J.

(damages)

21st November

1982 (Cont'd)

keeping with neighbourhood development." The house was thus assumed to be demolished.

I should like to make these observations however of D.W.4's evidence of sales. Lots 6021 and 6022 which were about the nearest to the subject lot being two lots away were not strictly market value transactions because they were transfers for love and affection. The collector valued the land for the purpose of stamp duty, at ₦27,000/- per acre in August 1975 for Lot 6022 and ₦37,000/- per acre for Lot 6021 in April 1976. There is further no evidence that the valuation had been referred to the Valuation Department for their approval. There were times before when valuations were done by the collectors themselves. Three particular lots were singled out by D.W.4- Lots 6602, was transacted at ₦24,300/- per acre in November 1973, with Lot 6603. Lot 6604 was transacted at ₦30,300 per acre in November 1973. They were as can be seen transacted at the same time. Lot 1252 was valued by the Government at ₦32,000/- per acre in January 1977. Except for Lot 6604 the Government had increased the land value in all the three lots. Lots 6602 and 6603 were increased from ₦17,000/- to ₦24,300/- per acre an increase of 43%. (D.19A Vol. 3). The Government had not increased the value in respect Lot 6604 and remained at ₦30,300/- per acre. But there had been

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an increase in the same month over lands adjoining one another and enjoying the same characteristics from \$17,000/- per acre in Lots 6602 and 6603 to \$30,000/- per acre in Lot 6604 an increase of well over 76%. In another adjoining Lot 1252 the value had been increased by the Government from \$10,000/- to \$32,000/- per acre an increase of 220%. These increases are thus the clearest recognition by the Government itself that there has been a very sharp and steady increases in prices contrary to what D.W.4 said, even after 1974 and this seemed quite prominent from 1974 to 1977. The following defects must however be noticed regarding these four lots as comparables. 6602, 6603, 6604 and 1252 relatively, are in a different locality altogether, being at Kulai New Village whereas the subject lot is at Kulai Besar. They appear to be about 2 miles from one another. This may be gauged by P.W.6's evidence that the subject lot to Lot 6017 is about half a mile. The distance may appear to be insignificant in a lesser developed area but where the witness himself says in his report and in evidence that the Kulai area is fast developing the distance of two miles or so may have a sharp bearing on prices depending on where the centre of activity is in relation to the one or the other. That is only common logic.

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Again, the four lots mentioned are at some distance from the main road. They appear to be about half a mile away whereas the subject property is fronting the Johor Bahru-Kuala Lumpur road. Whatever potentiality these four lots have, could hardly compare with a lot on the main road. Indeed, according to D.W.4 land fronting the main road is superior in respect of commercial element, although in respect of residential aspect, he would prefer the comparisons at Khet Loong (that is the 4 lots). He also agreed that the land with frontage to the main road would enjoy better price than at the rear (that is away from the main road). The subject lot is nearer to Johor Bahru and the Senai Airport by their relative positions which again makes it a much superior land. In the light of these factors in favour of the subject land, the four lots could hardly be compared. Lot 3625 had been cited as another comparable, but this land is even further away from the subject land than the four lots by it seems a mile. It is also more than twice the size of the subject land. It is an accepted fact in valuation that lands tend to be valued less as they become bigger in size. Thus as one can see there is no sale within the immediate vicinity of the subject land which could safely be used to reflect its true value. That the subject lot had building

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potentiality seems acknowledged by both sides.  
The very fact that the land was used later to build  
houses on it only confirmed that fact. There was  
no question also that the owner could have easily  
converted and sub-divided the land as borne out by  
D.W.4's testimony. He said Lot 6024 adjoining  
the subject lot had shop-houses at the front. He  
was of the view that if land on either side were  
developed land it would not be difficult to get the  
approval for conversion and sub-division irrespect-  
ive of whether it was in the Town Council area or  
not. It seems in fact that D.W.4 had accepted every-  
thing regarding the distinct superiority of Lot 6025  
except giving it the extra value which it deserved.  
Perhaps, as I said he was somewhat in a dilemma to  
have to reconcile his latter position with the earlier  
one. But I think there is no question that even if  
all things were equal, Lot 6025 is definitely far  
superior to the five lots cited by D.W.4 but which  
fact unfortunately he had not given sufficient  
recognition to. That in itself, quite apart from  
the general increase in prices, should have been  
given extra credit by D.W.4 over and above the other  
lots. An admission for instance of the vast supe-  
riority of Lot 6025 is the evidence by him earlier,  
that the latter is superior in commercial element,  
although in respect of residential aspect he would

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Court  
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Judgment of  
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1982 (Cont'd)

prefer the residential lots (i.e. the four lots).

I think no one will quarrel with that line of

reasoning, but surely when it comes to dollars and

cents it must mean that the subject lot is more

valuable per acre than the four strictly residen-

tial lots. But evidently he had not considered

this aspect of the four lots when comparing them

with the subject lot. At least I cannot find any-

where that he had distinctly emphasised on this

point. The plaintiff called two valuers, P.W.3 and

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P.W.6 to give evidence of value as on July 1975.

P.W.3 said that he valued the land at \$4.50 per sq.

ft. and the house at \$126,000/-. P.W.6 valued the

land at \$3/- per sq. ft. and the house at \$48,000/-.

The plaintiff's valuers were quite distinct in one

respect and that is that they had not cited any

comparables, but quite obviously, from what I had

earlier said, that if they did not do so, it was

apparent, because there were no sales directly

comparable to the subject lot. P.W.3 based his

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evidence of value essentially on the offer made to

him by some developers. In Pribu v. The Secretary

of State (135 I.C. 183) it was held that "Evidence

of such offers were certainly admissible and could

be of value if there were firm offers supported by

the testimony of reliable witnesses or documentary

evidence". It was open to the defendant to challenge

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P.W.3 as to the truth of the offer. One simple way to do so was to put it to him that the assertion was not true, as would have required him to substantiate his assertion. At least he should be asked whether P.W.3 was calling anyone. Quite understandably if asked to produce them, their evidence may be awkwardly prejudicial if not detrimental to the defendant. That may explain for the defendant's stand, or else because the figure quoted was acknowledged to be of general acceptance. The fact that a witness had testified to a fact, which was not challenged, does not make him unreliable. P.W.3 was asked merely how he arrived at the figure of \$4.50 per sq. ft. to which the answer was, in 5 acres, 20 terrace-houses could be built and each could be sold at \$20,000/- to \$30,000/-. He said that one could also build shop-houses at the front and in 1975 each would sell about \$75,000/-. He did not deny the fact that he had to set aside for roads, drains and open spaces. He was also aware that there was a Government ruling that 40% of the sub-divided areas must be set aside for low-cost houses where each could not be sold for more than \$15,000/-. No question was however asked as to how he arrived at the \$120,000/- for the house, seemingly thus again accepting the figure. The \$4.50 per sq. ft. was his value for the land after

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In the High  
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conversion and sub-division. P.W.6 on the other hand based his value at \$3.00 per sq. ft., essentially on the valuation which he made on the 29th. March, 1975 on Lot 6017 which was 6 lots away. There were 32 units of terraced and shop-houses. 20 units for shop-houses. At the time he made the valuation, there was no requirement for setting aside for low-cost. He valued the shop-house at \$15/- per sq. ft. and \$4/- per sq. ft. for the terrace-houses. The area of the shop lot was 2,070 sq. ft. The area for Lot 6017 was 4 acres 3 rots and 37 poles which was slightly smaller than the subject land. The owner was Tai Kuey Enterprises Sdn. Bhd. The defendant did not ask for what purpose the land was valued and whether the valuation was accepted. It is safe to assume, as is normally the case, for the purpose of getting some credit facilities from some financial body or other and was accepted. Again, this must be the necessary inference, if the defendant chose not to question the witness. I do not see why he should be asked to value the land, otherwise. P.W.6's valuation on Lot 6017 by itself should thus be prima facie evidence of value, because if lands are valued for the purpose of stamp duty and also for the purpose of land acquisitions by Government Valuers and are normally accepted by the Collectors and by the

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Court alike as prima facie evidence of market value, I do not see why in cases where valuation are made by private valuers for the purpose of some financial institutions and are seen to be accepted by them that that in itself should not also prima facie be some evidence of value, when both are subject to statutory check and restraint. It seems difficult for me, besides, to see the logic of the defendant's refusal to accept P.W.O's valuation when in 1972, he valued the same land and like his 2nd. report, had also cited no comparable. What is more absurd to me is that whereas they accepted P.W.O's value of the land at \$210,000/- in 1972, that 3½ years later in 1975, they valued the land at \$185,000/-, \$35,000/- less, and what was worse, against their own valuer's valuation, that it was worth \$220,000/- which is clearly shown to be more by \$35,000/- than theirs! I wonder which part of the country had shown land prices steadily going down instead of going up as was suggested by the defendant. The \$3/- per sq. ft. does not appear to be wholly unreasonable and unrealistic. P.W.O had valued the shop-lots at \$15/- per sq. ft. and the terrace-houses at \$4/- per sq. ft. The average value of the land per sq. ft. was therefore \$8/- per sq. ft. Deducting 40% from it for the low-cost, the land value per sq. ft. would thus be about \$4.80 per sq. ft. P.W.O's figures therefore ...15/-

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Judgment of

Razak J.

(damages)

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Court

No. 43  
Judgment of  
Razak J.  
(damages)  
21st November  
1982 (Cont'd)

more or less tallies with P.W.3 at \$4.50 per sq. ft.  
If their values are without substance, it is a strange  
coincidence that they both happen to be about the  
same, in their figures. What D.W.4 had to say besides,  
seemed to support merely the consistency of P.W.3  
and P.W.6's figures being fairly reliable and true.  
D.W.4 said that the development of Kulai was apparent  
in 1972 - 1973 and it was gathering momentum in the  
succeeding years, modifying substantially in effect  
his own report that "property values have reached 10  
their peak around the end of 1973 and early 1974  
with the property market providing for general  
stabilization, thereafter. He made the qualification,  
however, that market reaction would not have been  
consistent with the development pace because of fiscal  
constraint made to lie by Government, which affected  
the price, example the Land Speculation Act. But if  
there was any statutory restraint it would, in my  
humble view, only have been minimal because surely  
the curb was, if at all not on development but on 20  
the amount of the gain to be reaped, at least that  
must be the intention, if not the effect of the  
law. Because the right of the public to borrow till  
lately, any rate, for any amount from financial  
houses had been, as far as everyone knows, quite  
unrestricted. And the right of the individual to  
own houses, again till lately, had also been

...lc/-

unlimited and unhindered. Logically, the Government  
legislation should act, instead to induce people  
particularly developers to invest more in land so as  
to increase their turn-over of profit, to make up  
for what they would otherwise have gained. The  
rate of development would therefore continue at the  
same, if not greater pace, followed by a correspon-  
ding market reaction but of course at a slightly  
reduced acreage annual rate of increase. That must  
be the necessary economic picture because the  
National Economy must necessarily generate growth  
to bring in the prosperity with a fair balance main-  
tained between healthy development and inflation  
which is the opposite of an uncontrolled economic  
growth. However, it seems rather surprising to  
me, is D.W.4 was right, that despite the imposition  
of the Land Speculation Act and other fiscal measures  
that Government Valuers themselves felt that there  
should be an increase in value in kulai alone from  
74% in 1973 to 220% in 1977. That does not seem to  
support D.W.4's argument that land prices had been  
checked because of the fiscal restraint. It seems  
to be completely the other way round as I had  
suggested. In my view considering what has been  
said, the value of the subject land at \$1.70 per sq.  
ft. in July 1975 would not be unreasonable, which  
would be about \$74,000/- per acre. On the \$1.70

...17/-

In the High  
Court  
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In the High  
Court

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Razak J.  
(damages)  
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1982 (Cont'd)

per sq. ft. should be added such sums as would reflect, as earlier stated, the necessary increase in price between 1975 and the date of judgment, that is July 1982, a period of 7 years. In my view it has become a matter of public and common knowledge that even if there was no boom in prices, the normal annual rate of increase of land prices has always been generally about 20% a year. 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. There would thus be an increase of 140% over the years from 1975 - 1982 to the value of the land. One must also remember in valuing lands that it is common knowledge that the public by and large do not always declare the true consideration for their transactions, so as to avoid being subjected to the statutory levies earlier cited, more than they would want to, and in considering the record of sales in the Land Office quoted by valuers, the Court must always give some allowance for this fact. To the value of the land must be added the cost of the house. That must necessarily be the cost of reinstating the house in 1975. In my view there is no double counting here because the plaintiff has lost her house and her land. Giving the value for both is not necessarily contradictory because even in land acquisition cases, the house is separately compensated for simply because, I think the land use of agriculture

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...18/-

land can only be estimated not exact. Besides, as recalled earlier, if the test of reasonableness is to be applied, then it should be held more in favour of the plaintiff, because she has lost her house and her land against her will. P.W.3 valued the house at \$120,000/-; P.W.6 valued it at \$48,000/-. As I said, no question was asked by the defendant as to how they arrived at these figures. I think an average figure of \$84,000/- would in the circumstances be fair.

10

It had also been said that the amount of \$212,000/- should be deducted from whatever was due to the plaintiff because she had received them, but as I stated in my judgment, these sums were not paid pursuant to P.30, so they could not rightly be set off against the amount due to her. The \$92,000/- was not, first of all, paid to G.K.B. by the 2nd. defendant as it should have been, but by the first defendant. And it was paid by the defendant because that was the only means by which the land could have been discharged and eventually transferred to them. As to the \$120,000/- paid to H.K.B., it was again not paid by the 2nd. defendant, as it should have been, but again by the 1st. defendant and it was paid to H.K.B. strictly under his guarantee to H.K.B. for Dr. Dass's overdraft. These sums were, besides, paid pursuant to and arising from a fraud. Under

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...19/-

In the High  
Court

No. 43

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21st November

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In the High  
Court

No. 43

Judgment of

Razak J.

(damages)

21st November

1982 (Cont'd)

Section 65 of the Contract Act it clearly does not allow the defendant to recover them. Pollock & Mulla (9th. Edition, Page 463) says:-

"It seems on the whole that the present action (S.65) does not apply to agreements which are void under Section 24 by reason of an unlawful consideration or object and still less to those which are tainted with fraud or moral turpitude and there being no other section in the Act under which money paid for an unlawful purpose may be recovered back, the analogy of the English law will be the best guide."

10

And as clearly stated in Falaniappa Chettiar v. Arunasalam Chettiar (1962 A.C. Page 294) the process of the Court cannot be used by the plaintiff to achieve a fraudulent purpose and also get the plaintiff's property back where it had been transferred to the defendant in order to defeat the law.

20

That leaves me therefore with the last item of damages. It had been urged by the plaintiff that it is only right and proper that in this case the defendant be asked to pay in addition to compensatory, exemplary damages. McGregor on Damages (Pg. 219) says that the primary object of an award of damages is to compensate the plaintiff for the harm done to

...20/-

nim; a possible secondary object is to punish the defendant for his conduct in inflicting that harm; such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which are variously called exemplary damages, punitive damages, vindictive damages, even retributory damages, and comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment, as where it discloses malice, fraud, cruelty, insolence or the like. It is however said by Lord Hailsham in Cassell v. Broome and another (A.C. 1972 Page 107b) that the principle of exemplary damages does not extend to the tort of deceit, disagreeing with the dictum of Widgery L.J. in Mayo v. Adam 1971 A.C. that Lord Devlin's analysis of the principle laid down in Rookes v. Barnard (1964 A.C. 1129) was wide enough to allow it to be extended to cases hitherto not included in the category of exemplary damages like deceit. Lord Hailsham said the explanation in this lay in the close connection the action had with the breach of contract. Lord Denning however in Drane v. V. Evangelou (1978 1 W.L.R. Page 455) seen clear on the contrary to regard the category of cases for which exemplary damages may be awarded are not closed and he cited Lord Devlin's passage in Rookes v. Barnard to support his view where the latter said -

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...21/.

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Court  
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"This category is not confined to money-making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of ~~the~~ plaintiff some object - perhaps some property which he covets - which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrong doer that tort does not pay."

10

In that case the plaintiff was awarded exemplary damages for unlawful eviction of a tenant, an action somewhat contractual in nature. I am however bound by the decision in Cassel v. Brcome above (although it seems obiter) because although Lord Hailsham said:

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"It is of true that the action for deceit could well come within the purview of the second category"  
• (i.e. that the defendant's conduct had been calculated by him to make a profit for himself which may well exceed the compensation payable

..22/-

to the plaintiff) - that nevertheless he said -

"I can see no reason for thinking that Lord Devlin intended to extend the category to deceit."

In the High Court

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10 In the circumstances I would disallow the plaintiff's claim for exemplary damages. If, however, I found to be wrong then I would award a sum of \$20,000/- for the same. I think that is a fair and reasonable amount considering the circumstances. The plaintiff had been subjected to great mental pain, agony and humiliation as a result of the defendant's outrageous conduct. I would only quote Lord Lawton in Drane v. Evangelou in this respect where he said:

20 "To deprive a man of a roof over his head in my judgment is one of the worst tort which can be committed. It causes stress, worry and anxiety. It brings the law into disrepute if people like the defendant can act with impunity in the way he did."

To the defendant's contention that the plaintiff cannot claim under this head because the damages will be definition exceed the profit, it must

...23/-

In the High  
Court

No. 43  
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simply be said that on principle, the only essential criterion is whether the defendant's conduct is calculated to result in profit (the emphasis is mine). As Lord Devlin in Rookes v. Barnard said:

"Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrong doing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity." (the emphasis is mine).

10

As regards the principle of award of damages, the authorities are somewhat uncertain as to whether there should be separate award for each item of damages where the plaintiff had succeeded in the separate causes of action united in the same suit as in this case. McGregor 14th Edition Page 1031 citing Barber v. Piquen (1973 1 K.B. 604) is of the view that the Court should either make a separate award but a single award will not be upset in the absence of prejudice or, a Court has a discretion to make a single award but should make a separate award if a single award could lead to prejudice.

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...24/-

The 1st., 2nd. and 3rd. defendants shall be jointly and severally liable for the tort of deceit, but the 1st. and 2nd. defendants shall be jointly and severally liable for the breach of contract. The 2nd. defendant says that he is not personally liable for any damage because I had found that he was merely an agent of the 1st. defendant. But, as the evidence showed, the 2nd. defendant had never disclosed that he was acting for the 1st. defendant, his principal, and under S.183 of the Contract Act, he is in that event, presumed to be personally liable on the contract. Polloch & Mulla (at Page 772, 9th. Edition) says:

"It is settled that an agent cannot claim indemnity in respect of acts which he knows to be unlawful, even if they are not criminal whether on an express or implied promise.

Any such promise is void as being contrary to public policy."

And finally, S.186 says:

"In cases where an agent is personally liable a person dealing with him may hold either him or his principle or both of them liable."

...25/-

In the High Court

No. 43  
Judgment of  
Razak J.  
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21st November  
1982 (Cont'd)



In the High  
Court

No. 43  
Judgment of  
Razak J.  
(damages)  
21st November  
1982 (Cont'd)

Quite apart from the above principles, it is abundantly clear that the 1st. defendant was present when the 2nd. acted as his agent to commit fraud on the plaintiff, which thus makes him also liable, on the facts, jointly with the 2nd. defendant.

I would therefore in the circumstances award a sum of \$973,000/- as general damages to the plaintiff with costs to be taxed. As I said earlier this sum represents the award for the tort of deceit, only but having considered the other claims, it would necessarily also cover them, if need be. This sum, as have already been stated does not include the amount for exemplary damages. There shall be an award of interest as suggested by the defendant at 6% per annum on the \$370,260/- (the price at July 1975) from 1975 till July 1982 and at 8% per annum on the Judgment sum from the date hereof till realization.

10

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Sd.  
( RAZAK J )  
HIGH COURT  
KUALA LUMPUR

21st. November, 1982.

...26/-

Mr. H.E. Cashin for Plaintiff  
assisted by Subra Maicker,  
Subra Maicker & Co.,  
45, Jalan Ibrahim,  
(Tingkat 1),  
Johor Bahru.

In the High  
Court

No. 43  
Judgment of  
Razak J.  
(damages)  
21st November  
1982 (Cont'd)

10

Mr. Chin Yew Meng for 1st.  
& 2nd. Defendants,  
Allen & Gledhill,  
Advocates & Solicitors,  
Bangunan UMBC (24th Floor),  
Jalan Sulaiman,  
Kuala Lumpur.

Mr. Ronald Khoo for 3rd. Defendant,  
Shearn & Delamore,  
Advocates & Solicitors,  
No. 2, Benteng,  
Kuala Lumpur.

Certified true copy

20

(Sd)  
.....  
Secretary to Judge  
Kuala Lumpur.

ORDER ON DAMAGES

In the High  
Court

No. 44  
Order  
(damages)  
21st November  
1982

IN THE HIGH COURT OF MALAYA AT JOHORE BAHRU

CIVIL SUIT NO. 284 OF 1979

Between

Tara Rajaratnam (m.w.)

... Plaintiff

And

1. Datuk Jagindar Singh
2. Datuk P. Suppiah
3. Arul Chandran

... Defendants

10

BEFORE THE HONOURABLE MR. JUSTICE  
ABDUL RAZAK BIN DATO' ABU SAMAH  
HIGH COURT, MALAYA, JOHORE BAHRU

IN OPEN COURT  
THIS 21ST DAY OF NOVEMBER 1982

O R D E R

UPON READING the Written Submission on Damages of the Plaintiff dated the 16th day of August 1982 and the Written Submission of the Defendants dated the 25th day of September 1982 and the Reply by the Plaintiff dated the 8th day of October 1982 and this Action coming on for judgment on damages this day in the presence of Mr. Howard E. Cashin of Counsel for the Plaintiff assisted by Mr. Subra Naicker and Mr. Cecil Abraham of Counsel for the First and Third Defendants and Mr. Chin Yew Meng of Counsel for the Second Defendant IT IS ORDERED that the Defendants do pay the Plaintiff the sum of \$973,000.00 as general damages with costs to be taxed and 6% interest per annum

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...2/-

- 2 -

on the sum of \$370,260.00 (the price of the property at July 1975) from 1975 till July 1982 and interest at 8% per annum on the Judgment sum from the date hereof till realisation, and IT IS FURTHER ORDERED that the Defendants do pay the judgment sum into Court within one month from the date hereof.

GIVEN under my hand and the seal of the Court this  
21st day of November 1982.

In the High  
Court  

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No. 44  
Order  
(damages)  
21st November  
1982 (Cont'd)

(L.S.)      Sd. Yeoh Wee Siam  
Senior Assistant Registrar,  
High Court, Malaya,  
Johore Bahru.

10

NOTICE OF APPEAL OF 1ST AND 2ND  
APPELLANTS RE: DAMAGES

In the  
Federal  
Court

IN THE FEDERAL COURT OF MALAYSIA  
(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. 291 OF 1982

No. 45  
Notice of  
Appeal  
1st & 2nd  
Appellants  
(damages)  
21st November  
1982

Between

1. Datuk Jagindar Singh  
2. Datuk P. Suppiah  
3. Arul Chandran ... Appellants

And

Tara Rajaratnam (m.w.) ... Respondent

(In the Matter of Civil Suit No. 284  
of 1979 in the High Court in Malaya  
at Johore Bahru

10

Between

Tara Rajaratnam (m.w.) ... Plaintiff

And

1. Datuk Jagindar Singh  
2. Datuk P. Suppiah  
3. Arul Chandran ... Defendants

NOTICE OF APPEAL

20

TAKE NOTICE that Jagindar Singh and P. Suppiah the  
First and Second Appellants/Defendants abovenamed being  
dissatisfied with the decision of the Honourable Justice  
Abdul Razak Bin Dato' Abu Samah given at Johore Bahru on  
the 21st day of November 1982 appeal to the Federal Court  
against the whole of the said decision awarding damages  
interest and costs.

FILED AT JOHORE BAHRU THIS  
21ST DAY OF NOVEMBER 1982

Sd. Yeoh Wee Siam  
Sr. Assistant Registrar,  
High Court, Malaya,  
Johore Bahru.

30

Deposit of \$500/- lodged this 21.11.82.

Dated this 21st day of November 1982.

