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52,1961

IN THE PRIVY COUNCIL

No. 6 of 1960

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

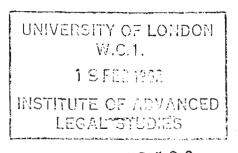
<u>BETWEEN</u>:

YEOW KIM PONG REALTY LIMITED (Defendant) Appellant

- and -

NG KIM PONG .. . (Plaintiff) Respondent

RECORD OF PROCEEDINGS



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LAWRANCE, MESSER & CO., 16, Coleman Street, London, E.C.2. Solicitors for the Appellant.

BULCRAIG & DAVIES, Amberley House, Norfolk Street, London, W.C.2. Solicitors for the Respondent.

No. 6 of 1960

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

BETWEEN:

YEOW KIM PONG REALTY LIMITED (Defendant) Appellant

- and -

NG KIM PONG (Plaintiff) Respondent

RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

BETWEEN:

YECW KIM PONG REALTY LIMITED (Defendant) Appellant and -

NG KIM PONG ... (Plaintiff) Respondent

RECORD OF PROCEEDINGS

No. 1

STATEMENT OF PLAINT

IN THE SUPREME COURT OF THE FEDERATION OF MALAYA IN THE HIGH COURT AT KUALA LUMPUR Civil Suit No. 374 of 1956

Between

Plaintiff, Ng Kim Pong . . . And Yeow Kim Pong Realty Limited Defendant

STATEMENT OF PLAINT

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The Plaintiff abovenamed states as follows:-

1. The Plaintiff is a building contractor residing at No. 37 Ceylon Lane, Kuala Lumpur, and carrying on there the business of building contractor under the firm or style of Ng Keh & Son.

2. The Defendant is a Limited Company incorporated in the Federation of Malaya and having a Registered Office at Nos. 22 and 24 Klyne Street, Kuala Lumpur.

Court of the Federation of Malaya

No. 1

Statement of Plaint.

16th November 1956.

In the Supreme

No. 6 of 1960

No.1

Statement of Plaint.

16th November 1956 continued. 3. On the 24th day of March 1956 the Plaintiff entered into a written agreement with the Defendant for the purchase from the Defendant of 22 lots of building land in the Town of Klang in the District of Klang for the price of \$66,000.00 and on the signing of the contract the Plaintiff paid to the Defendant the sum of \$15,000.00 by way of deposit and part payment. A copy of this contract is attached hereto and marked "P.1".

4. On the 24th day of March 1956 the Plaintiff entered into a further written agreement with the Defendant for the re-sale to the Defendant of the land contained in Lot No. 392 Section 24 in the Town of Klang in the District of Klang, being one of the lots included in the sale to the Plaintiff by the former contract, at the price of \$3,000.00. A copy of this contract is attached hereto and marked "P.2".

5. Under the terms of the former contract "P.1" the Plaintiff was to pay an instalment of \$24,000.00 on or before the 23rd day of June 1956 and the balance of \$27,000.00 on or before the 23rd day of December 1956. From the final instament was to be deducted the sum of \$3,000.00 being the sale price of the one lot included in the contract of re-sale to the Defendant. Upon payment of the sum of \$24,000.00 on 23rd day of June 1956 the Defendant was to transfer to the Plaintiff, his nominees or assigns eight of the said lots.

6. The Plaintiff was unable to pay the sum due on 23rd day of June 1956 but at a meeting between the Plaintiff and an officer of the Defendant on or about 7th July 1956 it was mutually agreed that the Plaintiff should be allowed to pay the said amount by two instalments of \$5,000.00 on 7th July and \$19,000.00 on 31st July 1956 respectively. The said sum of \$5,000.00 was paid by the Plaintiff to the Defendant on 7th July 1956.

7. The Plaintiff duly tendered the sum of \$19,000.00 but the Defendant has refused to transfer any of the said titles to the Plaintiff despite many demands on the part of the Plaintiff.

8. On the 7th November 1956 the Plaintiff's Solicitors wrote to the Defendant's Solicitors demanding return of the deposit and the sums paid by way

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of instalment and payment of compensation Defendant. A copy of this letter is atta hereto and marked "P.3". Wherefore the Plaintiff claims:		In the Supreme Court of the Federation of Malaya
(a) 1. Return of the deposit paid §	\$15,000.00	No.1
2. Return of the sum paid by way of instalment on 7th		Statement of Plaint.
July 1956	5,000.00	16th November
3. General damages for breach of contract being the esti- mated loss of net profits on the re-sale of the said lots		1956 - continued.
with houses erected thereon.	75,000.00	
 ۶	\$95,000.00	

- (b) Interest at 6% per annum on the said sums of \$15,000.00 and \$5,000.00 from the dates of payment of the said sums to the Defendant to the date of Judgment.
- (c) Interest at 6% per annum on the sum awarded from date of judgment to date of realisation.
- (d) Costs.

Plaintiff's Solicitors

Plainiff's Signature.

I Ng Kim Pong, the abovenamed Plaintiff hereby declare that the above statement is true to my knowledge except as to matters stated on information and belief and as to those matters I believe the same to be true.

Dated this 16th day of November, 1956.

Signature.

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No.1

Statement of Plaint.

16th November 1956 continued. This is the Exhibit marked P 1 referred to in the Statement of Plaint between Ng Kim Pong and Yeow Kim Pong Realty Ltd.

An Agreement made this 24th day of March, 1956, between YEOW KIM PONG REALTY LIMITED a Company registered in the Federation of Malaya and having its Registered Office at Nos. 22 & 24, Klyne Street, Kuala Lumpur, (hereinafter called the Vendor) of the one part and NG KIM PONG, trading as NG KEH & SON of No. 37, Ceylon Lane, Kuala Lumpur, (hereinafter called the Purchaser) of the other part:

4.

Whereas the Vendor is the registered owner of the 22 lots of land described in the Schedule hereto attached (hereinafter referred to as the Property):

And Whereas the Vendor has caused Building Plans prepared by LEE ENG TONG of No. 24, Sultan Street, Klang, (hereinafter called the Architect) which have been approved by the Town Council, Klang, under Plans Nos. 185/55, 185A/55, 185B/55, 185C/55 and 185D/55 for the erection of 21 Terrace Houses on the said Property:

And Whereas the Purchaser intends to erect the said 21 Terrace Houses for sale and agrees to give priority for such sale to the 36 Tenants of the Vendor of premises known as Nos. 102, 104, 106, 108, 110, 112, 114, 116, 118, 120, 122, 124, 126, 128, 130, 132, 134, 136, 138, 140, 142, 144, 146, 148, 150, 152, 154, 156, 158, 160, 162, 164, 166, 168, 170 and 172 Meru Road, Klang, (hereinafter called the Tenants):

And Whereas the Vendor has agreed to sell and the Purchaser has agreed to purchase the said Property for the sum of Dollars Sixty Six Thousand (\cancel{g} 66,000.00) only and the Vendor agrees to transfer such lot or lots of the Property described in the said Schedule to the Purchaser or any of his nominees or assigns free from all encumbrances as the Purchaser shall elect subject to the terms and conditions as mentioned hereafter:

NOW THIS AGREEMENT WITNESSETH as follows:-

1. Now in consideration of the above premises and in consideration of the sum of Dollars Fifteen 20

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thousand (\$15,000.00) only paid by the Purchaser to the Vendor, the receipt whereof the Vendor hereby acknowledges, as part payment towards the said purchase price it is mutually agreed as follows:-

The Purchaser shall pay to the Vendor a 2. further portion of the purchase money in the sum of \$24,000.00 (Dollars Twenty four thousand only) on or before the 23rd day of June 1956, and the balance of the purchase money in the sum of \$27,000.00 (Dollars Twenty seven thousand only) shall be paid by the Purchaser to the Vendor on or before the 23rd day of December 1956.

3. As and when the Purchaser pays to the Vendor each sum of \$3,000.00 (Dollars Three thousand only) forming part of the payments mentioned in Clause 2 above, the Vendor shall transfer to the Purchaser or any of his nominees or assigns any one lot of the said Property described in the said Schedule provided the above-mentioned sum of \$24,000.00 (Dollars Twenty four thousand only) shall

20 be paid in full by the Purchaser to the Vendor on or before the 23rd day of June, 1956, and the balance of the purchase money in the sum of \$27,000.00 (Dollars Twenty seven thousand only) shall be paid in full by the Purchaser to the Vendor on or before the 23rd day of December, 1956. Upon payment of the full amount of the purchase money in the sum of \$66,000.00 (Dollars Sixty six thousand only) the Vendor shall transfer to the Purchaser the balance or all of the Property as described in the said 30 Schedule to the Purchaser or any of his nominees or assigns.

4. The Purchaser agrees to construct at his own costs and expenses such roads and back lanes within and adjoining the said 21 New Terrace Houses as may be required by the Town Council.

5. The Purchaser shall pay to the Architect the total sum of \$2,520.00 (Dollars Two thousand five hundred and twenty only) being professional fees for the preparation of the Building Plans for the said 21 Terrace Houses at \$120/- (Dollars One hundred and twenty only) per house. The said fees shall include periodical supervision of the said construction work and any amendments to the said approved plans and or extra prints of the plans as may be necessitated during the period of construction In the Supreme Court of the Federation of Malaya

No.1

Statement of Plaint.

16th November 1956 continued.

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No.1

Statement of Plaint.

16th November 1956 continued. of the said 21 Terrace Houses. The payment to the Architect shall be made by instalments according to progress of work done.

6. The Vendor shall produce for the purpose of inspection, when necessary, any or all of the titles in respect of the said Property to the Purchaser or to any of his nominees or assigns when requested by the Purchaser.

7. Upon signing of this Agreement the Vendor shall inform all his said 36 Tenants regarding the priority given to them to purchase any of the said 21 Terrace Houses according to the normal terms and conditions of sale offered by the Purchaser. This priority shall hold good for a period of fourteen (14) days from the date of this agreement, after which the Purchaser shall reserve his right to sell the said houses to any other prospective buyers.

8. Beginning from the 1st day of January, 1956, the Purchaser shall be liable to pay the quit rent, assessments and other outgoings in respect of the said Property.

9. Within one (1) week from date hereof the Vendor shall give access to the Purchaser to the whole property described in the said Schedule so that work may be commenced on any of the said 21 building lots as the Purchaser may think fit.

10. In the event the Purchaser fails to pay the sums of money on the respective dates aforementioned the said advance money of \$15,000.00 (Dollars Fifteen thousand only) paid by the Purchaser to the Vendor shall be forfeited to the Vendor as liquidated damages and this agreement shall be treated as null and void in so far as the untransferred lot or lots in the Property are concerned. All constructions made on the untransferred lots shall become the property of the Vendor.

11. The costs and incidentals to this Agreement and of the transfer shall be borne by the Purchaser.

12. This Agreement shall be binding upon the heirs, successors, legal representatives and assigns 40 of the parties hereto.

IN WITNESS WHEREOF the parties hereto have

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hereunto set their hands the day and year first above written.

Signed by the said) VENDOR in the) presence of :-)

> Sd. Illegible Advocate & Solicitor Kuala Lumpur

In the Supreme Court of the Federation of Malaya

No. 1

Statement of Plaint.

16th November 1956 continued.

10 PURCHASER in the presence :-

Sd. Ng Kim Pong

YEOW KIM PONG REALTY LTD.

SD. Illegible

Managing Director.

Sd. Illegible Advocate & Solicitor Kuala Lumpur.

> This is the Exhibit marked P2 referred to in the Statement of Plaint between Ng Kim Pong and Yeow Kim Pong Realty Ltd.

AN AGREEMENT is made this 24th day of March, 1956 Between YEOW KIM PONG REALTY LIMITED a Company registered in the Federation of Malaya and having its Registered Office at Nos. 22 and 24 Klyne Street, Kuala Lumpur (hereinafter called the Vendor) of the one part and NG KIM PONG trading as NG KEH & SON of No. 37 Ceylon Lane, Kuala Lumpur (hereinafter called the Purchaser) of the other part

WHEREAS the Vendor is the registered owner of the 22 lots of land described in the attached Schedule hereto (hereinafter referred to as the Property) which the Vendor has agreed to sell and the Purchaser has agreed to purchase under a separate agreement.

AND WHEREAS the Vendor has called for Tenders for the erection of 21 Terrace Houses on the said property in accordance with the Building Plans approved by the Town Council, Klang as Approved Plans Nos. 185/55, 185A/55, 185B/55, 185C/55 and 185D/55 and has decided to award the Contract to the

No.1

Statement of Plaint.

16th November 1956 continued. successful Tenderer, CH'NG SIONG KENG of No. 37, Katar Road, Klang (hereinafter called the Contractor) for the sum of Dollars One Hundred and Eighty Thousand and six Hundred only (\$180,600.00) including

AND WHEREAS the Vendor is desirous of retaining the lot of land mentioned in the Schedule as Certificate of Title No. 15629 for Lot 392 Section 24 in area of 1,600 square feet in the Town and District of Klang, state of Selangor and marked () to which the Purchaser hereby agrees.

Sanitary and Electrical Installations and water supply.

NOW in consideration of the said separate Agreement in respect of the sale of the 22 lots of land mentioned in the said Schedule by the Vendor to the Purchaser and the premises and the Agreement herein IT IS HEREBY MUTUALLY AGREED among the parties hereto as follows:-

1. That the Purchaser agrees to re-sell and the Vendor agrees to re-purchase the land under Certificate of Title No. 15629 for Lot 392 Section 24 in area of 1,600 square feet in the Town and District of Klang, State of Selangor described in the Schedule and marked () for the sum of Dollars Three Thousand only (\$3,000.00) which sum of money shall be deducted by the Purchaser from the sum of Dollars Twenty-seven thousand only (\$27,000.00) to be paid by the Purchaser to the Vendor on or before the 23rd day of December 1956 as contained in the separate Agreement abovementioned.

The Purchaser shall construct for the Vendor 2. one Terrace House on the land Lot 392 abovementioned in accordance with the Approved Plans abovementioned including one Washing Well and one Washing Stool in the Kitchen, Sanitary Installation, Electrical Installation for ten Lighting Points and Water supply for four Water Taps and the making of the roads and back lanes at an inclusive price of Dollars Eight Thousand Six hundred only (\$8,600.00) to be paid by the Vendor to the Purchaser as and when Progress Payment Certificates are issued by the Superintending Architect, Lee Eng Tong of Klang. The Professional Fee payable to the Superintending Architect in respect of the Terrace House herein referred to shall be paid by the Purchaser.

3. As from the 1st day of January 1956 the Vendor

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shall be liable to pay the Quit Rent and Assessments in respect of the said Lot 392 abovementioned.

4. In the event of any claim by the successful Tenderer, Ching Siong Keng abovementioned upon the Vendor arising from the non-award of the Contract to the said Contractor by the Vendor, the Purchaser hereby agrees to indemnify and keep indemnified the Vendor against any loss, claim, proceeding, cost or expense arising out of any claim by the said Contractor.

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5. The cost and incidental to this Agreement shall be borne by the Purchaser.

6. In the event the Purchaser fails to observe any of the conditions contained herein the Vendor shall have the right to cancel the separate Agreement abovementioned and the advance money paid to the Vendor by the Purchaser under the said separate Agreement abovementioned shall be forfeited to the Vendor as liquidated damage.

20 7. This Agreement shall be binding upon the heirs, successors, legal representatives and assigns of the parties hereto.

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

Signed by the said) Vendor in the) presence of :-) YEOW KIM PONG REALTY LTD. Sd. Illegible Managing Director

30 Sd. Illegible 30 Advocate & Solicitor Kuala Lumpur

> Signed by the said) Purchaser in the) presence of :-)

Sd. Ng Kim Pong

Sd. Illegible Advocate & Solicitor Kuala Lumpur. In the Supreme Court of the Federation of Malaya

No.1

Statement of Plaint.

16th November 1956 continued.

No.1

Statement of

Plaint.

This is the Exhibit marked P3 referred to in the Statement of Plaint between Ng Kim Pong and Yeow Kim Pong Realty Ltd.

7th November, 1956.

NAM/JW/CAK/415/56 S.D. (B) 9443

16th November 1956 continued.

Messrs. Shearn Delamore & Co. Advocates & Solicitors, Kuala Lumpur.

Dear Sirs,

Ng Kim Pong and Yeow Kim Pong Realty Ltd.

Owing to the continued delay on the part of your clients in this matter, our client has now assumed that they are unwilling to proceed with the sale.

We have been instructed therefore to ask for an immediate return of the full deposit paid by our client under the term of the contract and also for payment of damages as follows:

Estimated loss of profit on sale of 21 lots with houses built thereon net profit \$3,000.00 per lot \$63,000.00

Would you therefore kindly inform your clients that unless we receive at least a reasonable offer within the next seven days for the settlement of our client's claim we shall forthwith commence proceedings against your clients for damages for breach of contract.

Yours faithfully,

Sd. Lovelace & Hastings.

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No. 2

AMENDED DEFENSE IN CIVIL SUIT 1956 No. 374

The abovenamed defendant states as follows:-

1. Paragraph 1 of the Statement of Plaint is admitted.

2. Paragraph 2 of the Statement of Plaint is admitted.

3. Paragraph 3 of the Statement of Plaint is admitted, the defendant refers to the Agreement therein
10 referred to for the full terms and conditions thereof.

4. Paragraph 4 of the Statement of Plaint is admitted, the defendant refers to the Agreement therein referred to for the full terms and conditions thereof.

5. Paragraph 5 of the Statement of Plaint is admitted except and in so far as it alleges that upon payment of the sum of \$24,000/- on 23rd day of June, 1956 the defendant was to transfer to the plaintiff his nominees or assigns eight of the said lots. The defendant contends that by virtue of paragraph 3 of the Agreement of the 24th day of March, 1956 the obligation to transfer only arose provided the plaintiff paid to the defendant the balance of the purchase price on or before the 23rd day of December, 1956.

6. Paragraph 6 of the Statement of Plaint is denied save and in so far that it is alleged that the plaintiff was unable to pay the amount due by him under the aforesaid Agreement on the 23rd day of June, 1956.

7. Paragraph 7 of the Statement of Plaint is denied except and in so far as it is alleged that the defendant has refused to transfer any of the lands referred to in the said Agreement. The defendant says that it was under no obligation to make any transfer to the plaintiff.

8. Paragraph 8 of the Statement of Plaint is admitted.

9. The defendant puts in issue all damages claimed by the plaintiff.

10. The plaintiff having failed to pay the sum of

In the Supreme Court of the Federation of Malaya

No.2

Amended Defence in Civil Suit No. 374.

21st June 1957.

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No.2

Amended Defence in Civil Suit No. 374.

21st June 1957 - continued. \$24,000/- due under the said Agreement on or before the 23rd day of June, 1956 the defendant agreed to extend the time for such payment upon the terms and conditions appearing in the Letter a copy of which is attached hereto and marked "A".

11. The plaintiff failed to observe the conditions upon which an extension of time for payment of the said sum of \$24,000/- was granted and therefore by notice in writing dated the 1st day of September, 1956 (a copy whereof is attached hereto and marked "B") the defendant rescinded the said Agreement.

12. The plaintiff transferred the Agreement sued on to one LIEW THEAN SIEW for \$10,000/- on the 10th day of May, 1956. This fact was unknown to the defendant prior to the 8th day of March, 1957.

13. The defendant has on the 8th day of April, 1957 given notice to the Flaintiff that the defendant accepts LIEW THEAN SIEW as the assignce of the Agreement.

14. The plaintiff therefore had no rights under the 20 Agreement sued upon at the date of the institution of this suit.

15. The said LIEW THEAN SIEW duly assigned the Agreement sued upon for \$1500/- to the defendant on the 8th of April, 1957.

16. Alternatively the defendant says that as the plaintiff has failed to comply with the terms of Clause 3 of the Contract, in so far as no payment of the balance of the purchase price has been paid, the plaintiff's action is misconceived and premature.

Wherefore the defendant prays that this suit may be dismissed and with costs.

This is the Exhibit marked "A" referred to in the Statement of Defence between Ng Kim Pong and Yeow Kim Pong Realty Ltd. dated this 10th day of January, 1957.

> YEOW KIM PONG REALTY LTD. Sd. Yeow Khim Joe Managing Director.

(D. 1)

7th July, 1956.

In the Supreme Court of the Federation of Malaya

No. 2

Amended Defence in Civil Suit No. 374.

21st June 1957 - continued.

Mr. Ng Kim Pong, 37, Ceylon Lane, Kuala Lumpur.

WITHOUT PREJUDICE

Dear Sir,

Lot 382 to 403 inclusive Section 24, Town of Klang.

With reference to your letter of the 25th June, 1956 we are prepared to permit you an extension of time within which to pay the sum of \$24,000.00 on the following conditions:-

- 1. To pay us a sum of \$5,000.00 forthwith and and balance of \$19,000.00 to be paid on or before the 31st July, 1956.
- 2. Construction work on the above land must be commenced within one week of the date hereof.
- 3. Construction must have begun on any land that is sought to be transferred.

4. Should there be any breach of the above conditions, the \$5,000.00 abovementioned, if paid, will be forfeited and the extension of time withdrawn.

Further, full payment of the balance of \$27,000.00 must be made on or before the 23rd December, 1956.

Yours faithfully, YEOW KIM PONG REALTY LTD.

Signed Yeow Khim Joe Managing Director.

I, Ng Kim Pong, acknowledge the receipt of the 40 original copy of this letter and agree to the terms as stated.

Signed Ng Kim Pong 5 p.m. 24/7/56.

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14.

In the Supreme Court of the Federation of Malaya

No.2

Amended Defence in Civil Suit No. 374.

21st June 1957 - continued.

This is the Exhibit marked "B" referred to in the Statement of Defence between Ng Kim Pong and Yeow Kim Pong Realty Ltd. dated this 10th day of Jan. 1957.

52, XXX

prn/-

SD (B) 9443

AR. REGISTERED

1st September, 1956.

Ng Kim Pong Esq., 37 Ceylon Lane, Kuala Lumpur.

Dear Sir,

Lots 382 & 403, Section 24 Town of Klang.

We have been instructed by our clients Messrs. Yeow Kim Pong Realty Ltd. that no action has been taken by you to fulfil your obligations under the contract, or to pay the sum due to our clients.

We are therefore instructed to give you notice that the contract is terminated by reason of your breaches, and that all monies paid to our clients are forfeit.

In consequence you are requested to vacate the land forthwith since you are now a trespasser thereon.

Yours faithfully,

c.c. Ms. Yeow Kim Pong Realty Ltd. 22/24 Klyne Street, Kuala Lumpur. 20

Sd. Shearn Delamore & Co. Defendant's Solicitors

> YEW KIM PONG REALTY LTD. Sd. Yeow Khim Joe Managing Director Signature of Defendant.

Shearn Delamore & Co.

Yeow Khim Joe

(Signed)

Defendant's Solicitors Signature of Defendant.

10 I, YEOW KHIM JOE a Director of the abovenamed defendant hereby declare that the above Statement is true to my knowledge except as to matters stated on information and belief and as to those matters I believe to be true.

Dated this 10th day of January, 1957.

Dated this 21st day of June, 1957.

Sd. Yeow Khim Joe

Signature of Yeow Khim Joe

Sd.

Yeow Khim Joe

Signature of Yeow Khim Joe

This Statement of Defence is filed for and on behalf of the defendant by Messrs. Shearn Delamore & Co. of and whose address for service is Chartered Bank Chambers, Seremban.

Delivered as amended pursuant to the order of The Honourable Mr. Justice B.G. Smith dated the 10th day of June, 1957 on the 21st day of June, 1957. In the Supreme Court of the Federation of Malaya

No.2

Amended Defence in Civil Suit No. 374.

21st June 1957 - continued.

REPLY IN CIVIL SUIT 1956 No. 374

No. 3

No.3

24th February

1958.

The Plaintiff abovenamed states as follows:-

Reply in Civil 1. The Plaintiff joins issue with the Defendant in his amended defence.

2. As to paragraph 12 the Plaintiff denies that the agreement was transferred to one Liew Thean Siew for \$10,000/- as alleged or at all.

3. The Agreement was deposited with Liew Thean Siew as security for a loan and that the whole of the said loan was repaid prior to the institution of these proceedings.

4. As to paragraph 15 of the amended defence the Plaintiff states that on 8th April 1957 the said Liew Thean Siew had no rights under the Agreement and further that the Defendant knew at all material times that no such rights existed.

Sd. Lovelace & Hastings	Sd. Ng Kim Pong
Plaintiff's Solicitors	Plaintiff's Signature

I, Ng Kim Pong, the abovenamed Plaintiff do hereby declare that the above statement is true to my knowledge except as to matters stated on information and belief and as to these matters I believe the same to be true.

Dated this 24th day of February 1958.

Sd. Ng Kim Pong Signature. 10

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16.

No. 4

OPENING SPEECH FOR PLAINTIFF (RESPONDENT)

Marjoribanks for plaintiff.

Rintoul for defendant.

Marjoribanks reads pleadings. Plaintiff unable to pay \$24,000 at correct time.

Extension granted.

Defendant under obligation to transfer 8 lots once \$5,000 and \$19,000 paid or tendered. Defen-10 dant not prepared to go on. S.40 contracts ordinance. Defendant failed to complete.

Harold Wood Brick Co. case. 1935 2 K.B. 198 at 205. S.74 contracts ordinance. Compensation for breach of contract.

S.76

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Return of deposits and loss.

Defendant says no obligation to transfer till final balance paid.

Rintoul: No admission that money was tendered.

20 <u>Marjoribanks</u>: The contract is P.1 to Plaint. From the agreement it is sufficiently clear that when \$3,000 is paid, property should be transferred.

Smith's case. 26 E.R. 881. Consideration of deeds - the design should be given effect to - the intent is more important than the words although the words cannot be altered.

Stroud Co. case. 55 E.R. 853. A clause should not be struck out unless it is impossible to reconcile with another clause.

Para 11 of defence - recission.

Ask that agreed bundle be marked.

Rintoul: No objection.

Agreed bundle Ex.P.1.

In the Supreme Court of the Federation of Malaya

No. 4

Opening Speech for the Plaintiff (Respondent).

18th March 1958.

Page 10 of agreed bundle - dated 1.9.56 - termination - forfeiture.

- not final.

No.4

page 11. Page 12.

Opening Speech for the Plaintiff (Respondent).

18th March 1958 - continued.

Even if there was right to rescind, subsequent action showed that the agreement was varied but then defendant changed his mind.

Defendant has pleaded the agreement was transferred. Plaintiff has denied this.

Construction work had begun within 1 week of 7.7.56 - there will be evidence of this.

Evidence will be plaintiff, witness as to extension of time, workmen as to commencement. Evidence as to damages.

Plaintiff will call evidence.

<u>Rintoul:</u> paras. 6 and 7 of Plaint. Plaintiff alleges he complied with the agreement of 7.7.57.

Page 28 of P.1.

11 31 11 1

Tender alleged on 28.7.56.

" " 19.9.5б.

Notice of recission page 10. Plaintiff says this recission not final but we are concerned with the 7.7.56.

Marjoribanks: That is so.

Plaintiff's Evidence

No. 5

EVIDENCE OF NG KIM PONG

No.5

Plaintiff's Witness 1, affirmed states in English:

Ng Kim Pong.

Examination.

Name: Ng Kim Pong. Building contractor. 8 Shaw Rd., Kuala Lumpur. Building contractor since 30

1941. Past 3 years I have put up 3 building schemes.

I know Yeoh Kim Pong. I approached him. I knew he had land at Meru Rd., Klang, which he was prepared to sell. Early in March '56 we had discussion in his office at Klyne Street, Kuala Lumpur.

We discussed about his 22 lots of land at Meru Rd., Klang. He told he had called for tenders to build houses on the land but if I would give a good offer he would sell the land. I offered him \$3,000 per lot - \$66,000 for 21 lots in which one lot was double size.

He agreed.

It was arranged I should pay at signing of agreement \$15,000 and within 3 months of agreement I would pay \$24,000.

Agreement was signed.

It was prepared and drawn up by Mr. Tham, Secretary of Yeoh Kim Pong Realty Ltd.

I bought the land so that I could sell it lot 20 by lot to purchasers.

21.6. I received letter from defendant that I had to pay balance. I asked for time. I approached Mr. Yeoh Kim Pong personally and asked for extension of 1 month to pay up my \$24,000. He told me to put it in writing so I wrote him a letter and had it tendered to him through Quai Pin Seong, Comprador of Chartered Bank, Kuala Lumpur. I informed Pin Seong to speak on my behalf to Yeoh Kim Pong to ask for extension of time. Pin Seong agreed. (Court: lsPin Seong a witness? Marjoribanks: Yes). A couple of days later Pin Seong told me he had seen Yeoh Kim Pong who had agreed to extension of time up 31.7.56 but I had to pay down a sum of \$5,000 on or before 7.7. and the balance of \$19,000 on or before 31.7.56.

On 7.7. I brought with me \$5,000 in cash, and with Pin Seong went to office of Yeoh Kim Pong Realty Ltd. There we met Mr. Tham and Yeoh Kim Joo. Yeoh Kim Joo is a Managing Director of the firm. Tham is Secretary of the Company. Before I handed the money to them I asked them to confirm if what Quay told me was correct. They replied in affirmative. In the Supreme Court of the Federation of Malaya

> Plaintiff's Evidence

> > No.5

Ng Kim Pong.

Examination - continued.

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> Plaintiff's Evidence

> > No.5

Ng Kim Pong.

Examination - continued.

Then I handed over the \$5,000 in presence of Quay Pin Siong. When I asked for receipt Yeoh Kim Joo told me his father Yeoh Kim Pong had gone out and as soon as he returned in day or two they could have receipt posted to me. I did not get receipt.

For about 2 weeks after the day I had given the money I had repeatedly telephoned and gone to their office to get receipt. Finally on about 24.7. at about 4.30 p.m. I went to the office again. I requested receipt.

They showed me receipt, i.e. Tham and Kim Joo, and told me the receipt was ready for me but before they could hand me the receipt I should acknowledge receipt of a letter which was handed to me first. I read the letter and found the terms and conditions had never been even discussed before or after I paid them the \$5,000.

I noticed the date on the letter was 7.7.56. Then I pointed out, particularly condition 2 of the letter which says I should commence work on the land within 1 week of the letter.

This is the letter (Exhibit "A" to defence).

After pointing out clause 2, I told Mr. Tham that that was a ridiculous condition - in fact the whole letter was ridiculous. Mr. Tham told me it was mere formality only and if I refused to sign a duplicate copy of the letter I would not get my receipt for \$5,000. In other words, I would not have proof I paid him the \$5,000. I did not know I did not know what to do. Then I decided to sign the letter and told Mr. Tham that I was signing it because I wanted receipt for the \$5,000. I thought I should put the time and date under my signature so it would at least show that this letter was antedated over 2 weeks before I received it. Afterwards I received the official receipt for the \$5,000. This is it. I noticed that the date on the receipt (p.3.). was 9.7.56. I told Tham that the date was not correct - I paid on 7.7.56.

I told Tham and Kim Joo that the date on the letter 7.7., and date on receipt 9.7. would eventually prove that I had agreed to the conditions in the letter before I paid in the money. But the money was paid without any conditions imposed. When

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I put the date 24.7.56 they did not say anything, but Tham was surprised at what I did.

I left the office.

Following day I went to the compradore of Chartered Bank complaining to him about the letter given me by defendant stating terms which have never been discussed or agreed upon.

After hearing me he was a little bit surprised. He told me that when he went to see Yeow Kim Pong regarding request for extension of time to pay \$24,000 the only complaint from Yeow Kim Pong was that I had not started work on his own house which I was to build for him.

That was under a separate agreement.

I know Goh Siew Heang and Yap Kam Kee. I met about selling 8 of the 22 lots.

I met them about end July '56 - it was 24.7.

They prepared to buy 8 of the lots from me.

I took them to Klang to see the land. They 20 were satisfied and offered me \$24,000 for 8 of the lots.

On 27.7.56 Goh and Yap and I went to office of Yong Kung Lin. They handed 2 cheques amounting to \$24,000 to Yong Kung Lin. Yong Kung Lin wrote me a letter.

The \$24,000 was in respect of the 8 lots. They told me to get 8 titles for purpose of transferring. Next day I went to see Mr. Ramani. I instructed him to write to defendant that I had the \$24,000 deposited in Yong Kung Lin's office requesting defendant to provide the titles for the 8 lots according to the lot Nos. I gave Mr. Ramani.

Mr. Ramani received reply. I instructed Mr. Ramani to reply.

I had commenced preliminary work in July 1956. I got a contractor named Poon Sung. I instructed him to do the siting of the lots, clearing of the land and digging foundation holes. I brought in my In the Supreme Court of the Federation of Malaya

> Plaintiff's Evidence

> > No.5

Ng Kim Pong.

Examination - continued.

21.

> Plaintiff's Evidence

> > No.5

Ng Kim Pong.

Examination - continued.

concrete mixer, piling machine, and some bakau piles. Before this I bought a kongsi house and paid for a temporary road that had been done. Work commenced some time in July. It went on till middle August. After that I told contractor to stop.

Mr. Ramani wrote letter on 3.8.56.

The men who had put up the deposit waited for a week. I saw them again about 10 days after they had deposited. They told me they had withdrawn their money from Yong Kung Lin as apparently I was not in position to get titles. (Marjoribanks says these men are witnesses). I think I saw them before Shearn Delamore's letter of 10.8.56.

I received Shearn Delamore's letter of 1.9.56.

I saw Lovelace & Hastings.

I met Tham of defendant.

I attended weekly at Shearn Delamore's office about 2 weeks after consulting Lovelace & Hastings.

Mr. Tham, Mr. Bentley of Shearn Delamore, Mr. Williamson of Lovelace & Hastings and myself attended.

I was obliged to give Yeow Kim Pong's tenants 1st preference for the houses.

Defendant suggested that a second circular be sent. A draft circular was sent to defendant's solicitors for approval. I think between September and October.

I instructed Lovelace & Hastings to send cheque for \$19,000 to Shearn Delamore & Co. about Oct. '56. Eventually I asked for the return of the money. I never saw any titles.

I received note from Tham telling me not to worry about settlement of the balance. When Lovelace and Hastings sent the \$19,000 it was to fulfil the 2nd instalment. I did it in good faith, after pleading.

I expected to get 8 titles transferred.

I did not get them.

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I instructed Lovelace & Hastings to get the \$19,000 back.

I gave instructions to institute proceedings.

I claim return of the deposits of \$15,000 and \$5,000 and \$75,000 general damages.

I have my calculation: on profit I would make on sale of the houses. There were 21 houses. Land was \$3,000 each. I was going to build a house on the land. The houses would cost \$7,500 each. I was hoping to get \$13,500 to \$14,500 per house.

I entered into agreement with 2 purchasers at \$13,500 and \$14,300 per house.

I expected around 20% $p{\rm rofit}$ on sale of each house.

Defendant has already put up all the houses. They were offering their houses at \$15,000 each.

The houses were on same plan on which I intended to build.

I signed this sale deed. (P.4).

(Rintoul formally objects to any evidence in support of paras. 2 and 3 of the reply and will argue the point later).

In fact I did not sell or transfer the agreement to Liew Thean Siew. I knew Liew Thean Siew before 10.5.56. At present he works in bank in Kuala Lumpur.

In 1956 he used to lend out money to people.

In 1956 I negotiated loan from him. That was about May 1956. I needed a loan very urgently to pay my labourers at Telok Anson. I spoke to Liew Thean Siew for a loan of \$5,000. He asked me if I had substantial securities. I told him no. Chellapa helped me to negotiate this loan. I had a loan from Liew Thean Siew without substantial security but he asked me to give him an assignment of my agreement with Yeow Kim Pong Realty Ltd. Only on that condition would he let me have a loan. In the Supremo Court of the Federation of Malaya

> Plaintiff's Evidence

> > No.5

Ng Kim Pong.

