10/1982

IN THE PRIVY COUNCIL No.20 of 1980

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. 12 OF 1978

(On appeal from High Court Action No.2459 of 1976, High Court Miscellaneous Proceedings No.155 of 1977 and High Court Miscellaneous Proceedings No.540 of 1977)

BETWEEN:

DAVID NG PAK SHING MELVILLE EDWARD IVES HO CHAPMAN FERMAY COMPANY LTD.	1st Appellant 2nd Appellant 3rd Appellant 4th Appellant	(The 4th, 5th, 6th and 7th Defendants in High Court Action No. 2459 of 1976, High Court Miscellaneous Proceedings No. 155 of 1977, and High Court Miscellaneous Proceedings No. 540 of 1977)

- and -

LEE ING CHEE also known as LEE HAI HOCK	1st Respondent	(The Plaintiff in High Court Action No.2459 of 1976)
LEE KON WAH	2nd Respondent	(The Plaintiff in High Court Miscellaneous Proceedings No.155 of 1977)
MALAYSIA BORNEO FINANCE CORPORATION (M) BERHAD	3rd Respondent	(The Plaintiff in High Court Miscellaneous Proceedings No.540 of 1977)

CASE FOR 3RD RESPONDENTS

RECORD

1. This is an appeal by leave of the Court of Appeal of Hong Kong against the Order of the Court of Appeal (Briggs C.J., Huggins and Pickering JJ.A.) dated 22nd day of March, 1979 which effectively dismissed the appeal by the present Appellants from the Order of the Honourable Mr. Justice Yang dated 25th January, 1978. Yang, J. had ordered that, consequent

1127-1128

1077-1080

RECORD

upon certain findings made by him in a trial which lasted 39 days,

(i) sundry parcels of shares totalling 15,880,160 in San Imperial Corporation Limited be charged, and

(ii) HK$2,813,300, being the balance of the proceeds of other shares in San Imperial, be garnished

with the payment of certain debts due on judgments obtained by the Respondents against one Choo Kim San, a fugitive. Those debts were at the date of his Lordship's order equivalent to HK$17,079,611.69 plus interest (MBF) and M$3,692,689.29 plus interest (the Lees).

2. The basis of the judgments of both the Court of Appeal and of the trial judge was that the present Appellants were acting in concert with or on behalf of the fugitive and had no independent title to the shares of which he, Choo Kim San, was the beneficial owner. The Court of Appeal, however, differed from the trial judge in concluding that 15,000,000 of the shares had been validly agreed to be sold to SKC and that, accordingly, the judgment creditors' remedy lay against the proceeds of sale of those shares rather than against the shares themselves.

DEFINITIONS AND PERSONS CONCERNED

3. In this case the following expressions have the meanings or persons are identified as respectively indicated against them :-

San Imperial	:	San Imperial Corporation Limited a company incorporated in Hong Kong
C.K. San	:	Choo Kim San, a fugitive
M$	:	Malaysian dollars
HK$	:	Hong Kong dollars
The Syndicate	:	The 1st, 2nd and 3rd Appellants; (4th, 5th and 6th Defendants below)
David Ng	:	David Ng Pak Shing, a stockbroker and accountant, 1st Appellant (4th Defendant below)
Melville Ives	:	Melville Edward Ives, 2nd Appellant (5th Defendant below)

Ho Chapman	:	Ho Chapman, 3rd Appellant (6th Defendant below)
Fermay	:	Fermay Company Limited, a company controlled by the Syndicate, registered as holder of 15,000,000 San Imperial shares, 4th Appellant (7th Defendant below)
The Lees	:	Lee Ing Chee and Lee Kon Wah, 1st and 2nd Respondents (Plaintiffs below)
MBF	:	Malaysia Borneo Finance Corporation (M) Berhad, a company incorporated in Malaysia, 3rd Respondent (Plaintiffs below)
The Respondents	:	The Lees and MBF
James Coe	:	A Hong Kong businessman who controlled, inter alia, SKC and Rocky
SKC	:	Siu King Cheung Hing Yip Company Limited, a public company controlled by James Coe
Rocky	:	Rocky Enterprises Company Limited a private company controlled by James Coe for the benefit of SKC
Chow and Hwang	:	A Taiwan citizen and his wife (Chow Chaw-I and Hwang Shang Pai) 8th and 9th Defendants below who did not enter appearance at the trial
Lee and Fong	:	Two other Chinese citizens, alleged to be owners, and vendors to the Syndicate, of shares, whose existence was doubted by all the learned judges
Fermay Agreement	:	An agreement dated 23rd March 1977 between Chow and Hwang and The Syndicate for the sale of the entire capital of Fermay. Found to be a sham by all the learned judges
The 12th May Agreement	:	An agreement dated 12th May 1977 whereby David Ng, on behalf of the Syndicate, agreed to sell 23,000,000