Sd. Jagindar Singh  
First Appellant/Defendant

Sd. P. Suppiah  
Second Appellant/Defendant

Sd. Allen & Gledhill  
Solicitors for the First and  
Second Appellants/Defendants

...2

To:

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

In the  
Federal  
Court

No. 45  
Notice of  
Appeal  
1st & 2nd  
Appellants  
(damages)  
21st November  
1982 (Cont'd)

And to:

The Sr. Assistant Registrar,  
High Court,  
Malaya,  
Johore Bahru.

10

And to:

The abovenamed Respondent/Plaintiff,  
and/or her Solicitors,  
Messrs Subra Maicker & Co.,  
No. 45, 1st Floor, Jalan Ibrahim,  
Johore Bahru.

And to:

The abovenamed Third Appellant/Defendant,  
and/or his Solicitors,  
Messrs Sneath, Delamore & Co.,  
No. 2, Benteng,  
Kuala Lumpur.

20

The address for service of the First and Second Appellants  
/Defendants is Messrs Allen & Gledhill, Advocates & Solicitors,  
Bangunan U.M.B.C. (24th Floor), Jalan Sulaiman, Kuala Lumpur  
01-33.

NOTICE OF APPEAL OF 3RD APPELLANT

In the  
Federal  
Court

IN THE FEDERAL COURT OF MALAYSIA  
(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. 292 OF 1982

No. 46  
Notice of  
Appeal  
3rd  
Appellant  
(Damages)  
21st November  
1982

Between

1. Datuk Jagindar Singh  
2. Datuk P. Suppiah  
3. Arul Chandran ... Appellants

And

Tara Rajaratnam (m.w.) ... Respondent

(In the Matter of Civil Suit No. 284  
of 1979 in the High Court in Malaya  
at Johore Bahru

10

Between

Tara Rajaratnam (m.w.) ... Plaintiff

And

1. Datuk Jagindar Singh  
2. Datuk P. Suppiah  
3. Arul Chandran ... Defendants)

NOTICE OF APPEAL

TAKE NOTICE that Arul Chandran the Third Appellant/  
defendant abovenamed being dissatisfied with the decision of  
the honourable Justice Abdul Razak Bin Dato' Abu Samah given  
at Johore Bahru on the 21st day of November 1982 appeals to  
the Federal Court against the whole of the said decision  
awarding damages interest and costs.

20

Dated this 21st day of November 1982.

Sd. Arul Chandran  
Third Appellant/  
Defendant

Sd. Shearn, Delamore & Co.  
Solicitors for the Third  
Appellant/Defendant

...2

FILED AT JOHORE BAHRU THIS  
21ST DAY OF NOVEMBER 1982

30

Sd. Yeoh Wee Siam  
Sr. Assistant Registrar,  
High Court, Malaya,  
Johore Bahru.

Deposit of \$500/- lodged this 21.11.82.

To:

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

In the  
Federal  
Court

No. 46

Notice of  
Appeal 3rd  
Appellant  
(damages)

21st November  
1982 (Cont'd)

And to:

The Sr. Assistant Registrar,  
High Court,  
Malaya,  
Johore Bahru.

10

And to:

The abovenamed Respondent/Plaintiff,  
and/or her Solicitors,  
Messrs Subra Naicker & Co.,  
No. 45, 1st Floor, Jalan Ibrahim,  
Johore Bahru.

And to:

The abovenamed First and Second Appellants/  
Defendants, and/or their Solicitors,  
Messrs Allen & Gledhill,  
Bangunan U.M.B.C. (24th Floor),  
Jalan Sulaiman,  
Kuala Lumpur 01-33.

20

The address for service of the Third Appellant/Defendant  
is Messrs Shearn, Delamore & Co., Advocates & Solicitors,  
No. 2, Benteng, Kuala Lumpur.



FURTHER MEMORANDUM OF APPEAL OF  
1ST AND 2ND APPELLANTS

In the  
Federal  
Court

IN THE FEDERAL COURT OF MALAYSIA  
(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. 291 OF 1982

No. 47  
Further  
Memorandum of  
Appeal 1st  
& 2nd Appellants  
(Damages)  
12th December  
1982

Between

1. Datuk Jagindar Singh  
2. Datuk P. Suppiah  
3. Arul Chandran ... Appellants

And

Tara Rajaratnam (m.w.) ... Respondent

(In the Matter of Civil Suit No. 284  
of 1979 in the High Court in Malaya  
at Johore Bahru

10

Between

Tara Rajaratnam (m.w.) ... Plaintiff

And

1. Datuk Jagindar Singh  
2. Datuk P. Suppiah  
3. Arul Chandran ... Defendants}

MEMORANDUM OF APPEAL

Jagindar Singh and P. Suppiah, the First and Second  
Appellants abovenamed appeal to the Federal Court against  
the whole of the decision awarding damages interest and  
costs of the Honourable Mr. Justice Abdul Razak bin Dato'  
Abu Samah given at Johore Bahru on the 21st day of Novem-  
ber 1982 on the following grounds:

20

1. The learned Judge erred in law in considering  
the damages only on the basis of fraud.
2. The learned Judge misconstrued the valuation  
evidence in holding at P.8 B.C. that there was "the clearest  
recognition by the government itself that there has been a  
very sharp and steady increases in prices contrary to what  
D.W.4 said even after 1974...".

30

3. The learned Judge erred in holding that there was  
no sale within the immediate vicinity which could safely  
be used to reflect the true value of the property in July

...2/-

1975 and in holding that the comparable properties relied upon by D.W.4 were defective and inferior to the plot in issue.

4. The learned Judge erred in placing any weight on the evidence of P.W.3 as to offers said to have been received by him.

5. The learned Judge misconstrued P.W.6's evidence in holding that its effect was to give an average land value of \$4.80 per sq. ft.

10 6. The learned Judge erred in principle in not accepting the expert evidence of D.W.4 that fiscal measures to curb speculation at the material time influenced prices.

7. The learned Judge ought to have accepted the evidence of D.W.4 and rejected the evidence of P.W.3 and P.W.6

8. The learned Judge's finding that the value of the property in July 1975 was \$1.70 per sq. ft. was against the weight of the evidence.

20 9. The learned Judge erred in law in holding that the changes in the value of the property between the date of the Transfer of the same from the Plaintiff to the Second Defendant and the earliest time the Action should have reasonably been brought to Judgment should be added to the value of the property to the date of such Transfer.

10. If the learned Judge was right in so holding as a matter of law the same was not pleaded by the Plaintiff and there was no evidence of any such change in value and the learned Judge ought not to have held that there was an increase of 140% over the years 1975 - 1982.

30 11. If the learned Judge was right in holding that the annual rate of increase of land prices was 20% a year and was relevant admissible and established he erred in principle in holding that 1982 was the earliest time the action should have reasonably been brought to Judgment.

In the  
Federal  
Court

No. 47  
Further  
Memorandum  
of Appeal  
1st & 2nd  
Appellants  
(damages)  
12th December  
1982 (Cont'd)

...3/-

In the  
Federal  
Court

No. 47  
Further  
Memorandum  
of Appeal  
1st & 2nd  
Appellants  
(damages)  
12th December  
1982 (Cont'd)

12. The learned Judge erred in principle in adding the value of the house to the value of the land.

13. The learned Judge erred in law in not deducting the sums of \$62,000/- and \$120,000/- paid by or on behalf of the Second Defendant from the value of the land.

14. If the learned Judge was on page 23D - F holding that the damages for breach of contract were the same as the damages for fraud or that a single award in the case of alternative remedies would not lead to prejudice he erred in law.

10

15. The learned Judge erred in law in holding that the First Defendant and the Second Defendant are jointly and severally liable for the breach of contract.

16. If contrary to the Appellant's contentions the learned Judge was right to award the Plaintiff additional damages by reason of the change in value of the property then he erred in principle in awarding the Plaintiff interest on the sum of \$370,260/- from July 1975 to July 1982.

Dated this 12th day of December 1982.

20

Sgd. Jagindar Singh

First Appellant

Sgd. P. Suppiah

Second Appellant

Sgd. Allen & Gledhill

Solicitors for the First  
and Second Appellants

...4/-

To:

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

In the  
Federal  
Court

No. 47  
Further  
Memorandum  
of Appeal  
1st & 2nd  
Appellants  
(damages)  
12th December  
1982 (Cont'd)

And to:

The Senior Assistant Registrar,  
High Court,  
Malaya,  
Johore Bahru.

10

And to:

The abovenamed Respondent,  
and/or her Solicitors,  
Messrs Subra Naicker & Co.,  
No. 45, 1st Floor, Jalan Ibrahim,  
Johore Bahru.

And to:

The abovenamed Third Appellant,  
and/or his Solicitors,  
Messrs Shearn Delamore & Co.,  
No. 2, Benteng,  
Kuala Lumpur.

20

The address for service for the First and  
Second Appellants is Messrs Allen & Gledhill, Bangunan  
U.M.B.C. (24th Floor), Jalan Sulaiman, Kuala Lumpur 01-33.

In the  
Federal  
Court  
No. 47  
Further  
Memorandum  
of Appeal  
1st & 2nd  
Appellants  
(damages)  
12th December  
1982 (Cont'd)

IN THE FEDERAL COURT OF MALAYSIA  
(Appellate Jurisdiction)  
FEDERAL COURT CIVIL APPEAL NO. 291  
OF 1982

---

Between

1. Datuk Jagindar Singh
2. Datuk P. Suppiah
3. Arul Chandran

...                      ...      Appellants

And

Tara Rajaratnam (m.w.)

...                      ...      Respondent

(In the Matter of Civil Suit No. 284  
of 1979 in the High Court in Malaya  
at Johore Bahru

Between

Tara Rajaratnam (m.w.)

...                      ...      Plaintiff

And

1. Datuk Jagindar Singh
2. Datuk P. Suppiah
3. Arul Chandran

...                      ...      Defendants)

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MEMORANDUM OF APPEAL

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Filed this 12th day of December, 1982.

Messrs Allen & Gledhill,  
Advocates & Solicitors,  
Bangunan U.M.B.C.  
(24th Floor),  
Jalan Sulaiman,  
Kuala Lumpur 01-33.

FURTHER MEMORANDUM OF APPEAL  
OF THE 3RD APPELLANT

IN THE FEDERAL COURT OF MALAYSIA  
(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. 292 OF 1982

Between

1. Datuk Jagindar Singh  
2. Datuk P. Suppiah  
3. Arul Chandran ... Appellants

And

Tara Rajaratnam (m.w.) ... Respondent

(In the Matter of Civil Suit No. 2 84  
of 1979 in the High Court in Malaya  
at Johore Bahru

In the  
Federal  
Court

No. 48  
Further  
Memorandum  
of Appeal  
3rd Appellant  
(damages)  
12th December  
1982

10

Between

Tara Rajaratnam (m.w.) ... Plaintiff

And

1. Datuk Jagindar Singh  
2. Datuk P. Suppiah  
3. Arul Chandran ... Defendants)

MEMORANDUM OF APPEAL

20

Arul Chandran, the Third Appellant abovenamed  
appeals to the Federal Court against the whole of the deci-  
sion awarding damages interest and costs of the Honourable  
Mr. Justice Abdul Razak bin Dato' Abu Samah given at Johore  
Bahru on the 21st day of November 1982 on the following  
grounds:

1. The learned Judge erred in law in considering  
the damages only on the basis of fraud.
2. The learned Judge misconstrued the valuation  
evidence in holding at P.8 B.C. that there was "the  
clearest recognition by the government itself that there  
has been a very sharp and steady increases in prices  
contrary to what D.W.4 said even after 1974...".
3. The learned Judge erred in holding that there was  
no sale within the immediate vicinity which could safely  
be used to reflect the true value of the property in July 1975

30

...2/-

In the  
Federal  
Court

No. 48

Further  
Memorandum  
of Appeal

3rd Appellant  
(damages)

12th December  
1982 (Cont'd)

and in holding that the comparable properties relied upon by D.W.4 were defective and inferior to the plot in issue.

4. The learned Judge erred in placing any weight on the evidence of P.W.3 as to offers said to have been received by him.

5. The learned Judge misconstrued P.W.6's evidence in holding that its effect was to give an average land value of \$4.80 per sq. ft.

6. The learned Judge erred in principle in not accepting the expert evidence of D.W.4 that fiscal measures to curb speculation at the material time influenced prices.

7. The learned Judge ought to have accented the evidence of D.W.4 and rejected the evidence of P.W.3 and P.W.6.

8. The learned Judge's finding that the value of the property in July 1975 was \$1.70 per sq. ft. was against the weight of the evidence.

9. The learned Judge erred in law in holding that the changes in the value of the property between the date of the Transfer of the same from the Plaintiff to the Second Defendant and the earliest time the Action should have reasonably been brought to Judgment should be added to the value of the property to the date of such Transfer.

10. If the learned Judge was right in so holding matter of law the same was not pleaded by the Plaintiff and there was no evidence of any such change in value and the learned Judge ought not to have held that there was an increase of 140% over the years 1975 - 1982.

11. If the learned Judge was right in holding that the annual rate of increase of land prices was 20% a year and

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20

30

...3/-

was relevant admissible and established he erred in principle in holding that 1982 was the earliest time the action should have reasonably been brought to Judgment.

12. The learned Judge erred in principle in adding the value of the house to the value of the land.

13. The learned Judge erred in law in not deducting the sums of \$92,000/- and \$120,000/- paid by or on behalf of the Second Defendant from the value of the land.

10 14. If the learned Judge was on page 23D - F holding that the damages for breach of contract were the same as the damages for fraud or that a single award in the case of alternative remedies would not lead to prejudice he erred in law.

15. The learned Judge erred in law in holding that the First Defendant and the Second Defendant are jointly and severally liable for the breach of contract.

20 16. If contrary to the Appellant's contentions the learned Judge was right to award the Plaintiff additional damages by reason of the change in value of the property then he erred in principle in awarding the Plaintiff interest on the sum of \$370,260/- from July 1975 to July 1982.

Dated this 12th day of December 1982.

Sgd. Shearn & Delamore  
Solicitors for the  
Third Appellant.

In the  
Federal  
Court  
No. 48  
Further  
Memorandum  
of Appeal  
3rd Appellant  
(damages)  
12th December  
1982 (Cont'd)

...4/-



In the  
Federal  
Court  
No. 48  
Further  
Memorandum  
of Appeal  
3rd Appellant  
(damages)  
12th December  
1982 (Cont'd)

To:

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

And to:

The Senior Assistant Registrar,  
High Court,  
Malaya,  
Johore Bahru.

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And to:

The abovenamed Respondent,  
and/or her Solicitors,  
Messrs Subra Naicker & Co.,  
No. 45, 1st Floor, Jalan Ibrahim,  
Johore Bahru.

And to:

The abovenamed 1st and 2nd Appellants,  
and/or their Solicitors,  
Messrs Allen & Gledhill,  
Bangunan U.M.B.C.,  
(24th Floor),  
Jalan Sulaiman,  
Kuala Lumpur 01-33.

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The address for service for the Third Appellant  
is Messrs Shearn Delamore & Co., No. 2, Benteng, Kuala  
Lumpur 01-19.

IN THE FEDERAL COURT OF MALAYSIA  
(Appellate Jurisdiction)  
FEDERAL COURT CIVIL APPEAL NO. 292  
OF 1982

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In the  
Federal  
Court  
No. 48  
Further  
Memorandum  
of Appeal  
3rd Appellant  
(damages)  
12th December  
1982 (Cont'd)

10

Between  
1. Datuk Jagindar Singh  
2. Datuk P. Suppiah  
3. Arul Chandran ... Appellants  
And  
Tara Rajaratnam (m.w.) ... Respondent  
(In the Matter of Civil Suit No. 284  
of 1979 in the High Court of Malaya  
at Johore Bahru)

Between  
Tara Rajaratnam (m.w.) ... Plaintiff  
And  
1. Datuk Jagindar Singh  
2. Datuk P. Suppiah  
3. Arul Chandran ... Defendants)

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MEMORANDUM OF APPEAL

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Filed this 12th day of December 1982.

Messrs Shearn Delamore  
& Co.,  
Advocates & Solicitors,  
No. 2, Benteng,  
Kuala Lumpur 01-19.

NOTES OF LEE HUN HOE  
C.J. (BORNEO)  
10th JANUARY TO 20th  
JANUARY 1983

In the  
Federal  
Court

No. 49  
Notes of  
Lee Hun Hoe  
C.J. (Borneo)  
10th January  
1983

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

Federal Court Civil Appeals Nos. 215, 216 and  
291 & 292 of 1982

Between

1. DATUK JAGINDAR SINGH
2. DATUK P. SUPPIAH
3. ARUL CHANDRAN ... Appellants

And

TARA RAJARATNAM (m.w.) ... Respondent

10

(In the Matter of Civil Suit No. 284 of 1979  
in the High Court in Malaya at Johore Bahru

Between

TARA RAJARATNAM (m.w.) ... Plaintiff

And

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

Coram: Lee Hun Hoe, C.J. (Borneo)  
Salleh Abas, F.J.  
Abdoolcaader, F.J.

20

NOTES OF SUBMISSIONS

MONDAY, 10TH JANUARY, 1983

9.30 a.m. Mr. Terrence Cullen, Q.C. (assisted by  
Mr. Ronald T.S. Khoo and Mr. Chin Yew Meng)  
for appellants.

Mr. H.E. Cashin (assisted by Mr. Subra Naicker)  
for respondent.

Q.C. Against Razak J's decision.

Substantial parts of record irrelevant.

30

If learned Judge right plaintiff lost over a million  
dollars.

70 grounds.

Can be briefly summed up.

Case of a widow against three advocates.

Learned Judge went widely wrong in law. He allowed  
his heart to rule on allegations of fraud and breach  
of trust. Hence without charge learned Judge found  
them guilty of contempt. That has been corrected.

40

Plaintiff had no case at all.  
 Breach of contract pure fact.  
 Fraud                                 )  
 Misrepresentation                 ) more on law.  
 Fraud - two questions.

In the  
 Federal  
 Court  
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 C.J.(Borneo)  
 10th January  
 1983 (Cont'd)

What do a person hopes to gain?  
 What was his prospect of not being caught  
 and made liable?

Neither the learned Judge nor the plaintiff's  
 10 counsel ask the two questions.  
 Learned Judge found plaintiff's land worth \$300,000/-.  
 So each defendant stood to gain \$150,000/-.  
 Not enough to start a new life elsewhere.  
 Value of property irrelevant except on question of damages.  
 Value vital in fraudulent misrepresentation.  
 Plaintiff has to show she gave more than she received.  
 This type of case. Transfer. Motive is given.  
 Did they give full value.  
 But learned Judge and plaintiff's counsel said  
 20 value irrelevant except on damages.  
 Appellant could not disappear in cases of other  
 confidence tricksters.  
 30/3/74 - Transfer.  
 Volume 6         Para. 142.  
 Page 52.         Plaintiff accepted that the transfer was left  
 blank as to date.  
 Normal common conveyance practice.  
 Page 54         "The fact that a.....  
 30 .....2nd defendant."  
 "The fraud.....  
 .....thereafter."  
 Page 157         Paras. 279 - 283.  
 "On the basis.....  
 .....picture."  
 Claim on common law fraud was put to the learned Judge.  
 Property was subject to charges to Chung Khiaw Bank.  
 Plaintiff would find out about the transaction.  
 She found when she was evicted.  
 40 This fraud would be doomed to failure from the outset.  
 Having negotiated with Devan they prepared transfer  
 documents.

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<u>Volume 2</u>	Page 57.	
<u>Eusoffe</u>	No attestation on 5/7/74.	
<u>Q.C.</u>	Practice in England.	
<u>Eusoffe</u>	See page 58.	
<u>Q.C.</u>	Can't be dated before.	
	Transfer can be effected on that date.	
	They took away document and at page 30 Volume 2	
	transfer confirmed.	
	Page 31 - description of property.	
	The manuscript was written at the house. A	10
	right to repurchaser.	
	Plaintiff is not a simpleton.	
	Passed School Certificate.	
	Agreement for a sale clear.	
	If the plaintiff is sensible she would see it	
	was not a security.	
	Statement of Claim on fraud sets out new matters.	
	Would have been brought out at an earlier stage.	
	Syed Othman, J. said this ground was being brought up.	
	Evidence in support has to be strong.	20
	Simply not a case here.	
	30/3/74 - Payment on transfer.	
	Transfer not dated.	
	27/4/74 - 1st appellant paid Hongkong & Shanghai	
	Banking Corporation \$120,000/-.	
	5/7/75 - Paid off Chung Khiaw Bank.	
	Stood below \$92,000/-.	
	Chung Khiaw Bank obliged to discharge the charges.	
	Then the transfer was dated 5/7/75	
	and duly registered.	30
	So 2nd appellant became the registered proprietor	
	31/7/75 - 2nd appellant transferred to 3rd appellant	
	a solicitor in Singapore.	
	Transfer at the direction of 1st appellant	
	who had paid the two sums to the two banks.	
	The two appellants held as bare trustees	
	or nominees for the 1st appellant.	
	2nd appellant not to transfer within one	
	Year from 30/3/74 or other date.	

4.

Not in breach of transfer on 5/7/75.  
It would be breach if date ran from 5/7/75 on  
payment to Chung Khiaw Bank.  
20/3/76 - Sessions Court.  
Registered proprietor.  
8/76 - Judgment.  
Plaintiff and Devan could not repay.  
Even if based on security.  
Borrowers losing house who could not repay in time.  
Many affidavits confusing.  
Schedule of proceeding submitted.

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10

Volume 8  
Page 193  
Page 194

Statement of Claim.  
Defence.  
Not a word about client solicitor relationship.  
Fraudulent representation and breach of trust.  
20/3/75 - Singapore action before the year was up.  
Section 340 of the National Land Code.

20

Abas

"2) The title or interest of any such  
person or body shall not be indefeasible.....".  
The Singapore action would indicate the whole  
transaction was meant to be a security and not an outright trans

Q.C.  
Volume 2  
Page 66.  
Page 68

In that sense yes.  
Statutory Declaration.  
1st caveat put up by plaintiff.  
Para. 2.  
Para. 4.  
Caveat lapsed.

30

Volume 3  
Page 36

Originating Summons.  
Affidavit.  
Para. 3.  
"Accordingly I executed....."  
....."A".  
Similar to para. 2 of Statutory Declaration.  
Para. 4.  
"blank transfer" is actually  
"blank date"

40

In the  
Federal  
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	This is normal conveyancing practice.	
	Breach of contract is a breach contract.	
	Para. 8 - Singapore action.	
	Para. 9 - Singapore action.	
	Para. 13 - First mention of fraud.	
	Para. 14 - Also mentions fraud.	
Page 367	Application for stay.	
	Different firm of solicitors.	
	Para. 2 - sets out agreement.	
	Para. 5 - breach of agreement selling within a year.	10
Pages 92 - 102	Statutory Declaration.	
	Sworn in Singapore.	
	Supports.	
	Complaint to Law Society in Singapore.	
	Para. 5 - "Our property is of some importance."	
	Para. 9.	
Page 98	Dr. Das's Statutory Declaration.	
Page 102	Devan's Statutory Declaration.	
	Para. 8.	
	Solicitor and client relationship.	20
Page 96	Respondent's supplementary declaration.	
	Para. 8 - no limitation as to time of payment.	
	Mentioned first time.	
Page 63	Amended Statement of Claim.	
Volume 8		
Pages 225-227		
Volume 2		
Pages 230-242		
Page 233	Para. 9.	
	"I humbly say that.....	30
	(a).....misrepresentation	
	or fraud.....	
	(b).....in my favour."	
	Paras. 10, 11 and 12 expressed representations.	
	Para. 13 - implied representations.	
	Para. 14 - Not limited to one year.	
	Para. 15 - Chung Khiaw Bank not paid untill 5/7/74.	
	Hongkong & Shanghai Banking Corporation	
	not paid until 27/4/74.	
	Para. 16 - Alleging fraud.	40
	Para. 18 - Security transaction.	

Volume 1  
Page 35  
Page 85

Statement of Claim dated 30/8/79.  
Items 11 and 12.

In the  
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12.45 p.m. Adjourned till 2.30 p.m.

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2.30 p.m.

Volume 1  
Page 39

Sum not paid according to agreement.  
Breach of agreement has to be looked into.  
5/78 - Sold by 3rd appellant to Jet Age  
Construction Company, Volume 2 page 147.  
1st appellant had originally 90%.  
Later own 60%.  
(See Volume 4 page 160)

10

Volume 1  
Page 40

Para. 10 - breach of agreement.  
Para. 11 - undue influence.