Examination - continued.

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> Plaintiff's Evidence

> > No.5

I told him the loan would be for 1 to 3 months. He suggested I should write \$10,000 instead of \$5,000. The idea was to have better security. I was also made to execute a full power of attorney to him. This was for him to collect whatever contract money I might receive in order to have his loan repaid. He asked me to give him a post-dated cheque for \$5,000 which I did.

It was post-dated 1 month from 10th May.

Ng Kim Pong.I did not receive \$10,000 although the agree-
ment says so.I only received \$5,000.He toldExamination -
continued.me if I wanted more money some other time to see
him.

(Marjoribanks says Liew Thean Siew is a witness).

I was still carrying on with the agreement with defendant after May 1956.

Liew Thean Siew wanted to see the agreement with defendant. It was given to him.

The \$5,000 I paid with interest.

I came to final instalment in Sept. 1956.

I got back the original agreement with defendant.

The post-dated cheque was dishonoured.

I had dealings with Malaya Borneo Building Society. They were due to pay me \$3,700. This money was paid to Liew Thean Siew direct.

Cross-Examination.

Cross-Examination

Cross-Examination:

Since 1946 or 1947 I would not say I have been 30 perpetually short of money.

After the re-occupation I ran a cinema at Raub.

I was sued in High Court at Raub. I had not got the money to pay for the equipment. I had spent my money building the cinema.

I have not satisfied the judgment completely yet.

The judgment was obtained 5 or 6 years ago. Since the re-occupation, I have been defendant in civil suits 3 or 4 times. In all these suits it was for money I owed plaintiffs. I know there is outstanding by me to East Asiatic Company \$5,000 or \$6,000 on judgment. East Asiatic obtained judgment against me about 3.12.56.

They filed a Bankruptcy Petition against me. I received Bankruptcy Notice. I don't remember receiving Petition.

I was to pay instalments. I did not keep up instalments. I am due to appear in High Court, Kuala Lumpur on judgment debtor summons.

This judgment was \$4,000. The judgment was obtained 6 or 7 months ago. That is 3 unsatisfied judgments. I can't think of any others.

Henry Waugh & Co. are suing me.

I had to borrow \$5,000 to pay labourers.

I also have about \$25,000 outstanding.

I had the unpleasant experience of my cheque being dishonoured. I may have had 8 or 10 cheques dishonoured.

Since 1950 I would not say I have been short of money.

When I started negotiating with defendant, I had an outstanding judgment against me. At one time I owed East Asiatic Coy. \$14,000. In 1956 I paid \$1,000 off that account.

When I started to negotiate with defendant I owed East Asiatic about \$10,000. I may have owed that since end of 1955.

Q. When negotiating with defendant you must have been short of ready money?

A. Yes.

I agree that in 1956 when these instalments fell due to defendant I did not have the money.

In the Supreme Court of the Federation of Malaya

> Plaintiff's Evidence

> > No.5

Ng Kim Pong.

Cross-Examination continued.

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> Plaintiff's Evidence

> > No.5

Ng Kim Pong.

Cross-Examination continued. I see paras 6 and 7.

My case is that all that happened on 7.7. was that I was given extension of time to pay \$19,000.

That was extension to 31.7. I was to pay \$19,000 before 31.7.

I knew I would pay. I did not pay it. I did not intend to pay with my own money. The money was tendered - I mean the letter from Yong Kung Lin. I told defendant I had the money. My proposition was that I would pay defendant when the titles were transferred to Yong Kung Lin's clients. The money was only to be transferred to me when I transferred the titles to Yong Kung Lin's clients.

The money deposited with Yong Kung Lin was on behalf of the purchasers.

Defendant was in breach of its agreement up to 31.7. I had the money ready and defendant did not produce the titles.

I did not write and ask defendant for inspection in their office but I went to their office.

The money was in Yong Kung Lin's office.

It was meant for the titles if the titles were produced.

I did not claim damages then because I did not like to litigate matters. I thought I could get a transfer of the lots. I thought I could get the titles transferred.

Adjourned to 19.3.58.

(Intld: W.B.S., J.)

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Before me in Open Court this 19.3.58.

(sd) W.B. Sutherland J.

Marjoribanks for plaintiff. Rintoul for defendant.

Resumed from 18.3.58.

Cross-examination resumed:

There was no agreement after 31.7. giving me time to pay. There were negotiations. I cannot say whether there was a subsequent agreement. Under the agreement I should have paid the \$19,000 on or before 31.7.

I was sure to get this from Goh and Yap if a transfer was effected in their favour.

This is the letter which confirms this.

Without the money from Yong Kung Lin I could raise the money from relations. I did not get the titles. I did not take the money to defendant and ask for the titles and transfers, but I asked Mr. Ramani to write a letter.

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I entered a written undertaking with Goh and Yap.

I had received no deposit.

When I instructed Lovelace & Hastings to send the \$19,000 it was in order to pay the money and get the title without going into litigation. I did not pay the \$19,000 by 31.7.

Defendant did not comply with Clause 6 of the agreement.

30 Because Clause 6 was not complied with, I could not pay.

Mr. Ramani asked for the titles to be handed over for inspection.

I did not ask for inspection at defendant's

In the Supreme Court of the Federation of Malaya

> Plaintiff's Evidence

> > No.5

Ng Kim Pong.

Cross-Examination continued.

> Plaintiffⁱs Evidence

> > No.5

Ng Kim Pong.

Cross-Examination continued. office. I think I spoke to Tham about that. I said:

"I have the money now ready in Yong Kung Lin's office. I would like to have the titles produced for inspection."

I did not say where they were to be produced. I think it was about the 25th.

Because I could not get the titles I went to Mr. Ramani. After Ramani's letter of 28th, I did not go and ask for the titles. I was never given a chance to see any of the titles.

I seeletter 9 in P.1. Before that no titles were produced. The letter says I can inspect the titles at any time in defendant's office. The letter isdated 10.8.56.

Before 10.8., i.e. on 24 or 25.7., I asked for these titles. At that time the \$24,000 was still with Yong Kung Lin. Defendants I presume purposely delayed showing the titles till they knew the \$24,000 was withdrawn by the intending purchasers. 20 From previous experience I know they delayed things. That is my presumption. I knew on 9.8. that the money had been withdrawn. It is my handwriting in pencil on D.5.

The purchasers told me verbally they had withdrawn. I did not go for inspection between 28.7. and 10.8. I think I did my best. I did not go any more because the money had been withdrawn.

I did not instruct Mr. Ramani to reply to letter No.9. It was too late.

By letter No.10 defendant rescinded the contract. I did not agree.

Immediately I received letter 9, I went to Lovelace & Hastings and instructed them to try and let me pay the instalments out of time.

I did not instruct them to say defendant was in breach because I did not want to cause unpleasantness. It is not so that I did not instruct them to say defendant was in breach because I knew I was in breach of the agreement of 7.7.

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I see letter No.13.

There was no suggestion that defendant was in breach, because I hoped to settle amicably.

I see letter No.23.

It called off the deal because negotiations had gone on, and it could not be settled amicably.

I did not consider it was necessary to say that defendant was in breach on 31.7.

I see para. 7 of plaint. That means defendant lo has committed a breach in not producing and transferring. This para. 7 refers to tender of \$19,000.

I see letter 31. (b)(1) more or less is accurate. That is the general idea.

I did not at any time consider P.2 to be valid. I signed it more or less under duress - it is dated 7.7. but I signed it on 24.7.

I deny the terms were verbally agreed on 7.7.

I signed because I wanted a receipt which I had not got.

I had paid them the \$5,000 in presence of Quai.

But I would rather have the receipt.

The only duress was if I did not sign I would not get the receipt.

I have never suggested duress until I came to the witness box.

P.2 was attached to the defence.

The reply does not attack P.2 because I left things to my solicitors.

I started building operations between July and 30 August.

I see letter No. 8.

Q: Why does it not say building operations have started?

In the Supreme Court of the Federation of Malaya

> Plaintiff's Evidence

> > No.5

Ng Kim Pong.

Cross-Examination continued.

A: We were under no obligation to start operations.

In the Supreme Court of the Federation of Malaya

> Plaintiff's Evidence

If P.2. were the agreed terms, I had not started construction on the 8 lots.

It says until building operations are commenced,

I was not going to build on the 8 lots.

done no building operations on the 8 lots.

No.5

I see letter 9.

defendant cannot transfer.

P.2 was not valid.

Ng Kim Pong.

Cross-Examination continued.

I did not reply to it.

The 2nd term of P.2 was ridiculous. I had never suggested I could start work within 1 week of 7.7. I started preliminary work in July and August. On 25.6. I admit defendant could have taken my \$15,000 and that would have been the end of the matter.

At that time I was very hard up.

I see letter No.4. It says I arranged to commence work 1 week from 25.6.56.

It was not on letter No.4 that P.2 was made. It is merely a coincidence that 1 week was mentioned in both letter No.4 and P.2.

As to damages, I have figures. I worked them out. I originally suggested \$63,000. Then I jumped them up to \$75,000, because I had to include one or two extra items. It was for loss of profit. I added \$12,000 for other expenses because I had to pay my solicitors and interest. \$63,000 was rough estimate.

I was trying to get a settlement.

I did not want litigation. The \$75,000 represents loss of profit and other general expenses. About \$70,000 is loss of profit. I estimate it on cost of land \$3,000. As time goes on I estimate the land value would be \$4,000. The house would cost \$7,000 to \$7,500. I was going to sell at about \$14,000. I was going to make about \$3,500 per house. That is how I was estimating \$75,000. 10

I had

As to the 8 lots, I would not have made profit, but these purchasers would have paid me \$900 for the kongsi house. We might co-operate on other things.

This is the agreement I had with them (D.6.).

I do not know whether defendants have been unable to sell all the houses at \$14,000 for houses costing \$8,600 but I am a contractor and defendant would have to employ contractors.

The only agreement with my purchasers provided 10 for advances from Malay Borneo Building Society.

It was a condition that any purchaser obtain loan of \$9,000 from a loan society.

I have carried out 3 substantial building schemes. I made a profit on 2 of them of about \$,6000. It was in 1955 and 1956. On the first I made about \$35,000. On the second I made about \$20,000. On the third I made a loss of about \$30,000. I abandoned it because the work was slow. That is the scheme on which I had to borrow the \$5,000.

I did not pay East Asiatic because I had other commitments.

Occasionally my relations help me.

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At end of 1955 I owed East Asiatic \$14,000 approx. In 1956 I paid them \$2,500 approx. In July 1957 I paid them \$5,000. After they took bankruptcy proceedings against me.

(Rintoul asks that cross-examination on P.4 be without prejudice to his objection. Court: Yes).

I see P.4., I paid for its stamp. I paid stamp duty at the rate on an assignment or conveyance.

I do not know whether the duty on mortgage is less than on an assignment. Witness was A. Chellappa. I signed it and initialled a small alteration.

I did not get the document back when I repaid because he said I had to pay some extra money. In the Supreme Court of the Federation of Malaya

> Plaintiff's Evidence

> > No.5

Ng Kim Pong.

Cross-Examination continued.

Plaintiff's

Evidence

No.5

I never wrote and asked for it back. I never got it back from him but I got back the original agreement.

The Power of Attorney is still with him.

I have not written to ask for it back.

I have not taken steps to cancel the P/A.

I gave him full power of attorney.

Ng Kim Pong.

Cross-Examination continued. He could do anything he liked in connection with the agreement but it was given merely as security.

I knew defendant had got hold of the assignment.

I knew Liew had proposed to transfer the document to defendant.

I got letter from defendant informing me of the assignment.

I had no time to cancel the Power of Attorney.

I paid the \$5,000 to Liew between August and September 1956. I used some money due to me from Malaya Borneo Building Society for material supplied.

The Society paid Liew direct about \$3,700.

Bannon & Bailey also paid Liew \$3,000 on my behalf.

Liew has received \$6,700 from me. Out of these two amounts Liew returned me \$1,500.

My cheque is still with Liew. He still has the Power of Attorney, the document and the cheque because he says I still owe him \$1,000. That is for a separate loan which was given to me a month after the assignment.

I asked for all the documents but he said no. 30

As far as I know he is not a registered money-lender.

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Re-Examination

Re-Examination: The Raub debt is still unsettled, because I bought a pair of projectors for about \$12,500 and I paid about \$8,000 at one time.

Action was taken against me for the balance of \$4,500.

I then paid about \$3,000 leaving a small balance.

They have not taken further steps.

I paid the \$3,000 about 1952 or 1953.

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They have not written me any more.

Henry Waugh's suit is only pending. I am defending it.

The judgment debtor summons is in respect of deposit on one of these 22 lots.

In 1955, 1956 and 1957 my total work amounted to nearly over a million dollars.

In one year I owed East Asiatic \$48,000. Now I only owe them about \$7,000.

20 'The stamp on the assignment was put there a month from when I signed. The idea was that if I had not repaid the loan within a month I had to pay the whole amount of \$10,000 to redeem the assignment.

No.6

EVIDENCE OF LIEW THAN SIEW

Plaintiff's Witness 2, affirmed, states in Haaka:

Name: Liew Than Siew.

I am a market runner.

I work in the Bank - Chung Kiaw Bank. Live at 30 16 Jalan Barat, Kuala Lumpur.

In the Supreme Court of the Federation of Malaya

> Plaintiff's Evidence

Ng Kim Pong.

Re-Examination.

No. 6

Liew Than Siew.

. .

Examination.

I know Plaintiff.

I have had dealings with him in 1956.

I assisted him.

Plaintiff's Evidence

No.6

When he was in financial difficulties I helped him. I lent him money. The amount was \$5,000. I asked about security he bought lands on agreement and I asked him to deposit the agreement as security. The lands were in Klang. He deposited agreement with me. I read English. Liew Than Siew.

Examination -I did not get any other documents. I received 10 continued. Power of Attorney from him.

> He executed the Power of Attorney first, then later borrowed money from me.

I see P.4.

It says agreement was sold to me. That is the agreement about the land at Klang. The agreement was deposited with me as security for loan. P.4. was drawn up at same time as the loan of \$5,000 was P.4 was drawn up as security for my loan. made.

I knew that the agreement was between Ng Kim Pong and Yeow Kim Pong Realty.

I did not inform Yeow Kim Pong Realty of the document.

I never sent any money to Yeow Kim Pong Realty.

I eventually assigned the agreement to Yeow Kim Pong Realty. Before that I had had no dealings with Yeow Kimg Pong Realty about the agreement affected by the assignment.

Ultimately I assigned P.4 to Yeow Kim Pong Realty. The document says \$10,000. It was the Borrower's desire I lend him \$5,000 for 1 month. Ιſ the money is not returned on due day it will become After signing it went for stamping within \$10,000. 1 month.

There is still something due on the \$5,000.

20

Cross-Examination

Cross-Examination:

Plaintiff signed the document of his own free will readily understanding the terms. The document is a sale deed. I stamped it as a conveyance. The arrangement was that he could have it back if he paid \$5,000 in a month or \$10,000 after a month. As he has not paid the \$10,000 I maintain the agreement has been assigned to me. That is why I felt justified in accepting \$1,500 from defendant for my rights under the agreement.

In the Supreme Court of the Federation of Malaya

> Plaintiff's Evidence

> > No.6

Liew Than Siew.

Cross-Examination.

10

This is the assignment from me to defendant of the agreement (D.7.).

When I signed D.7, plaintiff owed me at least \$5,000.

The agreement was that until defendant had repaid \$10,000 the agreement was mine.

On P.4 is: "received \$10,000".

Plaintiff wrote that on his own suggestion. He wrote it on his own suggestion because at that time he was badly in need of money and he gave me that condition that if he paid within 1 month he would pay \$5,000 and if after that he should pay \$10,000.

When plaintiff signed P.2, he handed me the agreement concerned. I did not give it backto him. I gave it to Yeow Kim Pong Realty's lawyer when I received \$1,500.

Re-Examination

Re-Examination.

Re-Examination:

30

The agreement between Plaintiff and defendant was assigned to me. It was deposited with me as security for loan. The condition was that if he paid me \$10 000 the assignment was void if the \$10,000 was not forth coming, the assignment was good.

When he borrowed the money and when he executed P.4, he said he would repay the 5,000 in 1 month and if over one month, he would pay 10,000 and also the

> Plaintiff's Evidence

> > No.6

Liew Than Siew.

Re-Examination - continued.

When I assigned the agreement in April 1957 I knew the agreement between plaintiff and defendant had expired.

10

In April 1957 Plaintiff still owed me some money on the loan.

I have no claim against plaintiff for the balance of the loan because I have assigned it.

I do not know who can now claim against plaintiff for the balance of the loan.

D.7 is the assignment to defendant. Before I signed D.7, I had a claim against plaintiff regarding the \$10,000. After I signed D.7, I had no rights 20 against plaintiff. I had already assigned my rights to defendant.

I personally did not hand the agreement between plaintiff and defendant to plaintiff.

I cannot say whether anyone else did.

It was not in my possession. When I signed D.7 I handed P.4 to the lawyer.

No. 7

EVIDENCE OF ARUMUGAM CHELLAPPAH

Arumugam Chellappah.

Examination.

Plaintiff's Witness 3, affirmed states in English:

Name: Arumugam Chellappah. General Broker. I live at 95, Travers Rd., Kuala Lumpur.

I see P.4 (id.)

No.7

30

assignment of the agreement. If he paid the \$5,000

dant the agreement would be void. I knew the money

1956 because of the agreement between plaintiff and

I realised that if plaintiff did not pay defen-

I did not pay plaintiff any money before end of

within 1 month then there would be no assignment.

had to be paid by end of 1956.

defendant.

I have seen it before. I have signed it as a witness.

I know about P.4.

I know Plaintiff and Plaintiff's Witness 2 (Liew Than Siew).

On the date of the document Plaintiff and Plaintiff's Witness 2 had been long friends. Plaintiff wanted a loan of \$5,000. Plaintiff's Witness 2 was not agreeable. He was agreeable provided Plaintiff could assign a contract he had from Yeow Kim Pong Realty Ltd.

Plaintiff executed P.4.

On that day when he wrote P.4 he meant if he did not do it in a month's time. If Plaintiff paid the money within 1 month, he will redeem the document.

\$10,000 was not paid on the day of the agreement.

I have seen an agreement between plaintiff and defendant. I have had it in my possession.

I first saw it on the date of P.4.

20 I have not still got it.

P.4 and the agreement between plaintiff and defendant were in Plaintiff's Witness 2's possession.

I made out P.4.

No Cross-Examination

No.8

EVIDENCE OF QUAI PIN SIONG

Plaintiff's Witness 4, affirmed, states in English:

Name: Quai Pin Siong, Comprador of Chartered Bank, Kuala Lumpur. I know plaintiff (id.). I know Yeow Kim Pong. In June 1956 plaintiff came and saw me about land in Klang. He told me his In the Supreme Court of the Federation of Malaya

> Plaintiff's Evidence

> > No.7

Arumugam Chellappah.

Examination - continued.

No. 8

Quai Pin Siong.

Examination

30

> Plaintiff's Evidence

> > No.8

I saw Yeow Kim Pong. I told him plaintiff asked for extension of 1 month. Yeow Kim Pong agreed to 1 month's extension provided Plaintiff

gave another \$5,000 deposit. If I am not mistaken Mr. Yow Kim Pong said he must carry out the old agreement.

I don't think the amount was mentioned to me Quai Pin Siong. except the 35,000.

Pong and see if he could extend.

Examination - continued.

Yeow Kim Pong spoke of some conditions which plaintiff had not carried out. I can't remember the conditions.

After I had seen Yeow, I told plaintiff Yeow had agreed to extend provided plaintiff carried out the terms of the agreement.

I told plaintiff to bring the \$5,000. I took the money and handed it to Yeow Kim Joo.

I don't know if a receipt was given. As soon as I had handed the money I went away.

Later plaintiff saw me and I told him to fix up with Yeow Kim Joo.

Plaintiff did not complain to me after that.

Cross-Examination

I don't remember what terms of the agreement Yeow Kim Pong mentioned. Yeow Kim Pong complained that plaintiff had not started to build.

I think Yeow said that if plaintiff paid money and went on with the building, Yeow would extend the option.

I can't remember whether plaintiff was present when I handed the \$5,000 to Kim Joo.

Re-Examination.

Cross-

Examination.

Re-Examination

I think that Yeow said that plaintiff should go on with building houses.

option had expired and he begged me to see Yeow Kim

20

30

I don't know who owned the houses. I do not remember whether anyone suggested that the terms should be written and signed.

Witness released.

No. 9

EVIDENCE OF POON SUNG

Plaintiff's Witness 5, affirmed, states in Cantonese:

Name: Poon Sung. Carpenter and Mason. Ι live at Kg. Jawa, Klang.

I know Plaintiff (id.)

In 1955 I saw him

I heard he was going to build 21 houses and I went to see him if I could get the contract work.

The work was going to take place on the Main Road behind 36 houses.

I got the sub-contract for doing the masonry and carpentry, each at \$2,200 for each house.

Materials would be supplied by plaintiff.

On 16.6.56 we entered into an agreement. 20 Plaintiff paid me \$500.

> I had cleared up the ground, made holes and put the strings for measuring the houses.

I started work some time on 4th or 5th July. I worked till August.

Poon Sung.

Examination.

In the Supreme Court of the Federation of Malaya

> Plaintiff's Evidence

> > No.8

Quai Pin Siong.

Re-Examination - continued.

No.9

39.

> Plaintiff's Evidence

> > No.9

Poon Sung.

Examination - continued.

Cross-Examination.

No Re-Examination - released.

No. 10

Than Sun Hong.

Examination.

The holes were for piles. The piles were for concrete pillars for foundation.

On 8 or 9 August plaintiff asked me to stop work, because there was trouble over the land which had not been settled.

Cross-Examination

Up to the time I stopped work, plans were passed. I did not do any building. I dug holes

Apart from that, I did not construct anything.

No. 10

EVIDENCE OF THAN SUN HONG

Plaintiff's Witness 6, affirmed, states in Cantonese.

Name: Than Sun Hong. Asst. Mgr. Chop Keng Chong Ltd., Station St., Klang.

I know plaintiff (id).

In early 1956 I saw him. He used to come to my shop to buy.

He mentioned he was going to buy land to build houses.

A new 2-storey building in Klang in 1956 could be sold for about \$13,000 or \$14,000.

I live in Meru Rd., Klang. It is a very good residential area. Plaintiff told me he was building houses there and I should introduce prospective customers to him.

In March I introduced Lai Peng Yew to buy a house from him.

Cross-Examination

I do not know how much these houses worth. Would cost \$13,000 to \$14,000 to build. I have no idea of cost of road works, fees, water connections, etc. I am not an expert. Most of the houses in Klang which changed hands in 1956 had to be financed by instalments.

I do not know why instalments were paid.

No Re-examination - released.

10

20

No. 11

EVIDENCE OF ONG JUK SOO

Plaintiff's Witness 7, affirmed, states in Hokkien:

Name: Ong Juk Soo. Sawmill owner. Live at 96 Kapar Rd., Klang.

I know plaintiff (id).

He was to build 21 houses for sale in junction of Meru Rd. It is a good area. 4 of my friends booked 4 houses. 2 of them paid deposits of \$500 each.

2 withdrew because the work done was very slow.

The value of new houses built in Meru Rd. in 1956 was between \$13,500 and \$14,500.

Cross-Examination

The houses would each cost \$8,000 to \$9,000 to There would also have to be something for build. the architect - about \$125 per house. The road would cost about \$300 to \$500 per house.

For water mains it would cost about \$200 per house. There is also the cost of the land.

30 No Re-examination - Witness released.

Adjourned to 20.3.58 at 10 a.m.

Cross-Examination.

No. 11

Examination.

Ong Juk Soo.

Examination.

In the Supreme Court of the Federation of Malaya

> Plaintiff's Evidence

> > No. 10

Than Sun Hong.

Cross-

Before me in Open Court this 20th day of March 1958.

(sd) W.B. Sutherland, J.

10

Marjoribanks for plaintiff. Rintoul for defendant.

Hearing resumed from 19.3.58.

No. 12

Plaintiff's

Evidence

Edmund Samuel Cooke.

No. 12

EVIDENCE OF EDMUND SAMUEL COOKE

Examination.

Plaintiff's Witness 8, affirmed, states in English:

Name: Edmund Samuel Cooke. Architect and Licensed appraiser. 8 Market St., Kuala Lumpur.

I have inspected land at Meru Rd., Klang, known as lots 382 to 402 inclusive, sect. 24, Town of Klang.

I went to make valuation of the land on 4.3.57 and to note if any work had commenced on the site. It was a valuation of vacant land. It was suitable for building. The layout of the land was given to me on loan.

This is one of the plans I saw (P.8).

I made estimate of the cost of building a house 20 on these lots based on the plan.

The estimated cost of building a house was that there were slight variations in the cost of building a house on the Estate. I based 20 of the houses at \$7,200 per house which gives \$144,000 i.e. for 20 houses, and a corner house at \$9,600, total of \$153,600.

If bakau piling was necessary that will increase the cost - 3638 extra per house.

I have valued 10 chains of roadway for a total 30 of \$2,500.

The total estimate for the 21 houses was \$169,498.

I estimated the probable sale price of the houses.

I have based my valuation of the expected sales on an increasing value per house. I have suggested of the 20 similar houses, 5 could be sold for \$13,500 per house, total of \$67,500.

5 at \$14,000 per house, total of \$70,000 5 at \$14,500 " " " \$72,500 5 at \$14,750 " " " \$73,750.

10 The remaining house at \$20,000. Giving total of \$303,750.

In speculative building of this nature I would anticipate a contractor would expect 20% return.

The increasing value was because when an estate begins development the houses are sold at slightly lower cost to obtain purchasers.

The demand then follows and the price would be increased.

Cross-Examination

20 I did the valuation in March 1957. Between February 1956 and March 1957 the cost of building a house would have been very little different.

The total cost, I would say it would be difficult to express a percentage difference.

At that time I had designed houses at Klang, a little better than this.

For this specific valuation I have made no enquiries as to whether prices went up or down between February 1956 and March 1957.

30 A contract would be a useful guide as to the cost of a house.

I inspected a tender for the erection of 21 houses the total of which was \$180,600 without the roads.

I have no record of the date of the tender.

Cross-Examination.

Court of the Federation of Malaya

In the Supreme

Plaintiff's Evidence

No. 12

Edmund Samuel Cooke.

Examination - continued.

Plaintiff's Evidence

No. 12

Edmund Samuel Cooke.

Cross-Examination continued. I wrote a report after my visit to Klang. This is it (D.9).

The tender for \$180,600 was produced to me and I cannot doubt it was a genuine tender. It was a tender in February 1956. It would not surprise me in June 1957 the lowest tender was \$194,250.

It would not surprise me that the man who tendered \$180,600 in February 1956, in June 1957 tendered at \$205,000.

The method of arriving at \$7,200 per house is 10 in my report.

I had made calculations in my report.

 β 8 per square foot is a calculation based on doing the same type of work.

I have done the same type of work over the whole of Malaya.

I can't remember building such a low type house in Klang but I have done so in other places in Kuala Lumpur in middle of 1957.

I cannot say the price per square foot for that. 20

My report is based on completion within 35 weeks.

If only 13 houses were going to be completed, the cost of construction would be alittle higher than the cost of 21. If a house was constructed and sold, he would expect slightly larger profit per unit.

I would say he would sell a great percentage within 18 months.

The practical test is always the best.

30

The houses could be purchased with help of a Building Society.

\$8 per sq.ft. would include architect's fees.

It is not normal to charge for water mains because they produce revenue. I have not included water mains. I understand Ng Kim Pong would build and to sub-contract is normal.

Ng Kim Pong's profit would depend on the terms of his sub-contract.

I have not had time to consider record of a transaction.

The report had to be given hurriedly for the case.

I received instructions to go on 15th February.

10 I have made no enquiries about transactions in houses of this nature since March 1957.

Re-Examination

The tender for \$180,600 would include profit.

To arrive at cost of building I have worked at 10% profit. After deduction of profit I have worked out the cost at \$162,600.

Witness released.

No. 13

EVIDENCE OF YAP KIM KEE

20 Plaintiff's Witness 9, affirmed, states in Hokkien: Exa

Name: Yap Kim Kee.

I purchase land to build houses for sale.

I live at Tiong Nam Settlement, Batu Rd., Kuala Lumpur.

I know Plaintiff (id).

I bought pieces of land from him in Klang in July 1956. I agreed to buy 8 lots of land from him. My money was deposited with my lawyer Yong Kung Lin.

As he would not produce titles, I took back my 30 money. In the Supreme Court of the Federation of Malaya

> Plaintifi's Evidence

> > No. 12

Edmund Samuel Cooke.

Cross-Examination continued.

Re-Examination.

No. 13

Yap Kim Kee.

Examination.

> Plaintiff's Evidence

I deposited \$24,000.

I know Goh Swee Hian. He is my partner.

In July 1956 he was my partner. He was concerned in the agreement to purchase from plaintiff.

Plaintiff and I went to Yong Kung Lin's office. Goh Swee Hian was there.

I did not see the titles.

Yap Kim Kee.

No. 13

I instructed my lawyer to write to get the titles from plaintiff. Examination continued.

> The purchase price for the 8 lots was \$24,000. 10 I was prepared to pay this in full.

I gave cheque for \$24,000.

I had seen the land.

I wanted to buy it.

I took the money back after 1 week.

Cross-Examination

Cross-Examination.

I deposited a cheque with Yong Kung Lin. After k I think he gave me his cheque. When I gave 1 week I think he gave me his cheque. Yong Kung Lin my cheque, I can't remember whether he gave me receipt.

Yong Kung Lin was acting on my behalf.

I was introduced into this matter because plaintiff came to see me and said he wanted to sell 8 lots of land. That was in July 1956 a week before I saw Yong Kung Lin.

I saw the land. I agreed to buy.

Plaintiff did not tell me why he wanted to sell.

Plaintiff showed me a plot of land. I chose the 8 lots myself. I chose the 8 lots because in my opinion they were the best. I said I would pay 30 when he transferred.

I made an agreement with him relating to the

sale of land. D.6 (id) is the agreement.

I expected the road to cost \$500 per house.

Water from the mains I estimated to cost about \$250 per house.

I would be my own contractor. I estimated the house at \$8,000 to \$10,000, acting as my own contractor. My estimated selling price would be about \$13,000 to \$14,000 each.

I was expecting to make about \$1500 per house.

There was another agreement. I don't know where it is.

My money was not to be paid out till the titles had been transferred to my name.

When I talk about production of the titles, I mean them to be kept by my lawyer.

Re-Examination

Re-Examination.

I was going to build my own houses.

Witness released

20

10

By consent of both counsel, the agreement between plaintiff and defendant is produced, as P.10, with the schedule endorsed on it, as the schedule does not appear on the copy of the agreement in the pleadings.

Marjoribanks states that Mr. Tham, the Secretary of defendant has been subpoenaed by plaintiff but plaintiff does not intend to call him.

PLAINTIFF'S CASE

In the Supreme Court of the Federation of Malaya

> Plaintiff's Evidence

> > No. 13

Yap Kim Kee.

Cross-Examination continued.

No. 14

Opening Speech for Defendant.

No. 14

OPENING SPEECH FOR DEFENDANT

<u>Rintoul</u>: Proposes to lay the authorities before Court, after the facts for defence have been heard.

3 pronged defence. Each is a omplete defence in itself.

 (1) Para.ll of amended statement of defence plaintiff failed to observe conditions. Agreement and supplementary agreement not 10 complied with.

Because plaintiff did not pay on or before 31.7., defendant rescinded.

- (2) Para.5 of amended defence.
 - Point of construction.
 - no facts involved.
 - by para. 3 of agreement the obligation to transfer only arose provided plaintiff paid defendant balance on or before 23.12.56.
- (3) Paras. 12, 13, 14 and 15 of amended defence. 20 Defendant tried to take out in effect an insurance policy. Defendants have bought up their own agreement. Necessity for this only arises if first defence is to be held bad.

In the reply, no fraud is alleged. Plaintiff had no rights under the agreement.

Is evidence admissible to vary the agreement?

As to the point of construction, the whole of para. 3 of the agreement must be read.

30

Para. 3 of the agreement.

Before the obligation to transfer lots piecemeal arose, 2 provisos must be adhered to:

- \$24,000 was to be paid on or before 23.6.56.
- balance to be paid on or before 23.12.56.

The second part of the proviso may well make the rest of the agreement nonsense.

But the word and joins the 1st and second provisos. This means that the 2 provisos can be separated, and there was no obligation to transfer until the $\frac{924,000}{24,000}$ was paid.

For the 23rd June, the 24th July would be substituted.

Line 3 of Clause 3 speaks of payments.

10 If the Plaintiff after paying the \$15,000 could tender \$3,000 and ask for a transfer, it would mean the insertion of a full stop after the word schedule in line 5.

Only that part of the sentence should be abandoned which would make it nonsense.

If Clause 3 has to be dropped, the suit must fail.

As to P.4, no attempt has been made to prove Reply Para. 4 that defendant knew that Liew had no rights under the agreement. This was inserted because defendant is a bona fide holder for value.

As to the 1st line of defence, it falls into 2 parts. Does Court accept plaintiff or defendant.

Plaintiff's Witness 4's evidence is important. Plaintiff says he was to pay \$5,000 and \$19,000.

Defendant was in strong position.

He included terms as to construction. This is likely. The terms were agreed verbally, reduced to writing and confirmed in writing - Issue of fact.

30

Were the terms as alleged by defendant, or is plaintiff correct that only payment was to be made?

If defendant correct, that is the end of the matter because plaintiff admits he did no construction on the 8 lots.

In Clause 3 of 7.7.56 construction must be commenced on any land sought to be transferred.

In the Supreme Court of the Federation of Malaya

No. 14

Opening Speech for Defendant - continued.

Even if plaintiff's version of supplementary agreement accepted, on his own admission he did not pay the \$19,000 before 31.7. and he was in default.

There was no fresh agreement after 31.7.

The notice determined the agreement.

Opening Speech for Defendant - continued.

No. 14

Before any obligation to transfer arose, \$3,000 must be paid.

Clause 3 says: "As and when the purchaser pays" payment comes first.

Plaintiff admits he did not pay the \$19,000 10 before the 31.7. - payment means more than tender.

A tender of the \$19,000 was never made. Is the letter No.6 a tender?

Tender was actual production of the money. Letter No.6 is not a tender.

Letter No.31.

The only tender alleged is Letter 6 and that is not a tender.

Plaintiff said he had not got the \$19,000.

Letter No.6 says if you will hand over the titles, the money would be handed over.

Plaintiff had no chance of getting the money until the titles were transferred.

Yong Kung Lin was not holder as stakeholder for Plaintiff. He was acting for Yap.

Para. 6 and 7 of Plaint.

Plaintiff says he tendered. But he did not, and that concludes the matter.

The breach which plaintiff complains of is not pleaded.

He must prove tender. He cannot rely on alleged breach of Clause 6 - no reference to this in the pleadings.

20

Cases must be decided on pleadings.

Blay v. Pollard Morris 1930 1 K.B. 628 at 634.

Cases must be decided on the issues on the record.

Haji Mohd. Dom v. Sakiman 1956 M.L.J.45.

Judge wrong in deciding an issue not on the record.

No application to amendment for breach of Clause 6.

10 Plaintiff's claim is based on para. 7 of Plaint - tender and refusal to transfer.

Letter No. 31.

Particulars of tender are Mr. Ramani's letter of 28.7.56.

The idea of particulars is to save time and prevent surprise.

Weinberger v. Inglis 1918 1 ch. 133 at 138.

Object of particulars - save expense and avoid surprise.

Further particulars are part of the pleadings.

The authority is 1958 White Book, Vol.II, p.3264.

Main issue is:

Was Mr. Ramani's scheme a tender? Plaintiff has alleged it was.

Defendant says no.