RECORD

			San Imperial shares (including the 15,000,000) to Rocky, subject to an option as to whether the 15,000,000 shares were sold direct or via the medium of the entire issued capital of Fermay, in whose name the shares were registered.
	Asiatic	:	Asiatic Nominees Limited, a nominee company holding shares exclusively for C.K.San
	Triumphant	:	Triumphant Nominees Limited, another nominee company holding shares exclusively for C.K.San.
	Ho Chung Po	:	A director of various companies, particularly MAF, Asiatic and Triumphant. Acted as the lieutenant of C.K.San in Hong Kong
1103 1.41 - 1.43			
	MAF	:	Malaysia American Finance Corporation (HK) Limited, Registrars of San Imperial; controlled by C.K.San
	MAF Nominees	:	MAF Nominees Limited, a subsidiary of MAF, used as nominee holder of several parcels of San Imperial Shares
	MAF Option Agreement	:	An agreement bearing date 30th April, 1977 under which the Syndicate acquired 3,226,000 San Imperial shares from MAF
1093	"Court of Appeal Held"	:	Since the Chief Justice agreed with both judgments delivered, without delivering any separate judgment, references are only given to the judgments of the Justices of Appeal.

ISSUE

4. The question which arises in this appeal is whether the Appellants were at any material time beneficially entitled to any of (1) the 15,000,000 shares, and (2) the sum of HK$2,813,300 (paragraph 1, above) having as they claimed purchased all the relevant shares

from persons who had themselves bought from C.K.San or whether, as both the trial judge and the Court of Appeal held, the sales and purchases were mere shams designed to conceal the continuing beneficial interest of C.K.San.

RECORD

FACTS

5. C.K.San was arrested for fraud in Hong Kong in June, 1976. He failed to answer to his bail on 28th October 1976. He was subsequently known to be in Taiwan whence there is no extradition. He was known to the Syndicate to have defrauded a number of companies in South East Asia or, at least, to be the probable object of claims by persons defrauded.

1040 1.6 - 1.7
1043 1.26 - 1.28
1120 1.30 - 1.3

6. At that time, he was the beneficial owner of a substantial interest in San Imperial, a company whose principle asset was a hotel on a valuable site in Nathan Road. It was generally C.K.San's practice to use nominees, rather than hold assets in his own name. Of the 48,200,000 San Imperial shares in issue C.K.San was beneficially entitled to at least 20,840,160, which were registered in the names of either Asiatic or Triumphant save as to 57,600 which were in his own name. In the summer of 1976 C.K.San had caused the Registrars of San Imperial to issue fresh share certificates for much of his shareholding, mainly into certificates of a high denomination, probably to facilitate their realisation.

1054 1.21-1.22
1039 1.22-1.26
411 1.27-1.33
425 1.42- 426

7. In November, 1976, shortly after C.K. San failed to answer to his bail, James Coe enquired of Melville Ives and of Ho Chapman whether there was any chance of obtaining his interest in San Imperial. By 12th May, 1977, James Coe, through Rocky had agreed to buy inter alia the whole of C.K. San's shareholding (save for certain residual packets) for the benefit of SKC. It is with the intervening events that these proceedings were concerned.

223 1.29 - 224 1.2
804 1.27-1.42
1186 - 1191

8. It was the Syndicate's case, disbelieved by the trial judge and by the Court of Appeal, that they formed themselves into a syndicate to acquire C.K.San's shares if they could and then sell them onwards at a profit. David Ng was to do any active work, especially travelling; Melville Ives was to provide legal expertise; and

RECORD

Ho Chapman was to provide finance.

9. According to the Syndicate they were almost immediately successful in locating C.K. San in Taipei but, unhappily, he had already sold his shares to various Taiwan citizens. David Ng thereupon located these people and persuaded them to sell to the Syndicate. The Syndicate were then able to agree to sell the collected parcels, together with certain other shares bought in Hong Kong in the stock market and elsewhere (paragraph 36(11) - (13) below), to James Coe as an effective controlling interest in San Imperial.