Page 88

Item 31.

Page 89

Item 44 - breach of trust.

Page 43

Para. 12 - fraud.

20

Page 91

Item 58.

Page 44

Para 12(iv).

Page 91

Item 61.

Volume 4  
Page 109

3rd appellant appeared in person.  
Submission of no case to answer.

Cashin

Did not raise question of election.

Q.C.

Snell's Equity, 28th Edition, page 536.  
Fraudulent misrepresentation.  
See Volume 7 page 116.  
Submission.

30

Case in fraud does not get off the ground.

Volume 8

Will go into the judgment.

Page 11.

Pages 15-22

Set out appellants' evidence without finding.

Submit date ran from 30/3/74.

If respondent did not pay by 30/3/75 there would be a breach



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Federal  
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7.

Payment made to Hongkong and Shanghai Banking  
Corporation on 27/4/74.

Payment made to Chung Khiaw Bank on 5/7/75.

Breach never treated as fundamental breach.

Alternative is that time ran from time money paid.

Was there a variation in the agreement?

See Volume 4 page 183-5.

"The 1st defendant.....

.....2nd February."

Evidence of 2nd appellant.

That was the variation.

Cross-examination at page 201, 204.

Volume 2

Page 95 - Letter dated 19/8/74.

Learned Judge wrong as Devan did operate the account.

Page 96

Letter dated 16/9/74.

All extrinsic evidence shows that there was variation.

Hence submit learned Judge wrong.

4.15 p.m. - Adjourned till 9.30 a.m.

(Sgd) Lee Hun Hoe  
Chief Justice (Borneo); 20  
10/1/83

11th January  
1983

TUESDAY, 11TH JANUARY, 1983

Coram: Lee Hun Hoe, C.J. (Borneo)  
Salleh Abas, F.J.  
Abdoolcader, F.J.

9.40 a.m.

Whether there has been a breach of agreement.

Whether there has been variation.

Volume 8

Page 23D-26D

Learned Judge - 2nd defendant would pay within one  
week. After one week the overdraft  
came to \$120,000/-.

Irrelevant.

Submit quite irrelevant whether  
discovery made a week after - Difficult  
to remember event after such a long time.  
Plaintiff did not treat the fundamental  
breach as repudiated.

Volume 3

Page 132

Dr. Das Account.

1/4/74 - \$120,717.75.

27/4/74 - \$121,619.80

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8.

Learned Judge's finding why insert \$110,000/- when they knew it was \$120,000/-.

In the  
Federal  
Court

Volume 2  
Page 145

Devan's account.

Final point taken by learned Judge. Singapore action.

Plaintiff's evidence - Volume 4 page 10A

page 13E

Dr. Das's evidence - page 47F - 48.

No. 49  
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Lee Hun Hoe  
C.J. (Borneo)  
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10

Volume 3  
Page 48  
Page 38

Devan's affidavit dated 26/7/76.

Para. 8 - plaintiff knew of the arrangement.

Quite wrong for learned Judge to reject Suppiah's evidence

Volume 2  
Page 112

Page 100.

Page 101.

Page 113.

Page 45.

Registration cannot be effected because of caveat by Suppiah.

20

Learned Judge ignored this.

He held that not on Devan's benefit to vary.

He held Singapore action in breach of agreement.

Volume 4  
Page 208

2nd appellant did not pay Chung Khiaw Bank because Devan was still operating the Chung Khiaw Bank.

Devan's creation of another charge of \$30,000/- will not affect Suppiah.

Volume 2  
Page 46

30

Letter dated 22/6/75 from Suppiah to Chung Khiaw Bank.

Letter dated 1/7/75 from Yeow & Chin.

Suppiah learned overdraft was \$92,000/-. Throughout the whole transaction Devan had been acting as plaintiff's agent.

Page 48 of Bundle of Cases.

Terrapin International Limited v. Inland Revenue Commissioners (1976) 1 W.L.R. 665.

"This is quite.....

.....took place."

No pleading.

No cross-examination.

40

In the  
Federal  
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No. 49.  
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Lee Hun Hoe  
C.J.(Borneo)  
11th January  
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Yet learned Judge found 1st appellant guilty  
of fraud in attesting.

Submit learned Judge wrong.

Whether Devan was plaintiff's agent.

Submit he was.

He was co-owner of property.

Volume 3

Page 92

Para. 4.

Page 102

Para. 2.

Volume 4

Page 120

10

Volume 3

Page 25

Page 16

Page 17

Page 18

Page 50D

Page 19

Page 23L

Page 28

1. Plaintiff and Devan went on operating  
Chung Khiaw Bank account.

20

2. No reason for 1st appellant to pay \$121,000/-  
to Hongkong & Shanghai Banking Corporation not pressing  
to pay. The 1st appellant was liable for \$110,000/-.

3. Plaintiff, Devan and Dr. Das knew that  
1st appellant had paid \$121,000/- and Dr. Das attempted  
to repay the money and get back property.

4. Plaintiff and Devan knew only \$92,000/- was  
paid in July, 1975. No complaint that it should be  
\$110,000/-. At that time Yeow & Chin acting for them.  
They sought to get \$140,000/-.

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5. They continued to live there after discharge  
of Chung Khiaw Bank. Might to live there until end of  
1975 on account of variation.

10.

6. Unless there has been variation as Suppiah said plaintiff did not receive the full \$220,000/-.  
Payment \$203,000/-.  
So variation.  
Balance used to set off for occupation.  
For those reasons Your Lordship should hold there was a variation.  
No implication for the year to run from date of payment.  
Variation does not change it.  
Section 42 Contract Act.  
We say learned Judge wrong to say that there was no variation.

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10

Page 244

Para. 9.

Volume 4

Page 229

Volume 8

Page 189

20

Volume 2

Page 211

Para. 7.

Volume 8

Page 31

".....In the circumstances, the plaintiff is entitled to hold the 1st or the 2nd defendant liable."

But learned Judge held them both liable for damages. Submit learned Judge wrong.

The Law of Agency - Bowstead 14th Edition.

Election and Merger.

Section 186 of Contract Act.

12.20 p.m. - Adjourned till 2.15 p.m.

30

2.20 p.m.

Undue influence.

Volume 8

Page 32C - 41 - Section 16 of Contract Act.

Section 16(1) ) require plaintiff to establish  
and 16(2)(a) } solicitor-client relationship.

Section 3 - switch of burden if transaction unconscionable.

L.R. 47 I.A. 1.

In the  
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Poosathurai v. Kannappa Chettiar & Ors. L.R. I.A.  
1919-20 pages 1 and 3.  
"It is a mistake.....  
.....undervalue."  
Under equitable rule still applies in this country.

Bundle of  
Cases II  
Page 8 Halsbury's Laws, 3rd Edition, Volume 36, page 85.  
Para. 118, para. 119, para. 121.

Page 403 Encik Noriah v. Shaik Allie bin Omar (1929) A.C. 127, 135. 10  
Page 135 - "The decision in each case.....  
.....presumption."

Page 179 Allison v. Clayhills The Law Times Volume LCVII 704 & 712.

Bundle of  
Cases II  
Page 620 Edwards v. Williams Volume 32 page 763 and 765.  
Submit learned Judge took far too narrow a view  
by merely looking at P.27 on question of client and  
solicitor relationship.

Volume 4  
Pages 9-11  
Page 18F

Volume 8  
Page 270

Last paragraph.

Volume 4  
Page 130E  
Page 193D

Cross-examination of 1st appellant.  
Cross-examination of 2nd appellant.  
The price was fixed on a valuation produced by  
Devan.  
The bargain was on the face seemed to be a sale.  
Submit nothing unconscionable to switch burden  
on to the appellants.  
Nothing unfair in sale and re-sale at the same  
price. Bargain not unfair.  
Learned Judge went wrong as he did not give any  
weight to the Edwards v. Williams concept.

Volume 8

Pages 37B-39 Reviewed judgment.

Page 40 If learned Judge wrong on question of "unconscionable"  
he would be wrong on the matter.

Therefore learned Judge wrong in saying burden  
had switched to appellants.

In the  
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Bundle ofCases II

Page

Western Bank of Scotland v. Addie (1867) L.R. H.L.

10

S.C. 145.

Bundle ofCases I

Page 6

Steedman v. Frigidaire Corporation

Unfortunately Devan is dead and so is Yeow.

Volume 2

Pages 42, 43,  
99, 46, 47,  
48, 49, 50,  
51, 52.

20

4.10 p.m. - Adjourned till 9.30 a.m.

(Sgd) Lee Hun Hoe  
Chief Justice (Borneo)  
11/1/83

WEDNESDAY, 12TH JANUARY, 1983

9.30 a.m.

12th January  
1983

J.C.

Yesterday I went into the correspondence and the  
oral evidence whether Yeow & Chin was retained by respondent.

Volume 4

Pages 121D-125

30

Page 156

"Q. I put it to you.....

A. It is not true."

Page 173E

Shown P.52. "I asked Yeow.....

.....Devan's account."

Page 175A

"I say now that Yeow &amp; Chin were acting.....

.....Devan."

Page 185D

2nd appellant's evidence.

".....There we received a letter.....

.....my name."

Page 9D

Respondent knew of Chung Khiaw Bank's account.

40

Page 26A

of course respondent knew state of account.

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Volume 3  
Page 137

Requisition for stocks and shares.

Yeow & Chin were holding respondent's title deeds recovering money on respondent's behalf.

Inescapable that respondent and Devan that land had been transferred and because of variation they were getting \$92,000/- instead of \$103,000/-.

Retention of Yeow & Chin vital to appellants' case. Was \$220,000/- a fair price for appellants to pay.

On expiry of contractual right she could seek rescission for fraudulent misrepresentation. She could not make restitution so could not sue on undue influence.

10

#### Breach of Trust

Volume 1  
Page 42

Solicitor and client relationship.  
No evidence.

Volume 8  
Page 41D

"A person acting as solicitor.....  
.....undue influence."

20

Cordery on Solicitors.

No special circumstances pleaded.

Respondent's submission startling.

Every solicitor will be in trouble.

Must see the capacity of the solicitors.

Solicitors may be holding the titles as purchasers or mortgagers and not as solicitors. That was the position of 2nd appellant.

Pages 41-42 "It is clear therefore.....  
.....trust."

30

Submit claim is misconceived.

Fraud.

Submit learned Judge was wrong.

Appellants no longer have the property.

Respondent could only claim damages for fraud.

So far as civil action fraud has a special meaning.

It does not mean merely for general dishonesty.

Fraud has a precise meaning.

Bundle of  
Cases I  
Page 415

Barclays Bank Limited v. Cole (1967) 2 Q.B. 738.  
Page 743G Denning.

".....Robbery includes.....  
.....  
'Fraud'in ordinary speech.....  
.....representations.....  
  
Page 744 Diplock.  
"Robbery.....  
.....in this sense."  
"Mr. Ashe Lincoln has contended.....  
.....dishonesty."

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10

Bundle of  
Cases I  
Page 148

Clarke & Linsil.  
Chapter 17 FRAUD.  
Fraud has a procise and limited meaning as a  
term of art.

20

Bundle of  
Cases I  
Page 449

Spencer Bower.  
Para. 19 ) Statement which are  
Para. 20 ) promises only.  
Para. 21 - ethics.  
Para. 22 - Representation distinguished from warranty.  
Para. 24 - Representation repeated as a promise.

George Wimpey & Co. Ltd. v. Sohn & Another (1967)  
1 Ch. 487.  
Page 502 - Herman, L.J.  
"The Judge held.....  
.....contract."  
Page 509 - Russel, L.J.  
"Before the contract the vendors through.....  
.....provision."

30



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Lee Hun Hoe Page 43  
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Once representation became a term of contract  
then the plaintiff or respondent cannot sue on contract.  
Not right for learned Judge to go outside  
the pleadings.

Particulars of fraud.

12(a)(i) No evidence.

(ii) Particulars at page 91 item (58).

Contractual promise to pay \$220,000/-  
not a representation.

Can be liable on contract if promise  
not fulfilled.

My learned friend said seven days.

If that was so then there was a breach

(iii) No evidence.

(iv) Particulars at page 91 item (61).

Submit no evidence.

Collateral agreement.

(v) Not a representation.

Particulars at page 80 items (62) and (63).

Referred to para. 4(e) and (f) of

Statement of Claim.

If she relied on such a promise her remedy is on  
contract.

11.10 a.m. Adjourned.

11.45 a.m. Resumed.

Q.C.

Fraudulent misrepresentation due to misrepresentation  
of facts.

Volume 4  
Page 8D

"When I read it I saw .....

.....land back."

Brikon Investments Ltd. v. Carr (1979) 2 W.L.R. 737.

Denning put it on High Tree's principle.

Roskill and Cumming-Brace on collateral contract.

City and Westminster Properties v. Mudd (1959) Ch. 129.

Volume 1  
Page 44

Para. 12(a)(vi) goes to the undertaking.

Para 12(b).

Then it went on concerning subsequent events. May be  
breach of contract or breach of trust if she was right  
but certainly not fraud.

No such thing as fraudulent breach.

May be breach of contract.

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Particulars of fraud of 3rd defendant

If 3rd defendant promised breach of contract between 2nd defendant and plaintiff. He may be liable for promise of breach of contract. There must be evidence.

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Volume 8  
Page 42C

Dealing with fraud.

Under section 340 of National Land Code if land cannot be recovered then can sue for damages.

Page 44B

Section 17 of Contract Act.

Referred to sections 10 - 18 of Contract Act.

Fraud wider than misrepresentation.

Submit learned Judge misdirected himself.

10

2.15 p.m. Resumed.

Cashin

Ask leave for Subra Naicker to be absent.

Court

Granted.

Bundle of  
Cases I,  
Page 36.

Saminathan v. Pappa (1981) 1 M.L.J. page 121 & 123B.

Page 123B - "As regards fraud.....  
.....the land."

Page 124A - "It is to be observed.....  
.....office."

"During the course .....  
.....another."

Page 125B - Lord Diplock:

"As registered proprietor.....  
.....Saminathan."

Page 126E - "Their Lordships accordingly.....  
.....this matter."

"There were, however, two other findings.....  
.....340(2)(a)."

20

30

Volume 8  
Pages 47-59

Transfer with right to purchase.

If Your Lordship accept our submission that there was a variation than there would be no breach of that contractual term.

Even I am wrong on the Mudd concept she would have to establish beyond reasonable doubt on fraud.

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A. Kanapathi Pillay v. Joseph Chong (1981)2 M.L.J. 117.

Page 120.

"Second Issue

"It was contended.....

.....the developer."

Only pleaded representation learned Judge could  
consider concerns "payment as you like."

Pages 59E - Submit all subsequent events of no  
85D consequence.

10

COLLUSION.

Page 85E

Section 10 of Evidence.

No basis on claim of fraud against 3rd appellant.

Bundle of

Chapple v. Electrical Trades Union and Others

Cases I

(1961) 1 W.L.R. 1290.

Page 1

Page 92E

4.10 p.m. Adjourned till tomorrow at 9.30 a.m.

(Sgd) Lee Hun Hoe,  
Chief Justice (Borneo)  
12/1/83.

20

13th January  
1983

THURSDAY, 13TH JANUARY, 1983

Coram: Lee Hun Hoe, C.J. (Borneo)  
Salleh Abas, F.J.  
Abdoolcader, F.J.

9.30 a.m.

Q.C.

Volume 2

Page 230

Respondent's affidavit.

Para. 18 - security.

Volume 4

page 272D

Cross-examination of 3rd appellant.

30

Volume 8

page 101F

Submit astonishing finding. Page 102B.

We have affidavit of Majid.

Volume 3

page 339

Affidavit.

Para. 7 - The plaintiff (3rd appellant) did not  
turn up at any hearing.

Volume 4  
Page 251 D&E To show 3rd appellant was absent.  
 247D

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10 Volume 8  
Page 103  
 Page 289 Para. 25 - Complaint.  
 Meeting.  
 Page 163 Minutes of Meeting.  
 Page 166 Material passages.  
 Page 168  
 Page 108F-  
 109A  
 Page 111  
 Page 112A  
 Page 194 Defence of Tara in Sessions Court.  
 Page 232 Syed Uthman J's judgment.  
 Page 115 Plaintiff said land worth a million dollars.  
 20 Volume 2  
Page 63 Land Speculation Tax.  
Volume 3  
Page 58 Notification of Disposal Chargeable Asset.  
 11.10 a.m. Adjourned.  
 11.40 a.m. Resumed.

Q.C.  
 (continued)

30 Volume 8  
Page 117E  
 Page 122D  
 Page 123B  
 Page 125A If plaintiff failed in this appeal then the  
 counterclaim would succeed.  
 Page 126 Referred to Syed Uthman J's judgment.  
 Submit learned Judge's assessment of respondent's  
 credibility was wrong.  
 Not true she did not know about payments to  
 Hongkong & Shanghai Banking Corporation and Chung Khiaw Bank.  
 This claim cannot be anything but a breach of  
 contract.  
 Completion delay at Devan's request.

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Contractual claim is the only one possible action.  
Submit no breach.

If date ran from 5/7/75 then there would be  
breach but no damage.

Account for profit not possible as respondent could  
not get restitution.

Liability dealt with.

Will now deal with damages.

Bundle of Nanyang Manufacturing Co. v. The Collector of  
Cases I Land Revenue, Johore (1954) 20 M.L.J. 69 & 71.

Page 466

This is applied in Hock Lim Estate Sdn. Bhd.  
v. Collector of Land Revenue, Johore Bahru (1980)  
1 M.L.J. 210 & 211.

Safest guide comparable sales.

Weight to be given to offer.

Abdul Rahim v./Secretary of State A.I.R. (1926)  
Lahore 618.

Pribhu Diyal v. Secretary of State 135 I.C. 1932  
Lahore 183.

Expert evidence.

Volume 2 Report of Valuation by Mohd Kepol bin Bidin  
Page 77 (dated 5.7.75).

\$4.50 p.s.f.	980,100
Building	126,000
	<u>\$1,106,100</u>

Volume 4  
Page 61

Evidence in court - Kepol.

12.30 p.m. Adjourned till 2.15 p.m.

2.15 p.m. Resumed.

Q.C.

Volume 3  
Page

1st Valuation Report - Chong Kin Seng dated 26/2/82.

Land at \$42,000/- p.a.	210,000
Building	48,000
	<u>258,000</u>

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20

30

2nd Valuation Report - Chong Kin Seng dated 19/10/79

Land at \$3/- p.s.f. 653,400

Building 48,000

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701,400

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Page 83

Chong Kin Seng's evidence.

Page 101C

Mohd Rashidi b. Mohd Nor's evidence.

Page 102E

Cross-examination.

10

Volume 3  
Page 279

Valuation Report - Parampathy

Page 133

Sketch.

Page 134

Schedule of comparison.

Volume 4  
Page 273

Evidence of Parampathy

Volume 9Pages 160-  
178

Judgment on Damages.

Pages 182 -  
184

\$973,000.

20

Page 163

What was the value of the land in July 1975?

Learned Judge criticised appellants' expert merely  
asked whether \$220,000/- fair.

Page 166E-F

Dealt with the three lots 6602, 6603 and 6604.

Learned Judge went on to make astonishing finding -  
increase of 76%Another more astonishing finding on Lot 1252 -  
increase of 220%

Submit quite impossible inference or deduction.

Learned Judge ignored Chong's report and

30

Parampathy's report on comparables.

Parampathy gave \$44,000/- per acre. Added some  
40% to comparable of \$32,000/-.

Page 170

"....no sales directly comparable."

Experts said otherwise.

Page 172

Referred to Chong's evidence.

Page 173

Learned Judge ignored the safest guide is  
comparable sales as held by this Court in Hock Lim's case.  
See page 57 last paragraph.

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Page 175D      Learned Judge wrong.  
                 He should accept the only reliable evidence of  
                 appellants' expert, Parampathy.  
  
Page 175F      4.05 p.m. Adjourned till 9.30 a.m. tomorrow.

(Sgd) Lee Hun Hoe  
Chief Justice (Borneo)  
13/1/83

FRIDAY, 14TH JANUARY, 1983

Coram: Lee Hun Hoe, C.J. (Borneo)  
Sallen Abas, F.J.  
Abdoolcader, F.J.

10

10.25 a.m.

Q.C.  
Volume 9

Page 175F-      "On the \$1.70 per sq. ft.....  
176      .....7 years."

Page 163      "But to that value.....  
                 .....judgment (McGregor page 334)"

20

14th Edition page 353 para. 482.

Changes in the value of property.

"Where damages.....  
                 .....damages."

"This problem.....  
                 .....goods."

Malhotra v. Choudhury (1978) 3 W.L.R. 825, 826, 844.

"The principle of restitution - that damages can be  
at date of judgment.

In undue influence and breach of trust remedy  
in lieu of restitution is amount of profit.

30

Peek v. Derry (1887) Ch.D. 541.

Page 591 Cotton, L.J.:

"One rather difficult point.....  
                 .....shares."

"Now, it must not be taken.....

Lord Campbell says:.....  
                 .....Plaintiff."

Respondent did adduce evidence as to subsequent value.

Learned Judge wrong to give 20% increase per year.

Wrong to increase 1975 value by 140% over the year.

Learned Judge using his own knowledge of 700 cases he heard. This is wrong.

Value of the house should be ignored by the learned Judge. Expert evidence house has no value to developer. To be pulled down.

10

What did she refuse?

What was paid by appellants?

Palaniappa Chettiar v. Arunasalam Chettiar referred to by learned Judge wrongly. Not applicable as payment was lawful in their case.

McGregor on Damages 14th Edition, para.1473 page 990.

"All these rather.....

.....broad."

\$202,000/- must be deducted. If no variation.

20

If there was variation then \$220,000/- must be deducted.

Page 182

Measure of damages different learned Judge wrong to make one award.

He awarded \$973,000/- as general damages.

Damages should be at date of wrong.

Damages for breach of contract.

Learned Judge found two breaches.

What damages flow from that breach.

1st breach -

Premature transfer on 31/7/74.

30

This caused no loss.

She would not repay at any material time. Willing but unable to pay.

2nd breach -

No loss if there was variation.

If \$121,019/- was found on 27/4/74 instead of 30/3/74 and \$92,000/- was paid on 5/7/75 instead of \$103,000/-.

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If there was a variation there would be no breach.  
If there was no variation so far as capital sum  
is concerned only \$202,000/- is paid under contract.  
Respondent entitled to recover \$18,000/-. Of course  
she is entitled to interest on that from 30/3/74.

She suffered no loss in the late payment to  
Hongkong & Shanghai Banking Corporation.

She can't recover for two reasons:

Section 56(3) of Contract Act.

She was living in the house.

10

If this is wrong and if she is entitled there  
ought to be an inquiry.

If I am wrong counter-claim would still stand.  
That is if appeal is dismissed.

RESPONDENT'S SUBMISSION

Cashin

Attack on learned Judge's finding of facts  
and credibility of witnesses.

The facts show something was wrong.

Learned Judge amply justified in all his finding of facts.

There can be no doubt at all.

20

Whole thing started when 1st appellant stood as  
guarantor for Dr. Das.

When he did this at the time he did not know  
Dr. Das could not pay otherwise he would not stand as guarantor.

Pestered by 1st appellant for payment of money.

Bank not pressing for the money.

Dr. Das offered 2nd mortgage on his property in Johore.  
This was not accepted. Dr. Das was also indebted to Moscow Bank.

After one or more conversation with Dr. Das he  
mentioned his brother Devan's property.

30

Devan could have called on 1st appellant.

Respondent felt more loss at Devan's death.

Suggestion of variation is nonsense.

Could have objected to mention of what Devan said.

My learned friend imported evidence.

If one looks at the evidence he would be wrong.

E.g.

Attestations.

Cross-examination of 1st appellant.