The houses have been built. A number have been sold and this will reveal profit. It will coincide with Mr. Yap's figure, i.e. approximately \$1,500.

In any event, plaintiff's figures are wrong.

In the Supreme Court of the Federation of Malaya

No. 14

Opening Speech for Defendant - continued.

Defendant's

Evidence

No. 15

Yeow Kim Pong.

Examination.

Defendant's Witness 1, affirmed, states in Hokkien:

EVIDENCE OF YEOW KIM PONG

Name: Yeow Kim Pong. Live at 372 Circular Road, Kuala Lumpur. Chief Director of Yeow Kim Pong Realty Ltd. I am the Governing Director. The Managing Director is Yeow Kim Joo (id). He is my son.

I heard plaintiff say how he came to enter into contract with defendants.

I left the matter to my son, and Tham Lim Pung (id). In early March I agreed to enter into negotiations with the plaintiff. I left details to my son and my Secretary.

Apart from the interview with plaintiff, Plaintiff's Witness 4 came to see me in June 1956. He came to persuade me to give plaintiff more time to pay an instalment under the agreement. Plaintiffs Witness 4 asked me to extend the time for 1 month and plaintiff would pay \$5,000 first.

But I said there must be conditions attached, one of which was the houses must be erected at once.

When I discussed with Plaintiff's Witness 4, plaintiff was not there.

I took no part in the agreement of 7.7. It was my son and my Secretary.

All the other matters are left in the hands of my son. After this action started and the agreement was rescinded, the houses have been erected.

I opened it to tender.

The lowest tender was just over \$9,000 per house. That was accepted.

On top of that, I had to build roads, and pipes.

There were architect's fees.

The total cost excluding the land was about \$10,000.

52.

No. 15

20

30

I sold only 11 houses. The others are ready for occupation.

For the 11 I have sold I have averaged \$15,000.

I am prepared to sell the rest for from \$13,500 to \$14,000 each.

Cross-Examination

The Company purchased the land in a whole piece in 1919. It was empty all the time.

I do not know whether plaintiff paid my solici-10 tors \$19,000 in September 1956.

It was a family Business.

For small monies, my son handles it, for big monies I handle it.

My brother was alive in 1956. Plaintiff said he would build a house for my brother on my land. Plaintiff did nothing towards building the house.

Plaintiff has not built nor did he pay any money.

I complained about it and instructed my son to send him a notice.

When Plaintiff's Witness 4 came to see me, plaintiff had not commenced work on my brother's house.

I did not tell plaintiff that it was a term of the extension that work on my brother's house should be commenced.

I did not see my solicitors about this matter after September 1st, 1956.

When I received summons, I saw my solicitors.

My son complained to me the money was not paid. 30 That was in June or July, 1956.

I told my son to take action according to the agreement. My son carried out my instructions. After the agreement was terminated by letter, I do not know whether there were discussions. In the Supreme Court of the Federation of Malaya

> Defendant^{*}s Evidence

> > No. 15

Yeow Kim Pong.

Examination - continued.

Cross-Examination.

This is a big thing.

I think if there were discussions after the agreement was terminated, I would have been told. I was not told.

Defendant's Evidence

No. 15

Early 1957 I went to Singapore. During later part of 1956 I was in Singapore for some time.

My son had full powers to transact the Company's business.

Since last year I have not been to Singapore.

Cross-Examination continued.

Yeow Kim Pong.

Re-Examination.

Re-Examination

10

In June, 1956 when Plaintiff's Witness 4 came to see me, plaintiff had done no building on the land.

No. 16

No. 16

Yeow Kim Joo.

Examination.

EVIDENCE OF YEOW KIM JOO

Defendant's Witness 2, affirmed, states in Hokkien:

Name: Yeow Kim Joo. Live at 7 Kamunting Street, Luala Lumpur.

I am Managing Director of defendant. 1956 till today defendant owned land in Klang, Meru Road.

20

We have 22 lots of land behind 36 houses. The 36 houses also belong to our Company. The 22 lots are Nos. 382 - 402 inclusive. In 1955 the Company intended to demolish the 36 houses and build houses for them behind.

We had tenants in the 36 houses. We wanted to find them alternative accommodation so we could rebuild the 36 houses.

The 36 houses are referred to in the 4th recital in Exhibit P.10.

With view to implementing the scheme on October, 1955 we gave instructions to an architect in Klang named Lee to prepare plan for erection of these houses.

Plans were prepared and approved. I see P.8. It is one of the plans. There are 5 plans. The numbers attached to the plans are 185/56, 185A/56, 185B/56, 185C/56 and 185D/56.

To Court:

10 P.8 is for 11 houses.

Examination-in-Chief resumed: I may have given it to plaintiff. He would be entitled to a plan. I don't know who wrote the selling price on P.8. It is not in my writing.

We called for tenders for building 21 houses as shown in P.8.

These are the tenders I received (D.11).

The \$180,600 tender was accepted. That works out at \$8,600 per house.

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In addition to that \$500 for each house would be necessary for making roads, \$125 architect's fees for each house, \$250 for pipes for each house. That makes \$9,475 per house exclusive of the land.

When we were about to sign the contract with lowest tenderers, plaintiff came and wanted to buy the 22 lots from us.

After negotiation, the Company entered into P.10 with plaintiff.

At the same time as P.10 another agreement was 30 entered into. This is the agreement relating to the construction of the house on one of the lots. (D.12).

Plaintiff and defendant signed together before Mr. Au-Yong.

After signing the agreement, I accompanied plaintiff and his assistant to Klang.

In the Supreme Court of the Federation of Malaya

> Defendant's Evidence

> > No. 16

Yeow Kim Joo.

Examination - continued.

Defendant's

Evidence

No. 16

Yeow Kim Joo.

We went to every occupier of my 36 houses handing them each a letter telling them 21 houses would be built behind them and they had priority. Page 1 of P.1 is a copy of the letter.

2 or 3 persons made bookings and I think paid deposits.

After delivery of the letter, plaintiff was given possession of the site in accordance with Clause 9 of the agreement. I left the site to plaintiff to carry on with his building.

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Examination - Plaintiff paid the Company \$15,000 when the agreement was signed.

Next payment was due on 23.6.

Plaintiff did not pay the \$24,000 due on 23.6.

I told my father this. As a result of what he told me I wrote the letter No.3 in P.1.

I had sent him the warning letter No.2 in P.1 I was afraid he might have forgotten.

After sending the letter dated 25.6.56, Plaintiff's Witness 4 approached my father.

I was not present.

Also I received the letter No.4 in P.1 from plaintiff.

This letter was handed to my father by Plaintiff's Witness 4.

After Plaintiff's Witness 4 had spoken to my father, my father told me and my Secretary to give him one month's grace on payment of \$5,000, and three other new conditions to which plaintiff agreed.

The conditions were:

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- 1. \$5,000 down.
- 2. Commence work within 1 week.
- 3. Any land that was to be transferred, the house must be in construction. The object of that was to protect the tenants of the

56.

57.

36 houses. It was my intent that plaintiff should build the houses primarily for the 36 tenants.

4. If any of the above conditions were not complied with, the grace of 1 month was to be forfeited and the \$5,000 would also be forfeited.

If those conditions were fulfilled he had till 31.7. to pay the \$19,000.

10 Those were the terms the Company decided to offer.

We offered those terms to plaintiff. My secretary Mr. Tham was there and plaintiff was there.

Plaintiff understood those terms and accepted them.

Then he signed the agreement of 24.7.

He accepted the terms on the 7.7.

When the terms were explained he did not have the \$5,000 with him.

He asked me to reduce the conditions in writing. I reduced it to writing and he read it over and he said he would ask Plainciff's Witness 4 to bring the money.

Exhibit P.2 is the letter.

P.2 was propared on 7.7. after plaintiff had agreed to the terms thereof.

He did not sign it on 7.7. He said he did not bring the \$5,000 and he would come back with the money and sign the document but he did not return and Plaintiff's Witness 4 returned with the money.

To Court:

He said he was going to come back the same day.

Examination-in-Chief resumed:

The 7.7. was a Saturday.

P.3 is the receipt for the \$5,000.

In the Supreme Court of the Federation of Malaya

> Defendant's Evidence

> > No. 16

Yeow Kim Joo.

Examination continued.

20

The 7th was a Saturday. I could not pay into the bank, so I prepared the receipt on the 9th. I did not send him the receipt because he had not signed the letter. I was going to keep the receipt until he signed the letter.

Defendant's Evidence

To Court:

-

No. 16

Adjourned to 25.3.58 at 8.30 a.m.

I received the \$5,000 about 1 p.m. on 7.7. when

Examination - continued.

Yeow Kim Joo.

Before me in Open Court this 25th day of March 1958

(sd) W.B. Sutherland, J.

Hearing resumed.

Plaintiff's Witness 4 brought the money.

Marjoribanks for plaintiff. Rintoul for defendant.

Examination-in-chief resumed:

Up to 9.7. plaintiff had not signed the letter. He signed it on 24.7. as stated in the document. The document was signed in my office. He signed it of his own free will.

We looked for him several times. He could not 20 be found. On 24.7. he came to my office. I did not know on 24.7. whether he had built anything there. Prior to 7.7. I made enquiries. He had not made any erections.

About 28.7. I received Braddell & Ramani's letter of 28.7. On receipt of this letter I sent Mr. Tham to make investigations. I handed Braddell & Ramani's letter to Shearn Delamore and instructed them to reply.

On or about 1.9. I instructed Shearn Delamore 30 to give notice of recission.

In their letter appear the words "or to pay the sum due to our client".

Plaintiff had not come and offered the \$19,000 either by cash or banker's draft.

After 1.9. plaintiff tried to persuade me through his solicitors to give him another chance.

Though negotiations took place, there was no fresh agreement.

During those negotiations I received letter No.24 of the bundle. I had no objection to the \$19,000 being returned because no houses were built on the land.

In February, 1956 I had obtained a tender to build the 21 houses. In June 1957, after this action had started I called for fresh tenders. I accepted the lowest. The successful tenderer was Poon Swee Kong (id.).

In connection with both tenders, i.e. February and June, I engaged an architect Lee Eng Hong (id.). As regards the June tender, this is the contract (A for id.).

That is a contract to build the houses at \$9,250 per house, completion within 6 months. Those are the houses some of which are depicted in P.8.

Per house the road would cost about \$500. That is in addition to the \$9,250. Architect's fees were \$125 per house. Water mains were \$250 per house. If the land had cost \$5,000, it would give a total of \$13,125 per house.

The houses have been built. I sold 11.

I have received \$15,000 each for them. That 30 leaves me with 20. I am prepared to accept \$13,500 for each of the 10.

I have not got buyers for them.

That gives a total prospective selling price of \$300,000.

That gives \$14,300 approx. for each.

The 11 houses I sold, some were sold for cash, some by instalments. About 7 or 8 houses were sold by instalments. In the Supreme Court of the Federation of Malaya

> Defendant's Evidence

> > No.16

Yeow Kim Joo.

Examination - continued.

20

> Defendant's Evidence

> > No. 16

Defendant did not know when it bought P.4 that

Yeow Kim Joo. Q: How did you come to know P.4 was in existence?

Liew Than Siew had no rights under it.

Instalments are still outstanding.

I see P.4 and D.7.

ween defendant and Liew Than Siew.

Examination continued.

Cross-

Examination.

A: After the 1st hearing of this case I came to know of it as a result of what Chellappa told us.

Defendant purchased P.4 for what it was worth from Liew Than Siew. D.7 represents the deal bet-

We purchased it because in our opinion after we purchased it there is no case for plaintiff.

Cross-Examination

We obtained P.4 on 8.4.57. Before that we had been told by Liew Than Siew that he had taken the assignment from plaintiff. At the time we took P.4 we did not know that there was no value attached to it. It is worth money. It is good for my case. I was prepared to pay \$1,500 to buy evidence.

On 7.7. Plaintiff's Witness 4 paid \$5,000 to us on plaintiff's behalf.

I did not give receipt that day because banks were closed.

Plaintiff's Witness 4 handed the money and said plaintiff would come for the receipt.

It was not so that Plaintiff came for the receipt and we would not hand it to him. We would not hand over receipt till plaintiff had signed the letter.

Plaintiff did not turn up to ask for receipt till 24.7.

I see condition 2 of Exhibit P.2.

I went to the land before 7.7. and found no work had started.

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By construction work I mean actual commencement work of a building.

If there were workmen in the place I would consider work of building has commenced.

Mr. Tham went down after 7.7. In July, 1956 certain work of levelling and digging holes had not commenced.

In July 1956 no work had commenced at all - no levelling and no digging of holes.

I do not know whether there was a cement mixer on the site.

As far as the agreement of 24.3. was concerned, it says plaintiff must commence work.

I see Clause 9 of the agreement.

Apart from receiving the \$66,000 it is not so that I had no interest in the land.

Plaintiff must build houses. Nothing is said in the agreement to compel plaintiff to build houses.

If plaintiff had come at end of July with the 20 full purchase price, and asked us to transfer the lots to friends of his, I cannot say whether we would have transferred. I must ask my directors.

If the money is paid in accordance with the agreement I have to act.

I see Clause 3 of P.10.

If plaintiff had come at end of July with full purchase price, we would not have been compelled to transfer to plaintiff's nominees because on 7.7. the agreement was void. It was completely void.

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In D.7 I was buying the agreement P.10.

Under P.10 the \$15,000 was to be forfeited if plaintiff did not complete the agreement.

I have received also the \$5,000 which I have retained.

In the Supreme Court of the Federation of Malaya

> Defendant's Evidence

> > No.16

Yeow Kim Joo.

Cross-Examination continued.

Defendant^{*}s

Evidence

No.16

Yeow Kim Joo.

Examination - continued.

Cross-

comply with the agreement. I do not know whether plaintiff has paid part

of my architect's fees.

I cannot remember whether he pzid \$500.

When plaintiff paid cheque for deposit I cannot remember whether he made it out for \$15,500.

The object of composing the terms of P.2 was because on due date he did not pay the \$24,000. He asked for time.

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Because he asked for extension of time, I wanted these conditions.

These conditions were composed because I had to give priority to the 36 tenants.

I see page 1 of agreed bundle. The tenants had the right to book a house.

Unless the houses were being built, the tenants of my 36 houses could not know when they would get a house. Some of the tenants came to book - 2 or 3 booked in reply to letter 1 of P.1.

The letter of 7.7. imposed the new condition about construction work because he was to start work and he had not started. I see condition 3 in P.2. It says construction must have begun on land sought to be transferred.

Between 7.7. and 24.7. we did not go down to see the land. After 24.7. Mr. Tham went.

It was after 24.7. we discovered no work had commenced.

Plaintiff did not pay the \$19,000 on or before 30 31.7.;

On 1.8. plaintiff had not paid the \$19,000 nor had he commenced building operations. The letter of 7.7. was handed to plaintiff on 24.7.

On 7.7. plaintiff already read the contents of this letter and because he did not pay the \$5,000

The \$20,000 was forfeit because he did not

he did not sign this document. The \$5,000 was paid by Plaintiff's witness 4 on 7.7.

Plaintiff's Witness 4 was acting for both partles as mediator.

I showed the letter to Plaintiff's Witness 4 but Plaintiff's Witness 4 said plaintiff would come himself to sign.

I think my father was away in Singapore about beginning of July.

10 I cannot force plaintiff to sign the letter unless he agrees. It is not true I said I would not give him receipt until he signed. He signed the letter and I gave him the receipt. He must carry out the new conditions.

He must pay the \$24,000 by 31.7.

I see the letter No.9 in P.1.

It does not mention non-payment of the g24,000. It was in reply to letter No.8 in P.1.

On 10.8. it was still open to plaintiff to pay the \$19,000.

Plaintiff did eventually pay the \$19,000 to my solicitors. My solicitors may have held the \$19,000 for about 2 months. On 19.9 my solicitors sent \$19,000 to defendant's solicitors. My solicitors returned the money on 19.11.

\$19,000 had been deposited with my solicitors by plaintiff's solicitors.

(Marjoribanks agrees that this money was held by Shearn Delamore on behalf of Lovelace & Hastings on the terms of the letter dated 19.9.)

I knew this money had been deposited with my solicitors.

That made \$5,000 paid in cash and \$19,000 deposited with my solicitors.

Why should I transfer?

In the Supreme Court of the Federation of Malaya

> Defendant's Evidence

> > No. 16

Yeow Kim Joo.

Cross-Examination continued.

Defendant's

Evidence

No. 16

He had not constructed. The old agreement had already expired.

Mr. Tham may be able to say why the \$19,000 was not returned. I am the Managing Director.

The \$19,000 was for completion of the \$24,000 instalment.

Plaintiff's solicitors had to write to get the money back. We received the letter No.24 in P.1 from my solicitors asking for the titles.

I cannot remember why we did not send the money back straightaway.

I could not receive the money because he had not constructed the houses.

He did not follow my condition on the letter of 7.7.

I cannot remember whether there is any reference in the correspondence after 1.9. as to the requirement as to building.

There is no reference to building in the correspondence after 1.9.

I saw the letter No.21 of P.1.

I cannot say why the money was not sent back then.

I saw the letter No.15 in P.1. I cannot remember quite well about this matter because I handed it to Mr. Tham and my solicitors. Tham is the Company's Secretary.

Building must be constructed on the land.

The reason why I did not hand over titles was because plaintiff had not constructed.

On the conditions expressed in my letter of 7.7., plaintiff should know that was a condition.

I don't know about letter 18 in P.1. Mr. Tham may know about it. I did not see it.

Cross-Examination -

continued.

Yeow Kim Joo.

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65.

We authorised Tham to negotiate. The final say is with my father and I. I did not see the letter on P.20 of P.1.

I did not read letter 21 of P.1.

I did not read letter 25 of P.l. It was in the hands of Mr. Tham. I cannot remember whether Tham told me about it.

He might have.

Letter 25 in P.1. was in Tham's hands.

I am positive of what happened on 7.7. because I was in it. It was in my favour.

There was an agreement on 24.3. whereby we retransferred one lot to plaintiff and he was to build a house on it. I see Clause 2.

The contract price for the house was \$8,600.

The tender I accepted was for \$9,745.

The difference was what plaintiff agreed. Plaintiff agreed and signed.

Re-Examination

Between 7.7. and 24.7. plaintiff never asked me 20 for the receipt. He showed no reluctance in signing the letter.

He had already agreed to the terms on 7.7.

Apart from the purchase price the scheme was to build the houses for the 36 occupiers of my houses.

I wanted to be able to say I had offered them alternative accommodation. That is why letter No.1 of P.1 was written.

On 7.7. P.10 was void. Void means expired. It had expired because he had not paid on due date and he had not followed the conditions.

On 7.7. it was revived but subject to certain conditions.

In the Supreme Court of the Federation of Malaya

> Defendant's Evidence

> > No. 16

Yeow Kim Joo.

Cross-Examination continued.

Re-Examination.

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> Defendant's Evidence

> > No. 16

Yeow Kim Joo.

Re-Examination - continued.

I did not terminate in order to make a profit.

As from 24.6. I could have kept the \$15,000 and refused to negotiate further with plaintiff.

On 7.7. I agreed to give him another chance provided he agreed to certain terms

By 7.7. I know that 2 or 3 of my tenants had applied to plaintiff for these houses.

If plaintiff did not get on and build I was afraid I would not be able to say I could offer my tenants alternative accommodation.

I was asked about a number of letters after Lovelace & Hastings came on the scene.

I knew the contract had been cancelled by letter of 1.9.

I knew Lovelace & Hastings were trying to get plaintiff another chance.

Mr. Tham attended the meeting in Shearn Delamore on 13.9.

Mr. Tham reported what was discussed.

The report from Tham was that within 2 weeks plaintiff would commence construction of buildings on the land.

Then also a letter to the 36 tenants giving them priority to purchase within 21 days.

There were three conditions:-

- (1) The price of the house would not exceed \$14,000.
- (2) When would be commencement of building.
- (3) Approx. when the houses would be ready.

Those terms were to be in the circular. Further negotiations were left to Mr. Tham and Mr. Bentley of Shearn Delamore.

I realise that the agreement had been cancelled.

There was no need to return the \$19,000 until there was a new agreement or negotiations were broken off. I had no objection to the return of the \$19,000 when it was demanded back.

That would show negotiations were broken off.

No. 16

In the Supreme

Court of the

Federation

of Malaya

Defendant's Evidence

Yeow Kim Joo.

Re-Examination - continued.

No. 17

EVIDENCE OF LEE ENG KONG

Defendant's Witness 3, affirmed, states in English:

Lee Eng Kong. I live at 2, Lorong Raja Muda, 10 Klang.

I am registered under Part 2 of Architect's Ordinance.

I have heard of Yeow Kim Pong Realty Ltd. In 1955 or 1956 I prepared drawings for construction of 21 houses in Klang for defendant. I prepared a set of plans.

I see P.8. I prepared it. It is for 4 houses. I cannot say how many houses it is in respect of.

In respect of the 21 houses, they were not all to be the same.

I cannot estimate the cost of building the houses from the plan.

A contractor must have a site plan and the different sizes of the lots.

If the lots were the same size I could not estimate the houses from the plan.

The amount of levelling and felling depends on the size of the lots.

No. 17

Lee Eng Kong.

Examination.

Defendant's

Evidence

No. 17

Lee Eng Kong.

Examination -

continued.

I would want to see the specification before estimating cost. The specification did not require any fine work.

Tenders were called in March, 1956.

The lowest tender was \$8,600. Extras would be road-making and water service and my fees.

If \$8,600 had been accepted in 1956 I would have estimated road-making per house at \$500, water connection \$250, my fees were \$120.

Later I asked for \$5 more.

The tenderer for \$8,600 did not build the houses.

Plaintiff came on the scene and took over the site.

Plaintiff paid the successful tenderer β 1,700 for loss of bargain.

Up to 31st August, 1956, plaintiff dug a few holes but he did not construct anything.

Usually we have to get plans re-approved after 1 year.

I had to get the plans re-approved in April, 1957.

Tenders were then called.

The lowest tender was \$9,250 per house. There was a specification and contract. I prepared it.

It is A for identification (becomes D.13).

On top of the \$9,250 there would be roadmaking again. My fees were \$125 per house, water connection \$250 per house.

The specification was the same one as before.

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Cross-Examination.

Cross-Examination

I do not know about the estimate of the house to be built by plaintiff for defendant \$8,600 to include everything but the architect's fees.

It was \$10,000 for making up all the roads for the 21 terrace houses.

I have been practising since 1947. In 1956 I would expect \$13,000 to \$14,000 selling price per house.

The Malaya Borneo Building Society was advancing money for ourchase of houses.

I saw foundation holes. I do not agree there were over 170 of them. When I inspected the job was to be abandoned.

I do not know how many holes there were. They must per out before making holes.

I did not see a cement mixer. The land had not been levelled.

Nothing was done as to piling.

The land was already surveyed into lots.

Re-Examination

The surveying into lots took place before the titles were issued.

It was done before March, 1956. I only counted 20 a few holes.

Witness released.

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No. 18

EVIDENCE OF PANG SWEE TANG

Defendant's Witness 4, affirmed, states in Cantonese: Examination.

Name: Pang Swee Tang. Live at 70 Bukit Bintang Road, Kuala Lumpur. Contractor.

I see D.13.

I entered into it. I constructed the Terrace 30 Houses. They are in Meru Road, Klang, and belong

In the Supreme Court of the Federation of Malaya

> Defendant's Evidence

> > No. 17

Lee Eng Kong.

Cross-Examination continued.

Re-Examination.

Pang Swee Tang.

No. 18

> Defendant's Evidence

> > No. 18

Pang Swee Tang.

Examination - continued.

Examination.

Cross-

to plaintiff. The lot numbers on which I constructed the houses are on the plan. My price was \$9,250 per house.

I made a little profit out of that contract. For all the 21 houses I made a nett profit of just over \$1,000 - that is \$1,000 for all the houses. Out of contract price \$194,000 I only made profit of \$1,000. The reason was the ground was low - I had to fill and I had to construct a road to take materials to the site. My contract did not allow for roads. When I contract, I allow margin of profit.

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Our intent was to make 5% on each house.

Had I know the felling was going to cost so much I should have quoted a higher price.

Cross-Examination

I read the plan but did not inspect the locality when I tendered. The houses are all under the same plan but 3 different blocks.

Among the 21 there is one bigger house. Under the contract I was to fill. I did not include for 20 that.

Re-Examination.

Re-Examination

The temporary roads are for my own business. They do not deal with the roads to the houses. If I had added a little to each house I would have made more.

No. 19

No. 19

Tham Lim Pau.

Examination.

EVIDENCE OF THAM LIM PAU

Defendant's Witness 5, affirmed, states in English:

Name: Tham Lim Pau. I live at 4th mile, Gombak Road, Kuala Lumpur. I am secretary for defendant - have been since incorporation of the Company in 1952.

Defendant Company is owner of 22 lots of land in Meru Road, Klang. Lots Nos. 382 to 403 - one lot being road reserve.

In addition in March, 1956 the Company owned 36 dwelling houses adjacent to the lots. The dwelling houses were occupied in March, 1956.

At beginning of 1956 the Company had a scheme.

The existing 35 houses were rather old and In order to demolish the houses, required repair. we had to find alternative accommodation for the existing houses.

Thereupon the Company decided to build 21 ter-10 race houses to provide alternative accommodation.

Tenders Plans were prepared and approved. were called in March, 1956. The tender of a contractor was accepted for \$180,600. \$8,600 per house. In addition Company would have to pay for road, architect's fees and laying of water mains.

\$250 per house.

Roads would cost \$500 per house.

Water

Architect's fees \$125 per house.

Architect was Defendant's Witness 3.

Before the houses were built, plaintiff ap-20 proached us.

2 agreements were entered into on 24.3.

I see Exhibits D.10 and D.12. They are the 2 agreements.

I see D.12, para. 2.

Plaintiff was prepared to build for \$8,600 including roads and equipment.

This included a discount to the Company in consideration of the main agreement.

\$15,000 was paid on signing of the agreement.

By 21.6. there was no sign of payment.

The letter on page 1 of P.1 was sent to the tenants to give them priority in purchasing houses. In the Supreme Court of the Federation of Malaya

> Defendant's Evidence

> > No. 19

Tham Lim Pau.

Examination continued.

> Defendant's Evidence

> > No. 19

Tham Lim Pau.

continued.

Some tenants booked houses.

The letter on page 2 of P.1 was sent.

I did not receive any of that money so the letter on page 3 of P.1 was sent.

On that day we could have put the \$15,000 in our pocket.

After that a letter was handed over by plaintiff through Plaintiff's Witness 4.

Examination -That is the letter on page 4 of P.1. Plaintiff's Witness 4 handed the letter to Defendant's Witness].

> After reading the words "I shall also welcome any other suggestion from you on this matter" in page 4 of P.1, I took it to mean that plaintiff was agreeable to conditions governing the extension of time.

We decided to allow plaintiff extension of time on conditions.

The conditions were:

- (1) Plaintiff should pay immediately \$5,000.
- (2) Plaintiff should commence building constru-20 ction on the land within 7 days from the day the agreement was arrived at.
- (3) Building work should have commenced on any lot for which transfer was sought by plaintiff.
- (4) Any breach of the 3 conditions would render the payments of \$19,000 and \$5,000 as forfeit.

Another sum of \$19,000 should be paid by 31.7.56.

Plaintiff should have paid us \$24,000 on 23.6. 30

Since the signing of the agreement plaintiff had not taken any steps to commence building con-So the terms as to construction were struction. put in.

I knew he had not commenced because I inspected

73.

the site. We were concerned with the construction because we were anxious to give alternative accommodation to our tenants. That was the main object of the scheme.

Those terms were communicated to plaintiff.

Plaintiff's Witness 4 came to the office again and asked what was the result of plaintiff's application for extension. I said to Plaintiff's Witness 4 we ware prepared to grant extension subject to the 4 conditions. Plaintiff's Witness 4 said he would convey the terms to the plaintiff.

Later the same day Plaintiff's Witness 4 came to our office and said plaintiff had accepted those terms and handed over \$5,000 in cash. Plaintiff's Witness 4 asked me to draw up the letter embodying the terms so he could get plaintiff to sign it later.

Plaintiff was not present at either of these meetings with Plaintiff's Witness 4 on 7.7.

Plaintiff's Witness 4 told me plaintiff agreed.

20 I reduced the terms into a letter, having discussed them with Plaintiff's Witness 4.

P.2 is the letter.

Plaintiff came to my office to sign P.2 on 24.7. I had received the \$5,000 on 7.7.

Receipt was prepared for the \$5,000. Page 5 of P.1 is it.

The \$5,000 was handed to me on 7.7. in the afternoon.

It was a Saturday.

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The money was held and receipt issued on 9.7.

Between 7.7. and 24.7. plaintiff never asked for his receipt. As far as I know he did not come to the office or my house between those dates.

He raised no objection to signing the letter.

On 24.7. he was out of time as to construction work within 1 week from 7.7.

In the Supreme Court of the Federation of Malaya

> Defendant's Evidence

> > No. 19

Tham Lim Pau.

Examination - continued.

He raised no objection to that when he signed.

I thought he had already commenced building

In the Supreme Court of the Federation of Malaya

Defendant's Evidence

No. 19

On 28.7. letter 6 in P.1 arrived. I handed the letter to our solicitors. I handed it to my solicitors and approved of their reply on page 7 of P.1. The 27th in that letter should be 7th.

I inspected the site after receiving the letter No. 6 in P.1.

Examination - continued.

Tham Lim Pau.

I found no work had been done.

construction on the land.

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I saw Shearn Delamore about letter No.8 in P.1.

At that time plaintiff had not commenced building. If he had, and had paid the money, we would have let him continue.

We were prepared to give him a few days' grace.

At that time I read Clause 3 of P.10 as meaning that at any time a lot could be transferred on payment of β 3,000.

I now know defendant is contending for a different construction.

No one came between 7.7. and 31.8. and offered money in return for transfers.

The defendant did not accept the procedure in letter 6 of P.1.

There was no reply to the letter No.9 of P.1.

On 1.9. I caused the Company's solicitors to terminate the agreement.

After that I learned of receipt of letter by our solicitors from plaintiff's solicitors.

I returned from Singapore on 13.9.

I was shown letter 11 in P.1.

A meeting was suggested with plaintiff and his solicitor. I agreed to attend because I wanted to 20

hear what plaintiff had to say. I attended meeting in Mr. Bentley's office.

Mr. Williamson of Lovelace & Hastings was there, and plaintiff and Mr. Chellappa.

I told plaintiff he was out of time and the agreement had been rescinded, and asked him what suggestions he had. Plaintiff suggested proposals. I reported with the proposals to the Company.

I knew of the letter No. 13 in P.1. I had no objection to the money remaining with Shearn Delamore till the negotiations terminated in a new agreement or were broken off.

I was shown letter 15 of P.1. We were not worried. The agreement had expired and been rescinded. Negotiations were still going on. I see letter No.16 in P.1.

Once the circular had been prepared, we were prepared to consider entering into new agreement.

The terms of the new circular were never agreed.

We were never in a position to conclude the fresh agreement. We did not approve of the new circular.

I saw the letter No.20 in P.1. I was not concerned by it because the circular which Lovelace & Hastings sent did not incorporate the terms agreed on.

I was not worried because no new agreement had been entered into.

I see letter No.21 in P.1. At that time the 30 circular had not been agreed.

I wrote letter No.22 to plaintiff.

Since receipt of the letter of 25.10, plaintiff had been phoning me 2 to 3 times a day asking me to persuade the directors of defendant to accept the \$19,000.

In order to avoid him phoning me, I wrote him the letter.

In the Supreme Court of the Federation of Malaya

> Defendant's Evidence

> > No. 19

Tham Lim Pau.

Examination - continued.

Defendant's

Evidence

No. 19

Tham Lim Pau.

I saw letter 23 of P.l. I was not concerned by it, so no reply was given.

I was relying on the letter of 1.9. which ended the contract.

Adjourned to tomorrow at 8.30 a.m.

Before me in Open Court this 26.3.58.

(sd) W.B. Sutherland, J.

Examination - continued.

Hearing resumed from yesterday.

Marjoribanks for Plaintiff.

Rintoul for defendant.

Examination-in-Chief resumed:

I see D.13. In June, 1956 the defendant entered into this contract with contractor Pang. Under that, it cost defendant \$9,250 to build each house plus roads, water mains and architect's fees were as before. We have sold 11 houses at \$15,000 each. The Company will have to sell all houses before we make profit. At the moment Company is facing loss unless we can sell the other houses.

The specification in the contract is the same 20 as that to which plaintiff would have had to build had he completed the contract.

Cross-Examination.

Cross-Examination

The cost of each house is about \$10,175 excluding the land. The land was purchased a long time ago.

If each house is taken separately, there would be profit of \$1,825 on the houses sold.

The houses were sold last year but the sales completed this year. We have only been advertising the houses for sale this year. We have sold about half the houses since they were completed. Klang is expanding rapidly. I do not agree that the remaining houses will be sold in the next few months.

I knew Malaya Borneo Building Society.

Due to delay in construction the 36 tenants have lost interest in these houses and have not bought them. The tenants of the 36 houses in the 1st block pay \$25 p.m. In the 2nd block they pay \$23 p.m. In the 3rd block they pay \$22 p.m. They are people of average earnings. There are quite a number with financial resources. Some are businessmen, clerks and contractors. The rents are controlled rents. Most of them have been occupying the houses for some years. I would not say they do not wish to move.

10

Plaintiff had received bookings from some of the tenants. 2 or 3 people came as representatives of the tenants. None of them actually wrote something down.

I do not think the houses would be too expensive for the tenants.

We have not demolished the old houses.

20 When plaintiff saw us for extension, the tenants were interested and that is why we made the term that construction should commence. As far as the Company concerned, we urgently required commencement for the purposes of our business.

They did not book because construction had not started, and no arrangements were made for them to pay by instalments.

I drafted P.10 and plaintiff corrected it.

We did insist on a date for commencement of 30 construction and plaintiff asked for immediate access so that he could commence immediate construction forthwith.

I see clause 9 of the agreement. That does not mean that the plaintiff would commence when he liked, but that he could commence on such of the lots as he liked.

If he commenced before the 2nd instalment became due and the 2nd instalment was not paid, any building would belong to the defendant. In the Supreme Court of the Federation of Malaya

> Defendant's Evidence

> > No. 19

Tham Lim Pau.

Cross- . Examination - continued.

Defendant's Evidence

No. 19

Tham Lim Pau.

Cross-Examination continued. I know that plaintiff intended to build, then sell, and then build and finance himself as he went along.

I see letter No.6 in P.1.

there should be no risk to him.

On the face of it there was nothing unusual except that we did not have to send the titles to other solicitors. The titles were always open for inspection either in our office or in our solicitors' 10 office.

The matter was urgent. I had to satisfy myself whether construction work had commenced on the lots, transfer of which was being sought and therefore before I could reply I had to make inspection of the site.

The letter implied that the titles were for inspection and subsequent transfer. Our solicitors were to act as they thought fit. We gave them a reply within the time of the contract.

20

To Court: That is the letter No.7 in P.1.

Cross-Examination resumed:

There was no objection to solicitors inspecting titles in our offices.

Letter No.9 says this. They had not complied with the terms of the contract as to building. Just a few of the holes had been sunk. There was a workmen's shed on the land. There was not a concrete mixer on the site on 30.7. when I visited the place. The holes were sunk months ago. I would say the holes were sunk as a matter of camouflage. I did not see a machine for boring holes. It was not necessary. I cannot say when the sub-contractor made the holes.

I see page 4 of P.1.

At that time a concrete mixer was there but it was removed subsequently and no work was started apart from a few holes. I was present on 7.7. when Plaintiff's Witness 4 handed money to Defendant's Witness 2.

The terms were already conveyed to plaintiff before he handed over the \$5,000. The terms were conveyed through Plaintiff's Witness 4 and I assume he passed them on.