1059 1.18-1.24
1110 1.31-1.39
452 1.39-453 1.10

10. It was a remarkable fact that none of these Taiwan citizens ever gave evidence, nor did the two of them who had not been paid ~~they~~ seek to participate in any proceedings to protect their interest in the purchase price of their shares. Moreover, any document which purported to emanate from any of them was admitted to have been typed or drafted in Hong Kong in the office of Melville Ives. The trial judge expressed doubt as to whether two of them existed, a doubt which was echoed by Huggins J.A. and by Pickering J.A. who referred to "the very shadowy existence of Lee and Fong".

1062 1.41-1.43
1110 1.25-1.27
1124 1.11-1.12

11. The Respondents' case, which was accepted by both the trial judge and by the Court of Appeal, was that all the transactions with Taiwan citizens were mere shams, designed to give the illusion that C.K.San had divested himself of his beneficial interest: in the vernacular, to "wash" his name off the title to any interest in the shares. MBF pleaded that the Syndicate conspired with C.K.San for this purpose. This plea was rejected by Mr. Justice Yang but the Court of Appeal held that the primary facts found by the learned judge did constitute a conspiracy.

1096 1.12-1097 1.28
1119 1.24-1120 1.43

12. The Lees did not expressly allege conspiracy. They alleged that the Syndicate were, and acted as, nominees or agents of C.K.San. This plea was also rejected by Mr. Justice Yang but upheld by the Court of Appeal. It appeared that the learned judge had so found upon a mistaken belief that Counsel for the Lees had withdrawn the allegation. It was conceded by all Counsel that this was not so and the Court of Appeal held that: ".... Ng, Ives, Ho and Fermay, could have had no other status except that of nominees of C.K.San."

1110 1.25-1111 1.6
1126 1.11-1.15
1120 1.44-1121 1.24
1116 1.7-1.14
1121 1.1-1.3
1121 1.10-1.11

RECORD

13. It is submitted that there is no useful distinction to be drawn on the facts of the present case between MBF's allegation of conspiracy and the Lees' allegation on nomineeship. Both involve the fabrication of sham agreements - as to which all the learned judges were ad idem - in order to conceal the interest of C.K.San. True it is that conspiracy involved the further allegation that the purpose was to defraud C.K.San's creditors, but the Court of Appeal correctly said in general that ".... it is difficult to conceive of any other motive for the agreement than the frustration of C.K.San's creditors", and in particular that : 1120 1.27-1.28

> ".... Ives at least - and his knowledge must be imputed to the Syndicate as a whole - knew of the existence of large creditors of C.K.San being aware ... of the charges of fraud outstanding against C.K.San and hence of the concomitant claims of those alleged to have been defrauded." 1120 1.30-1.35

14. The gravaman of the Appellants' case before the Court of Appeal was an alleged inconsistency between the judge's findings of fact, in particular that the Fermay Agreement was a sham, and his rejection of the pleas of conspiracy and nominee status. Any inconsistency was resolved by the Court of Appeal's decision that the primary facts did amount to conspiracy and nominee status. Insofar as any difficulty in analysis was caused by the state of the pleadings MBF respectfully draw attention to paragraph 19, below. 1083 1.19-1.30, 1098 1.21-1.35, 1119 1.4-1.8, 1111 1.5-1.6, 1120 1.39-1.42, 1120 1.10-1.24

PREVIOUS AND INTERLOCUTORY PROCEEDINGS

15. Among the persons defrauded by C.K.San was MBF, of which he had once been Chairman. MBF obtained judgment against him in Kuala Lumpur for M$9,036,831.58 with interest at 15% from April 1976. That judgment was subsequently registered in Hong Kong on 19th August, 1977 in High Court Miscellaneous Proceedings No.540 of 1977; out of which the present appeal arises. 65 1.24-66 1.2, 65 - 66

16. Earlier the Lees had instituted proceedings against C.K.San in both Malaysia and Hong Kong. These were :

(1) High Court Action No.2459 of 1976 instituted by Lee Ing Chee against

RECORD

C.K.San in the Supreme Court of Hong Kong on 5th July, 1977 claiming the sum of M$2,338,651 plus interest

(2) (a) Civil Suit No.2445 of 1976 issued by Lee Kon Wah against C.K. San in the High Court of Malaya at Kuala Lumpur on 19th October, 1976 claiming the sum of M$1,254,037.35 plus interest

(b) High Court Miscellaneous Proceedings No.155 of 1977 instituted by Lee Kon Wah against C.K.San in the Supreme Court of Hong Kong on 3rd March 1977 for the registration in Hong Kong of the Malaysian Judgment obtained in Civil Suit No.2445 of 1976

17. In the interim various interlocutory steps were taken to prevent what appeared to be assets of C.K.San from being dealt with or dissipated. The Syndicate also sought to get the registration of certain judgments set aside. These proceedings included :

5 - 7 (1) High Court Action No.2459 of 1976 in which the Plaintiff as judgment creditor applied for Charging and Garnishee Orders and injunctions.