Volume 4 Page 155D	"I did not inform..... .....inform her."	In the Federal Court  No. 49 Notes of Lee Hun Hoe C.J.(Borneo) 14th January 1983 (Cont'd)
Volume 2 Page 57	Was she willing to the transfer after 15 months later. How can it be an Escrow.	
Volume 5 Page 60	Submission of 1st appellant. "It has further been alleged..... .....under cross-examination.... .....fraud."	
10	My learned friend was therefore wrong to say that there was no cross-examination.	
Volume 6 Page 375	Correspondence placed in chronological order. Consistency of respondent remarkable. Her story of what happened after May 1976 never changed. Went to see solicitor.  For reasons we think appellants never came out with their defence until the present action. From 1976 while we were coming out of what our case was they did not come out with it. They said they did not have to do so.  By 1981 they did pay the balance of \$92,000/-. So the variation was fitted in.  The built up was because we were collecting information. We were not even aware of existence of some letters. Yeow & Chin gave us some.  Unless these letters fitted in with their grand design.	
20		
30	Volume 6 page 379	1st appellant was worried about his guarantee. He was finding some means of recovery. Letter dated 12/3/74. "We act for Madam Tara." "As our client wishes to pay off the charge by charging the said property for an increased amount..... ....." Looks as if they "were charging to another bank or a person."

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No bank would allow to let another person to have a statement of account unless you are acting for that person.

"On our usual undertaking".

Carbon copy to respondent and Devan.

On 23/3/74 - "After seeing Devan they said there was going to be a sale."

Whether property was owned jointly. They had no other property.

Can you imagine respondent would sell her property to save Dr. Das when she has five daughters? 10

The whole thing was to get her to sign transfer form.

On 30/3/74 deputation arrived at respondent's house.

To say that they were not acting at that stage is ridiculous.

Page 280

Letter from Chung Khiaw Bank.

This was attached to the memorandum.

Something was surely said resulting in 2nd appellant making the manuscript.

Not relying on common law fraud misrepresentation. 20

Volume 4  
Page 6

How respondent paid for most of the money to H.C. Tan.

Page 7

"On 30th March, 1974.....  
.....security."

She did not expect to sell the land.

"He said the security was by way of a transfer.....  
.....charge."

Is she wrong to expect the money quickly. After all she had to pay interest to the bank.

As far as respondent was concerned they were acting for her when they came to her house on 30/3/74. 30

As the weeks went by she found she had not been paid. Her account with Chung Khiaw Bank increased. By 1975 the bank pressed for payment.

What benefit did she get by signing the documents?  
She did not know she was going to get \$92,000/-.  
How did the variation come in?

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What has she got to do with 1st appellant paying  
\$121,000/- to Hongkong & Shanghai Banking Corporation?

The sole purpose was to get the transfer form  
signed.

Not interested in acting for her.

Submit 2nd appellant had no intention of buying the  
property at all from the very beginning.

Learned Judge so found that they merely interested  
in getting the signed transfer form. Who can say  
he is wrong?

The way they got the transfer form signed on  
30/3/74 was dishonest. They had no intention of acting  
on the memorandum and the manuscript.

No reason for delay in payment.

Nothing to stop payment.

She was shocked in September 1975 to know her land  
was transferred to 2nd appellant.

12.30 p.m. Adjourned.

3.00 p.m. Resumed.

Cashin

Volume 4

Pages 11-12

Attestation matter.

Volume 1 page 39D para. 8.

Page 87 item 21 and item 23 "attesting".

Volume 4

Page 197E

Volume 2

Page 198

Page 158

Proposed agreed facts.

In the Federal Court	<u>Volume 4</u> Page 11, 13		
	15	Blank papers.	
No. 49	17		
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Lee Hun Hoe	26	She would know of the \$121,819.80 at the time.	
C.J.(Borneo)	27		
14th January	28E		
1983 (Cont'd)	30C-32		
	Page 40F-42	Re-examination.	10
	Page 46C	Never fulfilled term of the agreement so we could rely on such evidence.	
	Page 49C		
	<u>Volume 6</u> Page 380	Letter dated 14/3/74. Correspondence would show that there cannot be variation.	
	Page 381	Letter dated 16/3/74.	
	Page 383	Letter dated 10/6/74.	
	Page 383	Letter dated 13/6/74.	
	Page 384	Letter dated 21/6/74.	20
	Page 385	Letter dated 20/7/74.	
	Page 386	Letter dated 19/8/74. "Stagnant" yet appellants Devan was operating the account. Could there be variation? 30/3/74 - 27/4/74.	
	Page 387	Letter dated 16/9/74. Now dealing direct with Devan as the solicitors gave no response.	
	Page 388	Letter dated 10/9/74. Devan wanted to execute a further charge as pressed by the bank. But how could this be said to be a variation.	30
	Page 389	Letter dated 25/10/74. Chung Khiaw Bank asking Suppiah & Singh for return of documents.	
	Page 390	Letter dated 12/11/74. Trying their best to hang on to the title deeds.	
	Page 391	Letter dated 3/12/74. How can they get the information if they are not acting for Devan.	40

Page 392 Letter dated 4/12/74.  
They continuously obtained information from the bank. This is to help to effect the transfer.

Page 393 Letter dated 9/12/74.

Page 394 Letter dated 26/12/74.  
We see a copy sent to Devan.  
Learned Judge did not believe the appellants after evaluating the evidence.

Page 395 Letter dated 24/12/74.  
"our clients".  
Ask Devan obviously for instruction.  
Can we quarrel with the Judge on his finding.

Page 396 Letter dated 21/1/75.  
Was learned Judge wrong when he said the caveat by 2nd appellant was to prevent the charge from being registered.

Page 397 Letter dated 30/1/75.  
Returning the title deed and charges.

Page 398 Letter dated 2/2/75.  
After this letter no copy was sent to Devan.  
Submit they did not want Devan to know what was going on.  
2nd appellant said he had the money to pay Hongkong & Shanghai Banking Corporation and Chung Khiaw Bank at all times.  
This letter was written nearly a year since 30/3/74.  
Has learned Judge not got ample reason for not believing him.

Page 399 Letter dated 3/2/75.

Page 400 Letter dated 6/2/75 - Clear Yeow & Chin acting for bank.  
Chung Khiaw Bank were instructing Yeow & Chin to act for the bank.  
To suggest that Yeow & Chin was acting for respondent and Devan is going to far. It cannot be. Perfectly natural for Yeow & Chin to write to Devan on the money on behalf of bank.

Page 401 Letter dated 19/2/75.  
Chung Khiaw Bank chose Yeow & Chin instead of A.L. Looi, etc.

Page 402 Letter dated 1/3/75.  
Nothing can be clearer than Yeow & Chin acting for Chung Khiaw Bank.

Page 403 Letter dated 4/3/75.

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Page 404 Letter dated 10/3/75.  
That is how the \$140,000/- came up later perhaps.  
4.15 p.m. Adjourned till tomorrow at 9.30 a.m.

(Sgd) Lee Hun Hoe,  
Chief Justice (Borneo)  
14/1/83

15th January  
1983

SATURDAY, 15TH JANUARY, 1983

Coram: Lee Hun Hoe, C.J. Borneo  
Salleh Abas, F.J.  
Abdoolcader, F.J.

10

9.30 a.m. Hearing resumed.

Cashin

Pages 406-7 Yeow & Chin forwarding charges for registration  
and was told there was a caveat.

Page 408 Letter dated 8/5/75 from Chung Khiaw Bank.  
Important.

"Inactive". Yet appellants said Devan wanted to  
use overdraft.

No one like receiving a letter like that from  
the bank.

20

At that time title with bank caveat was lodged  
already by 2nd appellant.

So charge could not be registered.

The so called variation was said to be in February  
1975 according to evidence.

Would take court to Anandan's evidence.

Volume 4

Page 105

Read evidence.

The source of the \$40,000/- must be accepted.

Receipt at page 410 Volume 6.

30

This ties up with the strong demand from  
Chung Khiaw Bank.

Volume 6

Page 411

Letter dated 22/6/75.

No letter after four months since last letter  
at page 398 dated 2/2/75.

2nd appellant said Devan wanted to stay in the house to the end of 1975.

Submission on variation matter of construction based on evidence.

Purely question of facts.

Page 412 Letter dated 26/6/75.  
"on our behalf" by Chung Khiaw Bank.

Page 413 Letter dated 28/6/75.  
Clear 2nd appellant was in direct touch with Chung Khiaw Bank.

Page 414 Letter dated 28/6/75.  
Whoever said it was \$140,000 it was certainly not Devan or respondent.

Volume 4  
Page 79E

Evidence of David Foo Yong Siah.  
Devan died in 1981.

First time we saw the correspondence.  
Witness produced letters in court.

Page 81 Cross-examination by 2nd appellant.  
First time anyone knew about the shares.  
Merely to show Court the explanation about the \$140,000/-.

There was evidence before the learned Judge.

Volume 6  
Page 415

Letter dated 29/6/75.

2nd appellant was not talking only to Chung Khiaw Bank but to Yeow & Chin.

Wrong to say Yeow & Chin were acting for respondent.

Page 416 Letter dated 30/6/75.

This date is important.

Page 417 Letter dated 30/6/75.

To say Devan gave the information about the \$140,000 was entirely wrong on part of 2nd appellant.

Probably the bank made a mistake.

To say Devan gave instruction to his solicitors Yeow & Chin on the \$140,000 could not be so.

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Volume 4  
Pages 16-17

Evidence of respondent on cross-examination.  
She did not see P.51 at the time.  
The 3rd appellant came in so quickly because  
2nd appellant did not want Devan and respondent to  
get the land back.  
Learned Judge found this as a fact.  
How could we challenge his finding?

Volume 6  
Page 419

Statement of Account of Devan showing balance.

10

Volume 6  
Page 420  
Page 421

Letter dated 2/7/75.  
Letter dated 2/7/75.  
Chung Khiaw Bank to Yeow & Chin.

2nd appellant send no copy of letter to Devan.  
This silence should be commented on.

Page 422

Letter dated 5/7/75 signed by 2nd appellant to  
Yeow & Chin.

Not one letter to show at the time Yeow & Chin  
acting for Devan.

20

Page 423

Same as above except the endorsement at the bottom.

Page 424

Letter dated 9/7/75 from Yeow & Chin to Chung  
Khiaw Bank.

Page 425

Letter dated 9/7/75.

Volume 3  
Page 36

Affidavit of Tara Rajaratnam (respondent).  
Submit realising amount of information that can  
be put together this affidavit shows at once what  
respondent's case was.

Facts given to solicitors it is they out the matter  
together.

30

Consistent that ptoperty be pledged to help Dr. Das.  
Quite wrong for my learned friend to say money  
in 1974 was known to respondent. Presumably she learned  
about it in 1975.

Exaggeration to say we built our case up as we went along was entirely wrong.

Para. 13 - ".....the whole transaction was bad and a fraud perpetuated on me."

Para 14. - 1st appellant knew about the matter.

It is the defence who never answers anything at all. They got the information.

All before the learned Judge. He chose to believe respondent.

10

Ample facts for him to reach his finding.

My submission is merely answer to my learned friend.

Page 48

K.V. Devan's affidavit.

2nd agreement between 2nd appellant and Devan as to variation in February 1975.

2nd appellant would have mentioned he was owner of land instead of returning title to bank.

On 2/2/75 at page 398 Volume 6 he now came out that he bought it.

Does it make sense.

20

Learned Judge did not think so.

He said the 2nd variation took place in February 1975.

Devan mentioned blank transfer executed by respondent on 30/3/74 would be returned.

If he was to return the transfer form how could he hand back the transfer form.

Because he was telling the Bank he was buying the land.

My learned friend was also building up his case on evidence not arising out of cross-examination. So I am doing the same in my submission.

30

Volume 4  
Page 114

Evidence of Jaginder Singh (1st appellant).

No dispute he acted as guarantor.

History and reasons why Dr. Das could not pay.

Page 117E

"He was prepared to sell property."

Impossible to believe this in the circumstances.

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"Suppiah was interested in buying it (the land)."

Who would believe it Suppiah had never been to the land.

1st appellant would know how much was owing by Das  
in Hongkong & Shanghai Banking Corporation. He was pressing  
him for payment.

Nothing to say he signed the attestation at  
the time.

Page 124 Ronald Khoo made first appearance acting for  
3rd appellant on 6th day. Applied for amendment on  
7th day.

Page 125 "Then the \$92,000 was paid by the 2nd defendant  
to Yeow & Chin."

We now know who actually paid.

"I paid \$121,819.80 to Hongkong & Shanghai Banking  
Singapore on the 27.4.74."

The agreement did not expect him to pay but 2nd  
appellant.

Page 129-  
130

Page 130F- How can 1st appellant say he was not acting for  
131A Devan.

I was putting it to him that he was acting as  
solicitor but he kept on denying.

He could not get the title deed unless he acted  
as solicitor.

Page 134D ".....misrepresenting the bank the true  
facts....."

Extraordinary for a solicitor to do so.

Page 136C "I agree that the accumulation.....  
.....knows."

"Will you agree....."

.....Devan."

Page 138B

Page 139B "I paid it, at the request of the 2nd defendant."  
This was mentioned for the first time that 2nd  
defendant requesting him to do so.

Page 140C "Did Suppiah ever pay you \$121,000/-? (witness pauses)  
"He did not."

Page 141D

Page 142B

Page 142D "Q. I put.....\$214,000/-."  
This part was referred to by the learned Judge.

10 Page 143 I kept on putting to him respondent's case.  
Page 144-6

Page 147 No where it was said 1st appellant went to  
respondent's house to attest.  
Merely following 2nd appellant.  
Respondent ought to be separately advised.  
2nd appellant should say "I am going to buy.  
You better get a separate lawyer."  
Undue Influence.  
Two prominent citizens and lawyers coming to  
20 responuent's house with documents and asking her to  
sign. Worst they were her solicitors.

Page 148B "Q. Is it not the case.....  
.....cleared."

Page 149B Respondent was a lay person.  
No explanation given to her.  
Arguing about the commencement date.

Page 151A

Page 153

30 Page 156B We have been through that point.  
Page 157C  
Page 158E  
Page 159  
Page 160  
Page 161E  
Page 162B

Page 169B-170B We have to dig out every single point.

Page 171C Why register the judgment against Dr. Das in Johore?  
Now saying difficult thing.  
Now admitting \$149,520 (including \$110,000),

40

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Page 173D Why a foreigner would fare better in getting  
subdivision?  
Knew about approval of subdivision even before  
it was formally known.

12.00 noon. Adjourned till 18/1/83 at 9.30 a.m.

(Sgd) Lee Hun Hoe  
Chief Justice (Borneo)  
15/1/83.

18th January  
1983

TUESDAY, 18TH JANUARY, 1983

Coram: Lee Hun Hoe, C.J. (Borneo)  
Salleh Abas, C.J. (Malaya)  
Abdoolcader, F.J.

10

9.30 a.m.

Khoo Rise on behalf of Malaysian Bar on Your Lordship's  
recent appointment as Chief Justice (Malaya). Wish  
Your Lordship success.

Q.C. On behalf leading counsel from abroad also  
wish to express similar sentiment.

Cashin Express similar sentiment as a junior counsel.

Abas Replied briefly.

20

Cashin Just finished with evidence of 1st defendant.  
Would now come to evidence of 2nd defendant.

Volume 4  
Page 129C

"I paid the bank only when the overdraft had  
reached \$121,000/-. After that it did not matter  
to me whether I believe him or not. I just gave him  
time to pay."

Could not have referred to memoranda. P.30 and  
P.31.

Page 178E-179A Shows he knew both 1st appellant and Dr. Das.  
 Page 179D-180A On the 10th March, 1974.....  
 .....amount."

Is it really conceivable for a lawyer to agree  
 so quickly to buy land without seeing land but just  
 to rely on a valuation report.

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Page 184E Variation.

If it is an out and out sale what has the variation  
 got to do with it? What business has the extra  
 amount got to do with the amount when it was an  
 outright sale? That was the point made by the learned  
 Judge.

Learned Judge entitled to believe respondent  
 rather than appellants on the evidence.

What landowner would quit his property before  
 transfer or money paid? Just does not make sense.

Why should the landowner pay compensation before  
 the purchase price is paid?

The variations suggested by my learned friend  
 make no sense at all.

Page 184E-185B 2nd variation.

Your Lordship would recall the title deed was  
 sent back to Chung Khiaw Bank by Suppiah & Singh  
 on 30/1/75. See Volume 6 page 397.

Volume 6  
 Page 398

Suppiah said he was owner.

Why send the title back if he was the owner?

Throughout all the correspondence from bank  
 1974 until 2/1/75 did he tell the Chung Khiaw Bank  
 the property had been sold.

Submit there is no such thing as a 2nd variation  
 as well as the 1st variation.

Agreed with my learned friend agency of 2nd  
 appellant to 1st appellant not pleaded.

Page 187A But we did not know about it.

It came out at the trial.

As far as fraud is concerned we rely on section 340  
 of the National Land Code since July 1976.

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Page 187B Shows land really bought by 1st appellant. He merely asked 2nd appellant to transfer to 3rd appellant.  
If one looks at the correspondence on the bundle I prepared there can be only one inference.  
Singapore judgment against Dr. Das. Learned Judge commented on this. He was perfectly right.

Deal with cross-examination.

Page 192E

Page 194B "I used those words.....  
.....overdraft."

10

"What lawyer would use such trick? Misleading the bank.

Page 194E "Shown P.28 - It is true I received the title.....  
.....undertaking."

Page 199A "I do not regard it as an agreement for sale."

If it is not agreement for sale how was it that the property was transferred. If it is not a sale then it is a security.

If the transfer genuine why the money not paid within a reasonable time, say, a week.

20

Respondent was lured into believing that her property was used as security.

11.10 a.m. Adjourned.

11.45 a.m. Resumed.

Cashin

Volume 4

Page 203E

Cross-examination of 2nd appellant.

He was cross-examined on every single point.

Anyone reading the evidence would inevitably take the same view as the learned Judge that 2nd appellant cannot be believed.

30

My purpose of reading the evidence is to show that the learned Judge is aware of the facts.

Page 224E

Page 230A

Referred to Volume 8 page 243-4.

Go away and bring an action in the High Court.

Volume 8 page 245 para 10.

We did not know of some affidavits until 3rd appellant...

Volume 3  
Page 319

Showing 3rd defendant putting himself in as purchaser for value.

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Volume 4  
Page 236E

Hair splitting of rent and compensation.  
Compensation for occupation of premises.

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12.40 p.m. Adjourned till 2.30 p.m.

2.30 p.m. Hearing Resumed.

Cashin

3rd appellant became registered owner very shortly after 2nd appellant became owner.

2nd appellant contrary to what P.30 and P.31 had not paid any part of \$92,000/- or \$121,000/-.

From the moment he came on the register 3rd appellant held himself out as registered owner and purchaser for value.

It puts his credibility on issue.

Volume 4  
Page 249

Evidence of 3rd appellant.

Page 258-9

Not fraud but fraud of deceit.

He neither read nor approve the defence.

Particulars of fraud against the 3rd appellant were set out albeit in the particulars.

Not rely on common law fraud.

We were raising actual fraud not common law fraud and narrow it into fraudulent misrepresentation.

All three appellants know what was alleged against them.

3rd appellant must know what was alleged since July 1976.

Page 264B

3rd appellant did not know his name would be in the register??

If perfectly done why the trust? Why attempting to keep the true facts out?

Page 269B



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Volume 8

Page 280

Much was made of the fact that I was solicitor  
for plaintiff, Coomarasamy & Tan.

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Page 297

Reference by 3rd appellant.

Volume 4

Page 284

Page 289B

10

Volume 8

Page 304

The Complaint. Actually his reply.

Referring to Volume 8 page 297.

Not a word about trustee or nominee.

Volume 8

Page 304

Para 2 - under Para. 5 first time we know that  
Jagindar was called by the bank to make  
payment.

Page 306

Para. 9 -Para. 24 of complaint.

20

Page 310

He said when he appeared before the Law Society  
he told he was a trustee or nominee.

Volume 4

Page 90

Evidence of Lim Seng Bock.

No evidence for my learned friend to say that  
Yeow & Chin acted for respondent and Devan.

Quite plainly we have to look at the facts first  
and then the law applicable.

That was what the learned Judge did.

Evidence clear. Scale on respondent's favour.

30

In respect of appellants.

Changing of stand. Inability to answer questions.

What is the law?

Fraud in its ordinary meaning covers all types  
of fraud.

I accept all my learned friend said.

Also fraud in tort giving rise to tort of deceit.

Section 17 of the Contract Act include fraudulent

representation of English law fraud.

Section 18. Misrepresentation similar to English law of innocent misrepresentation.

O.18 r.12(i) of the High Court Rules.

Section 340(2) of the National Land Code which refers to fraud or misrepresentation and so on.

Clearly differentiating the two.

You set out the facts and particulars. You do not have to say fraud under section 340 of the National Land Code and so forth.

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Page 235

2nd appellant - his written submissions.

Submit 2nd appellant was left in no doubt about the actual fraud.

Volume 6  
Page 138

onwards. Fraud is dealt with in my written submissions.

I cannot do better than that.

Assets Co. Ltd. v. Mere Roihi (1905) A.C. 176.

Loke Yew v. Port Settenham Rubber Co. Ltd.

(1913) A.C. 491.

Butler v. Fairclough & Anor. (1917) 23 C.L.R. 79.

Waimiha Sawmilling Co. v. Waione Timber Co.

(1926) A.C.101.

Haji Junus v. Chik Anor. (1964) M.L.J. 343.

Adjourned till 9.30 a.m. tomorrow.

(Sgd) Lee Hun Hoe  
Chief Justice (Borneo)  
18/1/83

WEDNESDAY, 19TH JANUARY, 1983

Coram: Lee Hun Hoe, C.J. (Borneo)  
Salleh Abas, C.J. (Malaya)  
Abdoolcader, F.J.

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9.30 a.m.

Court resumed.

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Cashin  
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Haji Junus v. Chik & Anor. (1964) M.L.J. 343 (H.C.)  
Mohd. Isa v. Hj. Ibrahim (1968) 1 M.L.J. 186 (F.C.)  
Public Finance Bhd. v. Narayanasamy (1971) 2 M.L.J. (F.C.)  
Jasbir Kaur v. Tharumber Singh (1971) 1 M.L.J. 224.  
Waimiha Sawmilling Co (1925) A.C. 107.

Submit fraud is proved beyond doubt on the facts.

Volume 4  
Page 199A

"I consider P.30 as typed as a memorandum.....  
.....named."

10

Memorandum shows how consideration passed.

Submit neither 1st and 2nd appellant ever intended  
to act on that memorandum.

Immediate subsequent events made it clear that they  
did not intend to act on the memorandum.

Page 203A

"Q. I put it to you.....

.....

A. I do not agree."

Learned Judge made a finding on it at Volume 8 page 56C.

20

"In fact it was evident that P.30, 31.....

.....eventually."

It was put often enough to them that 1st appellant  
paid the money and not 2nd appellant.

Learned Judge accepted respondent's evidence rather  
than the appellants'.

Transferring land within a matter of three weeks  
from 2nd to 3rd appellant was mere part of a grand  
design to deprive respondent of her land.

Volume 4  
Page 98

Evidence of Mohd Rashidi bin Mohd.Nor.

30

Application to surrender land was made by 3rd  
appellant on 28/1/76.

Cannot say we only alleged common law fraud.  
We were alleging actual fraud as laid down in section 340  
of the National Land Code.

If the memorandum was arrangement to sale. Then submit 2nd defendant was in breach at once.

Haji Abdul Rahman & Anor. v. Mohd. Hussein  
(1917) A.C. 209.

Misrepresentation made at the time were set out.  
Learned Judge referred to them at Volume 8 page 55C.  
The defendant was also guilty.....  
.....opportunity."

That they did not want the land.

That it was a security.

Question of Breach of Trust.

Evidence that the 1st and 2nd appellants were acting as solicitors.

My learned friend said they were holding in trust the transfer form.

I say no they were holding in trust the property.

So the learned Judge found them liable on all the allegations.

Agree fraud is on a higher standard of proof.

K.E.P. Mohd Ali V. K.E.P. Mohd Ismail (1981) 2 M.L.J. 10.

Playing Cards (M) Sdn. Bhd. v. China Mutual Navigation Co. Ltd. (1981) 2 M.L.J. 182.

Esso Petroleum Co. Ltd. v. Southport Corporation  
(1956) 2 W.L.R. 81.

Siti Aisha Binte Ibrahim v. Goh Cheng Hwai  
(1982) M.L.J. 544.

Turn now to question of Damages.

Volume 9.

Common ground on both suits.

Value of conversion of land on 5/7/75.

Value of land agreed on P.1 (Valuation by Chong)  
\$220,000/-.

Date of valuation. File 1972.

Was learned Judge wrong having heard evidence of increase in land value in 1975. Does he have to accept valuer's value when they disagreed with each other.

Learned Judge knows one side is going to make it high and another to make it low.