When plaintiff signed P.2 on 24.7. he had not seen it before. He had not called for a receipt before that.

10 Plaintiff's Witness 4 said he could not wait for the receipt and he asked it to be handed to plaintiff. The receipt was not to be handed till plaintiff signed the letter of acceptance. I was dealing with the matter. I was the person who negotiated with our solicitors. I reported to the Managing Director. I saw the letter 13 of P.1. We were not obliged to accept the \$19,000 until the directors approved extension.

Plaintiff had not fulfilled his part of the bargain.

No instructions were given to reply to letter No.13. Between 19.9. and 2.10. I had not consulted my solicitors but my solicitors asked what we were prepared to do about the \$19,000.

I see letter No.16.

That was not my exact instructions.

I did not see letter No.17.

There was no reply immediately because the Company was considering the draft circular which was 30 attached to the letter.

If it was left to me I could consider it in half an hour. The directors were away. I felt I ought to consult Defendant's Witness 1.

I don't consider the proper drafting of this circular is a small matter. I drafted the 1st circular. I wanted to consult Defendant's Witness 1 before we made a further decision.

I told my solicitors that I wanted to consult Defendants Witness 1.

In the Supreme Court of the Federation of Malaya

> Defendant's Evidence

> > No. 19

Tham Lim Pau.

Cross-Examination continued.

> Defendant's Evidence

> > No. 19

Tham Lim Pau.

Examination -

continued.

Cross-

I saw the letter No.20. Defendant's Witness l was at that time in Kuantan. There was no telephone on the estate and Defendant's Witness 1 does not speak English and it needed a lot of explaining.

I did not get in touch with him.

I see letter 13. At that time there was no contract.

Plaintiff was negotiating for new opening of a contract. We were not obliged to reply. The contents of letter 13 were not conveyed to the defendant. We were merely informed that the \$19,000 had been deposited.

I cannot say how long our solicitors retained \$19,000 on behalf of Lovelace & Hastings. It would be about 2 months.

I saw letter 20. There was no contract.

Re-Examination.

Re-Examination

Of the 11 houses which have been sold, 6 were booked before completion. Of the 11 houses sold, only one was paid by cash in full.

We have received approx. \$65,000. We should get another \$100,000. We have spent \$194,000 on the contractor. We have spent \$9,000 on roads. We have spent architect's fees and water money.

The tenants lost interest when plaintiff did not build and moved away the concrete mixer and some of the materials.

Braddell & Ramani, if they wanted to inspect the titles in our office, they would have asked us. They never asked us to produce the titles for inspec- 30 tion.

As to putting the matter to Defendant's Witness 1 when he was outstation, there was no urgency as far as the Company was concerned.

It was plaintiff who was trying to get defendant to give him another chance.

The Company never withdrew letter 10 of P.1.

CASE FOR DEFENDANT

20

No. 20

CLOSING SPEECH FOR THE DEFENDANT

Rintoul states that he should have the last word on the question of Section 92 of the Evidence Ordinance.

Marjoribanks agrees.

Rintoul: 3 defences entirely independent. The defences are directed to the pleadings no allegation of breach of Clause 6 of agreement as to production and no allegation of fresh agreement after 1.9.

Plaintiff has relied on 6 and 7 paras. of statement of claim - he relies on agreement of 7.7. What happened after 1.9. is irrelevant.

No reference in pleadings to negotiations as to waiver of a breach.

Plaintiff alleges tender by Braddell & Ramani and tender by Lovelace & Hastings. But tender by Lovelace & Hastings was accepted on behalf of Lovelace & Hastings.

20 In any event, the correspondence after 1.9. is not relevant. The contract was terminated. The matter was under negotilation. There was nothing on which plaintiff could sue.

Letter 13 - there must be offer and acceptance - otherwise no contract - it was mere negotiation plaintiff did not get a contract. However hard it may be on plaintiff, Court must construe the contract according to what it says.

Para.11 of amended defence.

30

10

- plaintiff failed to observe the conditions.

Plaintiff says \$5,000 and payment of \$19,000 by 31.7. Defendant says he was in position to dictate terms, and did attach conditions.

If P.2 represents the supplementary agreement, action at an end, because plaintiff has admitted he had done no construction work on the 8 lots. In the Supreme Court of the Federation of Malaya

> Defendant's Evidence

> > No. 20

Closing Speech for the Defendant.

> Defendant^{'s} Evidence

> > No. 20

Closing Speech for the Defendant continued. Plaintiff did no work on the 8 lots. Plaintiff's Witness 4, a neutral witness, is of importance. Plaintiff said that with Plaintiff's Witness 4 he went to defendant on 7.7.

Plaintiff's Witness 4 says that Defendant's Witness 1 did raise the question of extra conditions concerned with buildings. It is reasonable to expect that the Company would impose terms as to building.

Further plaintiff has written his acceptance and is bound by it.

No suggestion that the letter dated 7.7. was obtained by duress.

Plaintiff filed reply on 17.1.57 directed to P.2 but there is no allegation of duress.

Plaintiff says he complained to Plaintiff's Witness 4 of the terms but Plaintiff's Witness 4 says plaintiff did not complain to Plaintiff's Witness 4.

There is conflicting evidence as to whether plaintiff was present on 7.7., but the probability is that plaintiff was not present. But he signed the terms and the onus is on him to disprove the terms.

If it cannot be decided whether plaintiff was or was not present on 7.7. then the writing should be adhered to.

If the extension did not begin till 24.7., then Clause 3 has not been complied with.

P.10 is dead on 25.6. This is admitted by defendant.

But plaintiff admits he had to pay \$5,000 and \$19,000. The original agreement was not revived but this was not pleaded and in any case estoppel might be argued against it, in view of letter 10 of P.1.

Plaintiff is suing on P.10. Can plaintiff be said to have paid the \$19,000 on or before 31.7?

He did not.

10

Plaintiff's Witness 9 said the money was not going to be released until the land was transferred.

Defendant was being asked to hand over the titles to a third party and then plaintiff would pay.

Letter No.6 says "will be able" and mentions 31.7.. although the letter is dated 28.7.

Clause 3 The agreement does not say this. says "as and When the purchaser pays" Plaintiff did not plead Clause 6. Even if he had pleaded it, letter 31 says tender was on 28.7.

Either plaintiff can say letter 6 is a request for production or a tender.

Plaintiff has elected to make it a tender.

The obligation was not on vendor to furnish transfer, but on the purchaser to pay.

Plaintiff has not alleged that he was prevented from paying by non-compliance with para.6 of P.10.

Can it be said that Braddell & Ramani's letter 20 was payment?

Can tender amount to payment?

If so, does the procedure which it was proposed to make amount to tender?

Stroud: Judicial Dictionary, 3rd Edition, Vol. 4, 2990 note 5. There is great difference between payment and tender. Payment extinguishes the debt, tender does not. Where payment is a condition precedent, tender does not suffice.

Para.3 envisages payment. Plaintiff may not 30 have so intended but that does not matter.

Beale's Cardinal Rules of Interpretation, 3rd Ed. 173.

Moneypenny's case 31 L.J.Ch.269. 275.

The question is not what the parties may have intended but what is the meaning of the words used in the deeds

In the Supreme Court of the Federation of Malava

> Defendant's Evidence

> > No. 20

Closing Speech for the Defendant continued.

> Defendant's Evidence

> > No. 20

Closing Speech for the Defendant continued. Smith v. Lucas 18 ch. 531. 542 - meaning of words used is the vital consideration.

This is not a will.

Lewis' case - 69 E.R. 1052. 1058. Courts in deeds are bound by the words, but there is greater latitude in a will.

There is no ambiguity in Clauses 2 and 3 of P.10.

Even if this is wrong, Braddell & Ramani's letter did not amount to a tender.

10

Tender does not mean being prepared to pay - it means an offer of the money.

Tender must be unconditional and must be tender of cash.

Blumberg v. Life Interests Corporation 1897 1 ch. 171 - tender must be in money and unconditional - tender must be in cash.

Contracts (Malay States) Ordinance 1950.

S.39

- must be unconditional and at proper time and 20 place and promisee must have opportunity of seeing that the thing offered is the correct thing.

In our case, no tender of payment.

Someone should have come around and laid the money on the table.

Pollock & Mulla - Indian Contract Acts, 6th Edition, 272 the money must be actually produced.

Sabarpathy Pillai v. Bannahalinga Pillai 23 I.C. 581 or I.L.R.38 Mad. 958 at 969. 30

Expression of willingness is not tender.

An offer to pay in future is not tender.

Offer must be unconditional.

	tende	Defendant was entitled to the money, not to a er to pay.	In the Supreme Court of the Federation	
	I.C.	Mulpuri Vecrayya v. Sanagavarapu Sivayya 26 121 - 122.	of Malaya	
	eall	Purchasers had to tender first before they could for transfer.	Defendant's Evidence	
		Rourke v. Robinson 1911 1 ch. 480 485.	No. 20	
10	That	Tender was unconditional and perfectly good. is what plaintiff should have done in our case.	Closing Speech for the Defen- dant -	
		After 1.9., what happened was irrelevant. e was no fresh contract. Threat of action was ndless.	continued.	
	by ag	Negotiations don't bind parties unless followed greement.		
		There is no plea of waiver.		
		Von Hatzaeldt Willenberg v. Alendander 1912 1 ch. 284 288 no agreement because no consensus ad idem.		
20	In our case the circular was to be approved. It was never approved. Letter No.17. Therefore no fresh agreement.			
		Page 20. The Company was not willing to proceed.		
	1.9.	The Plaintiff received notice of recission on		
		Page 21. The draft had not been agreed.		
		Page 22. No agreement.		
	The money was returned but there was no new agreement.			
		Raingold's case. 1931 2 ch. 307 at 315.		
30	to th	"subject to the term of a lease" means subject ne terms of a lease being executed.		
		H.C. Berry Ltd.'s case. 1939 3 A.E.R. 217 219.		

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> Defendant's Evidence

> > No. 20

Closing Speech for the Defendant continued. Followed Raingold's case. Spottiswood's case 1942 2 A.E.R. 65.

Raingold's case followed.

There was no agreement after 1.9. But if an agreement is alleged, the above cases are the answer.

Defendant abandons the suggestion that until the whole \$66,000 was paid, there could be no transfer.

But the defendant contends that Clause 3 as it stands is nonsense. It should read so that the words "and the balance December 1956" are omitted.

Then that is not inconsistent with the last sentence of Clause 3.

There was no obligation to transfer till the \$24,000 was paid.

Doe v. Martin 100 E.R. 882 897.

Court must provide such stops as will give effect to the whole.

In our case, there should be a full stop after 20 "23rd day of June 1956".

The first part of the clause must be given effect to.

Lucena's case 7 ch. D 255 260.

Court can make rational a result which would otherwise be absurd.

Mill's case 1891 1 ch. 588.

The whole agreement must be looked at.

Page 590 where a clause is ambiguous an interpretation which will make it valid is to be preferred 30 to one which will make it void.

Croson's case 1904 1 ch. 252.

If a meaning can be given to a word, it should be.

In our case, "orovided" meant something. In the Supreme Court of the Commissioners Inland Revenue 1935 A.C. 96 141. Federation of Malaya Adjourned to 8.30 a.m., 28.3.58. Defendant's Evidence Before me in Open Court this 28th day of March, 1958. No. 20 (sd) W.B. Sutherland, J. Closing Speech for the Defen-Marjoribanks for plaintiff. Rintoul for defendant. dant continued. Resumed from 26.3.58.

Rintoul: The proviso to Clause 3 can be split in half.

Commissioners v. Raphael 1935 A.C.96 at p.141.

Striking out the whole proviso would amount to rectification and rectification is not pleaded.

Smith v. Packhurst, 26 E.R. 81.

The end of the deed should take effect. We may reject any words that are merely insensible.

Only that part should be struck out which makes the clause insensible.

Strand Music Hall case. 55 E.R. 853 856.

20 Effect should be given to every part unless it is impossible to reconcile it.

There was no obligation to transfer the 8 lots until the \$19,000 was paid on 31.7. and as it was not paid, no obligation to transfer.

Last point: 5.92 Evidence Ordinance. If P.4. is taken at face value, the action is at an end, because at institution of suit he had transferred the agreement.

Can he give evidence to alter the agreement?

30

No.

87.

S.92 says that when you sign a document you must stick to it. Evidence cannot be given to prove the document is not what it says.

Exception (f) 1958 M.L.J. 35.

Evidence was admitted to fill in the gaps.

In our case no evidence is necessary to construe the document.

S.93 illustration (g). Than Chu Ho's case 1926 S.S.L.R.60. 102 115.

Joint tenants cannot be shown to be tenants in 10 common.

The English equity doctrine does not apply.

Balkisen Das' case 27 Indian Appeals 58 65.

Oral evidence inadmissible.

Saiyid Abdullah Khan's case 40 I.A.31 35.

Express terms of instrument cannot be varied by reference to preliminary negotiations or previous communications.

Maung Kwin's case 44 I.A. 236 243 244.

As between the parties to an absolute conveyance 20 S.92 precludes the giving of oral evidence to prove the transaction was intended to be a mortgage.

But where a grantee takes knowing a third person is the owner and the grantor only a mortgagee, oral evidence is admissible to prove real nature of transaction.

Alang Said's case 6 F.M.S. L.R. 108.

Oral evidence inadmissible to show the actual transaction was different from the transaction on paper. Chellathamby's case VII F.M.S.L.R.131.

Evidence inadmissible to vary.

Marion Rebello's case. 1933-34 F.M.S.L.R.96, 98.

Defendant's

Evidence

No. 20

Closing Speech for the Defendant continued. If promissory note is made jointly and severally, evidence inadmissible to show a party signed as survey.

Plaintiff had no cause of action.

Even were the evidence admissible, plaintiff has made no effort to get back his cheque and power of attorney. If Liew's (Plaintiff's Witness 4) evidence is accepted, it was an assignment and there was money owing at institution of suit and is still money owing.

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Damages: Estimated profit on houses not yet built is far too nebulous.

Lee's case 1958 M.L.J. 25 26 27 28.

Loss of bargain was what plaintiff would have been entitled to - difference between market value and contract price.

Daniel's case 1917 2 ch. 405.

The real value of the land should be looked to.

Only damages which naturally flow are allowable.

Even if loss of profit is claimable, \$1200 to \$1500 only per house is claimable.

Plaintiff is not entitled to loss of profit on houses he might have built, because that is too remote, but if he is, it is limited to \$1,200 to \$1,500 per house on the 13 houses, because the 8 lots were to be transferred as land without houses.

On the main 1st defence, Union Castle Mail case (1958) 2 W.L.R. 274 287. Silence does not amount to acceptance of an offer.

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No. 21

CLOSING SPEECH FOR THE PLAINTIFF

Marjoribanks:

Construction of P.10.

Forbes' case 1922 1 A.C. 256 259.

In the Supreme Court of the Federation of Malaya

> Defendant's Evidence

> > No. 20

Closing Speech for the Defendant continued.

No. 21

Closing Speech for the Plain-tiff.

No. 21

Closing Speech for the Plaintiff continued. The earlier proviso prevails over the later.

Clause 10 - the agreement void only so far as untransferred lots are concerned.

Marjoribanks agrees with Rintoul that the 2nd proviso of Clause 3 should be deleted because it would make nonsense. The 1st proviso should stay in, and thus there was an obligation to transfer a lot only if the \$24,000 was paid.

As to second point, plaintiff cannot argue that tender was made by Braddell & Ramani's letter No.6 of P.1. This is conceded by plaintiff in favour of defendant.

If there was a breach by refusing to accept, it was waived by plaintiff later.

There is no plea of duress. It does not matter whether plaintiff was present on 7.7. or not.

After 1.9. there were negotiations.

Hughes' case 1877 2 A.C. 439 448.

Negotiations which lead party to suppose that strict rights under contract will not be enforced may stop a party from enforcing rights when it would be inequitable with regard to the dealings between the parties.

Bentsen's case 1893 2 Q.B. 274 283.

Plaintiff was lead to suppose defendant did not intend to treat the contract as at an end.

In our case, plaintiff did not treat the contract as being at an end.

Charles Rickard's case 1950 1 K.B. 616 623 p.626.

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Party made a promise not to insist on his strict legal rights. Depends on the facts.

Hartley's case, 1920 3 K.B. 475 494.

Letter 17 in P.1.

Letter 19 in P.1.

Defendant waived his letter of 1.9. rescinding the contract - course of conduct extending over 2

Letter 24 of P.1.

In the above authorities, only the deposit would be returnable - not damages.

3rd Defence:

months.

Evidence to contradict documents.

S.92 Evidence Ordinance. Must be parties not 10 party.

Egged Co-operative Society case 1947 A.I.R. 32 33.

Document signed by only one party is not written agreement and evidence admissible to prove different intent.

Sarkar on Evidence, 9th Edition, 672.

S.92 does not apply to unilateral document.

In any case, even if evidence of transaction inadmissible conduct of parties is admissible.

20 Preonath Shah's case 25 Cl. 604.

Balkisen Das' case supra.

It is not certain that Balkisen Das' case overrules Preonath Shah's case.

Maung Kyin's case supra 44 I.A. 243.

In the opinion of Privy Council, Preonath Shah's case ceased to be of binding authority.

Kankar Abdur Rahman's case 28 Cal. 256 258.

In opinion of Privy Council this ceased to be of binding authority but the case states that evidence of conduct is admissible.

Liew (Plaintiff's Witness 4) never acted as a person who had taken on assignment.

In the Supreme Court of the Federation of Malaya

No. 21

Closing Speech for the Plaintiff continued.

Plaintiff however acted as if he had rights under the agreement.

There is evidence by conduct that it was not an assignment.

No. 21

Closing Speech for the Plain-

tiff -

continued.

Plaintiff's rights under the agreement were never lost.

Liew said he assigned the contract to recover the money, not the agreement.

Damages:

Contract was put an end to by plaintiff. He 10 has a right to damages. β 1,200 to β 1,500 per house would be reasonable - loss of expectation of sale of house.

Judgment for \$20,000 and damages as ascertained should be awarded.

Rintoul:

As to waiver, the cases were never put in opening and asks leave to reply.

Marjoribanks agrees.

As to Section 92

1947 A.I.R. 32. The document there was not an agreement until signed by both parties.

The illustrations (g) and (h) to S.92 show that the section is not limited to documents signed by both parties.

Our Court of Appeal has held S.92 applies to Promissory Note cases. 1933-34 F.M.S.L.R.96.

As to the 2 Calcutta cases.

44 I.A. 242 says these cases should not be followed. Evidence cannot be given to show an assign- 30 ment is a pledge.

As to waiver, the defendants wrote the letter of 1.9.

In the Charles Rickards case, there was no definite recission.

Onus of proving waiver is on the person alleging it.

Plaintiff gave no evidence of waiver.

C.A.V.

(Inltd. W.B.S.) J.

Before me in Open Court this 1st day of May, 1958.

10

(sd) W.B. Sutherland, J.

Marjoribanks for plaintiff. Rintoul for defendant.

Case called for Judgment.

I read Judgment.

(sd) W.B. Sutherland, J.

No. 22

JUDGMENT

20 IN THE SUPREME COURT OF THE FEDERATION OF MALAYA IN THE HIGH COURT AT KUALA LUMPUR

> Civil Suit No. 374 of 1956 Ng Kim Pong. .. Plaintiff v. Yeow Kim Pong Realty Ltd. .. Defendant

In his plaint, plaintiff averred that on the 24th March, 1956, he entered a written agreement with defendant to purchase 22 lots of building land

In the Supreme Court of the Federation of Malaya

No. 21

Closing Speech for the Plaintiff continued.

No. 22

Judgment.

lst May 1958.

No. 22

Judgment.

1st May 1958 - continued. for \$66,000/- and paid defendant \$15,000/- deposit and part payment. The agreement, which subsequently became Exhibit P.1C, included a schedule referring to lots 382 to 403 inclusive. It recited that defendant had caused building plans to be prepared for the erection of 21 terrace houses on the property and that plaintiff intended to erect these 21 houses for sale and agreed to give priority for such sale to the defendant's 36 tenants of certain premises in Meru Road, Klang. In the agreement the vendor acknowledged receipt of \$15,000/- as part payment. In the operative part of the agreement plaintiff undertook to pay defendant \$24,000/- on or before 23.6.56 and the balance of \$27,000/- on or before 23.12.56. The next clause caused difficulties of construction, so I propose to state it verbatim:

"As and when the purchaser pays to the vendor each sum of \$3,000.00 (Dollars Three thousand) forming part of the payments mentioned in Clause 2 above" (these payments were the \$24,000/- and the \$27,000/-) "the vendor shall transfer to the purchaser or any of his nominees or assigns, any one lot of the said property described in the said schedule provided the abovementioned sum of \$24,000/- shall be paid in full by the purchaser to the vendor on or before the 23rd day of June, 1956, and the balance of the purchase money in the sum of \$27,000/- shall be paid in full by the purchaser to the vendor on or before the 23rd day Upon payment of the full of December, 1956. amount of the purchase money in the sum of \$66,000/- the vendor shall transfer to the purchaser the balance or all of the property as described in the said schedule to the purchaser or any of his nominees or assigns."

Defendant was to produce for inspection the titles to the plaintiff or his nominees or assigns when requested by plaintiff.

This last clause assumes some significance in 40 the light of subsequent events.

Within one week from the date of the agreement, defendant was to give access to plaintiff so that work might be commenced on any of the 21 building lots as plaintiff might think fit. There was a forfeiture clause that if the plaintiff failed to 20

pay the sums on the due dates the \$15,000/- would be forfeit as liquidated damages and the agreement treated as void insofar as the untransferred lots were concerned.

The agreement was to be binding on the assigns of the partles. On the 24.3.56 plaintiff entered into a further written agreement with defendant for the re-sale to the defendant of lot 392 for \$3,000/-.

Plaintiff averred that upon payment of the 10 \$24,000/- on 23.6.56, defendant was to transfer to plaintiff, his nominees or assigns eight of the lots.

Plaintiff conceded that he was unable to pay the sum due on 23.6.56 but at on or about 7.7.56 it was agreed plaintiff should be allowed to pay the amount by \$5,000/- on 7th July and \$19,000/- on 31st July, 1956. The \$5,000/- was paid on 7.7.56.

Plaintiff then averred that he duly tendered the \$19,000/- but defendant refused to transfer any of the titles.

I would pause at this point to observe that, in his closing address, counsel for plaintiff finally conceded that plaintiff cannot argue that tender was made by the letter No.6 in the Agreed Bundle Exhibit P.1. This cut the ground from under plaintiff's feet on the issue that tender was made on or before 31.7.56.

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The other alleged tender on September, 1956 will be dealt with at a later stage in this judgment. Plaintiff demanded by letter dated 7.11.56 return of the deposit and \$63,000/- damages being estimated loss of profit on sale of 21 houses at \$3,000/- per house. This latter figure of \$63,000/- was subsequently advanced to \$75,000/-.

In his defence the defendant pleaded as follows:

The obligation to transfer only arose provided plaintiff paid defendant the balance of the purchase price on or before 23.12.56. This contention was modified by defendant's counsel in his closing address, when he stated that there was no obligation to transfer the 8 lots until the \$19,000/- was paid on 31.7.56. Defendant pleaded that it agreed to extend time for payment of the \$24,000/- on the In the Supreme Court of the Federation of Malaya

No. 22

Judgment.

lst May 1958
- continued.

No. 22

Judgment.

lst May 1958 - continued.

- following terms dated 7.7.56:-
 - (1) \$5,000/- to be paid forthwith. Balance of \$19,000/- to be paid on or before 31.7.56.
 - (2) Construction work must be commenced within one week.
 - (3) Construction must have begun on any land sought to be transferred.
 - (4) On breach of the above conditions, the \$5,000/- if paid will be forfeited and extension of time withdrawn.

It is of considerable significance that plaintiff signed these terms on 24.7.56 and that his signature is below a statement that he agrees to the terms as stated.

Defendant contended that plaintiff failed to observe the conditions upon which the extension of time was granted. By notice dated 1.9.56 defendant terminated the contract as plaintiff had not fulfilled his obligation thereunder or paid the sum due. Defendant forfeited all moneys paid. Alternatively, defendant contended that as no payments of the balance of the purchase price has been paid plaintiff's action was premature.

By an amended defence defendant alleged that plaintiff transferred the agreement sued on to Liew Thean Siew for \$10,000/- on 10.5.56. This was unknown to defendant prior to 8.3.57. On 8.4.57 defendant notified plaintiff that defendant accepted Liew Thean Siew (Plaintiff's Witness 4) as assignee. Plaintiff therefore had no rights under the agreement at the date of the institution of the suit. Liew Thean Siew assigned the agreement for \$1,500/to defendant on 8.4.57. Defendant prayed dismissal of the suit.

Plaintiff replied denying that the agreement was transferred, alleging it was deposited with Liew Thean Siew as security for a loan which was repaid prior to the institution of these proceedings. Plaintiff alleged that on 8.4.57 Liew Thean Siew had no rights under the agreement and that defendant knew at all material times that no such rights existed. 10

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Subject to the further and better particulars referred to hereafter, that concluded the formal pleadings.

Trial commenced on 18.3.58. Mr. Marjoribanks for the plaintiff submitted that defendant was under obligation to transfer 8 lots once \$5,000/- and \$19,000/- was paid or tendered.

He cited Smith v. Packhurst, 26 E.R. 881 that such a construction should be made of the words in 10 a deed as is most agreeable to the intention of the grantor. The words are not the primary things in a deed but the intent and design of the grantor. Words that are merely insensible may be rejected. Also cited was In re Strand Music Hall Co. Ltd., Exparte European and American Finance Co. Ltd., 55 E.R. 353 at 856 for the proposition that effect should be given to every part of a written instrument if this is possible and one clause should not be struck out or nullified unless it be impossible 20 to reconcile it with another and more express clause At this stage the Agreed Bundle in the same deed. was by consent marked as Exhibit P.1 and I should therefore refer to this bundle. Page 1 was a letter addressed to the tenants of the 36 houses giving them notice to quit by the 30.9.56. Letter No. 3 is from defendant to plaintiff dated 25.6.56, that as he failed to pay the \$24,000/- by 23.6.56 the \$15,000/- was forfeited and the agreement was void and defendant was instructing its architect to 30 proceed with erection of the houses.

The same day plaintiff, by letter No.4, wrote to defendant admitting it was his fault for not paying the \$24,000/- on 23.6.56. He had arranged to commence work within a week from 25.6.56 and asked for extension for one month to pay the \$24,000/-Plaintiff said he was prepared to let defendant penalise him and suggested defendant had reduction on the price of \$8,600/- for the house plaintiff was to build for defendant. Plaintiff also welcomed any other suggestion from the defendant on this matter. This last statement of plaintiff is noteworthy in view of the subsequent defence.

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Letter No.6 has already been mentioned. It is dated the 28.7.56 and addressed to defendant from Messrs. Braddell & Ramani. It states that plaintiff has purchasers for 8 lots and they have deposited with

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Mr. Yong Kung Lin, the solicitor, the purchase price. The letter requests defendant to let Messrs. Braddell & Ramani have the titles for the 8 lots to enable them being examined by the solicitors for the purchasers. Plaintiff would thereafter be able to pay the \$19,000/- before the 31st July.

I have referred in detail to the terms of this letter because one of the issues in the case is based on it. On 31.7.56 plaintiff's solicitors replied to the above letter No.6, stating that no building operations had commenced on the land mentioned in the letter under reply and in accordance with paragraph 3 of defendant's letter to which plaintiff concurred, there can be no transfer of the land. On information that building operations had commenced on the lots in question, defendant would be happy to comply.

By letter No.8 dated 3.8.56 Messrs. Braddell & Ramani replied that the question of the commencement of building operations has no relevance to defendant's obligations under the agreement.

I would pause here to remark that not only the original agreement must be considered but also the conditions imposed in the letter granting an extension of time, and construction is expressly specified in these terms.

On 10.8.56 by letter No.9 defendant's solicitors stated that defendant was prepared to permit plaintiff to inspect the titles at any time in their offices, and in my view that is the limit of the extent of defendant's liability to produce the titles for the purpose of inspection. Defendant's solicitors further stated that until building operations are commenced defendant cannot transfer the lots in question.

I would draw attention here to clause 3 of the defendant's letter of 7.7.56 that construction must have begun on any land that is sought to be transferred. Letter 10 in the bundle is the vital recission by defendant of the contract. It is dated 1.9.56 and states that no action has been taken by defendant to fulfil his obligations or to pay the sums due. The contract was therefore terminated and the moneys paid forfeit.

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Plaintiff changed his solicitors and on 8.9.56 (and I would stress that this was after defendant had rescinded the contract) Messrs. Lovelace & Hastings wrote to defendant's solicitors asking that defendant's instructions be obtained as to whether they were willing to accept the \$19,000/- at that Defendant's solicitors replied that their stare. client was in Singapore. By letter No.13, plaintiff's solicitors on 19.9.56 wrote to defendant's solicitors referring to the "offer". The letter 10 proceeds that plaintiff considers defendant's silence can only mean acceptance. Messrs. Lovelace & Hastings therefore forwarded \$19,000/- to be retained for defendant's solicitors' clients' account until the documents of title were handed to Messrs. Shearn Delamore & Co., with authority to pass them to Messrs. Lovelace & Hastings for the purpose of preparing transfers. By letter 16 dated 2.10.56 Messrs. Shearn Delamore confirmed a telephone conversation with plaintiff's solicitors in which it was agreed that plaintiff's plicitors would draft a new circular to be sent to the tenants. Upon the terms being agreed and evidence of posting defendant would conclude the matter.

The terms of this letter indicate that the matter was still under negotiation despite plaintiff's attitude that defendant's silence meant acceptance.

By letter No.17 dated 3.10.56 to defendant's solicitors plaintiff's solicitors enclosed for app-30 roval draft proposed new circular letter to be sent to the tenants.

Letter No. 24 is dated the 14.11.56, a copy of which was sent to Plaintiff's solicitors. The letter is addressed by defendant's solicitors to defendant and states that unless defendant's solicitors receive from defendant the titles and blank transfers the \$19,000/- would be returned to Messrs. Lovelace & Hastings.

Letter No. 31 contains the further particulars 40 requested by defendant's solicitors. In these particulars plaintiff says that the β 19,000/- was tendered by plaintiff on two separate occasions:

Firstly on 28.7.56 plaintiffs solicitors wrote to defendant that on receipt of titles to the 8 lots In the Supreme Court of the Federation of Malaya

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Secondly on 19.9.56 Messrs. Lovelace & Hastings tendered the \$19,000/- which was returned because defendant failed to make over any titles.

That concludes the review of the Agreed Bundle.

Plaintiff's counsel referred to letter No.10 in Exhibit P.1 terminating the contract and forfeiting all moneys paid to defendant. Plaintiff's counsel stated that even if there was a right to rescind, subsequent action showed that the agreement was varied but the defendant changed his mind. This aspect of the matter was again relied on by plaintiff's counsel in his closing address and I will deal with it then.

Defendant's counsel, with regard to the contention that the rescission was not final, interposed to say that they are concerned with the 7th July, 1955 and plaintiff's counsel agreed.

Plaintiff's Witness 1 was the plaintiff himself. 20 He stated that he asked for extension of one month to pay the \$24,000/-. He askedQuay Pin Siong to ask Heoh Kim Pong for extension. Quay Pin Siong told plaintiff Yeoh Kim Pong agreed to extension up to 31.7.56 but plaintiff had to pay \$5,000/- on or before 7.7.56 and the balance of \$19,000 on or before 31.7.56. On 7.7.56 plaintiff brought with him \$5,000/- in cash and with Quay went to defendant's office. There they met Mr. Tham and Yeoh Kim Joo, Mr. Tham the Secretary of the Company and Yeoh Kim 30 Joo a managing director of the firm. Plaintiff asked Tham and Yeoh Kim Joo to confirm what Quay told plaintiff was correct. They replied in affir-Then plaintiff handed over the \$5,000 in mative. the presence of Quay. Yeoh Kim Joo said the receipt would be posted to plaintiff. On about 24.7.56 plaintiff against requested the receipt. On about Tham and Kim Joo told plaintiff that before they could hand him the receipt plaintiff should acknowledge receipt of a letter. The terms and conditions 40 in the letter had never been even discussed. Plain-Plaintiff tiff produced this letter as exhibit P.2. told Mr. Tham that clause 2 was a ridiculous condition - in fact the whole letter was ridiculous. Mr. Tham said if plaintiff refused to sign a duplicate

copy of the letter, he would not get his receipt for \$5,000. Plaintiff told Tham he was signing because he wanted the receipt for \$5,000. He put the date to show that the letter was antedated over two weeks before he received it. The money was paid without any conditions imposed. Next day plaintiff complained to Quay about the letter stating terms which were never discussed or agreed upon. Quay told plaintiff that the only complaint from Yeoh Kim Pong was that plaintiff had not started work on his own house which plaintiff was to build for him. That was under a separate agreement. 0n 27.7.56plaintiff instructed Mr. Ramani to write to defen-dant that plaintiff had the \$24,000 deposited in Yong Kung Lin's office. Plaintiff has commenced preliminary work in July, 1956. Plaintiff instructed contractor Poon Sung to dig foundation holes. Work commenced in July and went on till the middle of After that plaintiff told the contractor to August. Mr. Ramani wrote a letter on 3.8.56. stop. This is the letter No.8 in exhibit P.1. In his last paragraph it states that building operations on the 8 lots will not be commenced by the purchasers unless they are satisfied about the titles. Plaintiff agreed that he was obliged to give Yeoh Kim Pong's tenants first preference for the houses. The plaintiff said that he signed the sale deed exhibit P.4.

Defendant's counsel formally objected to any evidence in support of paragraphs 2 and 3 of the 30 reply and this question of admissibility was deferred for later argument. This sale deed sets out that in consideration of \$10,000 paid to Plaintiff by Liew Thean Siew which sum plaintiff acknowledges plaintiff sells and transfers the agreement to purchase dated 24.3.56 between plaintiff and Yeoh Kim Pong Realty Ltd., to the said Liew Thean Siew. The sale On deed is dated 10.5.56 and signed by Ng Kim Pong. that is the endorsement:

"Recd. cash Ten thousand dollars (\$10,000).

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Ng Kim Pong".

Plaintiff affirmed that he did not sell or transfer the agreement to Liew Thean Siew. In 1956 plaintiff negotiated loan from him. Plaintiff needed a loan very urgently to pay his labourers at Plaintiff spoke to Liew for loan of Teluk Anson. Liew asked plaintiff to give him an \$5,000.

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1st May 1958 - continued. assignment of plaintiff's agreement with Yeoh Kim Pong Realty Ltd. Liew suggested plaintiff should write \$10,000 instead of \$5,000. The idea was to Plaintiff was also made to have greater security. execute a full Power of Attorney to Liew to collect whatever contract money plaintiff might receive. Liew asked plaintiff to give him a post-dated cheque for \$5,000 which plaintiff did. Plaintiff did not receive \$10,000 although the agreement says so. He received only \$5,000. The \$5,000 plaintiff paid with interest. He came to final settlement in September 1956. The post-dated cheque was dis-Under cross-examination plaintiff agreed honoured. that the East Asiatic Company obtained judgment against him about 3.12.56 and filed a bankruptcy petition against him. Plaintiff did not keep up Plaintiff may have had eight or ten instalments Plaintiff agreed that when cheques dishonoured. negotiating with defendant he was short of ready money and that in 1956 when the instalments fell due to defendant, plaintiff did not have the money. Plaintiff was to pay \$19,000 before 31.7.56. Plaintiff did not pay. He did not intend to pay with Plaintiff's proposition was that he his own money. would pay defendant when the titles were transferred to Yong Kung Lin's client. The money was only to be transferred to plaintiff when plaintiff transferred the titles to Yong Kung Lin's client. Defendant was in breach of its agreement on 31.7.56. Plaintiff had the money ready and defendant did not produce the titles. Plaintiff did not write and ask defendant for inspection in their office. Plaintiff did not claim damages then because he did not like to litigate. Plaintiff agreed that there was no agreement after 31.7.56 giving plaintiff time to There were negotiations. Plaintiff cannot pay. say whether there was subsequent agreement. Plaintiff agreed he did not take the money to defendant and ask for the titles and transfers but he asked Mr. Ramani to write a letter. Plaintiff agreed he did not pay the \$19,000 by 31.7.56. He stated that defendant did not comply with clause 6 of the agree-Because clause 6 was not complied with plainment. tiff could not pay. Plaintiff did not ask for inspection at the defendant's office. I would pause here to remark that in my view this is a material consideration which will be dealt with at a later stage in this judgment.