12 - 14 (2) High Court Miscellaneous Proceedings No.155 of 1977 in which the Plaintiff as judgment creditor applied for Charging and Garnishee Orders and injunctions.

628 1.4-629 1.15 (3) High Court Miscellaneous Proceedings No.159 of 1977 in which MBF applied for the registration in Hong Kong of a Malaysian judgment obtained against C.K.San. The Syndicate applied for fortification of MBF's undertaking as to damages in relation to the injunction, security for costs and to set aside the registration of the Malaysian judgment.

67 - 69 (4) High Court Miscellaneous Proceedings No.540 of 1977 in which the Plaintiffs as judgment creditors applied for Charging and Garnishee Orders.

18. It was in the course of these interlocutory proceedings that evidence was discovered which provided much of the basis for the Respondents'

cases at the trial. MBF are a foreign corporation, having no business activities in Hong Kong, and had no local knowledge. MBF were accordingly largely dependent upon the processes of discovery. It was a significant fact in the conduct of the case that discovery by the Appellant was protracted, dilatory, reluctant and inadequate. Since Melville Ives, one of the members of the Syndicate, was himself acting as solicitor to all the defendants who appeared (except one) no failure of communication or want of instructions could be responsible and the inference that this conduct was deliberate was open to be drawn and was so drawn. Mr. Justice Yang said :

RECORD

> "In the course of the hearing, Mr.Yorke requested from the defence certain bank accounts for the period commencing April, 1977. No convincing reason has been advanced for the long delay before their production. San Imperial's register of shareholders (Ex.P.14) was produced after a delay of three weeks. The probable reason in my view lies not in any difficulty in locating the documents but in the unwillingness of the defendants or some of them to disclose them. The blame in no way lies with defence counsel, or with Philip K.H. Wong & Company." 1052 1.29-1.35

Pickering J.A. said :

> "All that happened was that some of the learned Judge's illustrations were misguided and unfortunate; but he might just as easily have chosen other examples as for instance what come to be known as the blue card a document which was withheld by the Syndicate until late in the trial and the production of which was enforced by an adjournment for that purpose. The blue card proved to be the key to the underlying reason for the entry by Ng and Ho on behalf of the Syndicate into the option agreement for the purchase of San Imperial shares from MAF. Associated with the withholding of the blue card, which withholding cloaked the existence of certain share transactions, was the programming of a computer print-out to omit those transactions. This was never explained." 1123 1.25-1.34

19. This deliberate failure to give proper discovery until well into the hearing placed

RECORD

the Respondents, as Plaintiffs, under a handicap and this was aggravated by the trial being brought on at the instance of the Appellants at very short notice (MBF

82A 1.26-1.28 Malaysia Judgment registered 19th August; Order for Trial 23rd September; Trial 10th October). In the absence of adequate discovery and with the shortage of time, pleadings were not in the state that they should have been and accordingly it was

1042 1.27-1.30 agreed amongst leading counsel at the trial and accepted by the Judge that the parties should not be bound by the strict language of their pleadings, though they should not go beyond the broad concepts. It is respectfully submitted that it is necessary to keep both the fact of late and inadequate discovery by the Appellants and this agreement in mind whenever considering the state of the pleadings.

NATURE OF PROCEEDINGS

20. The proceedings heard before Mr. Justice Yang were for the making absolute of certain garnishee and charging orders. Strictly the Lees and MBF were claimants, as judgment creditors, of C.K.San as jusgment debtor and the issue to be tried was whether or not certain property, i.e. shares in San Imperial, was his. To that property, the Appellants and Respondents were adverse claimants. It is respectfully submitted that such proceedings are akin to interpleader proceedings and accordingly, since someone has to begin, the ordinary rule as to the Plaintiff having the burden of proof does not necessarily apply. The burden is equally or indifferently upon the parties, whoever begins. It is not submitted that this is a material factor in

1042 1.4-1.5 the present appeal but, as Mr. Justice Yang said "The burden is of course on the Plaintiffs to prove their case", MBF do not wish to make a concession and create a precedent as to the true scope or application of that proposition in interpleader proceedings or proceedings in the nature of execution. In the present case, whatever the burden on the Respondents, it was discharged.