He may not import knowledge of cases he heard but

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he can certainly import value of land.

Lots 6602 and 6603 nearest to the property  
transferred in 1972 for love and affection.

Learned Judge can say I heard what you say but  
I am not absolutely satisfied.

Collector of Land Revenue v. Alagappa Chettiar  
(1971) 1 M.L.J. 43.

Learned Judge gave judgment in 1982.

Price agreed \$220,000/- on 30/3/74.

Everyone knows land price increase exceeds  
more than 6%. Common knowledge.

10

My learned friend said the learned Judge must  
deduct the \$220,000/-.

If it was paid out of fraud that is. Not recoverable.

Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings  
(Industrialised Buildings) Sdn. Bhd. (1980) 1 M.L.J. 21.  
One last point Interest.

Volume 9  
Page 184

"There shall be an award.....  
.....interest.....  
6% per annum.....  
.....realization."

20

Found it difficult to support the 6% per annum  
having given him the benefit of the increase.

I though exemplary damages of \$20,000 should  
be given. Learned Judge turned it down. Would not  
say anything as we did not cross-appeal.

#### APPELLANTS' REPLY

Q.C.

My learned friend took the Court on the evidence  
before the lower Court.

30

Learned Judge was taken to all these facts.

Fraud must ve pleaded and proved.

Here pleadings were drafted contrary to Rules.

Would start with the law.

Section 340 of National Land Code does not give  
rise to damages. Merely allow court to set aside transfer.

Fraud is used in dozen of statutes.

Remedy is amount of profit.

Section 17 of the Contracts Act.

(a) Yes that is ingredient of common law fraud.

(b) Not common law fraud.

(c)

(d)

(e) Yes.

Section 18(a) Yes negligent misrepresentation.

(b) Not misrepresentation in the sense  
of innocent fraudulent.

(c) "

Innocent and fraudulent misrepresentation distinguish  
by motive only.

Do not know how wide is section 340 of National  
Land Code. But submit not relevant to this action.

Volume 6 page 156 para. 278.

Not known to law as submitted by my learned friend.

When this action commenced section 340 of National  
Land Code went out of the window. Land already transferred.  
Learned Judge confused. Hence judgment wrong.

Fraud - proof beyond reasonable doubt.

#### Facts

Volume 2

Page 100

Letter dated 10/3/75.

Page 101

Letter dated 2/3/75.

Volume 4

Page 140

"10th March, 1975" the fourth charge.

Volume 2

Page 105

Letter dated 2/7/75 from Chung Khiaw Bank to Yeow & Chin.

Page 55

Letter dated 5/7/75.

Redemption money received on 5/7/75.

Volume 3

Page 28

Attested on 5/7/75.

Same in others at pages 31 and 34.

Fraud must be pleaded with particularity and  
proved beyond reasonable doubt.

Volume 4

Page 120

1st appellant said clearly.

"I did not sign P.57 on 30th March. I subsequently  
signed it about the 5th July, 1975."

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Referred to para. 33.  
"33. An Advocate.....  
.....done."

11.10 a.m. Adjourned.

11.45 a.m. Resumed.

1 Atkin 299 26 E.R. 191.

The Earl of Chesterfield & Others.

Under section 340 of National Land Code can set aside  
for fraudulent misrepresentation and undue influence.

If plaintiff can't set aside can sue for  
constructive fraud and claim amount of profit.

10

Equity has never granted damages for fraud.

No use going to section 340 of National Land Code  
to find out common law fraud or fraudulent misrepresentation.

P.30 and P.31 prepared by appellants without  
manuscript.

An out and out sale.

Dr. Das's debt insecured.

1st appellant contingently liable.

All that is required is a second charge for the \$120,000/-. 20

We know from Dr. Das respondent wanted to sell  
her house in 1975.

Volume 4  
Page 51A&C

"When the pressure to repay the money was on  
me he wanted to sell the property."

"He did not.....  
.....in 1975."

Appellants thought the sale was agreeable.

Hence they prepared the documents.

Much time spent on this.

Submit immaterial really.

30

Volume 2  
Page 236

This affidavit of respondent introduced into  
the trial setting out all her claims.

Para. 13.

Page 242

Para. 18.

Matter of construction.

So we can forget this security.

Intention never to pay.

As a matter of law this cannot amount to fraudulent misrepresentation.

Within 28 days \$121,000/- plus was paid to Hongkong & Shanghai Banking Corporation.

Devan operated the account at Chung Khiaw Bank.

It was months later that Chung Khiaw Bank said his account was inactive.

10

Devan put the Chung Khiaw Bank account up within a month to over \$110,000/-. So payment was not made by 2nd appellant.

Late payment is not even a fundamental breach.

No period agreed by parties.

My learned friend's submission sounds all right until compared with contemporaneous documents. The learned Judge did not do that.

Let us go back to pleading.

20

Volume 1

Page 40

Page 43

Page 37

Para. 12 - No evidence.

Para 4 (e) and (f).

Not misrepresentation but collateral oral agreement.

There fraud however much latitude is given to respondent there is no evidence of misrepresentation. 12(v) and (vi) come nearer but submit not misrepresentation but collateral oral agreement.

30

Volume 8

Page 550

Judgment.

"The defendant was.....

.....opportunity."

Not pleaded. Quite wrong for learned Judge to do so.

"They had also been.....

.....intention."

Pleaded but no evidence was led.

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Respondent's claim of fraud simply breaks down on the pleading.  
Learned Judge wrong in law in looking at section 340 of National Land Code. In doing so wrong in applying to the facts.

If learned Judge made finding of facts when there were no evidence then it is duty of appellate court to set aside such findings.

If learned Judge made inference from documents then appellate court is entitled to make the inference itself. 10

Learned Judge even commit the three appellants to prison for contempt without hearing them.

Page 134-5 Learned Judge's approach wrong.  
Page 60E-61 They had for reasons.....plaintiff."

All appellate court should look into the finding with care.

Learned Judge's approach was clouded.  
Total disregard on pleading on fraud.  
Two vital issues of facts. 20

12.20 p.m. Adjourned till 2.30 p.m.

2.30 p.m. Hearing Resumed.

Q.C.

Learned Judge made perverse finding.

Were Yeow & Chin acting for respondent at the time of the completion of transaction in July 1975?

Vital on question of misrepresentation and also on variation.

Contemporaneously document.

Volume 2  
Page 97

Letter dated 20/9/74 from Devan to Chung Khiaw Bank. 30  
4th para.

"I am informed that Mr. A.L. Looi.....  
.....behalf."

So far as undue influence is concerned it is not.

Page 99 Letter dated 6/2/75 from Chung Khiaw Bank to  
Yeow & Chin. Copy to Devan.

In the  
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Also see  
Volume 6  
Page 399  
Page 112

Letter dated 19/2/75 from Yeow & Chin to Devan  
calling respondent to call on them.

Yeow & Chin acting for bank and respondent.  
Nothing wrong.

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10 Volume 6  
Page 402  
Page 403  
Page 405

Submitting bill.  
Yeow & Chin were certainly acting for the bank  
but also for respondent in respect of the charge.  
We know the charge cannot be registered because  
2nd appellant entered caveat.

Page 407 Letter dated 20/3/75 from Pengarah Tanah dan Galian,  
Johore.

20 Page 412 Letter dated 26/6/75 from Chung Khiaw Bank to  
Yeow & Chin.

Page 413 Letter dated 28/6/75 from Suppiah & Singh to  
Yeow & Chin.

Page 414 Submit the \$140,000/- must have been asked for  
by Devan.

Referred Volume 4 page 16F.

Referred Volume 3 page 75 para. e.

Referred Volume 4 page 191B. .

30 Mr. Yeow's partner said he was not dealing  
with the matter.

Both Yeow & Devan were dead unfortunately.

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Page 415

Page 416 Letter dated 30/6/75 from Yeow & Chin to call on Devan.  
Page 421 Chung Khiaw Bank instructed Yeow & Chin to collect  
from Devan.

Volume 4 pages 121E - 123.

173F - 174B

175B - 176B.

185E - 186E.

224D - 225E.

In the Federal Court	Volume 4 Page 9B	"The interest was 11½%..... .....interest."	
No. 49	Page 26A	"My husband does most..... .....Chung Khiaw."	
Notes of Lee Hun Hoe C.J.(Borneo) 19th January 1983 (Cont'd)	Volume 3 Page 137	Release of shares. Would not respondent know of transfer when the overdraft was discharged. Why should 2nd appellant pay off the charges.	10
	Volume 6 Page 408	Letter from Chung Khiaw Bank to Devan. Refer Volume 2 page 133. Submit the only inference is that Yeow & Chin were acting for respondent in July, 1975. Say she is bound by her solicitor's knowledge and Devan's knowledge. Was there a variation of the agreement. P.30. Volume 4 page 183F - 185B. In support of variation. Respondent knew of payment off by Dr. Das by cheque but cheque dishonoured. Sued in Singapore.	20
	Volume 4 Page 10A	"Dr. Das came..... .....May, 1975.	
	Volume 4 Page 12E-F	How could the Singapore cheque of Dr. Das be breach of P.30?	
	Volume 2 Page 145	Statement of Account. Nine cheques signed by Devan since 30/3/74. Adjourned till 9.30 a.m. tomorrow.	30
	Court		

(Sgd) Lee Hun hoe  
Chief Justice (Borneo)  
19/1/83

20th January  
1983

THURSDAY, 20TH JANUARY, 1983

Coram: Lee Hun Hoe, C.J. (Borneo)  
Salleh Abas, C.J. (Malaya)  
Abdoolcader, F.J.

9.30 a.m.

40

Q.C.

Chung Khiaw Bank won't release property unless overdraft cleared.

Overdraft over \$110,000/-.

By operating account and increasing the overdraft Devan breached the agreement unless there was a variation.

By August 1974 account became dormant. But the fact remains Devan operated the account to prevent completion of agreement.

10

2nd reason for variation.

No reason for 1st appellant to pay Hongkong & Shanghai Banking Corporation over \$121,000/-.

But points to variations.

Respondent Devan and Dr. Das all knew 1st appellant paid over \$121,000/-.

Respondent and Devan knew only \$92,000/- was paid in July, 1975.

Respondent was not telling the truth in Volume 4 page 190.

20

"I cannot remember whether I had possession of P.53. I did not know that \$91,000/- as shown in P.53 had been paid into Devan's account."

Eusoffe

Where is the evidence of variation.

Cashin'

Volume 4 page 1290.

Q.C.

Will come to it in due course.

We say Devan retained Yeow & Chin to ask for the \$92,000/-.

They lived there all the time until application for sub-division was made.

30

Unless there is a variation respondent would never receive \$220,000/- under the agreement or jual ganji.

She liked to pay but can't for business reason.

Devan was plainly respondent's agent.

No undue influence by retainer of Yeow & Chin.

No breach of contract because of variation.

Learned Judge was wrong even if 1st appellant was not 2nd appellant's principal.

In the  
Federal  
Court

No. 49  
Notes of  
Lee Hun Hoe  
C.J.(Borneo)  
20th January  
1983 (Cont'd)

In the  
Federal  
Court

No. 49  
Notes of

Lee Hun Hoe  
C.J.(Borneo)  
20th January  
1983 (Cont'd)

Bundle of  
Cases I  
Page 279 @  
Page 289  
Page 88

Bundle of  
Cases I  
Page 313  
@ 360

Butler v. Fairclough (1917) 23 C.L.R. 79.

"I will, however,.....devil."

Bain v. Fothergill (1873-4) C.R. 159.

Page 206: "In Sedgwick on Damages.....

.....principle.

"I fully agree.....

.....beyond doubt."

"Upon a review of all.....

.....action for deceit."

Learned Judge accepts applicable for "moral turpitude".

Therefore liable for fraud.

No fraud here. There was variation therefore no  
breach of contract.

Undue Influence

Learned Judge relied on P.27.

Attempt made to get increased overdraft from Hongkong &  
Shanghai Banking Corporation failed.

Volume 4 page 180B.

Was the jual ganji unconscionable.

Learned Judge misdirected himself in law.

Edwards v. Williams.

Referred to Volume 8, page 92A.

Dealt with briefly.

K.E.P. Mohd Ali v. K.E.P. Mohd Ismail (1981) 2 M.L.J. 10.

Playing Cards (M) Sdn. Bhd. v. China Mutual Navigation 30  
Co. Ltd. (1980) 2 M.L.J. 182.

If my learned friend applied for amendment this  
would be a new cause of action and learned Judge should  
reject it because it would be statute barred.

On fraud no issue of fact arose.

Undue influence no leave was sought.

Submit Your Lordships to reverse learned Judge's decision

On breach of trust no leave was sought.

On breach of contract no breach variation.

Would deal with certain points raised by my learned friend 40

	<u>Volume 4</u> Pages 7-8	Unpleaded allegation. Yet relied on assurances.	<u>In the Federal Court</u>
	Page 10A) Page 13E)	My learned friend accepted that respondent knew after February, 1975 she was not telling the truth.	No. 49 Notes of Lee Hun Hoe C.J.(Borneo) 20th January 1983 (Cont'd)
	Page 18D		
10	<u>Volume 2</u> Page 39 Page 40	Letter dated 26/12/74 from Chung Khiaw Bank. Letter dated 29/12/74 from Suppiah & Singh. 2nd appellant under no obligation to buy unless of variation. Not going to pay more.	
	Page 46	Point was made by my learned friend of a lapse of 6 months. No point writing unless the overdraft was reduced. Nothing sinister. Legal charger the Chung Khiaw Bank entitled to the title. 2nd appellant entered caveat after returning the title to protect his interest.	
20	<u>Volume 4</u> Page 119D Page 120B Page 186	Examination-in-chief of 1st appellant. Devan was Secretary of Modidata. Examination-in-chief of 2nd appellant re caveat. See Volume 2 page 62.	
	Page 97C	Caveat.	
	<u>Volume 3</u> Page 63 Page 66	Civil Suit No. 261 of 1977 Para. 16(2) and (3). First time fraud and misrepresentation were mentioned. If you plead fraud come forward with it as early as possible.	
30	Page 190 Page 191	Civil Suit No. 1224 of 1975. Singapore action. Registering judgment in Johore Bahru.	
	<u>Volume 3</u> Page 319 Page 317 Page 323	Para. 21. Para. 15. Para. 30.	

In the  
Federal  
Court

No. 49  
Notes of  
Lee Hun Hoe  
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20th January  
1983 (Cont'd)

Volume 8  
Page 290

From May 1978 if anyone talked about bona fide purchaser for value he might as well talk about the moon.

Learned Judge ought to accept 3rd appellant's submission of no case to answer.

Section 340 of the National Land Code is out.

2 points.

Complaint - critique on para. 25.

1st appellant was helping his friend Dr. Das who let him down.

On liability we say no liability.

Damages. Two valuers' opinions.

10

Bundle of  
Cases I  
Page 486

Nanyang Manufacturing Co. case (1954) 20 M.L.J. 925.

"With regard.....

.....circumstances."

Learned Judge simply ignored expert evidence.

Comparables were the best evidence.

No challenge by respondent on these comparables.

Learned Judge mentioning the 700 cases he dealt with. Must be prepared to enter arena.

Peek v. Derry

Learned Judge wrong to introduce the 140%.

Learned Judge should follow precedent otherwise whole system would fall down.

Singma Sawmilling case.

Respondent has to establish her loss.

Not a case of recovering money under illegal contract.

If learned Judge right the sum awarded should be reduced by the amount paid.

My learned friend did not say anything about damages for breach of contract.

Presumably he accepted my submission.

If there was variation there was no breach.

If no variation two breaches.

20

30

54.

\$110,000/- should be paid but \$92,000/- only.  
Loss \$18,000/-.

Respondent suffered no loss with Hongkong & Shanghai  
Banking Corporation payment.

Chung Khiaw Bank payment 15 months late.

Could ask for inquiry.

Reasonable sum for her use and occupation  
of the house.

Submit allow appeal.

Enter judgment for counterclaim.

In the  
Federal  
Court

No. 49  
Notes of  
Lee Hun Hoe  
C.J.(Borneo)  
20th January  
1983 (Cont'd)

10

Court

C.A.V.

(Sgd) Lee Hun Hoe  
Chief Justice (Borneo)  
20/1/83

Certified true copy:

(Sgd) Valerie Kuen  
P.A. to Chief Justice,  
Borneo.

14/6/83.



NOTES RECORDED BY ABDOLCADER,  
F.J.  
10th JANUARY TO 20th JANUARY 1983

In the  
Federal  
Court

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR  
(APPELLATE JURISDICTION)

No. 50

Notes recorded  
by Abdoolcader,  
F.J.

10th January  
1983

CIVIL APPEAL NOS. 215/82, 216/82, 291/82 & 292/82

Between

1. Datuk Jaginder Singh
2. Datuk P. Suppiah
3. Arul Chandran ... Appellants

And

Tara Rajaratnam (m.w.) ... Respondent

(In the matter of Civil Suit No. 284 of 1979 in the High  
Court in Malaya at Johore Bahru

10

Between

Tara Rajaratnam (m.w.) ... Plaintiff

And

1. Datuk Jaginder Singh
2. Datuk P. Suppiah
3. Arul Chandran ... Defendants)

Coram: Salleh Abas, C.J. Malaya  
Lee Mun Hoe, C.J. Borneo  
Abdoolcader, F.J.

20

NOTES RECORDED BY ABDOLCADER, F.J.

IN OPEN COURT

THIS 10th DAY OF JANUARY, 1983

Terance, Q.C., R.T.S. Khoo (for 3rd) & Chin Yew

Ming (for 1st & 2nd) for Appellants.

Howard Casnin & Subra Maicker for Respondent.

...2/-

Cullen

Brief facts of matter.

Grounds of Appeal: Case one of a widow with 5 daughters against 3 Advocates and Solicitors. Judge allowed his heart to rule his head.

Re fraud, 2 questions: (1) What does alleged fraudulent person stand to gain?

(2) What were his prospects of not being caught & made battle?

10 Value vital in fraudulent misrepresentation & undue influence - not considered by Judge.

Vol. 6 - p.52 - para 143

p. 54-5

p. 157-8

This is how common law fraud put to Judge.

Vol. 2 - p. 57 - transfer.

P. 30 & p.31 - p. 30 & 31. .

Allegations of fraud built up - since 1978.

Agreement & transfer signed on 30.3.74.

20 1st Appellant made HSB nearly \$122,000/- on 27.4.74.

CKB overdraft paid off on 5.7.75 - then just below \$92,000/-. Appellants paid this amount as part of agreed variation. CKB obliged to discharge the 3 charges on 5.7.75. Transfer could then be dated that date & was duly registered. So 2nd Appellant became registered proprietor.

On 31.7.75, 2nd Appellant transferred property to 3rd Appellant at direction of 1st Appellant who had paid the 2 sums to the 2 banks, & 3rd Appellant thereafter held as a bare trustee or nominee for 1st Appellant.

In the  
Federal  
Court  
No. 50  
Notes  
recorded  
by Abdoolcader,  
F.J.  
10th January  
1983 (Cont'd)

...3/-

In the  
Federal  
Court

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Notes recorded  
by Abdoolcader,  
F.J.

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P. 31 - 2nd Appellant not to sell land within 1 year  
from 30.3.74 or some other date.

On 4.3.76 3rd Appellant served notice on Respondent  
& husband to vacate premises as registered proprietor.  
Proceedings in Sessions Court brought on 20.3.76. Judgment for  
possession given on 9.8.76.

By then 1 year had elapsed even on Respondent's case.

Puts in a schedule of proceedings hitherto in this  
matter.

Sessions Court Case

Vol. 8 - p. 193 - Statement of Claim.

p. 194 - Defence.

S.340(2)W.L.C. - re fraud.

15.5.76 - Statutory Declaration in support of caveat  
by Respondent. Vol. 2 p. 66-9. - no reference to oral  
representation.

Vol. 3 p. 36 - affidavit of Respondent. - paras 3,5,8 -  
just simple breach of contract - para 13 - first mention of  
fraud in terms - para 14 - fraud.

Vol. 3 p. 367-8 - affidavit of Respondent in  
application for stay in Sessions Court case.

Vol. 3 p. 92-103 - Respondent's Statutory Declaration  
in support of complaint to Singapore Law Society made on  
25.1.77 - paras 5,9.

Vol. 3 p. 98 - Statutory Declaration of Dr. Das.

Vol.3 p. 101 - Statutory Declaration of Devan -  
paras 8 & 9.

Vol. 3 p. 96 - para 8 - Statutory Declaration of  
Respondent amended - first reference to oral representation.

10

20

Vol. 3 p. 63 - Statement of Claim in first action by Respondent.

Vol. 8 p. 225-7.

Vol. 2 p. 230-242 & p. 233 para 9 et seq.

Vol. 1 p. 35 - Statement of Claim of Respondent in present action (reads).

P. 85 - particulars para 11 re para 4(b) of Statement of Claim.

Adjourned at 12.45 p.m.

10 2.30 p.m.

Cullen continues

Vol. 2 p. 147 - sale of property by 3rd Appellant to Jet Age Construction Co. Ltd. in May 1978.

Vol. 4 p. 1600 - 1st Appellant held 60% of Jet Age Construction Co. Ltd. at time of trial.

Vol. 4 p. 1630 - directors of Jet Age.

Vol. 1 p. 88 - Particulars para 31.

p. 89 - Particulars para 44.

p. 91 - para 58.

20 re fraud, Snell on Equity (28th edition) p. 536

At common law, fraud means fraudulent misrepresentation.

Vol. 8 - Judgment.

P. 11B

P. 22E et seq.

Evidence re variation of Agreement - Vol. 4 p. 183F et seq., 201E, 204D-209.

Vol. 2 p. 95-6. Letters from CKB to Devan dated 19.8.74 & 16.9.74 & from Devan to CKB dated 10.5.74 & from CKB to Suppiah & Singh dated 25.10.74

30 Adjourned at 4.15 p.m.

In the  
Federal  
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F.J.  
10th January  
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...5/-

11TH DAY OF JANUARY 1983

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Cullen continues

Judgment Vol. 8 p. 23D et seq. 25B.

Dr. Das' bank account - Vol. 3 p. 132.

Vol. 2 p. 133 at p. 145 - CKB account.

Re Singapore action

Vol. 4 p. 10A, 13E, 47F

Vol. 3 p. 48 - Devan's affidavit - p.38 para 8.

Vol. 8 p. 26A.

Vol. 2 p. 112, 100, 101, 113 - Registration of 4th  
charge refused. 2nd Appellant had registered a caveat.

- Vol. 2 p. 45.

Judge completely wrong on question of variation.

Vol. 4 p. 208E.

Vol. 2 p. 46.

Re attestation on 5.7.75 of transfer by 1st Appellant.

Puts in Bundle of Cases - p. 48.

Terrapin International Ltd. v. IRL (1976) 1 W.L.R. 665  
at p. 669.

Vol. 3 p. 92 & 102 - Complaint to Singapore Law  
Society.

Vol. 4 p. 12 et seq. - Respondent's evidence.

Vol. 3 p. 25

- leaving things to Devan.

Re variation:

(1) Respondent & Devan went on operating CKB account.

(2) No reason for 1st Appellant to pay HSB \$121,000/-  
unless asked to.

(3) Respondent, Devan & Dr. Das knew 1st Appellant

...6/-

paid \$121,000/- & in February 1975 Dr. Das made effort to repay.

(4) Respondent & Devan knew \$92,000/- only paid in 1975 & yet no complaint it should have been \$103,000/- or \$110,000/-

(5) Respondent & Devan continued to live there after discharge by CKB during whole of 1975.

(6) Unless variation as 2nd Appellant said then Respondent never received the full \$220,000/-.

S.42 Contracts Act.

Vol. 8 p. 25D.

Vol. 8 p. 26E - re priority of contract.

Vol. 8 p. 244.

Vol. 4 p. 229E et seq.

Vol. 8 p. 200

Vol. 2 p. 209 at p. 211.

Bowstead an Agency (14th edition) p. 276.

Adjourned at 12.20 p.m.

2.15 p.m.

Cullen resumes.

Re undue influence

Vol. 8 p. 32C - 41A.

S.16 Contracts Act 1950.

Re S.16(3), see: 471 A.I.

Bundle of Cases p. 8-10, 11, 403 at p. 411, 179 at p.182.

Edwards v. Williams (1862) 32 L.J. Ch. 763 (in 2nd

Bundle of Cases) at p. 765.