Letter No.9 in Exhibit P.1 states that defendant

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is prepared to permit plaintiff to inspect the titles at any time in their offices. Plaintiff did not instruct Lovelace & Hastings to say that defendant was in breach because he did not want to cause un-There is no suggestion in letter No. pleasantness. 13 of exhibit P.1 that defendant was in breach, because plaintiff hoped to settle amicably. In letter No. 23 of P.1 it was not necessary to say that defendant was in breach on 31.7.56. Plaintiff agreed that he never suggested duress until he came into the witness-box. He further agreed that he was not going to build on the eight lots and had done no building operations on the eight lots.

This question, of course, had reference to condition No.3 of exhibit P.2, namely, construction must have begun on any land that is sought to be transferred. Defendant, with some justification, later contended that as plaintiff had not started construction on the eight lots he was in breach of this condition, involving forfeiture of the \$5,000 and withdrawal of the extension of time. Plaintiff did not reply to letter No.9 in P.1, which stated inter alia that until building operations are commenced, defendant cannot transfer the lots in question.

Defendant admitted that on 25.6.56 defendants could have taken his \$15,000 and that would have been the end of the matter. At that time plaintiff was very hard up. Letter No.4 in P.1 says plaintiff has arranged with masons and carpenters to commence work within a week from 25.6.56.

With regard to the sale deed plaintiff paid stamp duty at the rate on an assignment or conveyance. Witness did not get the document back when he repaid because "he" said plaintiff had to pay Plaintiff got back original some extra money. agreement. The power of attorney is still with Plaintiff has not taken steps to cancel the him. He could do anything he liked power of attorney. in connection with the agreement but it was given Plaintiff got a letter from merely as security. defendant informing him of the assignment. Plaintiff paid \$5,000 to Liew between August and September, 1956. Liew has received \$6,700 from plaintiff. Out of these two amounts Liew returned to plaintiff \$1,500. Plaintiff's cheque is still with Liew. Liew still has the power of attorney, the document and the cheque because he says plaintiff still owes

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lst May 1958 - continued. him \$1,000. That is for a separate loan given to plaintiff a month after the assignment. Plaintiff asked for all the documents but he said no.

The idea was that if plaintiff had not repaid the loan within a month, he had to pay the whole amount of \$10,000 to redeem the assignment.

Plaintiff's Witness 2 stated that he lent plaintiff \$5,000 and asked him to deposit an agreement as security. This was done. Plaintiff's Witness 2 received power of attorney from plaintiff. Exhibit P.4 was drawn up as security for the loan. Plaintiff's Witness 2 assigned the agreement to Yeow Kim Pong Realty. It was the borrower's desire Plaintiff's Witness 2 lend him \$5,000 for one month. If the money is not returned on due day it will become \$10,000. There is still something due on the \$5,000.

This last piece of evidence was significant. Plaintiff's Witness 2 stamped the document as a conveyance. As plaintiff has not paid the \$10,000 Plaintiff's Witness 2 maintains the agreement has been assigned to Plaintiff's Witness 2. When Plaintiff's Witness 2 signed exhibit D.7, plaintiff owed Plaintiff's Witness 2 at least \$5,000. When Plaintiff's Witness 2 assigned the agreement in April, 1957, he knew the agreement between Plaintiff and defendant had expired. In April 1957 plaintiff still owed Plaintiff's Witness 2 some money on the loan.

I may say that Plaintiff's Witness 2 impressed me as a truthful witness and I accepted this evidence that in April, 1957 plaintiff still owed Plaintiff's Witness 2 some money on the loan. Plaintiff's witness 3 stated that \$10,000 was not paid on the day of the agreement P.4. Plaintiff's Witness 4 said that Yeow Kim Pong agreed to one month's extension provided plaintiff gave another \$5,000 de-Witness thought Yeow Kimg Pong said he must posit. carry out the old agreement. Yeow Kim Pong spoke of some conditions plaintiff had not carried out. Witness told plaintiff Yeow had agreed to extend provided plaintiff carried out the terms of the Witness handed the money to Yeow Kim agreement. Later plaintiff saw witness and witness told Joo. him to fix up with Yeow Kim Joo. Plaintiff did not complain to witness after that.

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Yeow Kim Pong complained that plaintiff had not started to build. Witness thought that Yeow said that if plaintiff paid money and went on with the building, Yeow would extend the option. This was a significant piece of evidence and this witness impressed me as an honest witness of truth. and I accepted his evidence.

Witness could not remember whether plaintiff was present when witness handed the \$5,000 to Kim 10 Joo. This indefinite piece of evidence relates to a matter on which other witnesses gave varying accounts.

Plaintiff's Witness 5 said he had cleared up the ground, made foundation holes and put the strings for measuring the houses. He started work on 4th or 5th July and worked till August. On 8th or 9th August plaintiff asked witness to stop work. Witness did not do any building. He dug holes. that, he did not construct anything. Pl Apart from Plaintiff's Witness 8 said that he made an estimate of the cost of building a house based on the plan P.8. He based 20 of the houses at \$7,200 per house and a corner house at \$9,600. Plaintiff's Witness 9 said he agreed to buy eight lots from plaintiff. As plaintiff could not produce titles, witness took back his Witness was expecting to make about \$1,500 money. He was going to build his own houses. per house.

That concludes the case for the plaintiff.

Counsel for defendant stated that the defence was a three-pronged one each defence being complete 30 in itself. The first defence was that plaintiff had failed to observe the conditions on which extension of time had been granted. The second of the prongs was that by paragraph 3 of the agreement the obligation to transfer only arose provided plaintiff paid the balance on or before 23.12.56. Counsel somewhat modified this point in his subsequent argument.

Thirdly, defendant took out what was in effect an insurance policy by buying up their own agreement.

As to the point of construction, before the agreement to transfer lots piecemeal arose -

> Firstly, \$24,000 was to be paid on or before 23.6.56, and

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The second part of the proviso may well make the rest of the agreement nonsense, and for myself I must say that I am inclined to agree. Counsel however submitted that as the word "and" joins the first and second provisos they can be separated and there was no obligation to transfer until the \$24,000 was paid. Counsel also submitted that only that part of the sentence should be abandoned which would make it nonsense. It has not been proved that defendant knew that Liew had no rights under the agreement.

Were the terms as alleged by defendant? If defendant is correct, that is the end of the matter because plaintiff admits he did no construction on the eight lots.

This was a significant point, because in clause 3 of the terms of 7.7.56 construction must have begun on any land that is sought to be transferred.

Counsel submitted that even if plaintiff's version of the supplementary agreement is accepted on his own admission he did not pay \$19,000 before 31st July and he was in default. There was no fresh agreement after 31st July.

Here again this was a significant aspect of the matter in view of plaintiff's counsel's closing submissions.

Counsel emphasised the word "pays" in clause 3 of the original agreement and submitted that the moneys owing were not paid. A tender of β 19,000 was never paid. Letter No.6 in exhibit P.1 is not a tender, tender meaning actual production of the money. The breach which the plaintiff complains of is not pleaded.

Opening defendant's evidence, Defendant's Witness 1 affirmed that Plaintiff's Witness 4 came to see him in June, 1956 to persuade Defendant's Witness 1 to give plaintiff more time to pay. Defendant's Witness 1 said that there must be conditions attached, one of which was the houses must be erected at once.

Defendant's Witness 1 impressed me favourably

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and I accepted this evidence. The houses have since been erected. The total cost excluding the land was about \$10,000. Those sold have averaged Witness denied telling plaintiff that it \$15.000. was a term of the extension that work on Defendant's Witness l's brother's house should be commenced.

Defendant's Witness 2 stated that the Company intended to demolish the 36 houses and building houses for them behind. Plaintiff did not pay the 1.0 \$24,000 due on the 23rd June. Defendant's Witness 1 told Defendant's Witness 2 to give plaintiff one month's grace on payment of \$5,000 and three other new conditions to which plaintiff agreed. The conditions were (1) \$5,000 down; (2) Commence work within one week; (3) any land that was to be transferred the house must be in construction. The object of that was to protect the tenants of the 36 houses; (4) if any of the above conditions were not complied with the grace of one month was to be forhouses: feited and the \$5000 would also be forfeited. Those were the terms the Company decided to offer and they were offered to plaintiff. The Secretary Mr. Tham was there and plaintiff was there. Plaintiff understood those terms and accepted them. He accepted When the terms were the terms on the 7th of July. explained he did not have \$5,000 with him. He asked witness to reduce the conditions to writing. Witness reduced it to writing and plaintiff read it over and he said he would ask Plaintiff's Witness 4 to bring Exhibit P.2 was prepared on the 7th July. 30 the money. Plaintiff had agreed to the terms thereon. He said he would come back with the money and sign the document but he did not return and Plaintiff's Witness 4 Witness did not send him returned with the money. the receipt because he had not signed the letter. Plaintiff signed the letter on 24th July of his own Prior to 7th July plaintiff had not made free will. On about 1st September witness inany erections. structed his solicitors to give notice of recission. 40 Plaintiff had not come and offered the \$19,000 either by cash or banker's draft. After the 1st September plaintiff tried to persuade witness through his solicitors to give him another chance.

I would pause here to remark that these persuasions were later relied on by plaintiff's counsel in his closing address.

Witness had no objection to the \$19,000 being

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returned because no houses were built on the land. Defendant did not know when it bought exhibit P.4 that Liew had no rights under it.

By construction work witness means actual commencement work of a building. If there were workmen in the place witness would consider work of In July, 1956 work of building has commenced. levelling and digging holes had not commenced. Ιn July, 1956 no work had commenced at all. No levelling and no digging holes. The agreement of 24th of March says plaintiff must commence work. Nothing is said in the agreement to compel plaintiff to If plaintiff had come at the end of build houses. July with the full purchase price defendant would not have been compelled to transfer to plaintiff's nominees because on the 7th July the agreement was The conditions were imposed because witness void. had to give priority to the 36 tenants. Unless the houses were being built the tenants of the 36 houses would not know when they could get a house.

I would pause here to state that this affords some explanation for the terms of the letter of the 7th July. The letter of the 7th July imposed the new conditions about construction work because plaintiff was to start work and he had not started. After the 24th July defendant discovered no work had commenced. Plaintiff did not pay the \$19,000 on or before 31st July. On the 1st August plaintiff had not paid the \$19,000 nor had he commenced building operations. On the 7th July plaintiff already read the contents of the letter and because he did not pay the \$5,000 he did not sign the docu-Witness showed the letter to Plaintiff's ment. Witness 4 but Plaintiff's Witness 4 said plaintiff would come himself to sign. On the 10th August it was still open to plaintiff to pay the \$19,000. Plaintiff did eventually pay the \$19,000 to defen-Why should witness transfer? dant's solicitors. Plaintiff had not constructed. The old agreement Witness could not receive the had already expired. money because plaintiff had not constructed the Plaintiff did not follow the condition in houses. the letter of 7th July. There is no reference to building in the correspondence after the 1st Septem-The reason why witness did not hand over the ber. titles was because plaintiff had not constructed. Plaintiff showed no reluctance in signing the letter. He had already agreed to the terms on the 7th July.

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Witness wanted to be able to say he had offered the 36 occupiers alternative accommodation. On the 7th July exhibit P.10 was void. On the 7th July it was revived but subject to centain conditions. As from the 24th June witness could have kept the \$15,000 and refused to negotiate further with plaintiff. On the 7th July witness agreed to give plaintiff another chance provided he agreed to certain terms. Witness knew the contract had been cancelled by the letter of the 1st September, and he knew that Lovelace & Hastings were trying to get plaintiff another Further negotiations were left to Mr. Tham chance. and Shearn Delamore. There was no need to return the \$19,000 until there was a new agreement or negotiations were broken off. Witness had no objection to the return of the \$19,000. That means that negotiations were being broken off. I would remark here that defendant's contention as to this \$19,000 and as to what happened after the 1st September, is that they constituted nothing stronger than negotiations and did not culminate in anything higher.

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Defendant's Witness 3 stated that up to 31st August, 1956 plaintiff dug a few holes but he did not construct anything.

This witness was registered under the Architects Ordinance and I accepted this evidence that plaintiff did not construct anything.

Defendant's Witness 5 was Tham Lim Pau, Secretary to defendant Company. He affirmed that the company decided to build 21 terrace houses to provide alternative accommodation. Some tenants booked houses. On 25th June, 1956 defendants could have put the \$15,000 in their pocket. After that the letter No.4 of Exhibit P.1 was handed over by plaintiff.

In this letter plaintiff admits it is his fault for not fulfilling his part of the contract to pay \$24,000 which fell due on 23.6.56. He asked for an extension.

40 After reading the words "I shall also webome any other suggestion from you on this matter" in this letter, witness took it to mean that plaintiff was agreeable to conditions governing the extension of time.

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Defendant decided to allow plaintiff extension of time on conditions. The conditions were: (1) plaintiff should pay immediately \$5,000; (2) plaintiff should commence building construction on the land within seven days from the day the agreement was arrived at; (3) building work should have commenced on any lot for which transfer was sought by plaintiff; (4) any breach of the three conditions would render the payments of \$15,000 and \$5,000 forfeit. Another sum of \$19,000 should be paid by 31.7.56. Defendant was concerned with the construction because it was anxious to give alternative accommodation to its tenants. That was the main object of the scheme.

Those terms were communicated to plaintiff. Witness said to Plaintiff's Witness 4 they were prepared to give extension subject to the four conditions. Plaintiff's Witness 4 said he would convey the terms to the plaintiff. Plaintiff's Witness 4 came to defendant's office and said plaintiff had accepted those terms. Plaintiff's Witness 4 asked witness to draw up the letter embodying the terms so that he could get plaintiff to sign it later. Plaintiff was not present at either of these meetings with Plaintiff's Witness 4 on 7th July.

I would pause here to note that there is a difference between the evidence of different witnesses on this point. Plaintiff said that on the 7th July he brought with him \$5,000 and with Plaintiff's Witness 4 went to defendant's office. There they met Defendant's Witness 2 and Defendant's Witness 5. Defendant's Witness 2's evidence was that the Company offered those terms to plaintiff and Defendant's Witness five and plaintiff were there.

Now we have the evidence of Defendant's Witness 5 that plaintiff was not present at either of these meetings with Plaintiff's Witness 4 on 7th July. Plaintiff's Witness 4, whose evidence might have clinched the matter, was equivocal - he could not remember whether plaintiff was present when Plaintiff's Witness 4 handed the \$5,000 to Defendant's Witness 2. The difference in evidence is understandable, over 18 months having passed, and witnesses' memories are not infallible - in fact this is supported by Plaintiff's Witness 4's inability to remember. Defendant's counsel stated that if it cannot be decided whether plaintiff was or was not present on 7th July

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then the writing should be adhered to. He also said that the probability is that plaintiff was not present, but this of course is merely Counsel's interprotation of the evidence, and the point must ultimately fall for decision by the Court itself.

In view of my decisions on other aspects of the case, plaintiff's presence or absence on 7th July is immaterial, but it is desirable, I think, that I should express my finding of fact on the point and, this being so. I am of the view that plaintiff was present, although I can quite understand the difference in evidence for the reasons above stated. It should also be mentioned that Plaintiff's counsel stated in closing that plaintiff's presence or absence on 7th July was immaterial.

Defendant's Witness 5 said that Plaintiff's Witness 4 told him plaintiff agreed. On the 24th July plaintiff was out of time as to construction work within one week from 7th July. He raised no objection to that when he signed. Witness thought he had already commenced building construction on the No one came between the 7th July and 31st land. August and offered money in return for transfers. The defendant did not accept the procedure in letter No.6 of Exhibit P.1. On the 1st September witness caused the Company's solicitors to terminate the agreement. Witness had no objection to the \$19,000 remaining with Shearn Delamore until the negotiations terminated in a new agreement or were broken off. 30 The Company was not worried by letter No.15 of Exhibit P.1. The agreement had expired and been rescinded. The terms of the new circular were never agreed. Defendant did not approve of the new circular. Witness was not worried because no new agreement had been entered into. Defendant did insist on a date for commencement of construction and plaintiff asked for immediate access so that he can commence immediate construction forthwith. Clause 9 of the agreement does not mean that plaintiff could 40 commence when he liked but that he could commence on such of the lots as he liked. Defendant did not have to send the titles to other solicitors. The titles were always open for inspection either in defendant's office or in their solicitors' office.

At this stage I would remark that I agree that defendant did not have to send the titles to other solicitors and I will expand my remarks in this

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lst May 1958 - continued. Witness had to satisfy himself whether construction work had commenced on the lots, transfer of which was being sought and therefore before he could reply to letter No.6 in Exhibit P.1 he had to make inspection of the site. Plaintief had not complied with the terms of the contract as to building. Just a few of the holes had been surk. The holes were sunk months ago. Witness would say the holes were sunk as a matter of camouflage.

I would remark here that this last passage of witness's evidence was, of course, largely a matter of opinion; I would however agree that on the evidence of realities and not of superficialities, no genuine construction work as I think the parties understood the meaning of the term had been commenced on the land.

Witness continued that no work was started apart from a few holes.

The terms were already conveyed to plaintiff 20 before Plaintiff's Witness 4 handed over the \$5,000. The terms were conveyed through Plaintiff's Witness 4 and witness assumes he passed them on. When plaintiff signed Exhibit P.2 on 24th July he had not Defendant was not obliged to seen it before. accept the \$19,000 until the directors approved ex-Plaintiff had not fulfilled his part of tension. the bargain. There was no reply immediately to letter No.17 in Exhibit P.1 because the Company was considering the draft circular. The directors were 30 away. With regard to letter No.13 in Exhibit P.1 at that time there was no contract.

This answer, I think, reveals the correct relationship between the parties. Witness continued that plaintiff was negotiating for the new opening of a contract and defendant was not obliged to reply. With regard to letter No.20 in Exhibit P.1 dated the 9th October, 1956, there was no contract.

Here again, I think this is a correct representation of the relationship between the parties.

It was plaintiff who was trying to get defendant to give him another chance.

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In my view this correctly represents the state of affairs between the parties after the termination of the contract by the defendant on 1st September, 1956.

In his closing address Counsel for defendant submitted that what happened after the 1st September is irrelevant and as I have just stated I would uphold this submission. Counsel further pointed that there is no reference in the pleadings to negotiations as to waiver of a breach. As to letter No.13 of Exhibit P.1 there must be an offer and acceptance, otherwise there is no contract.

If Exhibit P.2 represents the supplementary agreement the action is at an end because plaintiff had admitted he had done no construction work on the eight lots.

It is right for me to say at this stage that I find that Exhibit P.2 does represent the agreement between the parties and that plaintiff did admit that he had done no building operations on the 8 lots. Therefore, in my view, the action must fail on this ground alone.

Plaintiff's Witness 4 says that Defendant's Witness 1 did raise the question of express conditions concerned with building. Also, plaintiff has written his acceptance and is bound by it. There is no allegation of duress in the pleadings. If the extension did not begin until 24th July then clause 3 has not been complied with.

30 Counsel cited Blumberg v. The Life Interests Reversionary Securities Corporation, 1897 Ch. Div. 171 at p.173 that tender must be in cash.

He also cited Pollock & Mulla's Indian Contract and Specific Relief Acts 6th edition, page 272 that a tender of money in payment must be made with an actual production of the money.

The offer must be unconditional. Defendant was entitled to the money and not to a letter to pay.

After the 1st September, what happened was ir-40 relevant. There was no fresh contract.

I agree with this submission.

In the Supreme Court of the Federation of Malaya

No. 22

Judgment.

lst May 1958 - continued.

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No. 22

Judgment.

lst May 1958 - continued. Counsel abandoned the suggestion that until the whole \$66,000 was paid there could be no transfer.

There was no obligation to transfer the eight lots until the \$19,000 was paid on 31st July and as it was not paid, there was no obligation to transfer.

As to exhibit P.4 if it is taken on its face value the action is at an end because at the institution of the suit plaintiff had transferred the agreement. Counsel cited Section 92 of the Evidence Ordinance, excluding evidence of oral agreement and contended that the oral evidence was inadmissible. He cited Balkishen Das and ors. v. Legge, 27 Indian Appeals page 58 that oral evidence of intention is inadmissible for the purpose of either construing the deeds or of proving the intention of the parties. He also cited Saiyid Abdullah Khan v. Saiyid Basharat Husain, 40 Indian Appeals, p.31 at page 35 (a Privy Council case) where Lord MacNaughten states:-

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"It is no more permissible in India than it is in this country to contradict or vary the express and unambiguous terms of a written instrument by reference to preliminary negotiations or previous conversations."

Counsel also cited Maung Kyin v. Mah Shwe La, 44 Indian Appeals 236 for the proposition that as between the parties to an absolute conveyance Section 92 of the Indian Evidence Act (subject to its provisos) precludes the giving of oral evidence to prove that the transaction was intended to be a mortgage. The Section, however, applies only as between the parties. Where, therefore the grantee takes knowing that a third person is the owner of the property and the grantor is only a mortgagee, and that the intention of all parties is merely to transfer the mortgage, oral evidence is admissible to prove the real nature of the transaction.

Also cited was Alang Said bin Abdullah and another v. Kulop Hamid bin Haji Sahak, 6 F.M.S.L.108, a Court of Appeal decision that the evidence of the oral agreement was not admissible to vary the terms of the written instrument and that such evidence must be disregarded.

Counsel also cited Marion Rebello and another v. Harbans Singh, 1933-34 F.M.S.L.R. 96 that when a promissory note is made by several persons "jointly and severally" it is not open to any one of them as between him and the payee to allege that he signed as surety and any agreement that he should be treated as surety is not collateral to the promissory note but in direct contradiction and therefore inadmissible under Section 92 of the Evidence Enactment.

On the authority of the above cases, particularly Alang Said's case supra, in my view evidence 10 was not admissible to vary the terms of exhibit P.4.

Counsel of course denied that damages were payable, but if they were, $\beta_{1,200}$ to $\beta_{1,500}$ only per house is claimable on the 13 houses plaintiff proposed to build.

Counsel finally cited Union Castle Mail Steamship Co. Ltd. v. United Kingdom Mutual War Risks Association Limited (1958) 2 W.L.R. 274 at p.287 where Diplock, J., states:

"I hold that there was in fact no approval, express or implied, by the committee within the meaning of the policy to any of the steps taken by the plaintiffs, nor can the committee's failure to raise objections to those steps give rise to any estoppel since I can see no duty upon them to speak."

Counsel for plaintiff in closing, conceded that plaintiff cannot argue that tender was made by letter No.6 of exhibit P.1.

He also stated there is no plea of duress and that it does not matter whether plaintiff was present on the 7th July or not. Counsel for plaintiff in closing rested his case mainly on a line of cases dealing with the Court's equitable jurisdiction. He cited Thomas Hughes v. the Directors, etc., of the Metropolitan Railway Company (1876-77) 2 A.C. 349 in which at page 448 appears the passage:

> "It was not argued at your Lordship's Bar, and it could not be argued that there was any right of a Court of Equity or any practice of a Court of Equity to give relief in cases of this kind by way of mercy or by way merely of saving property from forfeiture but it is the first principle upon which all Courts of Equity

In the Supreme Court of the Federation of Malaya

No. 22

Judgment.

lst May 1958 - continued.

No. 22

Judgment.

lst May 1958 - continued. proceed that if parties who have entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture - afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that strict rights arising under the contract will not be enforced or will be kept in suspense or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

116.

The question arises from this: Would it be inequitable to allow the defendant to enforce its rights, having regard to the negotiations? The facts of Hughes' case are of course completely different to the facts of the present case and it is a leading principle that each case must turn on its own facts. In my view a much stronger case would be required to displace defendant's rights.

Also cited was Bentsen v. Taylor Sons & Co. (1893) 2 Q.B.E. 274. At page 283 appears the passage:

"In other words did the defendants by their acts or conduct lead the plaintiff reasonably to suppose that they did not intend to treat the contract for the future as at an end, on account of the failure to perform the condition precedent but that they only intended to rely on the misdescription as a breach of warranty treating the contract as still open for further performance?"

Here again, of course, the facts are different to those of the case with which we are concerned. in our case there was an explicit rescission and I would not say that the defendant led plaintiff reasonably to suppose that defendant did not intend to treat the contract for the future as at an end.

Also relied on was Charles Rickards, Ltd. v. Oppenheim (1950) 1 K.B. 616 at 623 where there is this passage:

"If the defendant, as he did, led the plaintiffs to believe that he would not insist on the 20

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stipulation as to time, and that if they carried out the work he would accept it and they did it, he could not afterwards set up the stipulation as to time against them By his conduct he envinced an intention to effect the legal relations. He made, in effect, a promise not to insist on his strict legal rights."

But this is followed at page 626 by the follow-ing:

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"Upon this point I would say that in order to constitute a waiver there must be conduct which leads the other party reasonably to be-lieve that the strict rights will not be in-The whole essence of waiver is sisted upon. that there must be conduct which evinces intention to affect the legal relations of the If that cannot properly be inferred parties. there is no waiver In this case the conversation and the letter did not show any intention to affect the legal relations in this They were only approaches with a view matter. to settlement from which nothing concrete I therefore agree with the Judge that emerged. nothing in them can really be said to amount to a waiver of the clearly expressed notice given on June 29, 1948."

As I have already indicated in my view the negotiations in this case after the rescission were only approaches with a view to settlement and I would certainly say that nothing concrete emerged from them.

Counsel referred to letters Nos. 17 and 19 in exhibit P.1 and contended that defendant had waived his letter of the 1st September rescinding the contract, but I can view these letters as no more than approaches to settle and I am satisfied that there was no intention to affect the parties' legal relations.

On the question of Section 92 of the Evidence 40 Ordinance Counsel cited Egged Co-operative Society Ltd. v. Levi Geffen, 1947 A.I.R. 32 where at page 33 appears the passage:

> "The document exhibit D.6 was signed only by one of the parties and is not therefore a written agreement and Their Lordships have not

In the Supreme Court of the Federation of Malaya

No. 22

Judgment.

lst May 1958
- continued.

No. 22

Judgment.

lst May 1958 - continued. been referred to any provision in the law of Palestine which will render the evidence tendered at the trial inadmissible."

It appears to me however that this case turns on its own particular facts. In our case, even though the document is only signed by one of the parties it was not necessary for the other party to sign. Sections 92 and 91 refer to contract or a grant or any other disposition of property.

Counsel for plaintiff, on the authority of Preonath Shah's case, 25 I.L.R. Calcutta Series 603 urged that in any case the conduct of the parties is admissible. He stated that it was uncertain that Bal Kishen Das's case (supra) overruled Preonath Shah's case. He did, however, agree Maung Kyin's case (supra) decided that Preonath Shah's case had ceased to be of binding authority and in my respectful view Preonath Shah's case must be taken to have been overruled.

Finally, on the question of damages, counsel for plaintiff stated that \$1,200 to \$1,500 per house would be reasonable damages for the Plaintiff.

Counsel for defence submitted that with regard to the Egged Co-operative Society's case above, the document in that case was not valid until signed by the parties and Marion Rebello and another v. Harbans Singh 1933-34 F.M. Law Reports 96 decides that section 92 of the Evidence Enactment applies to promissory notes. In any case, I have already dealt with the Egged Co-operative Society case above. Finally, 30 on the question of waiver, the defendant's counsel submitted that the onus was on the plaintiff and he had given no evidence of waiver.

Collecting my views on this legnthy case, I would say that in my view production of titles and completion should be at the vendor - defendant's office. Defendant offered inspection there, and I think that that was all he was legally bound to do. The Encyclopaedia of Forms and Precedents, 3rd edition, Vol.14, page 484, sets out condition No.2 of 40 the Statutory Form of Conditions of Sale, that completion takes place at the office of the vendor's solicitors. In my view, plaintiff fell down on the agreement to extend the time for payment in that he did not begin construction as required by the terms to the extension agreement.

To some extent, the plaintiff has my sympathy in his financial misfortunes, but it cannot be gain said, indeed plaintiff had said, that defendant was entitled to forfeit the \$15,000 deposit because plaintiff did not fulfil his contract. The extension was a sympathetic forbearance on the defendant's part and I am satisfied that plaintiff did not, it may well be with the best will in the world, keep to the terms on which the extension was granted and that, unfortunately, he cannot succeed. Defendant was in a position from which to dictate terms, plaintiff being in default. I believe that it was a term that plaintiff should begin construction and he did not begin construction on the land that was sought to be transferred and therefore the \$20,000 was for-Plaintiff's counsel stated that it was imfeit. material whether the plaintiff was present on the 7th July or not and, in any case, against the plaintiff in this regard stands the unqualified acceptance of the terms - he made no refusal of the terms.

Plaintiff's counsel ultimately relied, for his main support, on what happened after the termination of the contract on 1st September, 1956, but it appears to me that by then the crux of the case had passed, and the \$20,000 was forfeited. The contract It is also significant that no had been rescinded. contract was made after that, nor indeed, is waiver expressly pleaded. Any difference between the evidence of plaintiff, Defendant's Witness 2 and Defen-30 dant's Witness 5 as to whether plaintiff was present is rendered less significant in view of plaintiff's counsel's statement that it does not matter whether plaintiff was present on the 7th July or not. The fact remains that these were the only conditions on which defendant would consider extension and plaintiff signed these conditions on the 24th July. In my view he is bound by them and fell down on them. Defendant's Witness 3's evidence that no construction Plaintiff's had commenced supports the defendant. 40 Witness 4 said that he thinks Yeow said that if plaintiff baid money and went on with the building Yeow would extend the option, and this supports the defendant's case. The plaintiff admitted that he was in breach of clause 3 of the conditions of 7th July and I am satisifed that he was bound by these In my view, plaintiff did not comply conditions. with the supplementary agreement which he signed on the 24th July. He did not pay the \$19,000 as required by this agreement. Therefore he cannot

In the Supreme Court of the Federation of Malaya

No. 22

Judgment.

lst May 1958 - continued.

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No. 22

Judgment.

lst May 1958 - continued. succeed. Defendant was, and said it was, willing to produce the titles at defendant's office and in my view that was the limit of the defendant's obligation to produce. Defendant was under no obligation to produce to plaintiff's solicitors either by express or by implied agreement. In addition, and as a further complete answer to the claim, defendant admits he had not started construction on the 8 lots sought to be transferred and was in breach of clause 3 of the agreement he signed on the 24th July. Further, in my view, plaintiff had no rights under the original agreement at the date of the institution of this suit because he had assigned his rights.

As to the authorities cited by plaintiff's counsel as to waiver, plaintiff has not pleaded waiver, nor, in my view, did the negotiations amount to waiver. It is a legal truism that each case must turn on its own facts. The points as to whether construction had commenced loses its significance in view of plaintiff's counsel's concession, and indeed my opinion if that were necessary, that Braddel & Ramani's letter of 28th July was not tender and that therefore plaintiff had broken his contract. In any case I found that construction had not begun on the eight lots sought to be transferred.

It is not necessary for me to decide whether evidence could be brought to show that the assignment was a pledge. If I had to decide this point I would say that evidence could not be given for this purpose.

As I am satisfied that plaintiff is not entitled to damages I make no award of damages; but had it been necessary for me to assess them I should have fixed the damages at β 1,350 per house for the 13 houses which plaintiff proposed to build for himself. However, as plaintiff is not entitled to damages, I make no award.

In my view,

(1) Plaintiff committed a breach of the agreement he signed on the 24th July in that he failed to begin construction on the land sought to be transferred. This is sufficient by itself to require that the claim fail.

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- (2) Plaintiff did not pay the \$19,000 as reguired. In this connection, defendant was under no obligation to let plaintiff's solicitors have titles for examination. This also is sufficient by itself to require failure of the claim.
- (3) At the time of the institution of the suit plaintiff had no rights under the agreement, he having assigned them. This in itself is sufficient to require dismissal of the claim.
- I dismiss the suit with costs.

Dated this 1st day of May, 1958.

(sd) W.B. Sutherland JUDGE, SUPREME COURT, FEDERATION OF MALAYA.

No. 23

FORMAL ORDER

20 Before the Honourable Mr. Justice Sutherland

This suit coming on for hearing on the 8th day of March, 1957 and adjourned by consent to a date to be fixed by the Senior Assistant Registrar and subsequently coming on for hearing on the 18th, 19th, 20th, 25th, 26th and 28th days of March, 1958 and for Judgment on the 1st day of May, 1958 before the Honourable Mr. Justice Sutherland, Judge, Federation of Malaya, in the presence of Mr. N.A. Marjoribanks of Counsel for the plaintiff and Mr. R.H.V. Rintoul of Counsel for the defendant, AND UPON READING the pleadings AND UPON HEARING the evidence and what was urged by Counsel aforesaid IT IS HEREBY ORDERED that this suit do stand dismissed AND IT IS ALSO ORDERED that the costs of this suit be taxed by the proper officer of this Court and when so taxed be paid by the plaintiff to the defendant.

Given under my hand and the seal of the Court this 1st day of May, 1958.

Sd.

SEAL.

Senior Asst. Registrar, High Court, Kuala Lumpur. In the Supreme Court of the Federation of Malaya

No. 22

Judgment.

1st May 1958 - continued.

No. 23

Formal Order.

lst May 1958.

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IN THE SUPREME COURT OF THE FEDERATION OF MALAYA IN THE COURT OF APPEAL AT KUALA LUMPUR

No. 24

Civil Appeal No. 21 of 1958

Between

29th May 1958

Notice of Appeal.

Ng Kim Pong ... Appellant and Yeow Kim Pong Realty Ltd. Respondent

> (In the matter of Kuala Lumpur High Court Civil Suit No. 374 of 1956).

Between

Ng Kim Pong ... Plaintiff and

Yeow Kim Pong Realty Ltd. Defendant

TAKE NOTICE that Ng Kim Pong, the appellant abovenamed being dissatisfied with the decision of the Honourable Mr. Justice Sutherland given at Kuala Lumpur on the 1st day of May 1958, appeals to the Court of Appeal against the whole of the said decision.

Dated this 29th day of May 1958.

Sd. NG KIM PONG Appellant

To:

The Senior Asst. Registrar, Supreme Court, Kuala Lumpur.

And to:

M/s. Yeow Kim Pong Realty Ltd., 22, Klyne Street, Kuala Lumpur, or their

Solicitors M/s. Shearn Delamore & Co., Amalgamated with Drew & Napier, Advocates & Solicitors, 2, The Embankment, (2nd Floor) Kuala Lumpur.

The address for service of the appellant is care of No.8, Shaw Road, Kuala Lumpur.

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MEMORANDUM OF APPEAL

IN THE SUPREME COURT OF THE FEDERATION OF MALAYA

IN THE COURT OF APPEAL AT KUALA LUMPUR

F.M. CIVIL APPEAL NO. 21 of 1958

Between

Ng Kim Pong ... Appellant AND Yeow Kim Pong Realty Ltd. Respondent (In the matter of Kuala Lumpur Civil Suit No. 374 of 1956

Between

Ng Kim Pong ... Plaintiff and Yeow Kim Pong Realty Ltd. Defendant)

Ng Kim Pong, the appellant abovenamed, appeals to the Court of Appeal against the whole of the decision of the Honourable Mr. Justice Sutherland given at Kuala Lumpur on the 1st day of May, 1958 on the following grounds :

1. the document Exhibit P.3 is inadmissible in evidence on the ground that it was written "Without Prejudice":

2. there is no evidence that the extension of time given by the Respondent to the Appellant for the payment of \$24,000/- was given subject to the following conditions:

- (a) construction work must be commenced within one week from the 7th day of July 1956,
- (b) construction must have begun on any land sought to be transferred:

3. the learned Trial Judge was wrong in treating all facts occurring after the 1st day of September 1956 as irrelevant: In the Court of Appeal

No. 25

Memorandum of Appeal.