21. The nature of the proceedings is material in another respect. It may well be that the Respondents would have been better advised to have sought as their remedy at the outset appointment of a Receiver by way of equitable execution of the assets of C.K.San in Hong Kong. This was in fact granted by the Hon.

In pocket Mr. Justice O'Connor on 2nd October, 1979,

after the judgment of the Court of Appeal (but limited to the rights of C.K.San arising out of the 12th May Agreement). However, it is respectfully submitted that this is an argument with the benefit of hindsight. The only assets of C.K.San in Hong Kong known to the judgment creditors were his shares in San Imperial. The obviously appropriate remedy at the time was a charging order, or a garnishee order upon the proceeds of sale. The multiplicity of complicated transactions into which the Appellants had entered was unknown not only when proceedings were commenced but also at the commencement of the trial on 10th October, 1977.

RECORD

NATURE OF ORDER OF COURT OF APPEAL

22. This may be significant in this appeal in relation to the relief granted by the Court of Appeal consequential upon their reserved judgments. On the substance of the matters in issue the Syndicate's appeal failed. The first paragraph of the Order reads :

> "1. Subject to paragraph 10 hereof the Appeal by the 4th, 5th, 6th and 7th Defendants/Appellants be dismissed." — 1127 1.6-1.7

and the Syndicate was ordered to pay the costs (paragraph 2). Paragraph 10 reads :

> "10. The Charging Order absolute made herein by the Honourable Mr. Justice Yang on the 25th January 1978 insofar as it relates to the said 15,000,000 shares of $1 each of San Imperial Corporation Limited be discharged." — 1128 1.1-1.3

What had happened was that the Court of Appeal had construed the 12th May 1977 Agreement differently from Yang J. He had held that this Agreement constituted an option. Accordingly it did not transfer beneficial ownership of the shares to which it related until the option was exercised, which had not been done. Therefore the vendors still had title and, as the true vendor was C.K.San, there was an interest which could properly be the subject of a Charging Order. — 1186-1191, 111 1.7-1.27, 1124 1.14-1125 1.9, 1058 1.37-1059 1.17

23. The Court of Appeal, however, held that its true effect was an agreement for sale, passing the beneficial interest to the purchaser forthwith; the option provision — 1111 1.14-1.27, 1124 1.32-1.40

RECORD

related only to the mechanics of the purchase. Therefore the vendor (i.e. C.K.San) had no interest which could properly be the subject of a Charging Order. That being so they considered they had to discharge that part of Mr. Justice Yang's Order (indeed, Mr.Robert Tang, junior counsel for the Syndicate, Fermay submitted that they had won the appeal). Although it might have seemed that a Garnishee Order over the proceeds of sale would have been an appropriate remedy in substitution, this was not open to the Court as the purchase price was not payable until after the exercise of the option: therefore there was no present indebtedness - Webb v. Stenton (1883) 11 Q.B.D. 518 - upon which a Garnishee Order could be made.

24. It is respectfully submitted that the Court of Appeal were wrong in law. An unpaid vendor has not lost all equitable interest in shares. He has a residual equity which entitles him to maintain an action for specific performance: without an equity there can be no claim to equitable relief. At very least he had a residual right to accept or refuse a repudiation, an acceptance would enlarge his legal title to include the equitable. It is submitted that it is difficult to analyse the juridical nature of a reversion of equitable title unless there was a residual right in the nature of an equity which was not extinguished until the agreement became wholly executed, or at least the purchase price paid. See Shaw v. Foster L.R.5H.L. 321, 338 applied in Hong Kong in Ho v Lau, (1980) H.K.L.R. 42. If that submission be right then paragraph 10 of the Order of the Court of Appeal was wrong.

25. It is a curious aspect of the Order of the Court of Appeal that their Lordships had found that the nominal vendors, the Syndicate, had acted in conspiracy with and as nominees or agents for C.K.San but the Order as drawn up gave the successful judgment creditors no relief in relation to the 15,000,000 shares. Yet it must be unarguable that if, at the time of making the Order, the option had been exercised and the price become payable, that price would have been subjected by the Court of Appeal to a Garnishee Order in place of Mr. Justice Yang's Charging Order.