Vol. 4 p. 9C, 10C, F - 11A, 18F-19A.

Vol. 8 p. 270.

Vol. 4 p. 130F, 193E.

Western Bank of Scotland v. Addie (in 2nd Bundle of Cases)

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...7/-

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1st Bundle of Cases p. 6 - Steedman v. Fidaire  
Corporation (1932) W.N. 248.

Vol. 2 p. 42, 43, 99, 46, 47, 48, 49, 50 L,  
52, 53.

Adjourned at 4.05 p.m.

12TH DAY OF JANUARY 1983

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Cullen continues.

Vol. 4 p. 121D, 156E, 173F, 175B, 186A, 9D.

Vol. 3 p. 137 - release of shares to Devan.'

Re breach of trust.

10

Vol. 1 p. 42

Vol. 8 p. 41B.

1st Bundle of Cases p. 425 85.

Cordery on solicitors p. 106 - in 1st Bundle of  
Cases p. 109.

Vol. 8 p. 41C - Judge wholly wrong.

Re fraud

Judge went seriously wrong in his approach.

Fraud means loss suffered through defendant's  
action.

20

Judge awarded damages for general dishonesty.

Barclays Bank v. Cole (1967) 2 Q.B. 738 - in 1st  
Bundle of Cases p. 415 at p. 420G, 421B, 421G - 422.

1st Bundle of Cases p. 148, 449 (Spencer Bower), 113  
at p. 128, 135.

Vol. 1 p. 43.

P. 91 - items 58, 61, 62, 63.

...8/-

Vol. 4 p. 8D.  
Brikon Investments Ltd. v. Carr (1979) 2 W.L.R. 746  
at p. 749, 752.  
City & Westminster Properties Ltd. v. Mudd  
(1932) Ch. 129.  
Vol. 1 p. 44-6.  
Vol. 8 p. 42C et seq.

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12.27 p.m.

2.15 p.m.

10

Cullen continues

Saminathan v. Rappa (1981) 1 A.L.J. 121 - in 1st  
Bundle of Cases p. 36 at p. 38B, 39B, 40B, 41E.  
Vol. 8 p. 47A.  
1st Bundle of Cases p. 233 - Ritlay v. Chong  
at p. 236.  
Vol. 8 p. 59E-85D - on subsequent events.  
Submit all subsequent events of no consequence.  
Vol. 8 p. 85E - collusion.  
1st Bundle of Cases pl.  
Adjourned at 4.10 p.m.

20

13TH DAY OF JANUARY 1983

13th January  
1983

Cullen continues

Vol. 4 p. 272E, 293E.  
Vol. 8 p. 101E.  
Vol. 3 p. 339 - Majid's affidavit.  
Vol. 4 p. 251D, 247D.

...9/-



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Vol. 8 p. 289 para 25, 163 - 172 at p. 166, 168 et seq.,  
173.

If no variation, only a breach of a collateral  
agreement.

This claim could not be anything other than for a  
breach of contract.

Now on question of damages

1st Bundle of Cases p. 466 - Nanyang Manaf at p. 468.

1st Bundle of Cases p. 455 at p. 456.

1st Bundle of Cases p. 469 at p. 471.

10

1st Bundle of Cases p. 473 at p. 477.

Vol. 2 p. 77 - valuation report by Mohd. Képol dated  
7.7.75.

Vol. 4 p. 61D - evidence of Kepol

Adjourned at 12.30 p.m.

2.15 p.m.

Cullen continues

Chong - valuer Vol. 3 p. 25 - valuation report  
of 26.2.72.

Vol. 2 p. 106 - 2nd valuation report by Chong dated  
19.10.79.

20

Vol. 4 p. 83E - evidence of Chong.

Vol. 4 p. 101C, 102E.

Vol. 3 p. 279 - report of Parampathy dated 12.9.81.

Vol. 3 p. 134-6 - schedule of comparisons.

Vol. 4 p. 273 - evidence of Parampathy.

...10/-

Vol. 9 p. 160 - Judgment re damages.

No damages because Value transferred same as value received.

Adjourned at 4.05 p.m.

14th DAY OF JANUARY 1983

Cullen continues

Mc. Gregor on Damages (14th edition) paras 482, 483 (13th edition) 459, 468.

2nd Bundle of Cases - Malhotra v. Choudhury (1978) 3 W.L.R. 825 at p. 826, 844F, 846B - approved by HL in Johnson v. Agnew.

Peek v. Derry 37 Ch. D. 541 - in 2nd Bundle of Cases - at p. 591, 594.

Mc. Gregor 14th edition 1473

13th edition 1371

If no variation, \$202,000/- must be deducted.

If variation, full \$220,000/- must be deducted.

Re damages for breach of contract.

Damages depend on particular breach. Judge found 2 breaches: (1) premature transfer (2) non-payment in accordance with agreement. If there was a variation no breach because payment in accordance with variation.

Say highest loss for breach of contract \$18,000/- but no loss because of variation of agreement.

Cashin

Judge amply justified in all his findings of facts. Gives facts as they occurred.

...11/-

In the  
Federal  
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No. 50  
Notes  
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F.J.

13th (Cont'd) &  
14th January  
1983

In the  
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Vol. 4 p. 155D.

Vol. 2 p. 57

Vol. 5 p. 60 - submission of 1st Appellant.

Vol. 6 p. 375 - Submission of Respondent - bundle of  
correspondence.

Defendant not honest in that only came out with  
their Defence in this action & so able to tailor their Defence  
to fit in. Letters produced on trial which we had never seen.

Vol. 6 p. 379 - p. 27\* - no mention of sale, only  
to pay off the charge by charging property for an increased amount - 10  
also asked for statement of her account - this can only be given  
if Suppiah & Singh acting as solicitors - also gives 'usual  
undertaking - c.c. to Respondent and Devan.

Vol. 6 p. 380 - letter attached to P. 30 (the agreement)  
in Vol. 2 p. 30.

Vol. 4 p. 6 - p. 7 et seq.

Sole purpose of transaction was to get a signed  
transfer - 2nd Appellant had no intention of buying property  
at all - 1st & 2nd Appallents had no intention of acting on it  
at all.

20

Way in which they got the transfer signed on 30.3.74  
clearly dishonest. Had no intention of acting on P. 30 & P. 31.

Adjourned at 12.30 p.m.

3.00 p.m.

Cashin continues

Pleadings Vol. 1 p. 39 para 8C-D

Vol. 1 p. 87 Items 21 & 23.

Vol. 4 p. 197E-198.

Vol. 2 p. 198 - p. 110.

...12/-

- 12 -

Vol. 4 p. 11 - 12, 13D, 15A, 17A-B, 18-19, 27, 28,  
30, 31, 40F.

- p.42 - evidence of PW2 - Das - p. 46 et seq.

Vol. 6 p. 380

- p. 381, 382, 383, 384, 385, 386\*, 387, 388, 389, 390,  
391\*, 392, 393, 394, 395\*, 396, 397, 398, 399, 400\*, 401, 402,  
403, 404, 405.

Adjourned at 4.15 p.m.

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F.J.

14th January  
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15TH DAY OF JANUARY 1983

15th January  
1983

10

Cashin continues

Vol. 6 p. 406, 407, 408\*.

Vol. 4 p. 105 - evidence of PW10 Anandan.

Vol. 6 p. 410, 411, 412, 413, 414.

Vol. 4 p. 79 - evidence of PW5 - CKB officer  
at p. 81F - 82A.

Vol. 6 p. 455, 416\* (date 30.6.75 - absolutely vital),  
417, 418.

Vol. 4 p. 16F - evidence of Respondent.

Vol. 6 p. 420, 421.

20

After p. 43 (Vol. 6 p. 398) Suppiah & Singh never  
sent copies of their letters to Respondent or Devan. This  
silence highly significant..

Vol. 6 p. 422, 423, 424, 425.

Vol. 3 p. 36 - affidavit of Respondent.

Vol. 4 p. 114 - evidence of 1st Appellant - at p.  
117E - 118 et seq.

...13/-

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Vol. 4 p. 137 - amendment by 3rd Appellant. From  
this stage, certain change in evidence.

Adjourned at 12.00 p.m.

Adjourned to 18.1.83.

18TH DAY OF JANUARY 1983

Cashin continues

Vol. 4 p. 129C4 - shows 1st Appellant did pay  
pursuant to Memorandum P. 30.

Evidence of 2nd Appellant

Vol. 4 p. 178.

p. 179C et seq.

p. 184 - if outright sale, increase in overdraft  
immaterial.

Vol. 6 p. 392 - p. 47 - title deeds returned.

Vol. 6 p. 398 - p. 43.

Vol. 6 p. 379 - p. 27.

Vol. 4 p. 203E et seq.

Vol. 4 p. 224D, E, p. 230A.

Vol. 8 p. 244, 245.

Vol. 3 p. 319 para 21.

Vol. 4 p. 236E - 237A, C.

Adjourned at 12.45 p.m.

2.30 p.m.

Cashin continues

Evidence of 3rd Appellant.

Vol. 4 p. 249

p. 250C et seq.

...14/-

Vol. 3 p. 280 - Complaint to Law Society of Singapore.  
- p. 297 - Reference by 3rd Appellant.  
- p. 304 - Reply to Complaint.  
Vol. 4 p. 288E - evidence of 3rd Appellant on this.  
Vol. 4 p. 90 - Evidence of Lim Seng Bock.

In the  
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F.J.  
18th January  
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LAW

Re Fraud

Fraud in oral meaning covers all types of  
fraud including fraud in contract & in Tort which gives rise to  
action in deceit for damages.

10

S. 17 Contracts Act - fraud equivalent to common  
law fraud.

S. 18 Contracts Act - misrepresentation equivalent  
to innocent misrepresentation.

O.18 r 12(1) RMC 1980 - misrepresentation & fraud  
treated separately.

S.340(2)(a) MLC refers to fraud & misrepresentation.

Statement of Claim - para 12(a) fraud in contract or in  
Tort - paras 12(b) & (c) - fraud in Tort contemplated in S.340(2)(a)  
MLC.

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Vol. 5 p. 235 - submission by 2nd Appellant.

Vol. 6 p. 138\* - submission by Respondent et seq.

Adjourned at 4.30 p.m.

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Cashin continues

Vol. 6 p. 149 - local authorities.

Vol. 4 p. 199A - he therefore regarded P. 30 itself

...15/-

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as a representation. Clear neither 1st nor 2nd Appellant ever intended to act on P. 30 & P. 31.

Vol. 4 p. 203A.

Vol. 8 p. 56C - finding by Judge.

Vol. 4 p. 98.

Haji Abdul Rahman v. Haji Hassan - 1st Bundle of Cases p. 139.

Misrepresentation made at the time - Vol. 8 p. 55C.

Re pleadings

KEP Mohd. Ali v. KEP Mohd. Ismail (1981) 2 M.L.J. 10 (FC).

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Playing Cards v. China Mutual Navigation (1980) 2 M.L.J. 182 (FC).

Esso Petroleum v. Southford Corporation (1956) 2 W.L.R. 81.

Siti Aisha v. Goh Cheng Hwai (1982) CLJ 544.

Re damages

D1 - Valuation of Chong in February 1972 at \$220,000/-  
Then how can Judge be wrong in saying value 370,000 odd in July, 1975.

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C.L.R. v. Alagappa Chettiar (1971) 1 M.L.J. 43 (P.C.)

Re 220,000/- not being recoverable, Singma Sawmill Co. San. Bhd. v. Asian Holdings (1980) 1 M.L.J. 21.

Re interest awarded, find it difficult to support award of interest at 6% on 370,000/- odd.

Cullen replies

Vol. 6 p. 156 - no court will award damages for these matters.

...16/-

Vol. 2 p. 100, 101.  
Re attestation date: Vol. 3 p. 140.

Vol. 2 p. 105, 55.  
Vol. 3 p. 28, 31, 32, 34, 35.  
Vol. 4 p. 120E, 155D.  
Vol. 5 p. 60.

Earl of Chesterfield v. Jansenn 26 E.R. 191 at p. 223

Vol. 4 p. 51C - Dr. Das' evidence that Devan trying  
to sell property.

Vol. 2 p. 236 - para 13(f)  
- p. 242 - para 18.  
Vol. 1 p. 43 - para 12 of Statement of Claim.  
Vol. 6 p. 55C.

Plaintiff's claim on fraud breaks down on pleadings.

2 vital issues of fact:

Adjourned at 12.35 p.m.

2.30 p.m.

Cullen continues reply

2 vital issues of fact which dispose of the action  
& on which Judge made perverse findings:

(1) Were Yeow & Chin acting as solicitors  
for Respondent at time of completion of transaction in  
July 1975. This vital re undue influence, variation.

Vol. 2 p. 97 - This shows Respondent and Devan did not  
regard Suppiah and Singh as their solicitors to extent they  
were unable to consult other solicitors.

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...17/-



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Vol. 2 p. 99, 112, 100.

Vol. 6 p. 412, 413, 414,

Vol. 4 p. 16F-17A.

Vol. 3 p. 75.

Vol. 4 p. 191B-C.

Vol. 6 p. 415, 416, 418, 419, 421.

Vol. 4 p. 121D-125E, 156E-157E, 173F-174B, 175B-D,  
185E-186E, 224D-225E.

Vol. 4 p. 9D-E, 26A-B.

Vol. 3 p. 137

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Vol. 6 p. 408.

(2) Whether there was a variation or not of the  
agreement.

Vol. 4 p. 183F-185D - evidence of 2nd Appallent.

Vol. 6 p. 23F, 24F-25A.

Vol. 4 p. 10A, 13E.

Vol. 2 p. 145.

Adjourned at 4.20 p.m.

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Cullen continues reply

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No reason for 1st Appallent to pay HSB almost \$122,000/-  
unless some arrangement.

Vol. 4 p. 19D.

Butler v. Fairclough - 1st Bundle of Cases p. 279  
at p. 289-290.

Bain v. Fothergill - 1st Bundle of Cases at p. 360-1.

...18/-

Re undue influence

Vol. 2 p. 27 - p. 27.

Vol. 8 p. 92B -93A.

Vol. 4 p. 7F, 8B, 10A, 13E - 14A, 18D.

Vol. 2 p. 39, 40.

Vol. 4 p. 119D, 120B, 128D, 186D.

Vol. 3 p. 62.

Vol. 4 p. 97C.

Vol. 3 p. 63 at p. 66 - para 16(2).

Vol. 4 p. 190, 191.

Vol. 3 p. 319, 317, 323.

Re 3rd Def.

Complaint to Law Society - Vol. 8 p. 290.

Re damages

Judge had opinion of 2 valuers.

Nanyang 1st Bundle of Cases p. 468.

C.A.V.

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Sgd. 19/5/83

Secretary to  
Dato E. Abdoolcader.

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JUDGMENT

In the  
Federal  
Court  
  
No. 51  
Judgment  
(Liability  
and damages)  
16th May  
1983

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

Federal Court Civil Appeals Nos. 215 & 216 and  
291 & 212 of 1982

Between

- |                         |                |
|-------------------------|----------------|
| 1. DATUK JAGINDAR SINGH |                |
| 2. DATUK P. SUPPIAH     |                |
| 3. ARUL CHANDRAN        | ... Appellants |

And

TARA RAJARATNAM (m.w.)	... Respondent
------------------------	----------------

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(In the Matter of Civil Suit No. 284 of 1979  
in the High Court in Malaya at Johore Bahru

Between

TARA RAJARATNAM (m.w.)	... Plaintiff
------------------------	---------------

And

- |                         |                  |
|-------------------------|------------------|
| 1. DATUK JAGINDAR SINGH |                  |
| 2. DATUK P. SUPPIAH     |                  |
| 3. ARUL CHANDRAN        | ... Defendants). |

Coram: Lee Hun Hoe, C.J. (Borneo)  
Salleh Abas, C.J. (Malaya)  
Abdoolcader, F.J.

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JUDGMENT OF THE COURT

(delivered by Salleh Abas, C.J. Malaya)

This is an appeal against the decision of Razak, J.  
It is a sad case and has a very chequered history.  
Mr. Terrence Cullen, Q.C. appeared for the appellants with  
Mr. Ronald Khoo and Mr. Chin Yew Meng while Mr. Howard  
Casnin and Mr. Subra Naiker for the respondent.

The Facts

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

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the 2nd appellant (Suppiah) are partners practising under the style of Suppiah & Singh in Johore. The 3rd appellant (Arul) was a partner in the Singapore firm of Rodyx & 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 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. 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.

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On 30th March, 1974 Suppiah, Jagindar 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 \$110,000.00 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. On 27.4.74 Jagindar paid the HKBC \$121,819.80. More than a year later he paid CKB \$92,000.00 and CKB was obliged to discharge the charges. He also attested the transfer form which Tara signed earlier when he entered into the agreement. He also inserted the date 5.7.75 on the transfer form indicating that Tara transferred the property to

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Suppiah on that date. The transfer was registered on 22.7.75. Some 18 days later Suppiah transferred the property for the same amount to Arul on 9.8.75. Later on instruction from Jagindar the property was transferred to Jet Age Construction Company which was almost wholly owned by Jagindar for \$361,114.00. Although Arul received no payment the account book showed the company owed him the amount. The property was eventually subdivided into 70 lots and sold to the public. So Tara was unable to get the property back.

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Between 30.3.74 and May 1975 various letters, documents and correspondence passed between Suppiah & Singh and CKB, Devan, Yeow & Chin, Department of Inland Revenue and Office of Pengarah Tanah dan Galian. In May 1975 Suppiah obtained judgment against Dr. Das for \$149,000.00 in Singapore and the same was registered at the High Court at Johore Bahru. In early 1976 applications for subdivision in respect of the property were made in the name of Arul by Suppiah & Singh through a firm of surveyors and architects. In early March, 1976 Devan and Tara each received a notice to quit dated 4.3.76 from Suppiah & Singh acting for Arul. They refused to quit and the dispute came before the court. What happened thereafter is a matter of going through the court records. Every technical and procedural point that one can think of was taken against Tara's claim. The history of the various proceedings was summarized not only by the learned Judge but also by Wan Suleiman, F.J. sitting with Hashim Yeop Sani, J., as he then was, and the late Ibrahim Manan, F.J. in Tara Rajaratnam v. Datuk Jagindar Singh & Ors.<sup>(1)</sup> In delivering the judgment of the Court Wan Suleiman, F.J. criticized the Judicial Commissioner for striking out the statement of claim and giving leave to file fresh action

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(1) (1981) 1 M.L.J. 232.

on two occasions. He could see no reason why leave of the court was necessary to file fresh action arising out of a different cause of action unless the Judicial Commissioner did not understand his own orders. In rejecting the plea of res judicata, the Court took the view that the two orders granting Tara liberty to file fresh action could only mean that no final decision had been pronounced so as to estop Tara in any subsequent litigation from disputing or questioning such decision on merits.

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So much has been said about the purport of P.30 and P.31 that it would be better to set them out in full. P.31 is in actual fact a continuation of P.30 which reads:-

"I TARA RAJARATNAM (f) NRIC No. 2317344 of No. 76, Main Road, Kulai, Johore, proprietor of the land described in the Schedule below and the house erected thereon and known as KLBK 681, Kulai Besar, Kulai, Johore, hereby confirm that the consideration of \$220,000.00 referred to in the Transfer executed by me in respect of the said land in favour of PAKKISAMY SUPPIAH of No. 33, Jalan Keruing, Kebun Teh Park, Johore Bahru is arrived at as follows:-

(a) in consideration of the said P. SUPPIAH paying the sum of Dollars \$103,658.44 which is the amount due from me to the CHUNG KHIOW 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 me 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 me.

(b) a further sum of \$110,000.00 is in consideration of the said P. SUPPIAH paying Datuk JAGINDAR SINGH of No. 41, Jalan Waspada, Johore Bahru, being the amount payable by my brother-in-law Dr. KRISHNA SHIVADAS (also known as Dr. Das) of No. 25, Jalan Waspada, Johore Bahru, to the said Datuk JAGINDAR SINGH who will be paying to the HONGKONG & SHANGHAI BANK, Collyer Quay, Singapore the sum of \$110,000.00 (which I hereby agree) being the loan granted to my said brother-in-law by the said Bank on the guarantee given by the said Datuk JAGINDAR SINGH.

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The Schedule referred to above

Mukim	Lot No.	Description and No. of Title	Share of land (if any)	Registered No. of lease/sub lease (if any)	Registered No. of charge (if any)
Senai- Kulai	6025	Certificate of Title No. 13817 for area 5A. OR.OOP or thereabouts	whole	nil	nil

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Dated this 30th day of March, 1974.

Witnessed by  
K.V. Devan

Signed by the abovenamed  
Tara Rajaratnam"

P. 31 reads:-

"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 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".

Solicitor/Client Relationship

Mr. Cullen submitted that the charges of fraud and undue influence were based on a solicitor-client relationship and that such a relationship had not been established between the appellants and the respondent at the trial. From the correspondence it seems clear that Suppiah & Singh were acting for Tara though they said they were merely assisting as they sent no bill. The fact that they did not bill Tara or Devan is no ground for saying they did not act for Tara. We need only refer to a few letters to see whether the relationship existed.

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On 12.3.74 Suppiah & Singh wrote to the CKB on the following terms (P.27):-

"We act for Madam Tara Rajaratnam who had been given overdraft facilities up to a maximum of \$110,000.00 by your bank in 1966 on a charge of her property. The overdraft account is operated by her husband Mr. K.V. Devan (Account No. 146) of 681, Kulai Besar, Kulai.

As our client wishes to pay off the charges by charging the said property for an increased amount, we would appreciate it very much if you could let us have a statement showing the amount due to your bank and the title deeds to the property on our usual undertaking for the above purpose."

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The letter speaks for itself in no uncertain term. No bank would allow them to have a statement of account or title deed of a customer unless they are acting for the customer. On 14.3.74 the CKB replied and advised them that the balance of the account as at 8.3.74 was \$103,658.44 with interest at 11.5% per annum. The title deeds and duplicate charges were enclosed for them to prepare the discharge of the charge. Nothing was heard from them. So on 10.6.74 the CKB referred to their earlier letter and enquired about the matter. When the bank received no response the bank wrote direct to Devan on 16.9.74. On 25.10.74 the CKB asked for the return of the title deeds and the duplicate charge. Suppiah & Singh tried their best to hold on to the documents by stating on 12.11.74 that "steps are being taken to have the property discharged within the next 21 days." They continuously obtained information from the CKB. They could not do so unless they were acting for Devan and Tara. On 26.12.74 the bank referred to their request to confirm the balance of \$116,596.25 for discharge and continued as follows:-

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"As this is the second time that we have been informed by you of our customer's intention to repay the overdraft and have the property discharged and to which both have not materialised we have no alternative but to request you to return to us on receipt of this letter the title deeds and documents pertaining to the property."



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They replied on 29.12.74 by referring to the above letter and stating:-

"We have, however, written to our clients to give us instructions whether they would pay the balance due to you on the charge and if we did not hear from them we would return all the title deeds within the next 10 days."

If, as was submitted, the agreement was an outright sale we could not see the purport of the above letter. Why take instructions from "our clients" from whom Suppiah had bought the property outright? Suppiah should have made payment within a reasonable time after the signing of the agreement. The learned Judge found that Suppiah never intended to buy. He was merely waiting for instruction from Jagindar. Such a situation could not have arisen if the agreement was an outright sale as claimed by the appellants as they allowed the debts to grow.

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On 30.1.75 they returned the title deeds and duplicate charges to CKB. Then on 2.2.75 they wrote to CKB to say they were acting for Suppiah "to whom the owner of the above land Tara Rajaratnam had sold the property subject to the charges....." They asked for the title deeds and duplicate charges again to prepare the discharge of the charge. After this letter no copy was sent to Devan. Apparently, they did not want him to know what was going on. Suppiah & Singh did not appear to be very ethical because they could have told CKB that Suppiah bought the property immediately after 30.3.74 as they maintained it was an outright sale. They did not do so because Suppiah had no intention of discharging the charges and of carrying out the terms set out in the agreement. One thing is clear from the correspondence and conduct of the appellants that Suppiah & Singh were acting as solicitors for Devan and Tara in connection with the agreement of 30.3.74. Yeow & Chin never acted for Tara except for the purpose of the discharge of the charge. If Suppiah & Singh as a firm of solicitors of which Suppiah and Jagindar were

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partners were acting for Tara and Devan at the time then quite clearly what happened on 30.3.74 was thoroughly reprehensible on the part of Suppiah and Jagindar. If they were not acting but assisting as they claimed then in such a situation they should have informed Tara of the fact and advised her to get independent legal advice to safeguard her interest.