15th September 1958.

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Memorandum of Appeal.

15th September 1958 continued. 4. the Respondent has by its agents and servants held itself out as not having put an end to the contract and as having waived to enforce its rights against the Appellant:

5. time is not the essence of the contract and the Respondent has not by reasonable notice made time essential:

6. upon the payment or tender of \$19,000/- by the Appellant on 19th September, 1956 the Respondent was under an obligation to transfer 8 lots of land to the Appellant and the Respondent by refusing to do so was in breach of contract:

7. the Agreement dated 24th March, 1956, Exhibit P.10, was not by virtue of the document, Exhibit P.4, transferred to Liew Thean Siew, but was merely deposited with the said Liew Thean Siew as a security for a loan, and evidence is admissible to prove the true nature of the transaction:

8. the said Liew Thean Siew had no rights under the said Agreement on the 8th April, 1957, and the 20 purported assignment, Exhibit D.7, of the said Agreement to the Respondent was void:

9. the forfeiture of the sums of \$15,000/- and \$5,000/- was penal in nature and the Appellant is entitled to relief in Equity.

Dated this 15th day of September, 1958.

Sgd. Y.S. Lee & Co.

Solicitors for the Appellant.

To,

The Registrar, Supreme Court, KUALA LUMPUR.

And to,

Messrs. Shearn Delamore & Co., Solicitors for the Respondent, KUALA LUMPUR.

The address for service of the appellant is c/o Messrs. Y.S. LEE & CO., Advocates & Solicitors, 46 Cross Street, Kuala Lumpur. 30

	No. 26	In the Court
	NOTES OF ARGUMENT - SMITH J.	of Appeal
		No. 26
	<u>Wednesday, 15th October, 1958.</u> <u>Cor:</u> Thomson C.J., Smith J., Ong J. <u>L.P. Thean</u> for Appellant.	Notes of Argument - Smith J.
	<u>Rintoul</u> and <u>Chan</u> for Respondent.	15th October 1958.
	Thean	
10	Contract 24th March - 22 plots \$66,000 \$15,000 paid - \$24,000 on or before 23rd June. \$27,000 on or before 23rd December.	
	P. 130 - p. 106.	
	After 1st Sept. negotiations.	
	Ground 3: Time was not of essence. He could not rescind by p. 106.	
	Forfeiture of $35,000$ or $319,000$ is a penalty.	
	Appellant did not transfer agreement. Ex. P4 (p.131) was not a transfer but security for a loan.	
	Assignment void.	
20	Grounds 3, 4 and 5:	
	P.170 (29) p. 171 (23).	
	Time is not of essence unless stipulated.	
	S.56 Courts Ordinance, 1950 = S.55 Indian Contracts Enactment.	
	Jamshed 43 I.A. 1916 at p.31.	
	Chitty on contract 21st Edn. Vol.1 p.186 s.353.	
	"leave against time".	
	1915 A.C. p.386 Stickney v. Keeble at p.405.	
	Smith v. Hamilton 1951 Ch. p.174 at p.179.	
30	p.181 quotes Green v. Seria.	
	unless conduct amounted to repudiation respondent cannot rescind.	

P.136 Original Agreement. In the Court of Appeal Not made of essence extension p.130 - not made of essence. No. 26 Had plaintiff repudiated. Notes of P.133 sale Argument -P.102 Smith J. letter P.103 reply 15th October 1958 -1900 2 Ch. 298 Cornwall v. Henson. continued. breach of one stipulation does not amount to repudiation - p.303. 10 Action after 1st Sept. P.27 of record (30) about 15th Sept. (109) P.107, p.109, p.112. P.118. Authorities Hughes v. Metropolitan Rly. Co. 1877 2 A.C. 439 at p.448. Birmingham & District Land Co. v. London & North Western Rly. Co. 1889 40 Ch. 268. 20 No adequate and reasonable notice given. Penalty 8 Ch. A.C. p.1022 In re Dagenham at p.1025. 1912 A.C. 319 Kilmer v. British Columbia Orchard Lands Ltd. applying Dagenham. Steedman v. Drinkle 1916 1 A.C. Stockloser v. Johnson - 1954 2 W.L.R. 439) 1954 1 Q.B. 476) At p.448 W.L.R. at p.490 L.R. Denning, J. - out of all proportion to damage. Unconceivable of seller to return money. 30 & p.450 W.L.R. Respondent's conduct. р. 63 - D.W.2 line б. No loss incurred.

As to assignment In the Court of Appeal Appellant apparantly assigned but a loan really. S.92 Evidence Ordinance - as between parties. No. 26 28 Allahabad 473 Bageshri v. Pancho. Notes of 1880 4 Bombay 594 at p.598 - Paksu Lakshman v. Govinda Karifi. Argument -Smith J. Acts of parties is admissible. P.224 not good as between 3rd parties. 15th October 1958 -I.A. 58 Balkishen Das v. Legge 27 continued. at p.65 - extrinsic evidence of surrounding circumstances. 10 I.L.R. 28 Calcutta p.256 at p.258. 44 I.A. 236 at p.243 Maong Kyin. Evidence that P4 was not an assignment. Assignee never acted under it - p.38 No notice of assignment. Admitted if evidence admissible only a deposit. Nothing to assign in D.7 p.134. Rintoul: Grounds 3 & 4: 20 Waiver, forfeiture, penalty, time not of essence not pleaded. Para. 5 & 6 of S.C. (1) was \$19,000 tendered
(2) meaning of agreement Case turned on (3) intention of parties. Ground 3: After 1st Sept. considered - p.178 Plaintiff broke off negotiations. 1956 M.L.J. p.45 Haji Mohd. Dom v. Sakiman. Issue was there a tender - held no. 30 Money held on terms of letter - p.109. My case: After 1st Sept. plaintiff tried to get a fresh agreement - p.109 para 2 offer. Ample evidence to support p.176. P.77 - Mr. Chan

In the Court Charles Rickards Ltd. v. Oppenheim 1950 1 A.E.R. of Appeal p.420 - p.422D. 1955 1 W.L.R. p.761 Tool Metal v. Tungsten. No. 26 Hughes considered facts different. Affidavit nor Consent by negotiating. Notes of 1900 2 Ch. p. 298 Argument -Smith J. Was vendor entitled to assume purchaser had repudiated. 15th October Simonds on indulgence in Commercial contracts. 1958 continued. Not pleaded time not of essence. 10 Halsbury 3rd edn. p.164 - Vol.8. p.130 - time made of essence. Third recital - p.7. letter 7th July. 1915 A.C. p.416 Stickney p.416. 1896 1 Q.B. 626 Willson v. Love - Lord Esher p.629 No evidence to shew \$15,000 not unreasonable. Evidence of \$5,000 was reasonable - considered for extension. 1938 1 A.E.R. p.210. 20 Romer in Stockloser 1954 W.L.R. S.92 1933/34 F.M.S.L.R. 96 Rebello v. Harbans Singh. Evidence is inconsistent with clear terms of document. Ex. P.4 is stamped as a conveyance (p.160). Notice of assignment was given. Respondent taken direct from the holder and gave notice to the Appellant. S.92 - respondent stepped into shoes of assignee. Broken contract and claim sum for damages. 30 Reply for Appellant Thean: As to waiver. I may introduce fresh arguments. 1890 15 A.C. p.225 Tasmania - 0.58 r.4. Tool Metal v. Tungsten. Letter of July - Smith v. Hamilton. re Barr's Contract 1956 2 A.E.R. p.854 at p.857. C.A.V. B.G. SMITH, Judge.

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NOTES OF ARGUMENT - ONG J.

Before: C.J. F.M., Smith J., Ong J.

Wednesday, 15th October 1958.

L.P. Thean for appellant. Rintoul & Chan Hwa Eng for Respondents.

Speech for Appellant

10 L.P. Thean withdraws grounds 1, 2 & 6.

Appellant entered into contract on 24.3.56 with Respondent - paying \$15,000; due payments 23.6.56 of \$24,000 & 23.12.56 of \$27,000. Extension by agreement (p.130).

interision by agreement (p.1.0).

Appellant failed to pay as per agreement.

On 1.9.56 Respondent rescinded (p.106)

Further correspondence subsequently: pp.98-129.

After 1st September - "negotiations" - resulting in nothing definite.

20 On 16.11.56 appellant filed suit.

Defence (p.13).

Hearing on 8.3.57 adjourned by consent.

Amended Defence 4.6.57 (p.17)

Claim dismissed: because (1) Appellant was in breach (2) on sale deed @ p.131.

Appeal: Judgment wrong (i) in treating all facts after 1.9.56 (p.106) irrelevant on ground that contract had been terminated.

(ii) Time not of essence.

- (iii) Respondent by agmnt. had treated contract as still subsisting.
 - (iv) Forfeiture of \$15,000 & 5,000 penalty against which appellant is entitled to relief in equity.

I must show agreement not transferred by appellant to 3rd person - that Sale Deed (at p.131) In the Court of Appeal

No. 27

Notes of Argument -Ong J.

15th October 1958.

In the Court was not assignment - but given as security for of Appeal a loan. Deed of Assignment (see pp.134-5) void as Liew had no right to assign. No. 27 On grounds 3, 4 & 5: Notes of From Judgment of Sutherland J: Argument -P.170: 171, 178 Submits facts after 1.9.56 are relevant. 15th October Unless express stipulation that time of essence: time is not. continued. S.56(1), (2) & (3) - identical with Indian 10 S.55. 1. Jamshed, etc. v. Burjorji etc. 43 I.E. 26 @ 31 2. Chitty on Contract (21st Ed.) Vol.1 p.186 3. (1915) A.C. 386 @ 405 4. Smith v. Hamilton (1951) Ch. 174 @ 179 181 (time initially not of essence). 5.13 Ch. D. 589. Unless conduct of Appellant amounted to repudiation respondent could not rescind. 20 Agreement (p.136): nowhere express stipulation making time of essence. Nor again in letter of 7.7.56 (p.130) was it expressly stipulated that time was of essence. Was appellant guilty of such improper conduct as to amount to repudiation of the contract? P.133: Agrees to sell to Goh & Yap. P.102: B & Ramani's letter of 28.7.56. Reply at p.104 (1900) 2 Ch. 298 @ 303 (Cornwall & Henson) breach of 1 condition not a repudiation. 30 Re: Ground 4 in particular: A meeting after 1st Sept. in Solicitor's office. (p.27 1.30) p.28 - line 1 - re second circular. p.109 (para 2) - fixes date of meeting. p.107 p.109

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Ong J.

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p.110 - Receipt by Shearn, Delamore & Co. for In the Court \$19,000. of Appeal p.111 No. 27 p.112 - Shearn Delamore & Lovelace & Hastings. p.113 Notes of Argument p.114 - circular Ong J. p.115 15th October p.118 - writer is Thean (see p.78). 1958 -Respondents by agents were holding out. continued. 10 (1877) 2 A.C. 439 Hughes v. Metrop. Rly. Co. Q 448 (1889) 14 Ch.D. 258 @ 286 per Bower L.J. As Respondents servants had held out that contract was not rescinded - they could not do so without proper notice. Forfeiture to be treated as penalty: L.R. 8 Ch. App. 1022 @ 1025 per Mellish L.J. In re Dagenham (Thames) Dock Co. ex. Hulse (1913) A.C. 319 @ 325 20 Kilmer v. Br. Columbia Orchards Lands Ltd. (1916) 1 A.C. 275 Steedman v. Brinkle (1954) 2 W.L.R.439: or (1954) 1 K.B. 476 Resumed at 2.30 p.m. Stockloser v. Johnson Refers p.448 W.L.R. or p.490 K.B. Unconceivable to forfeit the \$15,000 & \$5,000 Appellant had been making strenuous efforts. Conduct of Respondents' agents - not above 30 criticism p.63. 1.6: Re Assignment: Sale Deed - p.131 On its face a Sale Deed: S.92 Ev.Ord: "no evidence of any oral agreement shall be administered as between the parties."

In the Court of Appeal

No. 27

Notes of Argument -Ong J.

15th October 1958 continued.

Appellant & Respondent - not parties I.L.R. 28 Allahabad 473 (Bageshri Dayal v. Pancho) I.L.R. 4 Bom. 594 @ 598 (Paksu Lakshman v. Govinda (evidence of conduct admissible). Kariji) I.L.R. 25 Cal.603 (Preonath Shaha v. Madhu Sudan Bhuiya) Balkishen Das v. Legge (28 I.A. 65) I.L.R. 28 Cal 256 - (Khankar Abdur Rahman v. Ali Hufir) 44 I.A. 236 @ 243 & 244 10 (Transaction with a 3rd party - not governed by s.92). If evidence of conduct is admissible - what evidence that this apparent sale deed was not a sale deed? (1) Liew Thean Siew - never acted under agreement - or attempted to perform his part of contract. (p.28 1.22) If assignment - no P/A necessary. 20 (2) Liew Kean Siew admitted. Since Liew Kean Siew had no right in the agreement: the assignment is void. Speech for Respondent Rintoul: Neither waiver - nor that time is not essence nor forfeiture as penalty was pleaded (para 5, 6 & 7 s/claim). No argument in court below of time not being of essence - nor as to penalty. In Court below 3 points: 30 (i) was there tender? (ii) what did agreement mean? (iii) s.92. Submit: whether time of essence - a question

Ground 3:

of fact.

At p.178 trial Judge did consider the ground. p.179 2nd para. p.170, line 29.

133.

		Significant that negotiations broken off by appellant himself.	In the Court of Appeal
		(1956) M.L.J. 45 <u>Haji Md.Dom. v. Sakiman</u>	
		Issue below was simple - Was there a tender?	No. 27
		Page 66: 1.18: letter @ page 109.	Notes of
		Shearn, Delamore held the money on behalf of and in trust for Lovelace & Hastings.	Argument - Ong J.
		After 1st Sept: Respondent Co. were holding the whip hand:	15th October 1958 -
10		Page 109:	continued.
		" 115:	
		" 116:	
		" 117:	
		Ample evidence on which Judge could draw con- clusions which he did (p.176 1.5).	
		It was never pleaded that a subsequent agreement was reached after 1.9.56.	
		P.77 1.4: et seq.	
20		Chas.Rickards Ltd. vs. Oppenheim (1950) 1 A.E.R. 403 @ 422 (1950) 1 K.B. 616 @ 623, 624.	
		Hughes v. Metrop.Rly. (1877) 2 A.C. 439	
		Considered in (1955) 1 W.L.R. (<u>Tool Mfg.Co.</u> <u>v. Tungsten etc</u> . @ p.763).	
		How was appellant's position altered?	
		(1900) 2 Ch. 298.	
	Re:	Time not being of essence:	
		This point was never pleaded: Halsbury (3rd Ed.).	
		Matter of construction from surrounding circum- stances - whether time of essence.	
30		Letter of 7th July (p.130) made time of essence.	
		See Recital 3 of Agreement	
		(1915) A.C. @ 416 - Sticky v. Keeble.	
		"Time of essence" here not used as a defence.	
	Re:		
		(1896) 1 Q.B. 626 @ 629 (L. Esher).	

In the Court of Appeal

No. 27

Notes of Argument -Ong J.

15th October 1958 continued. Wellson v. Love (Penalty or liquidated damages). No evidence in this case that the \$15,000 was unreasonable. \$5,000 was a payment in consideration of extension of time. (1938) 1 A.E.R. 210 (Mussen v. V.Demian's Co.) S.92: M. Rebello v. Harbans Singh (1933-34) F.M.S.L.R. 96 @ 102 p.160 line 27 Respondents are "representatives in interest" 10 of the Assignor.

Reply for Appellant

Thean in reply:

(1890) 15 A.C. 225 (Tasmania) Order 58, r.4.

(1956) 2 A.E.R. 853 (Re Ban's contract), @ 857. Judgment reserved.

> (Sd) H.T. Ong 15.10.'58.

No. 28

No. 28

NOTES OF ARGUMENT - THOMSON C.J.

Notes of Argument -Thomson C.J.

15th October 1958. For Appt: L.P. Thean

For Respts: Rintoul

Speech for Appellant

Thean

Withdraws grounds 1, 2 & 6.

Deals with facts.

Contract 24.3.56.

J. was wrong in treating facts after 1.9.56 as

irrelevant on the ground that the contract was then terminated. Time was not of the essence & Respts ed. not rescind by letter dd. 1.9.56. In any event Respts treated the Contract as still subsisting after that date.

Also forfeiture of 15,000 & 5,000 as a penalty and Appt is entitled to relief in equity.

Also Appt did not transfer agreement dd. 24.3.56 to a 3rd pty. The purported transfer P.4 was not a transfer as such but was a document executed by way of security on a loan (p. 131). Evidence was admissible to show true nature of that transaction so 3rd pty ed. not transfer to Respts & that assignment (pp. 134-5) is void.

Will deal with grounds 3, 4 & 5 together.

I say facts after 1.9.56 are relevant & shd. be considered.

In a contract for sale of land time is not of the essence. Contracts Ord. s.56 (Indian s.55).

Jamshed v. Burjorji 43 I.A. 26, 31.

Chitty on Contracts (21 Ed.) I p.186 (§ 353)

Stickney v. Keeble (1915) A.C. 386, 405.

Smith v. Hamilton (1951) Ch. 174, 179, 181.

Green v. Sevin 13 Ch. D. 589, 599.

If time is not of the essence one pty cannot of his own notion make it so.

Unless conduct of Appt amounted to repudiation Respt cd. not rescind.

There is nothing in the agreement here (p.136) 30 wh. stipulates that time shall be of the essence.

Time was given by the letter dd. 7.7.56 (p.130) but again this does not state that time was of the essence.

So Respt cd. not rescind on question of time only.

In the Court of Appeal

No. 28

Notes of Argument -Thomson C.J.

15th October 1958 continued.

In the Court of Appeal

No. 28

Notes of Argument -Thomson C.J.

15th October

1958 continued. Was Appt guilty of improper conduct amounting to repudiation of the contract? The letter dd. 27.7.56 (p.133) shows that Appt was trying to get money to fulfil his part. Then Braddell & Ramani wrote letter dd. 28.7.56 (p.102). This asked for titles to enable Appt to sell.

This correspondence shows Appt was making efforts to perform his contract.

His conduct fell far short of repudiation.

Cornwall v. Henson (1900) 2 Ch. 298,303.

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Respt's letter dd. 1.9.56 was not effected to rescind the contract.

Even if it was rescinded the Respt held himself out as treating the contract as still subsisting.

After 1.9.56 there was a meeting at Respts' solicitors' office between the parties (p.27).

That meeting was some time after 1.9.56 (see letter at p.108).

Then on 8.9.56 Appt's solicitors told Respts' solicitors they were holding 19,000. They repeated 2 this on 19.9.56. Receipt was ack. by Respts' solicitors on 21.9.56 (p.110).

Then there is Respts' letter dd. 2.10.56 (p.112) which shows they did not regard contract as at an end. The letter dd. 26.10.56 (p.118) was written by Secy. of Respt Coy.

Hughes v. Metropolitan Rly. Co. (1877) 2 A.C. 439,448.

Birmingham & Dist. Land Co. v. L'don & N.W. Rly. Co. (1889) 40 Ch. D. 268.

I now pass to question of forfeiture wh. I say was fraud in nature.

In re Dagenham (Thames) Dock Co. 8 Ch. App. 1022, 1025.

Kilmer v. Br. Columbia Orchard Lands Ltd. (1913) A.C. 319, 325. 20

Steedman v. Drinkle (1916) 1 A.C. 275.

Stockloser v. Johnson ((1954) 2 W.L.R. 439, (448,450. (1954) 1 K.B. 476.

Here it is unconscionable to forfeit the whole amount.

From the correspondence it is clear Appt was making efforts to perform. Also Respts did not behave very well.

10 I now deal with the alleged assignment. The assignment is at p.131.

I submit evidence is admissible to show it was given by way of security.

Evidence Ord. s.92 does not apply. The evidence here is not sought to be admitted as between parties to the contract for Respt was not a party.

Bageshri Dayal v. Pancho I.L.R. 28 All. 473.

Also evidence of conduct can be admitted to show a conveyance is a loan.

Paksu Lakshman v. Govinda Kanji I.L.R. (1880) 4 Bom. 594, 598.

Preonath Shah v. Madhu Sudan Bhuiya I.L.R. 25 Cal. 603

Balkishen Das v. Legge 27 I.A. 58, 65.

Khankar Abdur Rahman v. Ali Hafez I.L.R. 28 Cal. 256.

Maung Kyin v. Ma Shwe La 44 I.A. 236, 244.

If evidence of conduct is admissible there is such evidence here. The purported assignee never 30 acted under the agreement. He paid nothing to Respts. In any event he said he took it as security.

(<u>Rintoul</u>: Concede that <u>if</u> evidence admissible then it was assigned as security for a loan.)

Equity applies in this country by virtue of s.3 of Civil Law Ord.

Case for Appellant

In the Court of Appeal

No. 28

Notes of Argument -Thomson C.J.

15th October 1958 continued.

In the Court of Appeal

Speech for Respondent

of the essence nor question of penalty was pleaded.

Rintoul

No. 28

Notes of Argument -Thomson C.J.

15th October

continued.

1958 -

(1) Was there tender of the 19,000.

(2) What the agreement meant.

The case tried below on:

(3) The question of s.92 of the Evidence Ord.

Neither waiver nor the point of time not being

The case was there had been tender and that was decided against them.

The true test of time being of the essence and of penalty is intention.

Here there were no findings of fact by trial Judge.

J. agreed that facts after 1.9.56 were irrelevant on the pleadings; he did not refuse to consider them. In fact he considered them carefully (see pp. 178, 179, 170).

It was Appt who broke off negotiations.

A case must be decided on pleadings.

Haji Mohd. Dom v. Sakiman 1956 M.L.J. 45

J. held there was no tender terms of the contract.

At trial Plaintiff's counsel admitted money held in terms of letter dd. 19.9.56 (pp. 66, 109).

All that happened after 1.9.56 was that Plaintiffs tried to get Defendant to reconsidere and enter into fresh agreement.

It was never pleaded that a subsequent agreement was concluded after 1.9.56.

Facts are within rule laid down in -

Charles Rickards Ltd. v. Oppenheim (1950) 1 A.E.R. 420, 425. (1950) 1 K.B. 616.

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Hughes supra was considered in -

Tool Metal Mfg. Co. Ltd. v. Tungsten Elect. Co. Ltd. (1955) 1 W.L.R. 761, 763.

In the present case Plaintiff did not alter his position for the worse by negotiating.

Cornwall v. Henson case also distinguished.

As to time not being of essence of the contract, this was not pleaded and there was no evidence.

As to the law on this -

10 Halsbury (3 Ed.) VIII p.164 § 280.

Here all the circumstances go to show that time was of theessence. It was in any event made of the essence by the letter of 7th July (p.130). As to effect of this I refer to -

Rickards (supra) at p.422.

As to <u>Stickney v</u> <u>Keeble</u> (supra), this must be taken as a whole particularly the passage on p.416.

As to whether the sums were liquidated damages or penalty -

20 Willsonv. Love (1896) 1 Q.B. 626.

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I agree s.75 may apply but there is nothing to show that 15,000 is unreasonable as an estimate of damages.

Burden of establishing anything is on party who says it. Burden was on Plaintiff to show 15,000 was unreasonable. But he did not raise the point below.

The 5,000 was reasonable - it was paid for extension of time.

Mussen v. Van Diemen's Land Co. (1938) 1 A.E.R. 210.

There only remains s. 92 of the Evidence Ord.

I submit that where there is, as here, a formal document our local c/s make it clear that oral evidence cannot be given to contradict the terms of the document. In the Court of Appeal

No. 28

Notes of Argument -Thomson C.J.

15th October 1958 continued.

No. 28

Notes of Argument -Thomson C.J.

15th October 1958 continued.

Marion Rebello v. Harbans Singh (1933-34) F.M.S. L.R. 96, 102.

Here if the evidence was admissible it wd. be in contradiction of the assignment itself. The assignment was produced by Pff. It is stamped as a conveyance.

S.92 applied as between original holder and Appt. Respts took from holder with notice to Appt.

Anyhow they cannot get damages for they are relying on the rules of equity to excuse their own breach and so get back their deposits.

Reply for Appellants

Thean

I am not bound by arguments in the Ct. below - as long as I can bring myself within the pleadings.

"Tasmania" v. "City of Corinth" (1890) 15 A.C. 223, 225. R.S.C. 0.58 r.4.

In Rickards v. Oppenheim time was held to be of the essence but the facts were very different from the present facts.

Barr's contract (1956) 2 A.E.R. 853, 857.

C.A.V.

(Sd.) J.B. Thomson. 15.10.58. 20

No. 29 In the Court of Appeal JUDGMENT OF THOMSON C.J. No. 29 IN THE SUPREME COURT OF THE FEDERATION OF MALAYA Judgment of IN THE COURT OF APPEAL AT KUALA LUMPUR Thomson C.J. F.M. Civil Appeal No. 21 of 1958. 23rd April (Kuala Lumpur Civil Suit No. 374 of 1956) 1959. Ng Kim Pong Appellant . . . - V -Yeow Kim Pong Realty Ltd. Respondents Cor: Thomson, C.J. Smith, J. Ong, J. I have had the benefit of reading the judgment which is about to be delivered by Mr. Justice Ong with which I am in entire agreement. Sgd. J.B. THOMSON. CHIEF JUSTICE, Federation of Malaya. Kuala Lumpur, 23rd April, 1959. No. 30 No. 30 Judgment of JUDGMENT OF SMITH J. Smith J. Coram: Thomson, C.J., 11th May 1959. Smith, J., Ong, J. I have read the written judgment of Ong J. and am in agreement therewith. I have nothing to add. Sd. B.G. Smith

Kuala Lumpur,JUDGE,11th May, 1959SUPREME COURT,FEDERATION OF MALAYA.

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No. 31

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JUDGMENT OF ONG J.

No. 31

Judgment of Ong J.

Coram: Thomson, C.J., Smith, J. Ong, J.

23rd April 1959.

This is an appeal from a judgment dismissing a claim by the plaintiff for the return of moneys paid by him and for damages for breach of contract for sale and purchase of land. The essential facts in this case are not in dispute.

On 24th March, 1956 the plaintiff entered into an agreement to purchase from the defendants 22 building lots for the sum of \$66,000 and made part payment of \$15,000 towards the purchase price. Clause 2 of the agreement provided for payment of a further portion of the purchase money amounting to \$24,000 on or before 23rd June 1956 and the balance of \$27,000 on or before 23rd December 1956. In Clause 10 it was stipulated that in the event of the plaintiff failing to pay the said sums on the said dates the advance of \$15,000 would be forfeited to the defendants and the agreement treated as null and The plaintiff failed to pay the \$24,000 due void. on 23rd June and on 25th June the defendants wrote to him that "the advance payment of \$15,000 has been forfeited to us as liquidated damages" and the agreement become null and void.

On the same day that he received the notice of forfeiture, that is, 25th June, the plaintiff, after personally interviewing the defendants, wrote to them requesting an extension of time of one month to pay them the \$24,000.

A couple of days later defendants intimated that they were agreeable to an extension of time till 31st July provided plaintiff paid down \$5,000 on or before 7th July and the balance of \$19,000 on or before 31st July. On 7th July the plaintiff duly paid the \$5,000 demanded of him. He repeatedly tried to obtain a receipt for this amount from defendants, and finally on 24th July was handed a letter only after he consented to sign his acceptance of the terms and conditions therein. According to plaintiff these terms and conditions were never discussed when his \$5,000 was accepted on 7th July, but

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he had to sign because otherwise the defendants refused to give him his receipt for the money he had paid. The letter was ante-dated 7th July and reads as follows:

Lots 382 to 403 inclusive Section 24, Town of Klang

With reference to your letter of the 25th June 1956 we are prepared to permit you an extension of time within which to pay the sum of 24,000 on the following conditions:-

- 1. To pay us a sum of \$5,000 forthwith and the balance of \$19,000 to be paid on or before the 31st July, 1956.
- 2. Construction work on the above land must be commenced within one week of the date hereof.
- 3. Construction must have begun on any land that is sought to be transferred.
- 4. Should there be any breach of the above conditions, the \$5,000 abovementioned, if paid, will be forfeited and the extension of time withdrawn.

Further, full payment of the balance of \$27,000 must be made on or before the 23rd December, 1956.

Yours faithfully, Yeow Kim Pong Realty Limited. (Sd) Yeow Kim Joo. Managing Director.

I, Ng Kim Pong, acknowledge the receipt of the original copy of this letter and agree to the terms as stated.

> Ng Kim Pong. 5 p.m. 24/7/56.

Subsequently the plaintiff made efforts to raise, and did succeed in raising, the balance of \$19,000 which was due for payment by 31st July. He found two persons, Yap Kim Kee and his partner Goh Swee Hian, willing and able to buy 8 lots for \$24,000 which sum they deposited with Mr. Yong Kung Lin, a In the Court of Appeal

No. 31

Judgment of Ong J.

23rd April 1959 continued.

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No. 31

Judgment of Ong J.

23rd April 1959 continued. solicitor of long standing in Kuala Lumpur, on 27th July. On the following day, Messrs. Braddell & Ramani, on behalf of the Plaintiff, wrote to the defendants that the plaintiff had found purchasers for 8 lots, Nos. 382 - 389, and that the purchase price had been deposited with Mr. Yong Kung Lin. They further requested that the titles be sent to them in the course of the day for examination by the solicitor for the purchasers and added:

"Our client will thereafter be able to make payment of the balance due to you in the sum of \$19,000 before the 31st July, as agreed. Please treat this letter as urgent and let us have the titles by return."

The Defendants, however, did not send the titles, but on 31st July replied through their solicitors, Messrs. Shearn & Delamore, as follows:-

"Our clients instruct us that no building operations have commenced upon the land mentioned in your letter aforesaid and in accordance with paragraph 3 of our client's letter of the 7th instant addressed to your client, and to which your client concurred, there can consequently be no transfer of the land as at present advised.

Upon information that building operations have commenced upon the lots in question, our clients will be happy to comply with your client's request."

On 3rd August Messrs. Braddell & Ramani wrote to Messrs. Shearn, Delamore & Co., the material passage being:-

"Will you let us have a direct answer to our request in respect of the 8 titles immediately required. In any event we wish to remind you that building operations on these 8 lots which are in fact ready to be commenced, will not be commenced by the purchasers unless they are satisfied about the titles and can lawfully go upon the land. This is what our client is endeavouring to get done."

On 10th August Messrs. Shearn, Delamore & Co. replied to the above:-

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144.

"Our clients are prepared to permit your client to inspect the titles at any time at their offices, but until building operations are commenced they cannot see their way to transfer the lots in question."

The defendants' insistence on the commencement of building operations resulted in an impasse, the purchasers withdrew their money from Mr. Yong Kung Lin, and on 1st September the defendants' solicitors gave notice to the plaintiff that no action having been taken by him to fulfil his obligations under the contract, or to pay the sum due to their clients, the contract was therefore terminated by reason of his breaches, and all moneys paid were forfeit, and he was requested to vacate the land forthwith since he had become a trespasser.

The plaintiff, however, did not accept rescis-sion of the contract and on 8th September managed to raise \$19,000 from his own resources and to deposit that amount with his own solicitors, who immediately notified the defendants' solicitors that this money was available for payment against delivery of the required documents of title. Then followed a conference on 13th September, attended by the plaintiff, the defendants' secretary, and the solicitors for the parties, which resulted in the \$19,000 being deposited with the defendants' solicitors on 19th September, to be retained by them until the titles should be handed over for completion of transfer. During the ensuing fortnight it would appear that the defendants' only reason for not proceeding with the transfer was that they were now concerned with imposing an entirely new and further obligation on the plaintiff, namely, that he should undertake to make all houses proposed to be built on the land in question available for purchase by tenants of the defendants who were in occupation of the defendants' own houses elsewhere. In fact the defendants were now insisting on something entirely outside the terms 40 of the contract, and which was not one of the conditions set out in the letter of 7th July. Nevertheless, the plaintiff was prepared to be accommodating, and by 2nd October the discussions had reached a stage where the Defendants' own solicitors were able to write to the plaintiff's solicitors as follows:

> "We confirm the telephone conversation of even date between Mr. Williamson and Mr. Bentley

In the Court of Appeal

No. 31

Judgment of Ong J.

23rd April 1959 continued.

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No. 31

Judgment of Ong J.

23rd April 1959 continued. in which it was agreed that you would draft a new circular to be sent to the existing tenants of the land in question.

Upon the terms of the same being agreed and upon evidence of posting of the same to the existing tenants, our client will be happy to conclude the matter."

On the following day, 3rd October, the plaintiff's solicitors sent the draft of the new circular for the defendants' approval. On 4th October the defendants' solicitors replied that they had sent the draft to their clients and expressed the hope that they would "very soon be in a position to finalise the matter". During the weeks that followed the defendants, in spite of repeated requests, refused to reply or give any indication whether they approved or rejected the draft circular or desired any amendments thereto. Finally on 7th November, the plaintiff's solicitors gave notice of intended action for breach of contract and demanded refund of all the deposits which the plaintiff had paid.

On 14th November the defendants' solicitors sent to the plaintiff's solicitors a copy of their own letter to their clients which reads as follows:-

"Re: NG KIM PONG

Further to the recent conversation between Mr. Tham and our Messrs. Rawson and Bentley, we confirm that unless we receive from you the titles in question together with blank transfers by Saturday, November 17, 1956, we shall have no option but to return the sum of \$19,000 to Messrs. Lovelace & Hastings."

This letter, in my opinion, throws an illuminating sidelight on the conduct of the defendants in respect of the whole transaction. On 19th November the defendants' solicitors returned to the plaintiff's solicitors the \$19,000 which had been lying on deposit for 2 whole months, and the plaintiff then filed action.

On the above facts the learned trial Judge gave judgment for the defendants, holding that they were entitled on 1st September, 1956 to rescind the contract and forfeit all the deposits paid to them on

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the following grounds, namely (1) that the plaintiff had himself committed a breach of the contract he signed on 24th July by failing to begin construction on the land sought to be transferred, and (2) that he had failed to pay the sum of β 19,000 by 31st July. The plaintiff's claim was also dismissed on a third ground which will be discussed later.

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With the greatest respect to the learned trial Judge it seems to me that before the defendants could be held entitled to rescind the contract by reason of the plaintiff's alleged breach of the construction clause (which was Condition 3 set out in the letter of 7th July), it must first be decided whether or not that condition was lawfully engrafted on the original contract between the parties, and was such that it was binding on the plaintiff.

In their notice dated 1st September the grounds on which the defendants relied for rescission of the contract and for the forfeiture were stated to be, 20 firstly, that no action had been taken by the plaintiff to fulfil his obligations under the contract, and secondly his failure to pay the sum due. As to the first ground, the plaintiff in truth and in fact was not in breach of any of the terms of the original contract made on 24th March, 1956, except only as to the date of payment of &24,000 by 23rd June. On that particular point the breach had been waived by the defaulants when they accepted payment of \$5,000 to account on 7th July, extended the time for payment of the balance of \$19,000 to 31st July and re-30 affirmed the contract. As to the second ground, non-payment of the \$19,000 by 31st July in my opinion As to the second ground, did not entitle the defendants to rescind. In the first place, payment by that date was not of the essence of the contract. This is unmistakably clear from the defendants' solicitors' letters of 31st July and 10th August. In any event these letters waived such stipulation, if there were any (see Hipwell v. Knight) (1)

40 In the second place, it does not lie in the mouth of the defendants to blame the plaintiff for the non-payment if they refused him reasonable facilities which would have enabled him to pay by 28th or 29th July, certainly before 31st July. There is clear evidence of this in the letters which passed between the solicitors for the parties between 28th July and 10th August, thus bringing this

(1) 4 L.J. Eq. 52; 103 E.R. 163.