26. The only explanation is that no one at the time considered the existence of a residual equity in an unpaid seller (paragraph 24 above) or that, more likely, no one considered the possibility of the appointment of a Receiver

by way of equitable execution (paragraph 21 above) an alternative indicated by Webb v. Stenton itself. A third alternative would have been an injunction restraining the vendors from dealing with the purchase price save upon notice to the judgment creditors, thus enabling a Garnishee Order to be obtained. A fourth possibility is that a Garnishee Order absolute could have been made, with execution suspended until the price became payable, which is similar to the practice in regard to Bills of Exchange before maturity: Annual Practice 49/1/15. A fifth possibility is that a Charging Order absolute could have been made subject to the rights of Rocky: O'Connor J. did in fact make such an order nisi, in addition to the appointment of a Receiver, on 2nd October, 1979.

In pocket

27. For reason which are not relevant to this Appeal the Order of the Court of Appeal, though agreed by the Court on 22nd March, 1979, was not entered until 13th October, 1979. MBF was advised that immediate protection would be necessary once the Order was entered (otherwise, for example, the purchaser might have repudiated, the Syndicate could have accepted the repudiation and sold the share at once and transferred the proceeds to C.K.San without being in breach of any extant order). Accordingly MBF obtained the appointment of a Receiver (paragraph 21 above) and a Charging Order before the entry.

28. However the nature of orders made or relief granted by Her Majesty's Courts are not totally controlled by the relief sought or suggested by the parties:- Belmont Finance v. Williams Furniture (1979) (H.250 at 269). Accordingly if the Privy Council were of the opinion that the Court of Appeal was right in its judgments but, consistently therewith, ought to have granted immediate relief to MBF in respect of the 15,000,000 shares then it is respectfully submitted that it is open to their Lordships to advise Her Majesty that the Order of the Court of Appeal should be varied accordingly.

29. If MBF are wrong in this view and an appeal is formally necessary to achieve the result suggested in the preceding paragraph, and that such relief is necessary, then MFB are willing to do so and to bear the consequent costs. However, MBF respectfully suggest that if they are right as to the relief which they ought to have been granted by the Order of the Court of Appeal then they are sufficiently

RECORD
In pocket

protected by the Orders of the Honourable Mr. Justice O'Connor granted on 2nd October, 1979.

CONCURRENT FINDINGS OF FACT

1186 - 1191
1111 1.7-1.27
1124 1.14-
1125 1.9

30. On all substantial matters relevant to the Appeal there are concurrent findings of fact. The Court of Appeal differed from the trial judge on the true construction, which is a question of law, of the 12th May 1977 Agreement (giving it a construction not contended for below) and as to the role of James Coe who is not a party to this appeal.

31. In particular, the trial judge found, and the Court of Appeal agreed that :-

1045 1.31-1.36
1048 1.10-1.21
1052 1.36-1.37
1110 1.6-1.8
1123 1.11-1.14

(1) the two principal members of the Syndicate were not truthful witnesses.

1054-1058 1.27
1060 1.20-1062 1.21
1062 1.28-1063 1.11
1118 1.32-1110 1.22
1123 1.8-1124 1.13

(2) the three principal share acquisition dealings of the Syndicate (other than dealings in the market) were shams.

32. The trial judge, on the facts found by him, rejected the allegation of the conspiracy made by MBF. MBF cross-appealed against this finding. The Court of Appeal upheld the judge's findings of fact and ruled that in fact and in law they did amount to a conspiracy. There were accordingly concurrent findings of fact on this issue and it is respectfully submitted that the Court of Appeal was right in the conclusion deduced therefrom.

1120 1.39-1.43

1041 1.14-1.18

33. The trial judge also rejected the allegation that the Syndicate were nominees of C.K.San. This proceeded upon a mistaken belief that Counsel for the Lees, Mr. Charles Ching Q.C., had withdrawn the allegation. He had not done so. The Court of Appeal held that, on the Judge's findings of fact they were. Pickering J.A. said :

1097 1.44-1098 1.21
1120 1.44-1121 1.24

1121 1.22-1.24

"... he would have been driven inexorably, on his own findings, to the further findings that Ng, Ives, Ho and Fermay, were all nominees of C.K.San holding the legal estate in Fermay, and hence the 15,000,000 San Imperial shares, for his benefit."

It is respectfully submitted that on this issue also there are effectively concurrent findings of fact and that the Court of Appeal was right in the conclusion deduced therefrom.

34. There being concurrent findings of fact on all substantial matters it is respectfully submitted that no point arises for effective determination by the Privy Council because, if those facts are undisturbed in accordance with the invariable practice of the Privy Council, the conclusions to which the Court of Appeal came are unassailably correct. The only point which does arise is whether the relief granted by the Court of Appeal to MBF and the Lees was as wide as it should have been, consistently with their own judgments (paragraphs 22-29 above).