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Fraud and Breach of Trust

10 Mr. Cullen submitted that the learned Judge was wrong in law when ruling on allegations of fraud and breach of trust. Because of this the learned Judge wrongly found the appellants guilty of contempt without formulating specific charges. This has been corrected in Jagimar Singh & Ors. v. Attorney-General<sup>(2)</sup> and no more need be said. It is the submission of Mr. Cullen that only the claim based on contract was one of pure fact while fraud and misrepresentation were based more on question of law. Neither the learned Judge nor the respondent's counsel asked the two questions - what did appellants hope to gain and what was their prospect of not being caught. 20 Based on the learned Judge's finding of the value of the property the most each appellant would gain would not be more than \$150,000.00. According to Mr. Cullen this would not be enough to start a new life elsewhere. We do not think the test which Mr. Cullen would want everyone to follow is appropriate. We are not dealing with a case of a trickster who, in one swoop, hopes to make his fortune and to fly elsewhere to enjoy his illgotten gain. We are dealing with professional men who take 30 advantage of their status and occupation to lure the unwary clients into parting with their property and making sure that they could not recover their property back. They act with such confidence because the prospect of their being brought to court is very slight by reason of costs and inconvenience to the clients.

<sup>(2)</sup> (1983) 1 H.L.J. 71.

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Mr. Cashin had made clear that he was not relying on common law fraud but rather on actual fraud as laid down under section 340 of the National Land Code. Mr. Cullen contended that fraud must be pleaded and proved and that in this case the pleadings were drafted contrary to the rules. He submitted that section 340 does not give rise to damages. It merely allows the court to set aside the transfer. Here the court could not do so. Therefore, section 340 is out. Further, fraud is used in many statutes. The remedy is the amount of profit. He referred to section 17(a) of the Contracts Act which clearly points to an ingredient of common law fraud. He did not know how wide section 340 was but submitted that the section would not be relevant to the present action. He contended that when the action commenced section 340 went out of the window as the land had already been transferred. It is the very case of the respondent that the appellants deliberately obtained the transfer form with the intention of using the transfer form to secure the property and then to enable Suppiah to transfer it to Arul in such haste as to prevent Tara from recovering her property. To make it doubly sure Jagindar further caused Arul to transfer the property to Jet Age Construction Company (in which Jagindar held a majority share). Eventually, the company sold the property in small lots to the public.

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It is the submission of Mr. Cullen that in civil action fraud has a special meaning. It does not mean merely general dishonesty. Fraud has a precise meaning. He cited Barclays Bank Ltd. v. Cole<sup>(3)</sup> where at page 743 Denning, M.R. answered Mr. Ashe Lincoln's contention that a charge of robbery includes fraud as follows:-

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".....Robbery includes stealing, he says and stealing includes fraud. I cannot accept this argument. 'Fraud' in ordinary speech means the using of false representations to obtain an unjust advantage: see the definition in the Shorter Oxford English Dictionary. Likewise in law 'fraud' is proved when it is shown that a false representation has been made knowingly, or

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(3) (1967) 2 Q.B. 738.

without belief in its truth, or recklessly, careless whether it be true or false: see Derry v. Peek(4) per Lord Herschell. In any case, 'fraud' involves a false representation. Robbery does not. It involves violence, not fraud.....".

Diplock, L.J. at page 744 said:-

10 "Robbery is not included in the ordinary meaning of the word 'fraud' - as the Oxford Dictionary confirms. But the section is dealing with procedure in an action in the Queen's Bench Division. If the expression 'a charge of fraud' has a special meaning in this context as a term of art, that special meaning must be ascribed to it. I think it had. For at least 100 years (see Bullen & Leake's, Precedents of Pleadings, 3rd ed. (1968) 'fraud' in civil actions at common law, whether as a cause of action or as a defence, has meant an intentional misrepresentation (or, in some cases, concealment) of fact made by one party with the intention of inducing another party to act upon it, which does induce the other party to act upon it to his detriment."

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No one quarrelled with the proposition that fraud must be pleaded with particularity and proved beyond reasonable doubt. Mr. Cullen submitted that however much latitude was given to the respondent there was no evidence of misrepresentation to bring fraud into the picture. What was said to be misrepresentation was merely collateral oral agreement.

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Under section 340(2)(a) of the National Land Code the title or interest of any person or body shall not be indefeasible "in the case of fraud or misrepresentation to which the person or body or any agent of the person or body, was a party or privy." The section speaks of "misrepresentation" not "fraudulent misrepresentation". The Code does not define "fraud or misrepresentation". Indeed, no Torrens statute expressly defines what constitutes "fraud". However, the Privy Council has made clear in Assets Company Ltd. v. Mere Roihi & Ors.(5) that "fraud" in the Torrens system means "actual fraud" and not

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(4) (1889) 14 App. Cas. 337.

(5) (1905) A.C. 176.

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"constructive or equitable fraud". There a registered title was challenged on the ground, inter alia, that it was obtained by fraud. Their Lordships found that the registered proprietor was not implicated in the making of any fraudulent statement, any bribery, corruption or dishonesty. In delivering the judgment of the Board, Lord Lindley, after referring to the various sections of the New Zealand Transfer Act, 1870 and Act of 1885 at page 210, said:-

".....by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort not what is called constructive or equitable fraud - an unfortunate expression and one very apt to mislead, but often used for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud...."

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Under section 340(2)(a) of the Code it is expressly provided that a registered title is defeasible in the case of fraud only where its proprietor was a "party or privy" to the fraud. In a subsequent case of Waimiha Sawmilling Company Ltd v. Waione Timber Company Ltd<sup>(6)</sup> the Privy Council held that a registered proprietor who took a transfer with actual knowledge of an existing adverse claim against his transferor, acquired an indefeasible title as his mere knowledge of the existence of the adverse claim did not amount to fraud. Lord Buckmaster stated:-

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"If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear....."

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Fraud may also be caused by deliberately and dishonestly registering an interest and then transferring the interest even before the ink is dry to another person without the consent of the original registered proprietor. The two authorities clearly show that fraud must be actual. It must involve dishonesty of some sort. Thus fraud may occur where the designed object of a transfer is to cheat

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(6) (1926) A.C. 101, 106 & 107.

a person of an existing right or where by a deliberate and dishonest act a person is deprived of his existing right. However, Lord Buckmaster very wisely added these words:-

"It is not, however, necessary or wise to give abstract illustrations.....for each case must depend upon its own circumstances."

The contention of Mr. Cullen is that "actual fraud" is the same as the common law "fraudulent misrepresentation" and that therefore whatever happened after 30.3.74 would be of no relevance whatsoever to the case. In other words, to succeed the respondent must prove that appellants were guilty of "fraudulent misrepresentation" on 30.3.74. Mr. Cashin disagreed with the above contention. He thought that an attempt had been made to narrow down the field and the scope of fraud as understood under the Torrens system by equating it to the common law fraud. In his book in "Tenure and Land Dealings in the Malay States" (1st Edition 1973), beginning at page 360, Dr. David Wong makes this observation:-

"(ii) 'Misrepresentation'

Section 340(2)(a) of the National Land Code sets out, alongside 'fraud', 'misrepresentation' as another ground on which a registered title may be set aside. As in the case of fraud, the person whose title is so rendered defeasible must be a party or privy to the misrepresentation. It is not clear whether, in the light of its being placed on the same footing as 'fraud', 'misrepresentation' could be regarded as a separate ground on its own account, that is, whether or not it may be extended to include 'innocent misrepresentation'. There has not been any decision on this point. However, it would appear that the ground of 'misrepresentation' should be confined to cases which involve fraudulent or some sort of dishonest intention, although this would mean treating the specific reference to 'misrepresentation' as redundant in view of the broader provision for 'fraud'. But, to give it a wider meaning seems undesirable as it would lead to an obvious anomaly of throwing the principle of indefeasibility wide open to full equitable intervention in cases of misrepresentation whereas the provision for 'fraud' (accepting the policy rationale behind the same provision in other Torrens statutes) is intended to circumscribe such intervention in various cases of 'equitable fraud'. There seems to be no justification for letting in any such 'equitable fraud' simply because it takes the form of a 'misrepresentation'."

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Mr. Cashin also referred to another book "National Land Code - A Commentary" by Judith E. Sihombing on the word "misrepresentation" as explained at page 277 onwards. The author thinks that because "the term 'misrepresentation' is limited to fraud in this section (i.e. 340), the term could be read as meaning fraudulent misrepresentation not only to complement fraud but also as an alternate ground to fraud to render a title defeasible. If the preposition 'or' is treated as conjunctive then it will be difficult to succeed for in few cases would fraud involve also misrepresentation. The better view is that the preposition 'or' is disjunctive so that 'fraud or misrepresentation' means either actual fraud or fraudulent misrepresentation or both." Mr. Cashin submitted that "fraud" in the Torrens system also included personal dishonesty or moral turpitude. In support he cited the Australian case of Butler v. Fairclough & Anor.<sup>(7)</sup> involving registration of land and allegations of fraud and breach of contract. On the facts the High Court held that there was no contract nor was there fraud to invalidate the registration in question. In the course of his judgment Griffith, C.J. said:-

"It is settled that the term 'fraud' as used in that section imports personal dishonesty or moral turpitude."

It would seem that from the cases that "fraud" under the Torrens system is wider in meaning than the limited common law fraudulent misrepresentation. So that while it is correct to say that "fraud" under section 340(2)(a) is a far broader concept than the common law "fraudulent misrepresentation" and that though "fraudulent misrepresentation" would be "fraud" within the National Land Code, it would be totally incorrect to say that "fraud" in the Code is the same thing as "fraudulent misrepresentation". Our courts have accepted the wider view of "fraud": See

Haji Junus v. Chik & Anor.<sup>(8)</sup>  
Mohd Isa v. Haji Ibrahim;<sup>(9)</sup>  
Public Finance Bhd. v. Narayanasamy;<sup>(10)</sup>  
Jasbir Kaur v. Tharumber Singh.<sup>(11)</sup>

(7) (1917) 23 C.L.R. 79.  
(8) (1964) M.L.J. 343.  
(9) (1968) 1 M.L.J. 186.

(10) (1971) 2 M.L.J. 32.  
(11) (1971) 2 M.L.J. 224.

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There seems to be substantial similarity between our case and the case of Loke Yew v. Port Swettenham Rubber Co. Ltd.<sup>(12)</sup> There one Haji Mohamed Eusope owned 322 acres of land in Selangor and the appellant Loke Yew was in possession of 58 acres thereof. The respondent bought the land with knowledge of the appellant's interest. Eusope refused to sign the conveyance without a document showing that he was not selling the appellant's land. Mr. Glass, who was acting as agent for the respondent, assured Eusope that he knew the appellant and would purchase his interest. However, Eusope insisted on something in writing. Accordingly, Mr. Glass wrote out a document which stated that "As regards Loke Yew's interest I shall have to make my own arrangements." The transfer was made to Mr. Glass who then transferred it to the respondent. Thereafter an action was taken to eject Loke Yew. The Judicial Commissioner found there was fraud and dismissed the suit. The Court of Appeal of the Federated Malay States reversed the order of the Judicial Commissioner. The Privy Council restored the order of the Judicial Commissioner. With reference to the document written by Mr. Glass the observation of Lord Moulton at page 502 would be of significance and equally applicable to our case:-

"Their Lordships have no doubt that the true conclusion to be drawn from the evidence is that the above statement of Mr. Glass to Haji Mohamed Eusope was intended to be and was a statement as to present intention as well as an undertaking with regard to the future, and that that statement was false and fraudulently made for the purpose of inducing Haji Mohamed Eusope to execute a conveyance which in form comprised the whole of the original grant, and that but for such fraudulent statement that conveyance would not have been executed....."

Arul was protected, so he thought, because he was a registered proprietor. The evidence that he was in fact a nominee and therefore not a bona fide purchaser for value was never allowed to surface but kept in doubt

(12) (1913) A.C. 491 @ 502 (P.C.)

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before Syed Othman, J., as he then was, when Arul claimed possession of the land in Arul Chandran v. Tara Rajaratnam.<sup>(13)</sup> In the light of the recent amendment made by Arul to his defence and other evidence we cannot say the learned Judge was wrong to say that not only Syed Othman, J. but also Annuar, J.C. were misled into believing that Arul was a bona fide purchaser for value of the property. It is difficult to accept that a lawyer of his experience knew nothing of the matter on 31.7.75 but came to know of something only in January, 1977. Even then he chose to cover up the matter. In order to maintain any sort of claim against Arul the respondent would first have to succeed against Suppiah and impeach his title. Under the National Land Code in order to succeed against Arul, the respondent must prove against him that at or prior to the time he obtained registration and title to the property, he was either fraudulent, which means that he was a party to the fraud, or had knowledge of the fraud.

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So as a bona fide purchaser for value as he had alleged until the mid-trial amendment of his defence Arul was protected although his vendor or any predecessor in title might have acted in bad faith. That is to say even though Suppiah or Jagindar had acted in bad faith Arul was protected. If Arul had admitted that he was not a bona fide purchaser for value he would not have been protected and the respondent would have a better chance of recovering her property. Jagindar, Suppiah and Arul all knew perfectly well that although on the face of it Arul was a registered proprietor in actual fact he was merely a nominee or trustee for Jagindar and therefore not a bona fide purchaser for value as claimed all along until the amendment. In other words, they had all along misled Syed Othman, J. and Annuar, J.C. to the detriment of Tara. They had no justification to mislead the courts into believing that Arul was a bona fide purchaser for value when he was a mere nominee.

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(13) (1979) 2 M.L.J. 172.

A misrepresentation is a ground for relief if it is one of the causes, though not the sole cause, that induced the plaintiff to make the contract: Edgington v. Fitzmaurice.<sup>(14)</sup> The fact that the appellants no longer have the property does not mean that the respondent cannot claim for damages for fraud.

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On the evidence the learned Judge was entitled to take the view that the appellants were not honest in that the 1st appellant and the 2nd appellant never really intended to fulfil the conditions of the agreement and that all they wanted was mainly to get the respondent to sign the transfer form so that they could lay their hands on the property at a time of their choosing. As regards the 3rd appellant he must know what was going on since he claimed himself to be the registered proprietor and denied he was a nominee. In effect he impliedly claimed to be a bona fide purchaser for value. He colluded with the other appellants to get possession of the property. The haste with which 2nd appellant transferred the property to 3rd appellant was part of a design to deprive the respondent of the property which was eventually put out of her reach on the property being subdivided and sold to the public. It is the act or conduct of the defrauder that the court is concerned with. Both Jagindar and Suppiah knew that Tara merely wanted the agreement to be a security agreement. Her questioning of Suppiah about the agreement and the insertion by Suppiah of the manuscript showed quite clearly that they knew it was meant to be a security agreement. They denied they acted as solicitors but were merely assisting. The learned Judge rightly rejected such a proposition.

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We are here dealing with a system of conveyancing completely different from the English system. We have to be very careful when attempt was made to introduce English law in such a case. The words of Lord Dunedin in Haji Abdul Rahman & Anor. v. Mohamed Hassan<sup>(15)</sup> still ring in our ears:-

(14) (1885) 29 Ch. D. 459.

(15) (1917) A.C. 209.

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"It seems to their Lordships that the learned judges, in these observations, have been much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were here dealing with a totally different land law, namely a system of registration of title contained in a codifying enactment....."

It is interesting to note that he made the above remarks in respect of a claim by the former registered owner of the land who alleged that although the ostensible transaction was an out and out sale, it was in truth no more than a jual janji or mortgage. There the parties entered into an agreement whereby as a security for a debt, the debtor's land was transferred to the creditor on condition that if the debtor repaid the debt within six months the land was to be reconveyed to him otherwise the agreement would become void. The debtor thought his right to redeem the property could be exercised at any time within 60 years. Held the agreement merely conferred on the debtor a contractual right and the action brought after 12 years was barred by limitation. Also, in Bachan Singh v. Mahinder Kaur & Ors. (16) Thomson, J., as he then was, referred to the difficulty and confusion which attend actions relating to land in Malaya in an attempt to force local law in conformity with conceptions of the English law. On the facts we have no reason to interfere with the findings of the learned Judge on fraud and breach of trust in the circumstances.

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#### Escrow

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The question of escrow has been raised both here and the court below. Mr. Cullen contended that the transfer form could be regarded as an escrow. In support he cited Terrapin International Ltd. v. Inland Revenue Commissioner, (17) a case involving payment of stamp duty. It was held in that case that a document intending to take effect as a deed on fulfilment of conditions could be executed as an escrow. It may not be effective until all the conditions were fulfilled. As a result of delay the exchange took place on 8.5.74 and not 30.4.74. Stamp duty became payable when the deed was executed by being

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(16) (1956) M.L.J. 97.

(17) (1976) 1 W.L.R. 665.

unconditionally delivered on 8.5.74. In our case the transfer form can in no way be regarded as an escrow. It was only signed by Tara and not attested at the time. The attestation was made later by Jagindar who was clearly interested in the property. He also dated the transfer form purporting to show that Tara sold the property to Suppiah when in actual fact he was the buyer. To be effective as an escrow all the formalities of a deed must be satisfied. Suppiah did not fulfil any condition of the agreement to make the transfer form effective as an escrow. In our view the basic formalities to create an escrow are lacking.

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#### Outright Sale or Security

The contention of the appellants is that the agreement was an outright sale of the property with the option for Tara to repurchase within a year from the date of the execution of the agreement, that is, 30.3.74. On the other hand, the respondent contended that the agreement was a security agreement whereby the property would be transferred to Suppiah on payment of the two sums mentioned earlier subject to the two undertakings given by Suppiah in the form of a manuscript. The two undertakings were (i) that Suppiah would not sell the property to anyone for one year without the consent of Tara; and (ii) that he would transfer the property back to Tara on her repaying the \$220,000.00 within one year. It is the submission of the respondent that the one year period is to be calculated from the time Suppiah paid the two sums and became the registered proprietor and not as contended by the appellants from 30.3.74.

Several factors favour the contention of the respondent. The insertion of the manuscript was a clear indication that it was meant to be a security agreement rather than an outright sale. It is not unlike the Malay customary transaction known as jual janji. In such a transaction the borrower transfers his land to the lender on payment who takes possession of the land and may make any profit out of the land as a sort of interest payment.

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The borrower is entitled to have the land transferred back to him upon paying the debt. However, when a period for repayment of the loan is fixed then the default to pay will convert the original arrangement into an absolute sale, jual putus. The learned Judge had no doubt at all that the appellants knew that Tara and Devan intended the agreement to be a security agreement by reason of the manuscript. He also pointed out that Tara had an earlier experience of such transfer and re-transfer of the property. Devan transferred the property to one H.L. Tan for \$10,200.00. 10  
Later, H.L. Tan transferred it back to Tara for \$10,700.00. The extra was meant to be for interest. Tara was therefore familiar with such type of transaction. Also, nowhere in the agreement was any mention made of selling and purchasing. Neither was purchaser or vendor used to suggest an outright sale. Further, if it was meant to be an outright sale the usual practice of payment within a reasonable time, say within a week, must be followed. Suppiah conceded as much when cross-examined that such was the practice in an outright sale. Further, the 20  
correspondence referred to earlier between Suppiah & Singh and the CKB do not seem to support an outright sale. In P.33 (Volume 8 page 179) Suppiah made a statutory declaration in support of an application for a caveat under section 323 of the National Land Code stating that by virtue of an agreement dated 30.3.74 made between him and Tara it was agreed that Tara "would transfer the land to him". The statutory declaration was made on 2.2.75, the very day the firm of Suppiah & Singh wrote to the CKB to say they acted for Suppiah implying that they were no more acting for 30  
Tara and Devan. This clearly suggests that there was as yet no actual transfer or sale.

The whole exercise was initially to assist Dr. Das financially by arranging payment to Jagindar of the money he paid the MKB as a guarantor. The fact that Devan could still continue to operate the account with the CKB and even arrange to create a fourth charge thereby burdening the property with more debt is clearly inconsistent with

the appellants' claim of an outright sale. That P.30 and P.31 did not affect the CKB was obvious when the bank asked Devan to reduce the overdraft (P.40) and also when the bank asked for the return of the title deeds and duplicate charges (P.42). The Statutory Declaration further shows that Suppiah knew how much he had to pay when he referred to the manner of payment. He was to pay \$103,684.44 to the bank and all further interest up to the date of actual transfer and also to pay \$110,000.00 to Jagindar who will pay HKBC the money and interest in discharging the overdraft of Dr. Das. There is no reason for us to disagree with the learned Judge that the agreement was a security agreement and that the one year period commenced to run from 5.7.75. Until Suppiah became the registered proprietor upon payment of the agreed sum Tara had no reason to buy back the property when she was still the registered owner. Why should she buy her own property when she received no benefit from the transaction? Unless Suppiah satisfied the consideration agreed he had no right to the property. The evidence shows clearly that Suppiah had no intention of paying off the CKB within a reasonable time; that although he put himself out as owner when the transfer was executed on 5.7.75 he was not so as it was Jagindar who put up the money; that he merely pretended to give Tara a year within which to redeem her property; that in fact he had no intention of allowing Tara any opportunity of redeeming her property at all.

#### Undue Influence

It has already been shown that a solicitor-client relationship existed between Suppiah and Jagindar and Tara. No one disputed that Devan was acting as Tara's agent during the negotiation. Appellants certainly took advantage of their relationship though they said that they were merely assisting Tara. If they were not acting for Tara then they had acted rather unethically and for their own advantage in furthering their design to acquire the property. They used not only their professional position but also their social status in exercising undue influence

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over Tara and Devan. Clearly Devan was under their undue influence earlier as he dealt with them from the beginning. When they visited Tara's house not a word was said about Jagindar being the attestor of the transfer. We were told Jagindar and Sivanathan were merely accompanying Suppiah there. We see from the evidence that Jagindar was interested in the property. Suppiah and Arul were his nominees. They contributed not a cent. Yet Suppiah tried to impress the learned Judge that he had the means to buy the property. Why did he not pay? Because he was never really interested 10 in the property from the very beginning judging from his conduct. Hence, he never paid anything at all. In order to show that Suppiah was the owner Jagindar tried to convince the court that Suppiah instructed him to pay both the HKBC and the CKB. Considerable tactical changes were made by Suppiah and Jagindar as a result of an amendment made by Arul to his defence seven days after the trial began. That Jagindar was the true owner became clear when he caused Suppiah to transfer the property to Arul who later transferred it to Jet Age Construction Company. Jagindar 20 and Suppiah knew about the approval of the subdivision which was purportedly applied by Arul. The eventual subdivision of the property into 70 lots and sale to the public made it impossible for Tara to recover her property. That Arul was a non-resident and would be more favourably considered by the local authority in the application for subdivision was merely part of a design to deprive Tara of her property. We cannot see how a non-resident can have an advantage over a citizen in matter of subdivision. To achieve the objective Suppiah had to breach the contract. 30 That was no problem to him since he never intended to fulfil the conditions of the agreement. That was an unfair advantage taken over Tara.

Appellants contended that under section 16 of the Contracts Act to succeed on the claim of undue influence Tara must establish a solicitor-client relationship. This had also been established. If the transaction was shown to be unconscionable then the burden shifted to the appellants

to show that the contract was not induced by undue influence under section 3 of the Act. In Inche Moriah v. Shaik Allie bin Omar<sup>(18)</sup> an old and illiterate Malay woman executed a deed of gift of a landed property in Singapore in favour of her nephew who had the management of her affairs. Before executing the deed the donor had independent advice from a lawyer who acted in good faith. However, he was unaware that the gift constituted practically the whole of her property and did not bring home to her mind that she could prudently, and equally effectively, have benefited the donee by bestowing the property upon him by a will. Held that the gift should be set aside as the presumption which arose was not rebutted. Lord Hailsham, L.C. stated at page 136:-

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"In the present case their Lordships do not doubt that Mr. Aitken acted in good faith; but he seems to have received a good deal of his information from the respondent; he was not made aware of the material fact that the property which was being given away constituted practically the whole estate of the donor, and he certainly does not seem to have brought home to her mind the consequences to herself of what she was doing, or the fact that she could more prudently, and equally effectively, have benefited the donee without undue risk to herself by retaining the property in her own possession during her life and bestowing it upon him by her will. In their Lordships' view the facts proved by the respondent are not sufficient to rebut the presumption of undue influence which is raised by the relationship proved to have been in existence between the parties....."