In the Court of Appeal

No. 31

Judgment of Ong J.

23rd April 1959 continued.

case within the provisions of section 68 of the Contracts Ordinance which is as follows:

No. 31

Judgment of Ong J.

23rd April 1959 continued. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

In the third place, since the stipulation as to time was not of the essence, the said sum of \$19,000 was again made available for payment to the defendants not later than 9th September and was in fact deposited with their solicitors on 19th September, for payment to the defendants if they would part with the 8 titles required by the plaintiff to be trans-I should emphasise here that after 1st ferred. September the defendants had dropped all pretence that a condition precedent to the transfer of the 8 lots was that "construction must have begun on any land that is sought to be transferred." That point in fact dropped out from all discussions after 1st September as completely as if it had never existed at all, and therefore the defendants could not then have had any valid excuse not to transfer unless they could lawfully have rescinded the contract on 1st September as they purported to have done.

It is to be observed that the plaintiff's default, as specifically alleged in the notice of 1st September was "that no action has been taken by you to fulfil your obligations under the contract". If that is taken, as it obviously must be, to refer to Condition 3 in the letter of 7th July, that was a clause engrafted subsequently on the original contract, and its validity must be carefully examined.

In this connection I think the proper approach to the problem is to start by considering what was the position of the parties after the plaintiff's default in paying the \$24,000 on 23rd June. Section 56 of the Contract Ordinance provides as follows:

(1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract. 20

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- (2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.
- (3) If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.
- I think it cannot seriously be denied that Clause 10 did make time for payment of the essence of the contract, so that on 25th June the defendants could have lawfully rescinded the contract once for all and forfeited the \$15,000 already paid to them. However, in the events that happened, the defendants did reaffirm the contract by acceptance of the part payment of \$5,000, and by so doing it seems to me that the case thereafter comes within the provisions of sub-section 3 of section 56 of the Contracts Ordinance (supra). Under that subsection, "If 30 the promisee accepts performance at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the nonperformance of the promise at the time agreed, unless at the time of such acceptance he gives notice to the promisor of his intention to do so."

All that this subsection gave to the defendants upon their reaffirming the contract was a right to compensation for any loss occasioned by the nonperformance of the promise at the time agreed, and It never entitled the defendants to nothing more. impose penal conditions or a fine. Condition 3 : as follows: "Construction must have begun on any Condition 3 is land that is sought to be transferred." Now this condition was relied on expressly by the defendants on 31st July and 10th August to justify their refusal to transfer the 8 lots of which transfer was sought by the plaintiff. Compliance therewith must necessarily cause loss to the plaintiff without any

In the Court of Appeal

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Judgment of Ong J.

23rd April 1959 continued.

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Judgment of Ong J.

23rd April 1959 continued. imaginable corresponding gain or profit by way of compensation to the defendants, and it could only benefit complete strangers to the contract with whom the defendants had no concern.

Whether the plaintiff himself, or a third party, was proposing to buy and take over the 8 lots, I cannot imagine how it could possibly be any concern of the defendants as transferors that construction must have begun on these lands. Whether or not the condition was performed would not have made the defendants a penny the richer or poorer. I have no doubt, therefore, in my mind that Condition 3 was a penal condition of the purest type, and because it could have no possible relation to compensation for any loss sustainable by the defendants I have also no it is therefore entirely void. doubt that this condition was imposed only as a colourable pretext to be resorted to for the purpose of enabling the defendants to evade performance of the contract if and when they should think it profitable to do so. I feel I am entirely justified in coming to this conclusion because it is abundantly clear from the evidence of what took place after 1st September that the defendants had then dropped all pretence that it was any concern of theirs whether construction should have begun on any lands sought to be transferred or not.

I am fortified in my view that this condition ought to be treated as void and non-existent because if the plaintiff had then sued for specific performance of the 8 lots, the defendants could not, in my opinion, have resisted the claim by pleading the plaintiff's default in respect of this condition.

In the view that I have taken of Condition 3 it follows therefore (1) that the defendants themselves were in default from 28th July in refusing to transfer the 8 lots upon request made to them by the plaintiff to do so; (2) that the plaintiff had a valid excuse for not paying the β 19,000 by reason of the defendants' letter of 31st July; (3) that the defendants were not on 1st September entitled either to rescind the contract or to forfeit the plaintiff's β 20,000; (4) that the defendants' repudiation of the contract not having been accepted by the plaintiff, the contract was still subsisting, and (5) that when the plaintiff left the β 19,000 on deposit with the defendants' own solicitors from 19th

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September till its refund on 19th November, the defendants themselves were in breach by refusing to complete the necessary transfers.

I come now to the defendants' last line of defence, on which again the learned trial Judge had also given judgment intheir favour. The hearing of this case was originally fixed for 8th March, 1957 but had on that date been adjourned by consent. Then certain matters came to the knowledge of the defendants on which they took appropriate action and on 21st June 1957 they filed an amended defence of which the relevant paragraphs are as follows:-

- "12. The plaintiff transferred the Agreement sued on to one Liew Thean Siew for \$10,000 on the 10th day of May, 1956. This fact was unknown to the defendant prior to the 8th day of March, 1957.
- "13. The defendant has on the 8th day of April, 1957 given notice to the plaintiff that the defendant accepts Liew Thean Siew as the assignee of the Agreement.
- "14. The plaintiff therefore had no rights under the Agreement sued upon at the date of the institution of this suit.
- "15. The said Liew Thean Siew duly assigned the Agreement sued upon for \$1,500 to the defendant on the 8th of April, 1957."

The plaintiff in his Reply denied that the said Agreement was transferred to Liew Thean Siew for \$10,000 as alleged or at all, but averred that it was deposited as security for a loan, the whole of which had been repaid before commencement of proceedings, and that Liew on 8th April, 1957 had no rights under the agreement and the defendants at all material times knew that no such rights existed.

Since there has been much argument in this appeal, with copious citations of authorities, regarding the admissibility of evidence as to the true nature of the transaction of 10th May, 1956 between the plaintiff and Liew, I think it is essential that the document should be reproduced here in full. It bears the heading "Sale Deed", was stamped with ad valorem duty stamps as on transfer to the value of \$100 and reads as follows: In the Court of Appeal

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Judgment of Ong J.

23rd April 1959 continued.

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No. 31

Judgment of Ong J.

23rd April 1959 continued. "In consideration of the sum of Dollars Ten Thousand only (\$10,000) paid to me by Mr. Liew Thean Siew of No. 70, Ampang Street, Kuala Lumpur which sum I do hereby acknowledge same.

I, the undersigned Ng Kim Pong of No.37 Ceylon Lane do hereby sell and transfer the Agreement to Purchase dated the 24th March, 1956 between me and the Yeow Kim Pong Realty Limited free from encumbrances, to the said Liew Thean Siew.

Dated this 10th day of May, 1956.

(Sd) Ng Kim Pong.

Received Cash (\$10,000) (Sd) Ng Kim Pong

Witness: (sd) 10.5.56."

Mr. Rintoul, Counsel for the defendants strenuously contended, both at the trial and in the appeal, that this document must be accepted at its full face value, and that all evidence to the contrary is inadmissible under Section 92 of the Evidence Ordinance, which provides that when the terms of any contract, grant or other disposition of property had been reduced to writing -

"No evidence of any oral agreement or statement shallbe admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms."

With all respect I am unable to accept this argument for reasons which are set out below:

(2) 27 I.A. 58

In the leading case of <u>Balkishen Das v. Legge</u>⁽²⁾ the following principle was laid down by the Privy Council:

"Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining

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the intention of the parties. By s.92 no evidence of any oral agreement or statement can be admitted as between the parties to any instrument or their representatives in interest, for the purpose of contradicting, varying or adding to, or subtracting from its terms; subject to the exceptions contained in the several provisos. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery, which were referred to by the learned judges in the High Court have not, in the opinion of their Lordships any application to the law of India, as laid down in the Acts of the Indian legis-The case must therefore, be decided lature. on a consideration of the contents of the documents themselves, with such extrinsic evidence of the surrounding circumstances, as may be required to show in what manner the language of the document is related to existing facts."

That principle is binding on this Court. I am, however, of opinion that it has no application to the facts of this particular case, because in Balkishen Das and in all the numerous cases where it was followed, the provisions of section 92 had to be, and had been, applied because the parties to the dispositive document were actually at variance as to the nature of the transaction. In the present case there were two parties to what on the face of it was an absolute assignment, but both parties were in no way disputing what the real transaction was between Instead they were indubitably agreed that them. the purported assignment was by way of security only for a loan of \$5,000 advanced by Liew to the plain-Therein to my mind lies an obvious distinctiff. tion and, I may add, the essential difference between this and the many cases following Balkishen Das v. Legge. If one party to the dispositive document does not dispute the allegation of the other that the written word did not express the true intention of the parties, then, in my opinion, Section 92 cannot possibly serve any purpose, because its very raison Accordingly, when Liew d'etre has disappeared. said in evidence that he advanced \$5,000 to the plaintiff and obtained by way of security the assignment of the contract between plaintiff and defendants, such evidence cannot be excluded by Section 92. The plaintiff in his evidence has stated that he had repaid the \$5,000 to Liew with interest, and paid

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the final instalment in September 1956 when he received back his original agreement with the def-Liew did not contradict the plaintiff's endants. evidence, but only claimed that there was at the date he assigned the "Sale Deed" to the defendants still some money owing to him because the plaintiff had agreed to pay him \$10,000 if the loan of \$5,000 was not repaid in full within one month. Liew also stated "when I assigned the agreement in April 1957 I knew the agreement between plaintiff and defendant had expired." Therefore the only right, if any, that Liew still had against the plaintiff as on 8th April 1957 was only a claim to an uncertain amount by way of interest which I very much doubt he could have recovered.

It then follows that the defendants could not, by their purchase, have obtained from Liew any better rights than he had himself. Consequently, if the defendants (in the words of Counsel) chose to take out "an insurance policy" by obtaining an assignment from Liew, such purported assignment is no answer to the plaintiff's claim.

In my opinion what I have stated above sufficiently disposes of the defendants' third and last line of defence. From another standpoint, however. I think the 6th proviso to Section 92 of the Evidence Ordinance should also make admissible "such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of a document is related to existing facts", to quote the words of Lord Davey in Balkishen Das v. Evidence unobjectionable in so far as Legge. Section 92 is concerned clearly establishes the following facts: that (1) Liew was only a market runner working in the Chung Khiaw Bank, not a building contractor or purchaser of property in the ordi-nary course of business; (2) he gave no notice of the assignment of the contract at any time to the defendants; (3) he gave to the plaintiff as consideration a sum of only \$5,000 for a contract on which the plaintiff had paid \$15,000; (4) when the \$24,000 instalment fell due on 23rd June he was as completely unconcerned about its payment as if he had no inter-est in the contract; (5) it was the plaintiff who undertook further liability on 25th June by his letter to defendants; (6) it was the plaintiff himself who on 7th July paid \$5,000 for the extension of time; (7) it was the plaintiff who was anxious to

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pay the balance of \$19,000 before 31st July and (8) who on 28th July found that sum; (9) when the defendants purported on 1st September to rescind the contract and forfeit the part payments, Liew was still not in the least concerned as to the fate of the contract; (10) it was the plaintiff who raised the sum of \$19,000 which was deposited with his own solicitors (Messrs. Lovelace & Hastings) on 8th September, and with the Defendants' solicitors (Messrs. Shearn Delamore & Co.) from 19th September to 19th November; (11) it was the plaintiff who accepted deposits from prospective purchasers; and (12) it was the plaintiff, and not Liew, who instituted proceedings.

Furthermore there is evidence provided by the agreed bundle of documents, covering a period from 24th March 1956 to 22nd January 1957. Such documentary evidence clearly establishes that the plaintiff's conduct at all times was that of a person 20 having rights and obligations under the contract with the defendant. Such conduct completely negatives his having assigned absolutely all his rights under that contract to Liew. Therefore, even if the plaintiff had been debarred from giving evidence of any oral agreement or statement contradicting the terms of the so-called "Sale Deed" of 10th May, 1956, there was nevertheless abundant proof aliunde, by documentary and other admissible evidence, of a state of affairs showing that, whatever the real transaction might have been between the parties, it cer-30 tainly was not an assignment to Liew of all the plaintiff's rights and benefits under the contract between himself and the defendants. In other words, it has been proved by extrinsic evidence of surrounding circumstances that the language of the document in truth had no relation whatever to existing facts. The Defendants' managing director giving evidence has said as follows: "At the time we took P4 we did not know that there was no value attached to it. It is worth money. It is good for my case. prepared to pay \$1,500 to buy evidence." Ir 40 I was In the light of this admission and of the surrounding circumstances it is impossible to hold that the defendants took the assignment from Liew as bona fide purchasers for value in good faith.

For the reasons I have stated above, I hold that by their purported purchase of all Liew's rights the defendants have not succeeded in divesting the In the Court of Appeal

No. 31

Judgment of Ong J.

23rd April 1959 continued.

No. 31

Judgment of Ong J.

23rd April 1959 continued. plaintiff of his right of action. This defence also fails.

The only remaining question, therefore, is: what is the proper quantum of damages that should be awarded to the plaintiff? He in effect had contracted to purchase only 21 lots from the defendant at \$3,000 each, since one lot was to be sold back to defendant for \$3,000, and a house erected thereon by the plaintiff for defendants at an agreed price of \$8,600. Had the contract been duly performed, the plaintiff would also have parted with 8 lots before 31st July at no profit to himself. That would leave him only 13 lots at his disposal, but from evidence of his means it is doubtful whether he had the funds to put up 13 houses. It would therefore not be correct to assess damages on the basis of the profits per house which the defendants themselves had been able to make, using their own available moneys for the purpose. (The finding of the learned trial Judge on this point is \$1,350 per On the other hand, once 8 lots had been house). sold and buildings were starting to rise, there would not have been any difficulty for the plaintiff in finding other ready buyers for lots in the immediate vicinity. He had been able to obtain a price of \$3,000 per lot when driven to sell, and I am of opinion that, under more favourable conditions, he should have been able to realise quite easily a profit of \$500 to \$800 per lot sold even as vacant Taking \$650 as the mean figure, the plainland. tiff's loss of profits on 13 lots would amount to \$8,450. I do not think he would necessarily incur any loss by putting up a house for the defendants on the 22nd lot at a price of \$8,600, and I propose therefore to make no deduction from the figure of \$8,450 as the amount of damages which the defendants should pay as compensation.

Accordingly I would set aside the judgment of the Court below and order (1) that the defendants do repay the sum of \$20,000 to the plaintiff with interest thereon at the rate of 6 per cent per annum with effect from 1st September 1956 till date of payment; (2) that the plaintiff do recover from the defendants the sum of \$8,450 as damages for breach of contract; (3) that the defendants do pay the plaintiff's taxed costs of this appeal and in the Court below and (4) that the plaintiff's deposit of \$500 lying in Court be paid out to him.

(Sd) H.T. Ong.

	JUDGE,
Kuala Lumpur,	SUPREME COURT,
23 April, 1959.	FEDERATION OF MALAYA.

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No. 32

FORMAL ORDER

Before:- The Honourable Dato Sir James Thomson, P.M.N., P.J.K., Chief Justice, Federation of Malaya

The Honourable Mr. Justice Smith, Judge, Federation of Malaya

and

The Honourable Mr. Justice Ong, Judge, Federation of Malaya.

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IN OPEN COURT

This 23rd day of April, 1959

THIS APPEAL coming on for hearing on the 15th day of October, 1958 in the presence of Mr. L.P. Thean of Counsel for the Appellant and Mr. R.H.V. Rintoul (with him Mr. Chan) of Counsel for the Respondent and upon reading the Record of Appeal herein and upon hearing the arguments of Counsel aforesaid IT WAS ORDERED that this appeal do stand adjourned 20 for judgment and this Appeal coming on for judgment this day in the presence of Mr. R.R. Chelliah on behalf of Mr. L.P. Thean and in the presence of Mr. R.H.V. Rintoul IT IS ORDERED that this appeal be allowed and that the judgment of the Honourable Mr. Justice Sutherland dated the 1st day of May, 1958 be set aside AND IT IS ALSO ORDERED that the Respondent do pay to the Appellant a sum of \$20,000.00 (Twenty Thousand dollars) with interest thereon at the rate of 6 (six) per cent per annum with effect from the 1st day of September, 1956 till date of payment 30 AND IT IS FURTHER ORDERED that the appellant do recover from the Respondent the sum of \$8,450.00 (Eight Thousand four hundred and fifty dollars) as damages for breach of contract AND IT IS ALSO FURTHER ORDERED that the Respondent do pay to the Appellant the costs of this Appeal as well as the costs in the Court below as taxed by the proper officer of the Court AND IT IS LASTLY ORDERED that the sum of \$500.00 deposited in the Court by the Appellant be paid to

In the Court of Appeal

No. 32

Formal Order.

23rd April 1959.

No. 32 Formal Order.

23rd April

continued.

1959 -

the Appellant.

Sealed.

Given under my hand and the seal of the Court this 23rd day of April, 1959.

(Sd). Shiv Channan Singh.

Assistant Registrar, Court of Appeal, Federation of Malaya.

No. 33

No. 33

Order granting Conditional Leave to Appeal.

8th July 1959.

ORDER GRANTING CONDITIONAL LEAVE TO APPEAL

BEFORE: THE HONOURABLE MR. JUSTICE HILL, ACTING CHIEF JUSTICE, FEDERATION OF MALAYA; THE HONOURABLE MR. JUSTICE GOOD, AND THE HONOURABLE MR. JUSTICE RIGBY.

IN OPEN COURT

This 8th day of July, 1959

UPON Motion made unto the Court this day by Mr. P. Hall of counsel for the Defendant-Respondent in the presence of Mr. Thean Lip Peng of Counsel for the Plaintiff-Appellant AND UPON HEARING counsel as aforesaid AND UPON READING the Affidavit of Yeow Khim Joe affirmed and filed herein on the 13th day of May, 1959 AND BY CONSENT:

IT IS ORDERED that conditional leave be and is hereby granted to the Defendant-Respondent to appeal to His Majesty the Yang di-Pertuan Agong from the judgment of the Court of Appeal dated the 23rd day of April 1959 upon the following conditions:-

(1) That the Defendant-Respondent do within three (3) months from date hereof enter into good and sufficient security to the satisfaction of the Registrar of the Court of Appeal at Kuala Lumpur in the sum of \$5,000/- for the due prosecution of this Appeal and the payment of all such costs as may become payable to the Plaintiff- Appellant in the event of the Defendant-Respondent not obtaining an

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order granting him final leave to appeal or of the Appeal being dismissed for non-prosecution, or of His Majesty the Yang di-Pertuan Agong ordering the Defendant-Respondent to pay the Plaintiff-Appellant's costs of the Appeal, as the case may be;

AND (2) That the Defendant-Respondent shall within the said period of three months take the necessary steps for the purpose of procuring the preparation of the Record and the despatch thereof to England;

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AND IT IS FURTHER ORDERED that the Defendant-Respondent shall pay into Court: (i) the sum of \$20,000.00 (Twenty thousand dollars) together with interest thereon at the rate of 6 (six) per cent per annum from the 1st day of September 1956 to the 8th day of January 1960; (ii) the sum of \$8,450.00 (Eight thousand four hundred and fifty dollars); and (iii) the taxed costs of the Plaintiff-Appellant's Solicitors within 7 (seven) days of service of the allocatur AND IT IS FURTHER ORDERED that execution of the Judgment appealed from be suspended pending the Appeal AND IT IS LASTLY ORDERED that the costs of this Motion be costs in the Appeal.

GIVEN under my hand and the seal of the Court this 8th day of July, 1959.

(Sd.) Shiv Chaman Singh.

Assistant Registrar, Court of Appeal Federation of Malaya. In the Court of Appeal

No. 33

Order granting Conditional Leave to Appeal. 8th July 1959

- continued.

In the Court of Appeal	No. 34 ORDER GRANTING FINAL LEAVE TO	APPEAL	
Order granting Final Leave to Appeal.	IN THE SUPREME COURT OF THE FEDERATION OF MALAYA IN THE COURT OF APPEAL AT KUALA LUMPUR		
2nd November 1959.	F. M. CIVIL APPEAL NO. 21 of 1958		
	Between:		
	Ng Kim Pong AND -	Appellant	
	Yeow Kim Pong Realty Limited	Respondent	
	(In the matter of Kuala Lumpur C: No. 374 of 1956	ivil Suit	10
	Between:		
	Ng Kim Pong - AND -	Plaintiff	
	Yeow Kim Pong Realty Limited	Defendant)	
	Managara , yawana kata kata na yang kata yang kata kata kata yang kata kata kata kata kata kata kata kat		
	Before: The Honourable Dato Sir James P.M.N., P.J.K., Chief Justic of Malaya; The Honourable Mr. Justice Hi	ce, Federation	

Judge of Appeal; And The Honourable Mr. Justice Good, Judge of Appeal. IN OPEN COURT.

This 2nd day of November 1959.

ORDER

sic

UPON MOTION made unto the Court this day by Mr. D.G. Rawson of Counsel for the abovenamed Defendant-Respondent in the presence of Mr. D.G. Rawson on behalf of Mr. L.P. Thean of Counsel for the Plaintiff-Appellant AND UPON READING the Notice of Motion dated the 22nd day of October, 1959 and the Affidavit of Yeow Khim Joe affirmed on the 22nd day of October 1959 and filed herein on the 23rd day of October, 1959 IT IS ORDERED that final leave be and is hereby granted to the abovenamed Defendant-Respondent to appeal to His Majesty the Yang di-Pertuan Agong

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against the judgment of the Court of Appeal herein dated the 23rd day of April, 1959 AND IT IS ORDERED that the costs of this application be costs in the cause.

Given under my hand and the seal of the Court this 2nd day of November, 1959.

(Sd.) Shiv Charan Singh Assistant Registrar, Court of Appeal Federation of Malaya. In the Court of Appeal

No. 34

Order granting Final Leave to Appeal.

2nd November 1959 continued.

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EXHIBITS

Exhibits P.1.

P.1. - (1) LETTER APPELLANT TO RESPONDENT

(1) Letter Appellant to Respondent.

YEOW KIM PONG REALTY LIMITED

(Incorporated in Federation of Malaya)

25th June 1956.

Klang Cycle Building, 22/24 Klyne Street, P.O. Box No. 102

Kuala Lumpur 25th June 1956.

Mr. Ng Kim Pong, 37 Ceylon Lane, Kuala Lumpur.

Dear Sir,

Purchase Agreement d/d 24.3.1956 re lots 382 to 402 inclusive, Section 24, Town of Klang.

With further reference to the above Purchase Agreement and our letter dated the 21st June 1956, we hereby inform you that as you have failed to pay a further portion of the purchase price in the sum of \$24,000.00 by the 23rd June 1956, the advance pay- 20 ment of \$15,000.00 has been forfeited to us as liquidated damage and the above Purchase Agreement has now become null and void.

We are now instructing our Architect to proceed with the erection of the houses and you are hereby requested to return to us the building plans and specifications which we have loaned to you.

We further inform you that you have erected a Signboard on our land without our permission and we hereby require you to remove the signboard within three days from date hereof, failing which we shall have it removed without further notice.

> Yours faithfully, YEOW KIM PONG REALTY LTD.

> > Sđ.

Managing Director.

P.1. - (2) LETTER RESPONDENT TO APPELLANT

Exhibits

P.1.

(2) Letter

Respondent to Appellant.

Ng Kim Pong, 37, Ceylon Lane, Kuala Lumpur.

25th June, 1956.

25th June 1956.

Towkay Teow Kim Pong, Yeow Kim Pong Realty Ltd., 22/24 Klyne Street, Kuala Lumpur.

10 Dear Sir,

Re: Lots 382 to 403 inclusive, Section 24, Town of Klang.

Further to my conversation with your goodself this morning I wish to confirm same as follows:-

I admit that it is my fault for not fulfilling my part on the agreement to pay you \$24,000.00 which fell due on 23rd June, 1956. This is because I was unable to collect my money in time due to most unexpected circumstances.

I have so far received deposits for booking of four houses on the abovesaid lots and have paid to Mr. Ch'ng of Klang about \$1,800.00 for the 'Kongsi' house and other material on site. Besides, I have brought in my concrete mixer and some other timbers and also have arranged with masons and carpenters to commence work within a week from date.

In view of the above facts I humbly beg of you to grant me extension of time for one month to pay you the said \$24,000.00 otherwise I am afraid I shall get into serious trouble and lose my reputation as a contractor in Klang and Port Swettenham. I shall be very grateful, therefore, if you would be good enough to grant me my request and give me a chance to make good. My future career in Klang depends solely on your sympathetic decision.

For your kind act and because of my own fault I am prepared to let you penalise me, and to this end I suggest to let you have whatever reduction you

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Exhibits may think fit on the agreed price of \$8,600.00 for the house which I am to build for you on contract. I shall also welcome any other suggestion from you on this matter.
 (2) Letter

Respondent to Thanking you and awaiting your favourable reply. Appellant.

25th June 1956 - continued. Yours faithfully,

(Sd.) Ng Kim Pong.

P.1. - (3) RECEIPT APPELLANT TO RESPONDENT

(3) Receipt Appellant to Respondent.

P.1.

YEOW KIM PONG REALTY LIMITED

(Incorporated in the Federation)

9th July 1956.

Registered office

Nos. 27-29 Klyne Street, B. No.1228 Kuala Lumpur.

Kuala Lumpur 9th July, 1956.

Received from Mr. Ng Kim Pong the sum of Dollars Five thousand only being payment in accordance with our letter dated 7th July, 1956.

YEOW KIM PONG REALTY LTD.

Sđ.

\$5,000/-

Director.

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Cash/Cheque.

P.1. - (4) LETTER RESPONDENT'S SOLICITORS TO APPELLANT

5766/56 RR/SK

28th July, 1956.

The Managing Director, Messrs. Yeow Kim Pong Realty Ltd., 22/24 Klyne Street, Kuala Lumpur.

Dear Sir,

Lots 382 to 403 inclusive Section 24, Town of Klang

We have been consulted by Mr. Ng Kim Pong in connection with his agreement with your company of the 24th March, 1956.

Our client has now secured purchasers for 8 of these lots and the purchasers have deposited with Mr. Yong Kung Lin, their Solicitor, the purchase price, and our client has been so notified.

We are therefore to request you to let us have the titles to the 8 lots Nos. 382 - 389 inclusive, in the course of the day, so as to enable their being examined by the Solicitor for the purchasers. Our client will thereafter be able to make payment of the balance due to you in the sum of \$19,000/- before the 31st July, as agreed.

Please treat this letter as urgent and let us have the titles, by return.

Yours faithfully,

(Sd.) Braddell & Ramani.

Exhibits

P.1.

(4) Letter Respondent's Solicitors to Appellant.

28th July 1956.

Exhibits

(5) LETTER APPELLANT'S SOLICITORS TO RESPONDENT'S SOLICITORS

P.1.

31st July 1956.

(5) Letter	SHEARN DELAMORE & CO.
Appellant's	Amalgamated with
Solicitors to	Drew & Napier
Respondent's	Advocates & Solicitors.
Solicitors.	

52 Ampang Road, Kuala Lumpur, Malaya.

Your: RR/SK 5766/56

Our: SD(B) 9443

31st July 1956.

Messrs. Braddell & Ramani, P.O. Box 372. Kuala Lumpur.

Dear Sirs,

Lots 382-403 inclusive Section 24, Town of Klang

Your letter of the 28th instant addressed to our clients Messrs. Yeow Kim Pong Realty Ltd. has been handed to us with instructions to reply thereto.

Our clients instruct us that no building opera-tions have commenced upon the land mentioned in your letter aforesaid, and in accordance with Paragraph 3 of our client's letter of the 27th instant addressed to your client, and to which your client concurred, there can consequently be no transfer of the land as at present advised.

Upon information that building operations have commenced upon the lots in question, our client will 30 be happy to comply with your clients request.

Yours faithfully,

(Sd.) Shearn Delamore & Co.

P.1. - (6) LETTER RESPONDENT'S SOLICITORS TO APPELLANT'S SOLICITORS

5812/56 RR/SK

3rd August, 1956.

Messrs. Shearn Delamore & Co., Advocates & Solicitors, Kuala Lumpur.

Dear Sirs,

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Lots 382 - 403 inclusive Section 24, Town of Klang

We write with reference to your letter of the Blst July, this reply having been delayed because of our Mr. Ramani's absence in Penang until this morning.

The question of building operations being commenced has no relevance to your client's obligations under the Agreement.

Your client accepted \$5,000/- for an extension 20 of time until the 31st July.

He received the money on the 7th, dated the receipt for the 9th and handed it to our client at 5 p.m. on the 24th July, after repeated requests. We shall make no comment on this at this stage.

At the same time a letter dated the 7th was handed to our client imposing certain conditions. That letter is headed "without Prejudice" to which apparently you did not pay sufficient attention.

As we are writing this as an open letter, we 30 desist from referring to any of the conditions set out in that letter.

Our client has on the faith of your client's obligations under the Agreement incurred obligations himself to the purchasers.

Will you let us have a direct answer to our request in respect of the 8 titles immediately required.

In any event we wish to remind you that building operations on these 8 lots which are in fact ready to be commenced, will not be commenced by the purchasers unless they are satisfied about the titles and can lawfully go upon the land. This is what our client is endeavouring to get done.

Yours faithfully,

(Sd.) Braddell & Ramani.

Exhibits

P.1.

(6) Letter Respondent's Solicitors to Appellant's Solicitors.

3rd August 1956.

Exhibits

P.1. - (7) LETTER APPEILANT'S SOLICITORS TO RESPONDENT'S SOLICITORS

P.1.

(7) Letter Appellant's Solicitors to Respondent's Solicitors. SHEARN DELAMORE & CO. Amalgamated with Drew & Napier Advocates & Solicitors.

Your: 5812/56 RR/SK

Our: SD (B) 9443

10th August 1956. 52 Ampang Road, Kuala Lumpur, Malaya.

10th August, 1956.

Messrs. Braddell & Ramani, Advocates & Solicitors, Hongkong Bank Chambers, Kuala Lumpur.

Dear Sirs,

Lots 382 & 403, Section 24 Town of Klang

We acknowledge receipt of your letter of the 3rd instant, and would inform you that our clients 2 are prepared to permit your client to inspect the titles at any time in their offices, but until building operations are commenced they cannot see their way to transfer the lots in questiln.

Yours faithfully,

(Sd.) Shearn Delamore & Co.

P.1. - (8) LETTER APPELLANT'S SOLICITORS TO RESPONDENT

SHEARN DELAMORE & CO. Amalgamated with Drew & Napier Advocates & Solicitors

> 52 Ampang Road, Kuala Lumpur, Malaya.

Exhibits

P.1.

(8) Letter Appellant's Solicitors to Respondent.

1st September 1956.

prn/-

Malaya. 1st September, 1956.

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SD (B) 9443

Ng Kim Pong Esq., 37 Ceylon Lane, Kuala Lumpur.

A.R. REGISTERED

Dear Sir,

Lots 382 & 403, Section 24 Town of Klang

We have been instructed by our clients Messrs. Yeow Kim Pong Realty Ltd. that no action has been taken by you to fulfil your obligations under the contract, or to pay the sum due to our clients.

We are therefore instructed to give you notice that the contract is terminated by reason of your breaches, and that all monies paid to our clients are forfeit.

In consequence you are requested to vacate the land forthwith since you are now a trespasser thereon.

Yours faithfully,

(Sd.) Shearn Delamore & Co.

30 c.c. Ms. Yeow Kim Pong Realty Ltd., 22/24 Klyne Street, Kuala Lumpur.

Exhibits

P.1. - (9) LETTER RESPONDENT'S SOLICITORS TO APPELLANT'S SOLICITORS

P.1.

(9) Letter Respondent's Solicitors to Appellant's Solicitors.

8th September 1956.

8th September, 1956.

NAM/JW/CAK/415/56.

J.G. Bentley Esq., Messrs. Shearn Delamore & Co., Kuala Lumpur.

Dear Sir,

Mr. Ng Kim Pong

With reference to our telephone conversation 10 today we wish to confirm that we are now holding in our client's account the sum of \$19,000.00 in respect of the instalment due to Yeow Kim Pong Realty Ltd. on today's date.

We further understand that you have not yet received instructions from your clients whether they are willing to accept this instalment now. We would ask you to be good enough to obtain these instructions as soon as possible, because our client is most anxious to proceed with this matter.

We confirm that we shall also require all the titles documents in exchange for the \$19,000.00 and would like to know whether these will be made available to us on payment of the instalment of \$19,000.00.

Yours faithfully,

(Sd.) Lovelace & Hastings.

P.1. - (10) LETTER APPELLANT'S SOLICITORS TO RESPONDENT'S SOLICITORS

SHEARN DELAMORE & CO. Amalgamated with Drew & Napier, Advocates & Solicitors.

prn/_

10 NAM/JW/CAK/415/56

11th September, 1956.

52 Ampang Road, Kuala Lumpur.

Malaya.

Exhibits P.1.

(10) Letter Appellant's Solicitors to Respondent's

Solicitors.

11th September 1956.

SD (B) 9443

Messrs. Lovelace & Hastings, Advocates & Solicitors, 57 Klyne Street, Kuala Lumpur.

Dear Sirs,

Ng Kim Pong

With reference to your letter of the 8th 20 instant addressed to our Mr. Bentley, we confirm the telephone conversation of even date in which we informed you that due to the absence of our client in Singapore we were unable to obtain instructions. We shall let you have a reply to this letter as soon as possible.

Yours faithfully,

(Sd.) Shearn Delamore & Co.

Exhibits

P.1. - (11) LETTER RESPONDENT'S SOLICITORS TO APPELLANT'S SOLICITORS

(?) 19th September,

1956.

P.1.

NAM/JW/CAK/415/56

(11) Letter Respondent's Solicitors to Appellant's Solicitors.

19th September

1956.

Messrs. Shearn Delamore & Co., Advocates & Solicitors, Kuala Lumpur.

SD (B) 9443

Dear Sirs,

Mr. Ng Kim Pong and Yeow Kim Pong Realty Ltd. Land at Klang

Our client is perturbed by the fact that you have not yet received instructions from your clients in this matter and accordingly has asked us to write to you in the following terms.

As your clients have had ample time to consider the offer that was mutually put forward at the meeting at your offices on Thursday of last week, our client considers that your clients continued silence can only mean an acceptance on their part of the terms put forward. Our client has therefore asked us to forward you the enclosed cheque for \$19,000.00 which is the amount of the instalment which fell due originally on 31st July last. We would remind you that we have been holding this amount since 8th September.

In exchange would you kindly let us have the Certificates of Titles in respect of the following lots:- 390, 391, 393, 394, 395, 396, 397, 398. These lots will be transferred to our client or his nominee in accordance with the terms of the contract. 30

We would also ask you to be good enough to retain the sum of \$19,000.00 in your own clients' Account until the document of title are handed to you with authority to pass them to us for the purpose of preparing the necessary transfers.

Yours faithfully,

Encl:

(Sd.) Lovelace & Hastings.

No. A 2541

21st September, 1956.

Received from Messrs. Lovelace & Hastings the sum of Dollars Nineteen thousand only being payment of the instalment of amount due by Ng Kim Pong re: Land at Klang. Account Yeoh Kim Pong Realty Ltd.