ALTERNATIVE SUBMISSION

35. If, contrary to MBF's primary submission, these were not concurrent findings of fact then there was enough material upon which the learned judge should have found, and which justified the finding the Court of Appeal did make, that the Syndicate acted as nominees of and conspired with C.K.San.

36. That material is sufficiently indicated in the judgments themselves. The Respondents merely respectfully draw attention to a number of particular facts which provide the skeleton of the multiplicity of matters canvassed at the trial and the appeal.

(1) C.K.San was a man of substantial means;

(2) who fled the Colony when on bail for fraud;

(3) which it is proper to infer he would not have done if confident of his innocence;

(4) and must have been known to the Syndicate to be subject to claims by creditors including in particular the claims of those defrauded

(5) C.K.San had caused the Registrars to rearrange his holdings in San Imperial and issue new certificates mostly of high denomination, shortly before leaving Hong Kong. It is reasonable to infer that this was done to facilitate their subsequent sale.

RECORD

(6) After the Syndicate had been formed they were successful in locating C.K.San in Taiwan at their first attempt. David Ng found him in the coffee shop of a leading hotel in Taipei, frequented by visitors from Hong Kong.

1046 1.1-1.8
1102 1.6-1103 1.8

(7) The learned judge found this a remarkable coincidence. The Court of Appeal regarded it as no more than a straw which may indicate the direction of the wind. Judges with local knowledge, particularly a Chinese judge, would appreciate that an absconding fraudsman might fear retribution in other forms other than by extradition.

1210

(8) Immediately after David Ng's return to Hong Kong Melville Ives telexed to London for Counsel's opinion on whether "client (can) safely purchase shares from XXX Ltd. and YYY Ltd. knowing that proceeds could be used to sustain a fugitive beyond the jurisdiction." XXX Ltd. and YYY Ltd. were identifiable as Asiatic and Triumphant: accordingly at that time Melville Ives already knew of the fact the C.K.San's share were held by Triumphant as well. However, David Ng's evidence was that C.K.San had already sold his shares to Chow and Hwang. If that were true the Asiatic and Triumphant shareholdings were irrelevant. Further, Melville Ives' own evidence was that he did not know of the existence of Triumphant until ".... some time after the enterprise had got under way." He said "At one stage we were trying to find more shares and we came across the name Triumphant then." That evidence could not have been true.

404 1.22-406 1.46

405 1.15-1.16
405 1.11-1.12

1108 1.14-1.18

(9) After alleged protracted negotiations with Chow and Hwang in Taiwan the Syndicate concluded arrangements with them, culminating in the Fermay Agreement, whereby Chow and Hwang:

(i) handed over share certificates for 15,000,000 San Imperial shares, and relinquished all rights thereto and control over them;

(ii) received $92,000;

(iii) precluded themselves from claiming the unpaid balance of the purchase price; $8,800,000.

RECORD

Neither the trial judge nor the Court of Appeal could regard this as a credible or bona fide transaction.

1057 1.37-1058 1.27
1109 1.27-1110 1.24
1118 1.13-1.23
1121 1.26-1122 1.13
1123 1.8-1.25

(10) 2,164,200 further shares were alledgedly purchased from Lee and Fong in Taiwan. None of the judges found the existence of Lee and Fong proven (paragraph 10 above); and Mr. Justice Yang's Garnishee Order absolute on the unremitted balance of the purchase price $2,813,300 (being $3,246,300 less $433,000 already remitted to Taiwan) was upheld by the Court of Appeal.

1060 1.20-1063 1.13
1123 1.35-1124 1.13

(11) Meanwhile, in Hong Kong, the Syndicate were engaged in arrangements to obtain further shares from 3 sources (i) the stock market, (ii) private sellers (iii) other C.K.San holdings. The vehicles used for (iii) were the two MAF companies, MAF Corporation and MAF Nominees, the latter also being used for the registration of the 'Lee and Fong' shares. No explanation apart from coincidence was offered for the use of M.A.F. Nominees for this purpose.

Exhibit P12, 1280

1102 1.12-1.21

741-742 1.42

448 1.15-1.19

(12) The shares obtained from MAF were 3,226,000, of which at least 2,150,000 were derived from Asiatic i.e. from C.K.San. That 2,150,000 was needed to make good a deficiency in MAF's books. The Respondents case was that this was done, shortly before C.K.San jumped bail, in order to enable Ho Chung Po (who was nominally the managing director of both companies) to remain safely in Hong Kong and act as C.K.San's lieutenant whilst his assets were realised. This seems to have been tacitly accepted by the learned judge.