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In Allison v. Clayhills<sup>(19)</sup> the court held that at the time of the transaction there was a solicitor-client relationship. Similarly, in Edwards v. Williams<sup>(20)</sup> where it was held that the case was not one strictly within the rules applicable to dealings between solicitor and client. Also, that there was no evidence of unfair advantage being taken of the client by the solicitor.

Mr. Cullen submitted that the learned Judge was wrong on the question of "unconscionable" and he was

(18) (1929) A.C. 127.

(19) (1908) L.T. Volume 37, 704 & 752.

(20) (1863) 32 L.J. Ch. 763.



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therefore wrong in saying that the burden had switched to the appellants. All these cases merely go to show that each case has to be decided according to its particular facts. We do not think the learned Judge was wrong on the facts of this particular case to say that the transaction was unconscionable and that the burden was upon the appellants to rebut the presumption of undue influence.

#### Breach of Agreement and Variations

It must be remembered that the agreement was prepared by Suppiah. Before inserting the two amounts he must be assumed to have made inquiries. He certainly did in the case of the CKB as shown earlier on in the long line of correspondence. If the agreement was an outright sale as contended by the appellants then Suppiah must follow the normal local practice of paying the \$220,000.00 within a reasonable time, certainly not more than a week. Both payments of \$121,619.80 to the HKBC on 27.4.74 and \$92,000.00 on 5.7.75 were made by Jagindar. Payment was conveniently made the moment Devan reduced the overdraft to the tune of \$40,000.00, a loan he obtained from his friend Arandan. Suppiah in actual fact paid nothing out of his own pocket. It seems that Jagindar was using his firm, his partner Suppiah and his friend Arul in acquiring the property. He kept in the background all the time. He knew he was buying the property yet he chose to attest the transfer form which he obtained earlier to make sure that Tara would not get it back by a series of transfers. There is much to be said in such a situation that appellants should advise Tara to get independent legal advice on the matter. The general view is that if a solicitor is involved in a matter as a solicitor he might have to get another solicitor to do the attestation. The conflict of interest is very clear. The self interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect the property of his client may interfere with his exercise of free judgment on behalf of his client. This was clearly in the mind of the learned Judge.

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Mr. Cullen submitted that the learned Judge did not give weight to the variations in the conditions of the agreement. Evidence of variations included the payment of \$121,619.80 when the agreement stipulated only \$110,000.00; Devan continuing to operate the account at the CKB for a year after the signing of the agreement; Tara being allowed to continue occupying the house on the land after the expiration of one year in return for compensation; payment of \$92,000.00 to the CKB instead of \$110,000.00 as in the agreement. It is the contention of the appellants that they could only be sued for breach of contract, if any, and that the agreement was made with free consent and there was no undue influence or misrepresentation or fraud. He said this was a case of breach of contract dressed up as a case of fraud. Therefore, Mr. Cullen submitted that the learned Judge was wrong in coming to the conclusion that the appellants were liable for breach of trust and fraud on grounds that an unconscionable bargain had been made in favour of appellants themselves. He pointed out that many people broke contracts when they found it profitable to do so but that did not make it fraudulent. We do not quarrel with this proposition. But it is important to bear in mind each case must be decided in accordance with its particular facts. That was what the learned Judge did.

By taking action against Dr. Das in Singapore Suppiah clearly elected to forego his security in the property and to treat Dr. Das as a debtor. Tara should have been released from any obligation to assist Dr. Das. The judgment against Dr. Das was registered in the High Court in Johore Bahru. It is not in dispute that the judgment included the sum of \$110,000.00 referred to in the agreement. The clear implication is that reference to \$110,000.00 in respect of Dr. Das's indebtedness to the HKBC must be regarded as extinguished by the judgment. We, however, were told of the ridiculous suggestion that the judgment was for Tara's benefit. Not surprisingly, the learned Judge considered such action a breach of the agreement. The late payments to the two banks concerned

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were also regarded as breaches. The agreement of 30.3.74 was actually a farce as Suppiah never intended to act on it. All he was interested was to get the transfer form signed by Tara. To prevent Tara from getting her property back Suppiah and Jagindar got Arul to help by posing as a registered proprietor when in actual fact he was merely a nominee. Thus Arul was instrumental in ousting Tara and family from her house and helping Jagindar to acquire the property by transferring it to Jet Age Construction Co. Arul seemed to think that he had done nothing wrong even when he must have known that he was being used to cheat Tara of her property. He had done everything he could to prevent Tara from setting aside the transfer, to the extent of not disclosing that he was a nominee. For an advocate and solicitor to mislead the court is a serious matter. Strong disciplinary action must be taken against such an advocate and solicitor.

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If Mr. Cullen is right that there was a variation then there could be no breach of any contractual terms. On the other hand, Mr. Cashin quite correctly asked how could there be variation when the appellants contended that the agreement was an outright sale. A perusal of the correspondence between the CKB and Suppiah & Singh does not support any variation. Suppiah agreed to pay two equal sums of \$110,000.00 each. The learned Judge accepted that there was no variation hence he gave no weight to the contention. We agree with him on this point.

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To sum up Mr. Cullen's case it is that on the evidence there is no fraud, breach of trust or undue influence except for breach of contract if the court considers that there is no variation. On the other hand, Mr. Cashin's case is that the findings of the learned Judge were all based on questions of fact. The appellants were merely attacking the learned Judge's finding of fact and his assessment of the credibilities of the witnesses. On the evidence the learned Judge was justified in all his finding of fact.

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If on the evidence the appellants had been found guilty of actual fraud so that an action of deceit would succeed it would be wrong to allow a case where one of the main charges was fraud to be hammered into a comparatively harmless case based on breach of contract. If the words of the appellants amount to a mere promise, they cannot be the basis of an action of tort. Further, they impose no liability on the appellants unless they conform to all the requirements of a valid contract. A statement of opinion, if wilfully false, is actionable as a tort: Jorden v. Money.<sup>(21)</sup> The action was in actual fact one of deceit and it was necessary to prove actual fraud. This was clearly laid down in Derry v. Peek<sup>(4)</sup> that fraud must be proved by showing that the false representation had been made knowingly or without belief in its truth or recklessly without caring whether it was true or false. All that the appellants wanted was to secure the property from Tara. To do so they had to get the transfer form signed. They did so by putting up an agreement for Tara to sign making her believe by inserting a manuscript that it was a security agreement for a loan. They had no intention of fulfilling the condition of the agreement. If we are to believe them that it was an outright sale then it was ridiculous for them to raise the question of variations of contract because we would expect them to pay off within a reasonable period according to accepted local practice.

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#### Land Valuation

Mr. Cullen submitted that the learned Judge erred in rejecting the expert evidence of a land valuer called by the appellants regarding the valuation of the property. He contended that the bench has to be guided by expert evidence if it was not challenged as was the case of the expert called by the appellants. This so called expert dealt with the property when he was in the Government service. His valuation is the same as the valuation given many years ago as a Government valuer. In other words, the

(21) (1854) 5 H.L.C. 165.

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value of the land remains stagnant. The expert said that the value of \$220,000.00 in 1974 in respect of the land was reasonable and would also be a fair price in July 1975. Mr. Cullen said the figure arrived at by the expert was based on the sale value of comparable pieces of land and the two experts called by the respondent did not make any comment on comparables and neither could they identify the people whose opinions they sought in making the valuation when they were challenged to do so. The method used by them was "novel" and "wholly unknown". One of the experts for the respondent valued the property at \$701,400.00 made up of \$653,000.00 for the land and, \$48,000.00 for the house on it. In the circumstances, Mr. Cullen submitted that it was outside the jurisdiction of the learned Judge to "pluck out of the air" the price of \$1.70 cents per square foot and arrive at a figure of \$370,260.00 as the price of the land in July 1975. The figure arrived at by the learned Judge was against the weight of the evidence. The learned Judge erred in adding value to the house to that of the land as the house would have to be demolished if the land was to be subdivided for property development. This method is not really "novel" as suggested. It has been accepted locally in a good number of cases on acquisition. The fact that the house would be demolished if the land was to be subdivided for property development is not really relevant in this "novel" type of valuation. It is the submission of the appellants that the valuation of \$220,000.00 was generous as the highest comparable figure at the time was \$37,000.00 per acre which worked out to \$185,000.00 for the whole property.

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It is interesting to point out that in 1974 it would seem that the appellants had accepted and relied on the valuation report of Chong Kim Seng (D.W.1) dated 26.2.72 to purchase the property for \$220,000.00. However, they now contend that in July, 1975 after a matter of 3½ years the property was worth \$35,000.00 less than what it was worth in February, 1972. This would mean that Chong Kim Seng was good enough for the appellants in 1972

but not in 1961. We are, however, concerned with the value to Tara 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 Tara. So her loss of the property would include the house.

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10 The experts were there to guide the learned Judge. He was not bound to accept their opinions, particularly where they conflicted. He had to do the best he could on the material before him. In Loi Hieng Chiong v. Kon Tek Shin<sup>(22)</sup> Syed Uthman, F.J., in delivering the judgment of the Court, took the opportunity to say something about valuation of land in this country in these words:-

20 ".....Considering the number of land cases passing through the courts nowadays, the courts are entitled to take cognisance of land values in a given area in this country. One does not have to be a valuer to know that in Kuching and surrounding areas, land has shot up in value by reason of the tremendous expansion of the town....."

That was precisely what the learned Judge did in the instant case. It would of course be of assistance if he were to cite a few cases to show that the land in a particular area had shot up because of development.

#### Building Up Case

30 On the point that the respondent had built up her case against appellants Mr. Casnin said that that was to be expected because she did not have all the facts before her. He submitted that she built up her case of breach of trust and fraud against the trio with a consistency that was remarkable. Correspondence between the legal firm of Suppiah & Singh and the CKB as well as correspondence involving the legal firm of Yeow & Chin which were never suspected to have existed gradually came to the respondent. All these correspondence pointed to a grand design of fraud by the appellants. It was clear that Suppiah and Jagindar were acting as solicitors when they wrote to the CKB about paying off the respondent's charge with the bank

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(22) (1983) 1 H.L.J. 31 & 33.

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for an overdraft by charging her property. The fact that they asked the bank for a statement of account for the amount due to it and for the title deed and duplicate charges was clear evidence that they were acting as her solicitors. They continued to so act until 2.2.75 when they suddenly said they were acting for Suppiah who was buying the property from the respondent for whom they were previously acting as solicitors. A lawyer should not use information acquired in the course of representing a client to the disadvantage of the client. He should not use it except with the consent of the client after full disclosure of such information for his own purpose. Breach of ethics and codes of conduct is different from breach of contract. Unless steps are taken to inquire into the professional conduct of such solicitors not only the courts but also the general public would lose confidence in the integrity of the profession in this country.

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#### Damages

Mr. Cashin submitted that the learned Judge was right in deciding that the appellants were not entitled to a deduction of whatever sums that might have been paid in the calculation of damages on the ground that fraud was perpetuated to obtain the property. He alleged that they first cheated the respondent of the property and then tailored their evidence to suit the allegations brought against them. The learned Judge decided to believe the respondent's evidence rather than the appellants' in weighing her consistency against their vacillations. He awarded the damages on the basis of fraud and stated that the award would be the highest attainable and would necessarily cover the claim for undue influence, breach of contract, and trust as well.

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Mr. Cullen submitted that fraud must be pleaded and proved beyond reasonable doubt. He said the facts must be presented within the framework of the law and that a mere flood of evidence without legal issues and principles firmly planted in the mind would not suffice. The law, he submitted, does not provide for damages for the six grounds set out

in the statement of claim of so called fraud, five of which were unsupported by evidence. The only remedy if there was any breach should be on the basis of an amount of profit. He took exception to the fact that Mr. Cashin did not mention in court fraud and damages for dishonesty in his opening submission. He submitted if there was any breach it was breach of contract in that the land was transferred prematurely to a third party and non payment in accordance with the contract. There would be such breach only if the court found there was no variation in the agreement of sale. If so, the appellants would be liable for \$18,000.00 only with interest on this sum from the date of breach. The interest was to be treated as compensation for being allowed to stay on the land till end of 1975. If the learned Judge was right that the price was \$370,000.00 then what was due to the respondent was \$150,000.00 taking into consideration the \$220,000.00 already paid for the land.

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In his written submission in the lower court which he adopted in this court Mr. Cashin pointed out that the \$18,000.00 was the short payment overlooked in the course of and arising out of their breach and fraud and was not the loss to Tara. Had the contract been performed on or within a week of 30.3.74 the results would be as follows:-

- (I) Tara would have received from Suppiah \$0,000.00;
- (II) The CKB would have been paid \$103,658.44; and Tara
  - (a) would not have been harassed by the CKB to pay up or reduce her overdraft;
  - (b) would not have to pay at the rate of \$100.00 per month as interest;
  - (c) need not have borrowed from Anandon \$40,000.00;
  - (d) need not have consented to create a further charge on the property and incurred expenses therefor;
- (III) The HKBC would have been paid and Dr. Das would have been released from his debts and he would not have been dragged into litigation and sued and a judgment obtained against him in the High Court in Singapore for \$149,000.00 and the said judgment registered in the High Court in Johore Bahru;



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- (IV) Tara would have one year from 5.7.75 to seek assistance elsewhere to redeem her property;
- (V) Only when Tara could not definitely repay that Suppiah could sell the property to a third party. After paying Suppiah the balance could have been used to buy a property for Tara. In which case she would not have to do battle in court for almost 8 years. She would not have been evicted against her will and forced to live in a rented house;
- (VI) Most important Tara and her family would not have been subjected to inconvenience, mental distress, agony and suffering.

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In the light of the above the claim by the appellants that she suffered no loss at all or that her loss was only \$18,000.00 is plainly unacceptable.

Mr. Cashin submitted that in assessing the quantum of damages whether in contract or tort the result would not be very different in this case. The learned Judge chose to make a single award. The appellants said the respondent ought to be asked to elect one of the three types of damages, namely damages for breach of contract, damages for breach of trust and compensatory or aggravated damages. According to Mr. Cashin this would jeopardise the position of the respondent on appeal. It could result in the case being sent back for assessment of damages. We can see nothing in either in the Courts of Judicature Act, 1964 or in the Rules of the High Court, 1960 to make separate verdicts and judgments invariably necessary in respect of separate causes of action contained in the same writ. The matter is discussed and set out in McGregor on Damages, 14th Edition, page 1031, paragraphs 1533 and 1534. The position seems to be that "either a court should always make separate awards but a single award will not be upset in the absence of prejudice, or a court has a discretion to make a single award but should make separate awards if a single award could lead to prejudice."

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The appellants have not shown how the single award in this case would be prejudicial to them. We do not think the learned Judge has exercised his discretion wrongly in making a single award in the circumstances.

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#### Conclusion

In the case of undue influence and breach of trust the usual relief would be an order for specific restitution of the property; but where this is not possible then an order for account of the proceeds from the disposition of the property may be made. As the property had been subdivided into lots and sold to members of the general public who are innocent third party purchasers neither specific restitution nor account would be possible in the circumstances.

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With regard to damages Salmond on Torts, 17th Edition at page 531 notes:-

"The general rule today is that damages are compensatory whether in contract or tort. The function of damages is therefore to put the person whose right has been invaded in the same position as if it has been respected."

20

Our law is substantially the same as the English law.

In assessing damages the learned Judge has clearly kept in mind the purpose and aim of the compensation, whether for breach of contract or fraud, the general rule of putting "the person whose right has been invaded in the same position as if it had been respected." He has considerable experience in matters relating to land valuation having been assigned to deal with such cases. As he had the advantage of seeing and hearing the witnesses, particularly as to the location of the land, its development potential and other related matters he would be in a **better** position, in view of the conflicting opinions of the **experts**, to assess the market value of the property. The value so assessed and awarded would become and form part of the general damages.

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Having decided upon the quantum of damages the learned Judge had to consider whether the sum of \$92,000.00 paid to CKB and the sum of \$121,819.00 paid to HKBC should be deducted from the quantum of damages. In his view the two sums were paid in pursuance and furtherance of fraud and therefore unenforceable and irrecoverable under section 24 of the Contracts Act, 1950 which reads:-

"The consideration or object of an agreement is lawful, unless -

- (a) it is forbidden by law; or
- (b) it is such a nature that, if permitted, it would defeat the provisions of any law; or
- (c) it is fraudulent; or
- (d) it involves or implies injury to the person or property of another; or
- (e) the Court regards it as immoral or opposed to public policy.

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In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

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Section 24 merely codifies and enacts the common law so that both the Act and the common law are in effect saying the same thing. The two sums, as found by the learned Judge, were not made in pursuance of the contract. They were paid outside the contemplated period for the benefit of and to suit the convenience of the appellants. Tara could not be expected or obliged to pay as if the contract had been performed. The ability or inability to repay is therefore irrelevant. It is therefore not surprising that the learned Judge refused to deduct the two sums. Dealing with the provisions of section 24 the Privy Council in Palaniappa Chettiar v. Arunasalam Chettiar (23) held that the original transfer of land from the father to the son was for a fraudulent purpose and the court would not lend its aid to secure a reconveyance to the father.

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The learned Judge had gone into the case very thoroughly and carefully. On the evidence the learned Judge

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(23) (1962) M.L.J. 143.

found all appellants liable for fraud. He found Jagindar and Suppiah liable for breach of contract, undue influence and breach of trust. As stated earlier the property had been subdivided and sold to the general public so that specific restitution was not desirable or possible. An order for account of the proceeds from the sale of the property is not desirable in the circumstances as it will take time and cause great inconvenience. In the exercise of his discretion the learned Judge decided to do the best he could in assessing damages. In awarding such damages the court is not obliged to go into any meticulous arithmetical calculations of general damages.

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The proper mode of giving relief posed some difficulties for the learned Judge. He decided to award damages for fraud which would also cover other heads of damages. It was suggested that the proper order was one calling for an inquiry as to damages. The measure of damages may not be the same in an action for fraud as in an action for breach of contract or undue influence or breach of trust. Money compensation may not always be an adequate substitute for the deprivation of one's property. We think only in exceptional cases should an appellate court not having the advantage of seeing the witnesses in the box differ from the finding of fact of the trial Judge who tried the case. As Jessel, M.R. remarked in Redgrave v. Murd<sup>(24)</sup> :-

".....The rule of the court of appeal is that when there is direct conflicting oral testimony, and the Judge who had seen the witnesses believes one party and disbelieves the other, this court, not having seen the witnesses, cannot disturb that decision any more than it could disturb the verdict of a jury under similar circumstances....."

It is really a disgrace that solicitors and advocates should descend to such level to deprive a client of her property and forcing her to fight a rearguard action for almost eight years before right could be done during which time apart from financial difficulty she not only lost her property but also her husband. So that during this period she must have suffered considerable agony of mind.

(24) (1881) 20 Ch.D. 1; 51 L.J. Ch. 113.

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For reasons given we would dismiss the appeal with costs. Deposit to the respondent on account of taxed costs.

Kuala Lumpur, 16th May, 1983.

(Sgd.) Lee Hun Hoe  
Chief Justice,  
Borneo.

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Notes:

Hearing in Kuala Lumpur on 10th, 11th, 12th, 13th, 14th, 15th, 18th, 19th and 20th January, 1983.

Counsel:

Mr. Terrence Cullen, Q.C. (assisted by Mr. Ronald ,  
T.S. Khoo and Mr. Chin Yew Meng) for appellants.  
Solicitors: Shearn Delamore & Co.

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Mr. H.E. Cashin (assisted by Mr. Subra Naiker) for respondent.  
Solicitors: Messrs Subra Naiker & Co.

Authorities other than those cited in the judgment:

Poosathurai v. Kannappa Chettiar & Ors. L.R. I.A. 1919-20.

Western Bank of Scotland v. Addie (1867) L.R. H.L. S.C. 145

Steedman v. Frigidaire Corporation (1932) W.N. 248.

George Wimpey & Co. Ltd. v. Sohn & Anor. (1967) 1 Ch. 487.

Briken Investments Ltd. v. Carr (1979) 2 W.L.R. 737.

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City and Westminster Properties v. Mudd (1959) Ch. 129

Saminathan v. Pappa (1981) 1 M.L.J. 121 & 123B.

A. Kanapathi Pillay v. Joseph Chong (1981) 2 M.L.J. 117.

Chapple v. Electrical Trades Union & Ors. (1961) 1 W.L.R. 1290

Nanyang Manufacturing Co. v. The Collector of Land Revenue,  
Johore (1954) 20 M.L.J. 69 & 71.

Hock Lim Estate Sdn. Bhd. v. Collector of Land Revenue,  
Johore Bahru (1980) 1 M.L.J. 210 & 211.

Abdul Rahim v. Secretary of State A.I.R. (1926) Lahore 618.

Pribhu Dyal v. Secretary of State 135 I.C. 1932.

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K.E.P. Mohd Ali v. K.E.P. Mohd Ismail (1981) 2 M.L.J. 10.

Playing Cards (M) Sdn. Bhd. v. China Mutual Navigation Co. Ltd. (1981) 2 M.L.J. 182.

Esso Petroleum Co. Ltd. v. Southport Corporation (1956) 2 M.L.J. 81.

Siti Aisha Binte Ibrahim v. Goh Cheng Hwai (1982) M.L.J. 544.

Collector of Land Revenue v. Alagappa Chettiar (1971) 1 M.L.J. 43

Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings (Industrialised Buildings) Sdn. Bhd. (1980) 1 M.L.J. 21.

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Bain v. Fothergill (1873-4) Volume 7, English & Irish Appeals, 159.

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of Counsel for the Respondent, IT IS ORDERED that the said Appeals be and is hereby dismissed with costs AND IT IS ALSO ORDERED that the sum of \$500.00 (Ringgit Five hundred only) deposited in Court as security for costs of each of these Appeals be paid out to the Respondent on account of taxed costs.

GIVEN under my hand and the Seal of the Court this 16th day of May, 1983.

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SENIOR ASSISTANT REGISTRAR  
FEDERAL COURT MALAYSIA  
KUALA LUMPUR.



In the  
Federal  
Court  
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Order  
(Liability  
and damages)  
16th May  
1983 (Cont'd)

IN THE FEDERAL COURT OF MALAYSIA HOLDEN  
AT KUALA LUMPUR

(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEALS NOS. 215 &  
216 and 291 & 292 OF 1982

BETWEEN

1. DATUK JAGINDAR SINGH  
2. DATUK P. SUPPIAH  
3. ARUL CHANDRAN .. APPELLANTS

AND

TARA RAJARATNAM (m.w.) .. RESPONDENT

(In the Matter of Civil Suit No. 284  
of 1979 in the High Court in Malaya  
at Johore Bahru

Between

TARA RAJARATNAM (m.w.) .. PLAINTIFF

And

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

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O R D E R

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Filed this 7<sup>th</sup> day of June, 1983.

SUBRA NAICKER & CO.,  
Advocates & Solicitors,  
45, Jalan Ibrahim  
(Tingkat 1),  
Johore Bahru.

Order  
granting  
Final Leave  
to Appeal  
15th August  
1983

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In the  
Federal  
Court  
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Order  
granting  
Final Leave  
to Appeal  
15th August  
1983 (Cont'd)

day of July 1983;

AND UPON HEARING Counsel as aforesaid;

IT IS ORDERED that final leave be and is hereby  
granted to the abovenamed Appellants to appeal to His  
Majesty the Yang di-Pertuan Agong against the decision of  
this Honourable Court given on the 16th day of May 1983  
dismissing the Appellants' Appeals herein.

AND IT IS LASTLY ORDERED that the costs of these  
Motions be costs in the cause.

GIVEN under my hand and the seal of the Court  
this 15th day of August 1983.

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L. S.

*SK K. J. Tan*  
.....  
SENIOR ASSISTANT REGISTRAR,  
FEDERAL COURT,  
MALAYSIA.

This Order is filed by Messrs Allen & Gledhill,  
Solicitors for the First and Second Appellants whose address  
for service is at No. 4, Lorong Medan Tuanku Satu, Kuala  
Lumpur and by Messrs Shearn Delamore & Co., Solicitors for  
the Third Appellant whose address for service is at No. 2,  
Benteng, Kuala Lumpur 01-19.

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