\$19,000/-

10 Cash/Cheque.

(Sd.) Shearn Delamore & Co.

Stamp

6 cents

21/9/56.

P.1. - (13) LETTER RESPONDENT'S SOLICITORS TO APPELLANT'S SOLICITORS

28th September, 1956.

NAM/JW/CAK/415/56 SD (B) 9443

Messrs. Shearn Delamore & Co., 20 Advocates & Solicitors, Kuala Lumpur.

Dear Sirs,

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Ng Kim Pong and Yeow Kim Pong Realty Ltd. - Sale of land at Klang

Owing to the continued delay on the part of your clients in this matter, our client has instructed us to commence proceedings for Specific Performance of the contract unless we hear from you by Monday next, the 1st October that your clients are willing to proceed.

Yours faithfully,

(Sd.) Lovelace & Hastings.

Exhibits

P.1.

(12) Receipt to Respondent's Solicitors from Appellant's Solicitors.

21st September 1956.

P.1.

(13) Letter Respondent's Solicitors to Appellant's Solicitors.

173.

P.1. - (12) RECEIPT TO RESPONDENT'S SOLICITORS FRCM APPELLANT'S SOLICITORS

P.1. - (14) LETTER APPELLANT'S SOLICITORS TO RESPONDENT'S SOLICITORS

P.1.

(14) Letter Appellant's Solicitors to Respondent's Solicitors. SHEARN DELAMORE & CO. Amalgamated with Drew & Napier, Advocates & Solicitors.

2nd October 1956.

prn/-

52 Ampang Road, Kuala Lumpur Malaya.

NAM/JW/CAK/415/56

SD (B) 9443

2nd October, 1956.

Messrs. Lovelace & Hastings, Advocates & Solicitors, Klyne Street, Kuala Lumpur.

WITHOUT PREJUDICE

Dear Sirs,

Ng Kim Pong vs Yeow Kim Pong

We confirm the telephone conversation of even date between Mr. Williamson and Mr. Bentley in which 20 it was agreed that you would draft a new circular to be sent to the existing tenants of the land in question.

Upon the terms of the same being agreed and upon evidence of posting of the same to the existing tenants, our client will be happy to conclude the matter.

Yours faithfully,

(Sd.) Shearn Delamore & Co.

P.1. - (15) LETTER RESPONDENT'S SOLICITORS TO APPELLANT'S SOLICITORS

Exhibits

P.1.

3rd October 1956.

NAM/JW/CAK/415/56

SD (B) 9443

Messrs. Shearn Delamore & Co. Advocates & Solicitors, Kuala Lumpur.

Dear Sirs,

10 Ng Kim Pong and Yeow Kim Pong Realty Ltd.

With reference to our telephone conversation yesterday, we confirm that your clients are willing to proceed with this matter providing that our client gives a further option to the tenants of the Meru Road properties.

We therefore enclose for your approval a draft of the proposed new circular letter to be sent to the tenants by our client.

We await hearing from you that the titles to the plots as set forth in our letter to you of 19th September are available to us for the purpose of transferring these plots to the purchaser or his nominee. We should like to proceed with this aspect of the matter with no further delay.

Yours faithfully,

(Sd.) Lovelace & Hastings.

Encl:

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(15) Letter Respondent's Solicitors to Appellant's Solicitors.

3rd October 1956.

Exhibits

P.1. - (15a) DRAFT LETTER

P.1.

(15a) Draft Letter. NG KIM PONG 37 Ceylon Lane, Kuala Lumpur.

October, 1956.

M No. Meru Road, Klang.

Dear Sir/Madam,

Re: 102/172 (even) Meru Road, Klang

I would refer you to the letter dated 24th March 1956 which you received from Yeow Kim Pong Realty Limited.

There has been a certain amount of delay in this matter, but the plans are now going forward again, and indeed you have probably noticed that construction work has started on the land where the new houses are to be built.

I have agreed with Yeow Kim Pong Realty Ltd. to give a further option to the tenants of the above properties, which means that if you should want to purchase one of these houses, then you will be able to do so in priority to any other person who is not a tenant at present of one of the above houses.

The plans of the new houses can, as before, be seen at my address as above or, alternatively, at

1. Yeow Kim Pong Realty Ltd., 2	2. Le	ee Eng Ton,
22/24 Klyne Street,	24	4, Sultan Street,
Kuala Lumpur.	Τ	op Floor, Klang.

The Company or myself will also of course be happy to let you have all the additional information which you will require concerning Building Society advances etc.

If you wish to purchase one of the new houses, will you please inform me personally within twenty one days of the date of this letter. This, I feel sure, will give you sufficient time to discuss and 20

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investigate the financial side of the matter before reaching your decision. If however I have not heard from you by the end of that time, I shall immediately make arrangements for the sale of these houses to third parties. There is of course no obligation upon you to purchase any house merely because you inspect the plans or make enquiries about it. You will not be bound to purchase unless and until you sign the current form of contract.

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I hope you will take advantage of this offer and I await hearing further from you.

Yours faithfully,

P.1. - (16) LETTER RESPONDENT'S SOLICITORS

9th October, 1956.

JW/CYC/415/56

Messrs. Shearn Delamore & Co., Advocates & Solicitors, Kuala Lumpur.

Dear Sirs,

Ng Kim Pong & Yeow Kim Pong Realty Ltd.

Will you please inform your clients that unless we have received the draft circular letter approved or amended by Monday next, 15th October, we shall assume that they are once again unwilling to proceed with this matter and will therefore forthwith institute proceedings for a decree for specific performance of the contract.

Yours faithfully,

(Sd) Lovelace & Hastings.

Exhibits

P.1.

(15a) Draft Letter continued.

P.1.

(16) Letter Respondent's Solicitors to Appellant's Solicitors.

9th October 1956.

P.1. - (17) LETTER RESPONDENT'S SOLICITORS TO APPELLANT'S SOLICITORS

P.1.

(17) Letter Respondent's

Solicitors to Appellant's

25th October, 1956

NAM/JW/CAK/415/56

SD (B) 9443

25th October 1956.

Solicitors.

Messrs. Shearn Delamore & Co., Advocates & Solicitors, Kuala Lumpur.

Dear Sirs,

Dear Mr. Ng,

Ng Kim Pong and Yeow Kim Pong Realty Ltd.

Please inform your clients that unless the draft circular as agreed and the titles are handed to us within the next ten days, proceedings will be commenced without further delay or notice.

With reference to our letter of 19th September, would you kindly return to us forthwith the sum of \$19,000.00 paid on that date. Our client is still willing and able to complete the contract and will pay this sum as soon as your clients are prepared to perform their part, but our client does not want this 20 money to lie fallow until then.

Yours faithfully,

(Sd.) Lovelace & Hastings

P.1.

P.1. - (18) LETTER TO RESPONDENT

(18) Letter to Respondent.

26th October 1956.

I have not got a chance to speak to my boss yet. You can leave the matter to me for another day or two and I assure you that I will do whatever I can to finalise the matter early. I shall not be seeing you this evening and as soon as I have spoken to my boss, I'll contact you - I think by Monday the latest. You have no need to telephone me.

If necessary, I'll see you earlier than Monday.

Sincerely yours,

(Sd.)

26.10.56.

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P.1. - (19) LETTER RESPONDENT'S SOLICITORS TO APPELLANT'S SOLICITORS

7th November, 1956.

NAM/JW/CAK/415/56

SD (B) 9443

Messrs. Shearn Delamore & Co., Advocates & Solicitors, Kuala Lumpur.

Dear Sirs,

10 <u>Ng Kim Pong and Yeow Kim Pong Realty Ltd.</u>

Owing to the continued delay on the part of your clients in this matter, our client has now assumed that they are unwilling to proceed with the sale.

We have been instructed therefore to ask for an immediate return of the full deposit paid by our client under the terms of the contract and also for payment of damages as follows:

Estimated loss of profit on sale of 21 lots with houses built thereon net profit \$3,000.00 per lot. \$64,000.00

Would you therefore kindly inform your clients that unless we receive at least a reasonable offer within the next seven days for the settlement of our client's claim we shall forthwith commence proceedings against your clients for damages for breach of contract.

Yours faithfully,

(Sd.) Lovelace & Hastings.

Exhibits

P.1.

(19) Letter Respondent's Solicitors to Appellant's Solicitors.

7th November 1956.

P.1.

(20) Letter

Appellant's Solicitors to

Appellant.

P.1. - (20) LETTER APPELLANT'S SOLICITORS TO APPELLANT

14th November, 1956.

S.D.(B) 9443

14th November 1956.

Messrs. Yeow Kim Pong Realty Ltd., Klyne Street, Kuala Lumpur.

Dear Sirs,

Re: Ng Kim Pong

Further to the recent conversation between Mr. 10 Tham and our Messrs. Rawson and Bentley, we confirm that unless we receive from you the titles in question together with blank transfers by Saturday, November 17, 1956 we shall have no option but to return the sum of \$19,000/- to Messrs. Lovelace & Hastings.

Yours faithfully,

c.c. Messrs. Lovelace & Hastings, 57 Klyne Street, Kuala Lumpur.

P.1. - (21) LETTER APPELLANT'S SOLICITORS TO RESPONDENT'S SOLICITORS

SHEARN DELAMORE & CO. Amalgamated with Drew & Napier, Advocates & Solicitors

52 Ampang Road, Kuala Lumpur, Malaya.

19th November, 1956.

S.D.(B) 9443

Messrs. Lovelace & Hastings, 57 Klyne Street, Kuala Lumpur.

Dear Sirs,

Ng Kim Pong & Yeow Kim Pong Realty Ltd.

We thank you for your letter of the 7th inst., and we notified the contents thereof to our clients.

We now enclose our cheque for \$19,000.00 being a return of the deposit as requested.

Kindly acknowledge receipt.

Yours faithfully,

(Sd.) Shearn Delamore & Co.

P.1. - (22) LETTER RESPONDENT'S SOLICITORS TO APPELLANT'S SOLICITORS

20th November 1956

NAM/JW/CAK/415/56

S.D.(B) 9443

Messrs. Shearn Delamore & Co., Advocates & Solicitors, Kuala Lumpur.

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Dear Sirs,

Ng Kim Pong and Yeow Kim Pong Realty Ltd.

We thank you for your letter returning the \$19,000.00 in this matter, and now enclose our receipt therefor.

As we informed you yesterday morning proceedings have been commenced. Have you instructions to accept service?

Yours faithfully,

(Sd.) Lovelace & Hastings.

40 Encl: P.1.

(22) Letter Respondent's Solicitors to Appellant's Solicitors.

20th November 1956.

Exhibits

P.1.

(21) Letter Appellant's Solicitors to Respondent's Solicitors.

19th November 1956.

P.2. - LETTER APPELLANT TO RESPONDENT

(295)

P.2.

Exhibit P2 Civil Suit 374/56

Letter Appellant to Respondent.

7th July 1956.

Stamped \$25/- and .50 cents cancelled STAMP OFFICE 16 FE 57. KUALA LUMPUR.

No.31/57 Penalty under section 47 of the Stamp Ordinance of 1949 \$25/-.

Sd: Illegible Dy. COLLECTOR OF STAMP DUTIES SELANGOR.

7th July, 1956.

WITHOUT PREJUDICE

Mr. Ng Kim Pong, 37 Ceylon Lane, Kuala Lumpur.

Dear Sir,

Lots 382 to 403 inclusive Section 24, Town of Klang

With reference to your letter of the 25th June 1956 we are prepared to permit you an extension of time within which to pay the sum of \$24,000.00 on the following conditions:-

- 1. To pay us a sum of \$5,000.00 forthwith and the balance of \$19,000.00 to be paid on or before the 31st July, 1956.
- 2. Construction work on the above land must be 30 commenced within one week of the date hereof.
- 3. Construction must have begun on any land that is sought to be transferred.
- 4. Should there be any breach of the above conditions, the \$5,000.00 above mentioned, if paid, will be forfeited and the extension of time withdrawn.

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Further, full payment of the balance of \$27,000.00 must be made on or before the 23rd December 1956.

Yours faithfully, Yeow Kim Pong Realty Ltd.

(Sd.) Yeow Kim Joe

Managing Director

I, Ng Kim Pong, acknowledge the receipt of the original copy of this letter and agree to the terms 10 as stated.

Ng Kim Pong

5 p.m. 24/7/56.

P.4. - SALE DEED

Exhibit P4 Civil Suit 374/56.

(52)

7th July 1956

- continued.

P.4.

Sale Deed.

10th May 1956.

\$100/-

Stamped

Sale Deed

In consideration of the sum of Dollars Ten thousand only \$10,000/- paid to me by Mr. Liew Thean Siew of No.70 Ampang Street Kuala Lumpur which sum I do hereby acknowledge.

I the undersigned Ng Kim Pong of No.37 Ceylon Lane do hereby sell and transfer the Agreement to Purchase dated the 24th March 1956 between me and the Yeow Kim Pong Realty Limited free from encumbrances, to the said Liew Thean Siew.

Dated this 10th day of May 1956.

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(Sd.) Ng Kim Pong. Signature.

Recd. Cash (510,000/-)

(Sd.) Ng Kim Pong.

Witness.

Sd. ?

10.5.56.

Exhibits

P.2.

to Respondent.

Letter Appellant

Exhibits

P.10. - AGREEMENT FOR SALE OF 22 LOTS OF LAND, APPELLANT TO RESPONDENT

P.10.

Agreement for sale of 22 lots of land, Appellant to Respondent.

24th March 1956.

Exhibit P.10. Civil Suit 374/56.

STAMP.

An Agreement made this 24th day of March, 1956 between YEOW KIM PONG REALTY LIMITED a Company registered in the Federation of Malaya and having its Registered Office at Nos 22 / 24, Klyne Street, Kuala Lumpur, (hereinafter called the Vendor) of the one part and NG KIM PONG, trading as NG KEH & SON of No.37, Ceylon Lane, Kuala Lumpur, (hereinafter called the Purchaser) of the other part.

Whereas the Vendor is the registered owner of the 22 lots of land described in the Schedule hereto attached (hereinafter referred to as the Property);

And Whereas the Vendor has caused Building Plans prepared by LEE ENG TONG of No. 24, Sultan Street, Klang, (hereinafter called the Architect) which have been approved by the Town Council, Klang, under Plans Nos. 185/55, 185A/55, 185B/55, 185C/55 and 185D/55 for the erection of 21 Terrace Houses on the said Property:

And Whereas the Purchaser intends to erect the said 21 Terrace Houses for sale and agrees to give priority for such sale to the 36 Tenants of the Vendor of premises known as Nos. 102, 104, 106, 108, 110, 112, 114, 116, 118, 120, 122, 124, 126, 128, 130, 132, 134, 136, 138, 140, 142, 144, 146, 148, 150, 152, 154, 156, 158, 160, 162, 164, 166, 168, 170 and 172 Meru Road Klang, (hereinafter called the Tenants):

And Whereas the Vendor has agreed to sell and the Purchaser has agreed to purchase the said Property for the sum of Dollars Sixty Six thousand (\$66,000.00) only and the Vendor agrees to transfer such lot or lots of the Property described in the said Schedule to the Purchaser or any of his nominees or assigns free from all encumbrances as the Purchaser shall elect subject to the terms and conditions as mentioned hereafter:

NOW THIS AGREEMENT WITNESSETH as follows:-

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1. Now in consideration of the above premises and in consideration of the sum of Dollars Fifteen thousand (\$15,000.00) only paid by the Purchaser to the Vendor, the receipt whereof the Vendor hereby acknowledges, as part payment towards the said purchase price it is mutually agreed as follows:-

2. The Purchaser shall pay to the Vendor a further portion of the ourchase money in the sum of \$24,000.00 (Dollars Twenty four thousand only) on or before the 23rd day of June 1956, and the balance of the Purchase money in the sum of \$27,000.00 (Dollars Twenty seven thousand only) shall be paid by the Purchaser to the Vendor on or before the 23rd day of December, 1956.

3. As and when the Purchaser pays to the Vendor each sum of \$3,000.00 (Dollars Three thousand only) forming part of the payments mentioned in Clause 2 above, the Vendor shall transfer to the Purchaser or any of his nominees or assigns any one lot of the said Property described in the said Schedule provided the above-mentioned sum of \$24,000.00 (Dollars Twenty four thousand only) shall be paid in full by the Purchaser to the Vendor on or before the 23rd day of June, 1956, and the balance of the purchase money in the sum of \$27,000.00 (Dollars Twenty seven thousand only) shall be paid in full by the Purchaser to the Vendor on or before the 23rd Upon payment of the full day of December, 1956. amount of the purchase money in the sum of \$66,000.00 30 (Dollars Sixty six thousand only) the Vendor shall transfer to the Purchaser the balance or all of the Property as described in the said Schedule to the Purchaser or any of his nominees or assigns.

The Purchaser agrees to construct at his 4. own costs and expenses such roads and back lanes within and adjoining the said 21 New Terrace Houses as may be required by the Town Council.

The Purchaser shall pay to the Architect 5. the total sum of \$2,520.00 (Dollars Two thousand five hundred and twenty only) being professional fees for the preparation of the Building Plans for the said 21 Terrace Houses at \$120/- (Dollars One hundred and Twenty only) per house. The said fees shall include periodical supervision of the said construction work and any amendments to the said approved plans and or extra prints of the plans as

Exhibits

P.10.

Agreement for sale of 22 lots of land, Appellant to Respondent.

24th March 1956 continued.

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P.10.

Agreement for sale of 22 lots of land, Appellant to Respondent.

24th March 1956 continued. may be necessitated during the period of construction of the said 21 Terrace Houses. The payment to the Architect shall be made by instalments according to progress of work done.

6. The Vendor shall produce for the purpose of inspection when necessary, any or all of the titles in respect of the said Property to the Purchaser or to any of his nominees or assigns when requested by the Purchaser.

7. Upon signing of this Agreement the Vendor shall inform all his said 36 Tenants regarding the priority given to them to purchase any of the said 21 Terrace Houses according to the normal terms and conditions of sale offered by the Purchaser. This priority shall hold good for a period of fourteen (14) days from date of this agreement, after which the Purchaser shall reserve his right to sell the said houses to any other prospective buyers.

8. Beginning from the 1st day of January, 1956, the Purchaser shall be liable to pay the quit rent, assessments and other outgoings in respect of the said Property.

9. Within one (1) week from date hereof the Vendor shall give access to the Purchaser to the whole property described in the said Schedule so that work may be commenced on any of the said 21 building lots as the Purchaser may think fit.

10. In the event the Purchaser fails to pay the sums of money on the respective dates aforementioned the said advance money of \$15,000.00 (Dollars Fifteen thousand only) paid by the Purchaser to the Vendor shall be forfeited to the Vendor as liquidated damages and this agreement shall be treated as null and void in so far as the untransferred lot or lots in the Property are concerned. All constructions made on the untransferred lots shall become the property of the Vendor.

11. The costs and incidentals to this Agreement and of the transfer shall be borne by the Purchaser.

12. This Agreement shall be binding upon the heirs, successors, legal representatives and assigns of the parties hereto.

IN WITNESS WHEREOF the parties hereto have

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hereunto set their hands the above written.	e day and year first	Exhibits
		P.10.
Signed by the said VENDOR) in the presence of :-) Sd. illegible	YEOW KIM PONG REALTY LTD. Sd. illegible Managing Director.	Agreement for sale of 22 lots of land,
Advocate & Solicitor Kuala Lumpur.		Appellant to Respondent.
Signed by the said PUR-) CHASER in the presence of)	Sd. Ng Kim Pong.	24th March 1956 - continued.
Sd. illegible		

Advocate & Solicitor

Kuala Lumpur.

SCHEDULE ABOVE REFERRED TO

Certifi-cate of

Title	Lot	Section	Area	Town	District
15619 15620 15621 15623 15623 15624 15625 15626 15629 15630 15631 15632 15631 15634 15635 15635 15636 15637 15638 15639 1	3888889901234567890123 399999999999999999999999999999999999	222222222222222222222222222222222222222	1,600 sq.ft. 1,600 " 1,600 " 1,538 " 0a.1r.22p.	Klang 11 11 11 11 11 11 11 11 11 11 11 11 11	Klang " " " " " " " " " " " " " " " " " " "

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D.5. - LETTER YONG KUNG LIN TO RESPONDENT

D.5.

Exhibit D5 Civil Suit 374/56.

Letter Yong Kung Lin to Respondent.

405/56.

27th July 1956.

6, Klyne Street, Kuala Lumpur.

27th July, 1956.

Mr. Ng Kim Pong, No. 37 Ceylon Lane, Kuala Lumpur.

Dear Sir,

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Re: Certificate of Title Nos.15619 to 15626 Lot Nos.382 to 389 Sec: 24 (8 vacant house lots) Town and District of Klang (Meru Road).

I am acting for Messrs. Goh Soo Hean and Yap Kim Kee of No. 51F Peel Road, Kuala Lumpur.

I am instructed by my clients to say that they have deposited with me two cheques amounting to \$24,000/- being the full payment of the agreed purchase price for the above 8 vacant house lots of land at Meru Road, Klang, at the rate of \$3,000/per lot, free from all encumbrances.

Will you therefore come to my office and bring with you the above title deeds to me for the purpose of preparing a transfer in favour of my clients at your earliest convenience.

Yours faithfully,

(Sd.) Yong Kung Lin.

D.6. - UNDERTAKING MADE BETWEEN GOH SOC HEAN AND RESPONDENT

Exhibit D6

Civil Suit 374/56

Goh Soo Hean & Yap Kim Kee, 51F Peel Road, Kuala Lumpur. 27th July 1956. D.6. Undertaking

made between Goh Soo Hean and Respondent.

27th July 1956.

Mr. Ng Kim Pong, No. 37, Ceylon Lane, Kuala Lumpur.

Dear Sir,

To:

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UNDERTAKING. Re: C.T.Nos.15619 to 15626 Lot Nos.382 to 389 Sec. 24 (8 vacant house lots) at Meru Road, Town of Klang.

In consideration of you agreeing to sell and transfer the above lands to us we hereby agree and undertake to pay to your architect Mr. Lee Eng Tong of No. 24 Sultan Street, Klang, the sum of Dollars Nine hundred and sixty \$960/-) only being the fees for the building plans in respect of the above 8 houses drawn by him which have been duly approved by the Town Council, Klang. The said sum of \$960/will be paid by us as soon as certificates of fitness for occupation have been obtained for us in respect of the above houses by the said architect 30 Mr. Lee Eng Tong.

It is also hereby agreed that the temporary shed thereat belonging to you shall be jointly used by us free of rent until the completion of the said houses. The expenses for the road frontage to the length of the said 8 houses shall be paid by us and you in equal shares. The pipe installation for water supply shall be at our expense, but the water bills shall be paid by us and you proportionately according to the number of houses built.

It is further hereby agreed that in the event

Yo	urs faithfully,	
(Sd.)	Goh Soo Hean	
(Sd.)	(in Chinese) Goh Soo Hean Yap Kim Kee	

Undertaking made between Goh Soo Hean and Respondent.

Exhibits

D.6.

27th July 1956 - continued.

I, Ng Kim Pong hereby agree to the above terms.

(Sd.) Ng Kim Pong. Ng Kim Pong.

D.7.

D.7. - DEED OF ASSIGNMENT MADE BETWEEN LIEW THEAN SIEW AND APPELLANT

Deed of Assignment made between Liew Thean Siew and Appellant.

Exhibit D7 Civil Suit 374/56

STAMPED

8th April 1957.

THIS DEED OF ASSIGNMENT is made the 8th day of April 1957 Between LIEW THEAN SIEW of 70 Ampang Street Kuala Lumpur (hereonafter called "the Assignor") of the one part and YEOW KIM PONG REALTY LIMITED a Company incorporated in the Federation of Malaya of Nos. 22/24 Klyne Street Kuala Lumpur (hereinafter called "the Company") of the other part.

WHEREAS by a Deed dated the 10th day of May 1955 Ng Kim Pong of 37 Ceylon Lane Kuala Lumpur sold and transferred to the Assignor all his right benefit and interest in and under an agreement to purchase dated the 24th March 1956 made between the said Ng Kim Pong and the Company.

AND WHEREAS the Company have recognised the said sale and transfer to the Assignor and released the said Ng Kim Pong from his contractual obligations under the said agreement to purchase.

AND WHEREAS the Assignor has agreed to sell to

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the Company at the price of \$1500 all his right benefit and interest in the said agreement to purchase.

NOW THIS DEED WITNESSETH:-

IN CONSIDERATION of the sum of \$1500 paid by the Company to the Assignor (who acknowledges the reccipt thereof) the Assignor as beneficial owner assigns to the Company ALL THAT the said recited agreement to purchase dated the 24th March 1956 and all the estate right title benefit and advantage property claim and demand whatsoever of the said Assignor of in or to the same TO HOLD the same unto the Company absolutely.

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

SIGNED by the	said LIEW)		
THEAN SIEW in		Sd.	Liew Thean Siew 8.4.1957
of :-)		0.4.1997

20 Sd. Illegible.

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THE COMMON SEAL of YEOW KIM PONG REALTY LIMITED was hereunto affixed in the presence of

> Sd. Illegible. Director.

Sd. Illegible. Managing Director. Exhibits

D.7.

Deed of Assignment made between Liew Thean Siew and Appellant.

8th April 1957 - continued.

Exhibits

D.11. - FIVE TENDERS (FIRST)

D.11.

Exhibit "D.11" - 1 in Five Tenders

15th February 1956.

(First).

Civil Suit No.374/56 Sd. In English

S.A.R.

Contractor: Ching Siong Keng, 37, Kapar Road, Klang.

20.3.58.

Form of Tender

Tender for the Construction of Proposed Terrace Houses on Lots 382 to 392; 393 to 396 and 397 to 402 (21 Houses), including sanitary Installations and Water Supply at Meru Road, Klang all in accordance with the plans and Specification.

> \$180,600/-Lump Sum

Dollars One hundred and eighty thousand six hundred only.

Conditions

- The whole work to be carried out in accordance 1. with the plans and specification and to be complete within a period of 50 week from date of acceptance of tender under a penalty of \$10.00for every day by which that term is exceeded.
- 2. No advance to be made except on work actually done.
- 3. Messrs. Yeoh Kim Pong Realty Co. Limited Kuala Lumpur do not bind themselves to accept the lowest or any tender.

Dated 15th February, 1956.

(Sd.) In Chinese

Contractor.

D.11. - FIVE TENDERS (SECOND)

Contractor:

Exhibits

D.11.

Five Tenders (Second).

25th February

1956.

Sd. In English S.A.R.

Exhibit "D.11" - 2 in

Civil Suit No.374/56

Tan Kin Tin & Co. 51A, Ipoh Road, Kuala Lumpur.

20.3.58.

Phone 4489

Form of Tender

10 Tender for the Construction of proposed Terrace Houses on Lots 382 to 392; 393 to 396 and 397 to 402 (21 houses), including Sanitary Installations and Water Supply at Meru Road, Klang all in accordance with the Plans and Specification.

Lump Sum \$202,300/-

Dollars Two hundred and two thousand three hundred only.

N.B. The above price includes Piling Works.

Conditions

- 20 1. The whole work to be carried out in accordance with the plans and specifiction and to be complete within a period of 20 week from date of acceptance of tender under a penalty of \$10.00 for every day by which that term is exceeded.
 - 2. No advance to be made except on work actually done.
 - 3. Messrs. Yeoh Kim Pong Realty Co. Limited Kuala Lumpur do not bind themselves to accept the lowest or any tender.
- 30 Dated 25th February, 1956.

(Sd.) In English

Chop of Tan Kim Ton & Co.

Exhibits	D.11 FIVE TENDERS (THIRD)			
D.11.	Exhibit "D.11" - 3			
Five Tenders (Third).	in Civil Suit No.374/56. Contractor: Yeo Kian Ann			
25th February 1956.	Sd. In English 174C Meru Road, S.A.R. Klang.			
	20.3.58			

Form of Tender

Tender for the Construction of proposed Terrace 10 Houses on Lots 382 to 392; 393 to 396 and 397 to 402 (21 Houses), including Sanitary Installations and Water Supply at Meru Road, Klang all in accordance with the Plans and Specification.

Lump Sum \$209,000/-

Dollars Two hundred and nine thousand only.

Conditions

- 1. The whole work to be carried out in accordance with the plans and specification and to be complete within a period of week from date of acceptance of tender under a penalty of \$10.00 for every day by which that term is exceeded.
- 2. No advance to be made except on work actually done.
- 3. Messrs. Yeoh Kim Pong Realty Co. Limited Kuala Lumpur do not bind themselves to accept the lowest or any tender.

Dated 25th February, 1956.

(Sd.) In English. 30

Contractor.

D.11. - FIVE TENDERS (FOURTH)

Exhibits

D.11.

Exhibit "D.11" - 4 in Five Tenders Clvil Suit No. 374/56 Contractor: Yeoh Hai Chong Sd. In English Address: 32, Bukit Kuda S.A.R. Road, Klang. 1956.

20.3.58

c/o Kim Chin Hoe.

Form of Tender

10 Tender for the construction of Proposed Terrace Houses on Lots 382 to 392; 393 to 396 and 397 to 402 (21 houses), including Sanitary Installations and Water Supply at Meru Road, Klang all in accordance with the Plans and Specification.

Lump Sum \$211,000/-

Dollars Two hundred and eleven thousand only.

Conditions

- 1. The whole work to be carried out in accordance with the plans and specification and to be complete within a period of week from date of acceptance of tender under a penalty of \$10.00 for every day by which that term is exceeded.
- 2. No advance to be made except on work actually done.
- 3. Messrs. Yeoh Kim Pong Realty Co. Limited Kuala Lumpur do not bind themselves to accept the lowest or any tender.

Dated 23rd February, 1956.

(Sd.) In English

Contractor.

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Exhibits

D.11. - FIVE TENDERS (FIFTH)

D.11.

Five Tenders (Fifth).

24th February

1956.

Civil Suit No.374/56 C Sd. In English S.A.R.

Exhibit "D.11" - 5

in

Contractor: Yap Hong Oon, Address: 66B, Hale Road, Kuala Lumpur.

20.3.58.

Form of Tender

Tender for the Construction of Proposed Terrace 10 Houses on lots 382 to 392; 393 to 396 and 397 to 402 (21 houses), including Sanitary Installations and Water Supply at Meru Road, Klang all in accordance with the Plans and Specification.

Lump Sum \$222,600/-

Dollars Two hundred and twenty two thousand and six hundred only.

Conditions

- The whole work to be carried out in accordance with the plans and specification and to be complete within a period of week from date of acceptance of tender under a penalty of \$10.00 for every day by which that term is exceeded.
- 2. No advance to be made except on work actually done.
- 3. Messrs. Yeoh Kim Pong Realty Co. Limited Kuala Lumpur do not bind themselves to accept the lowest or any tender.

Dated 24th February, 1956.

(Sd.) In English.

Contractor.

D.12. - ACREEMENT FOR RE-SALE OF LAND

Exhibit D.12. Civil Suit 374/56.

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STAMP.

AN AGREEMENT is made this 24th day of March, 1956 between YEOW KIM PONG REALTY LIMITED a Company registered in the Federation of Malaya and having its Registered Office at Nos. 22 and 24, Klyne Street, Kuala Lumpur (hereinafter called the Vendor) of the one part and NG KIM PONG trading as NG KEH & SON of No.37 Ceylon Lane, Kuala Lumpur (hereinafter called the Purchaser) of the other part.

WHEREAS the Vendor is the registered owner of the 22 lots of land described in the attached Schedule hereto (hereinafter referred to as the Property) which the Vendor has agreed to sell and the Purchaser has agreed to purchase under a separate Agreement.

AND WHEREAS the Vendor has called for Tenders for the erection of 21 Terrace Houses on the said Property in accordance with the Building Plans approved by the Town Council, Klang as Approved Plans Nos. 185/55, 185A/55, 185B/55, 185C/55 and 185D/55 and has decided to award the Contract to the successful Tenderer, CH'NG SION KENG of No. 37, Kapar Road, Klang (hereinafter called the Contractor) for the sum of Dollars One hundred and Eighty Thousand and Six Hundred Only (\$180,600.00) including Sanitary and Electrical Installations and water supply.

AND WHEREAS the Vendor is desirous of retaining the lot of land mentioned in the said Schedule as Certificate of Title No. 15629 for Lot 392 Section 24 in area of 1,600 square feet in the Town and District of Klang, State of Selangor and marked (/) to which the Purchaser hereby agrees.

NOW in consideration of the said separate Agreement in respect of the sale of the 22 lots of land mentioned in the said Schedule by the Vendor to the Purchaser and the premises and the Agreement herein IT IS HEREBY MUTUALLY AGREED among the parties hereto as follows:-

1. That the Purchaser agrees to re-sell and the Vendor agrees to re-purchase the land under Certificate of Title No. 15629 for Lot 392 Section 24 in

Exhibits

D.12.

Agreement for re-sale of land.

24th March 1956.

D.12.

Agreement for re-sale of land.

24th March 1956 - continued.

area of 1,600 square feet in the Town and District of Klang, State of Selangor described in the Schedule and marked (\neq) for the sum of Dollars Three Thousand only (\$3000.00) which sum of money shall be deducted by the Purchaser from the sum of Dollars Twenty-seven Thousand only (\$27,000.00) to be paid by the Purchaser to the Vendor on or before the 23rd day of December 1956 as contained in the separate Agreement abovementioned.

2. The Purchaser shall construct for the Vendor 10 one Terrace House on the land Lot 392 abovementioned in accordance with the Approved Plans abovementioned including one Washing Well and one Washing Stool in the Kitchen, Sanitary Installation, Electrical Installation for ten Lighting Points and Water Supply for four Water Taps and the making of the roads and back lanes at an inclusive price of Dollars Eight Thousand Six Hundred only (\$8,600.00) to be paid by the Vendor to the Purchaser as and when Progress Payment Certificates are issued by the Superintending Architect, Lee Eng Tong of Klang. The Professional Fee payable to the Superintending Architect in respect of the Terrace House herein referred to shall be paid by the Purchaser.

As from the 1st day of January 1956 the Vendor 3. shall be liable to pay the Quit rent and Assessments in respect of the said Lot 392 abovementioned.

4. In the event of any claim by the successful Tenderer, Ch'ng Siong Keng abovementioned upon the Vendor arising from the non-award of the Contract to 30 the said Contractor by the Vendor, the Purchaser hereby agrees to indemnify and keep indemnified the Vendor against any loss, claim, proceeding cost or expense arising out of any claim by the said Contractor.

5. The Cost and incidental to this Agreement shall be borne by the Purchaser.

6. In the event the Purchaser fails to observe any of the conditions contained herein the Vendor shall have the right to cancel the separate Agreement above- 40 mentioned and the advance money paid to the Vendor by the Purchaser under the said separate agreement abovementioned shall be forfeited to the Vendor as liquidated damage.

7. This Agreement shall be binding upon the heirs,

successors, legal representatives and assigns of the parties hereto.

Exhibits

D.12.

land.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first above Agreement for written. re-sale of

Signed by the said Vendor) YEOW KIM PONG REALTY LTD. in the presence of:-) Sd. Illegible 24th March 1956 Managing Director. - continued.

Sd. Illegible

Signed by the said Pur-) 10 chaser in the presence of) Sd. Ng Kim Pong

Sd. Illegible

SCHEDULE ABOVE REFERRED TO

Certifi- cate of Title	Lot	Section	Ar	<u>'ea</u>	Town	District
15619 15620 15621 15622 15622 15623 15624 15626 15629 15629 1563312 156334 156334 156334 1566334 1566356 1566356 156639 156659	3888 3888 3888 37 37 37 37 37 37 37 37 37 37 37 37 37	222222222222222222222222222222222222222	1,600 1,556 1,5566	tt	Klang " " " " " " " " " " " " " " " "	Klang " " " " " " " " " " " " " " " " " "
15640	403	24	0a.lr.2	22p.		