1103 1.41-1.43
1064 1.2-1.5

RECORD

1046 1.43-1047 1.11
1050 1.3-1.10
1103 1.25-1104 1.39
1123 1.29-1.34

(13) The MAF shares were acquired by the Syndicate under the MAF Option Agreement. That Agreement was regarded by all the judges as gravely suspicious

(14) Those suspicions may properly be reinforced by the fact that all or many of them might have been explained, if ill-founded, by Ho Chung Po, but Ho

537 1.8-1.10

Chung Po was not called as a witness although he attended on subpoena throughout the trial, until Leading Counsel for the Syndicate stated that in no circumstances would he call him. (Likewise Melville Ives' secretary and David Ng's foki and two other employees were not called on material issues about which their evidence was directly relevant.)

225 1.44-226 1.22
1050 1.11-1.37
1055 1.15-1.33

516 1.29-517 1.20
598 1.30-605 1.2
757 1.4-759 1.20

636 1.24-639 1.7
1046 1.29-1.42

(15) Further the evidence of the suspicious circumstances, and of the MAF share-dealings, was withheld from the Court by the Syndicate and by Melville Ives, their Solicitors, until after the trial had been going on for nearly 4 weeks (paragraph 18 above). Melville Ives was able to offer no explanation of why the "blue card" was withheld until the fourth attempt at inspection, including 2 attendances by leading counsel, and no witnesses or their counsel proferred any explanation of why the computer print-out was doctored to omit all MAF share transactions.

419 1.4-1.40

212 1.6-215 1.42
1123 1.25-1.34

(16) The withholding of evidence, and the failure to call any apparently independent witness (other than an accountant on peripheral matters), are matters from which it is proper to infer that the Syndicate had something to hide. That something could only be their own dishonest involvement with C.K.San. That the two principal Syndicate witnesses Melville Ives and David Ng were also held not to be truthful witnesses reinforces this inference.

37. MBF respectfully submit that, subject to the question of the extent to which the Order of the Court of Appeal properly gives

effect to the Judgment of the Court (paragraphs 22-29 above), the Order of the Court of Appeal should be upheld for the following among other

R E A S O N S

1. BECAUSE the Syndicate were at all times acting in conspiracy with C.K.San to defraud his creditors.

2. BECAUSE the Syndicate were at all times acting as agents or nominees of C.K.San.

3. BECAUSE the beneficial interest of C.K.San in his shares, or in the proceeds of shares agreed to be sold, has never been lost.

4. BECAUSE the Fermay Agreement was a sham.

5. BECAUSE the Syndicate never acquired the equitable interest in any relevant shares.

6. BECAUSE the judgments of the Court of Appeal and of Yang J. (save as to conspiracy and nominee status) were right and ought to be upheld.

RICHARD YORKE, Q.C.
DENIS CHANG, Q.C.
WINSTON POON

Counsel for the 3rd Respondent

No. 20 of 1980

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG
(APPELLATE JURISDICTION)
CIVIL APPEAL NO.12 OF 1978

(On appeal from High Court Action No.2459 of 1976, High Court Miscellaneous Proceedings No.155 of 1977 and High Court Miscellaneous Proceedings No.540 of 1977)

BETWEEN:

DAVID NG PAK SHING	1st Appellant
MELVILLE EDWARD IVES	2nd Appellant
HO CHAPMAN	3rd Appellant
FERMY COMPANY LTD.	4th Appellant

- and -

LEE ING CHEE also known as LEE HAI HOCK	1st Respondent
LEE KIN WAH	2nd Respondent
MALAYSIA BORNEO FINANCE CORPORATION (M) BERHAD	3rd Respondent

---

CASE FOR 3RD RESPONDENT

MAXWELL BATLEY & COMPANY,
27 Chancery Lane,
WC2A 1PA
London Agents for
PETER MARKS & COMPANY
Solicitors for the Appellants

LOVELL, WHITE & KING
21 Holborn Viaduct,
London EC1A 2DY
London Agents for
DEACONS
Solicitors for the 1st and 2nd Respondents

NORTON, ROSE, BOTTERELL & ROCHE
Kempson House
Camomile Street,
London EC3 7AN
London Agents for
JOHNSON STOKES & MASTER
Solicitors for the 3rd Respondent