

~~GMH 62~~

Judgment
H H, 1964

No. 30 of 1963

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

IN THE COURT OF APPEAL AT KUALA LUMPUR

B E T W E E N :

HERBERT GEORGE WARREN

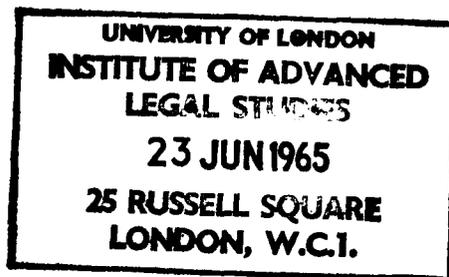
Appellant
(Plaintiff)

- and -

1. TAY SAY GEOK
2. LIM LIEW CHENG
3. NG LEI
4. LIM CHENG WAU

Respondents
(Defendants)

RECORD OF PROCEEDINGS



78672

GRAHAM PAGE & CO.,
Whitehall House,
41, Whitehall,
London, S.W.1.
Appellant's Solicitors.

COWARD, CHANCE & CO.,
St. Swithin's House,
Walbrook,
London, E.C.4.
Solicitors for the Respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL NO.30 of 1963

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

IN THE COURT OF APPEAL AT KUALA LUMPUR

B E T W E E N

HERBERT GEORGE WARREN

Appellant
(Plaintiff)

- and -

1. TAY SAY GEOK
2. LIM SIEW CHENG
3. NG MEI
4. LIM CHENG WAU

Respondents
(Defendants)RECORD OF PROCEEDINGSINDEX OF REFERENCE

No.	Description of Document	Date	Page
	<u>IN THE HIGH COURT</u>		
1.	Endorsement of Writ of Summons	22nd November 1960	1
2.	Statement of Claim	21st November 1960	2
3.	Defence and Counterclaim	6th February 1961	5
4.	Reply and Defence to Counterclaim	14th February 1961	10
	<u>PLAINTIFF'S EVIDENCE</u>		
5.	Notes of Evidence of Herbert George Warren	10th April 1962	11
6.	Notes of Evidence of Chong Fook Sung	10th April 1962	21

No.	Description of Document	Date	Page
7.	Notes of Evidence of Sathappan s/o K.R.S. Satappa Chettiar	10th April 1962	23
8.	Notes of Evidence of Segram Jeyaraja	11th April 1962	26
	<u>Defendants' Evidence</u>		
9.	Notes of Evidence of Tay Say Geok	12th April 1962	31
10.	Notes of Evidence of Tay Say Keng	12th April 1962	36
11.	Judgment of Mr. Justice Azmi	23rd June 1962	39
12.	Order of Court	23rd June 1962	51
	<u>IN THE COURT OF APPEAL</u>		
13.	Notice of Appeal	10th July 1962	52
14.	Memorandum of Appeal	18th August 1962	54
15.	Notes of Argument recorded by Thomson, C.J.	4th and 5th December 1962 and 28th February 1963	56
16.	Notes of Argument recorded by Hill, J.A.	4th and 5th December 1962	66
17.	Notes of Argument recorded by Barakbah, J.A.	4th and 5th December 1962	73
18.	Judgment of Chief Justice Thomson	28th February 1963	80
19.	Order of the Court of Appeal	28th February 1963	105
20.	Order granting final Leave to Appeal	28th August 1963	107

DOCUMENTS TRANSMITTED TO THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, BUT NOT PRINTED IN THIS
RECORD

Description of Document	Date
<u>IN THE HIGH COURT</u>	
Judge's Notes of hearing of the cause -	
(i) Rintoul's Opening Submission	9th April 1962
(vi) Ball's Opening Submission	11th April 1962
(ix) Ball's Final Submission	12th April 1962
(x) Rintoul's Final Submission	12th April 1962
<u>IN THE COURT OF APPEAL</u>	
Notice of Motion	6th April 1963
Affidavit of Herbert George Warren	26th March 1963
Order of Court granting Conditional Leave to Appeal	20th May 1963
<u>EXHIBITS</u>	

Exhibit Mark	Description of Document	Date	Page
P.1 (1)	Option: Tay Say Geok to Tay Say Keng	9th May 1960	109
P.1 (2)	Telegram: Williams to Warren	17th May 1960	109
P.1 (3)	Letter: Plaintiff's Solicitors to Registrar of Companies	18th May 1960	110
P.1 (4)	Letter: Plaintiff's Solicitors to Defendants' Solicitors	19th May 1960	110

Exhibit Mark	Description of Document	Date	Page
P.1 (5-8)	Agreement between Defendants and Plaintiff	31st May 1960	113
P.1 (9)	Letter: Defendants' Solicitors to Plaintiff's Solicitors	24th May 1960	111
P.1 (10-14)	Draft Agreement between Defendants and Plaintiff	24th June 1960	120
P.1 (15)	Letter: Defendants' Solicitors to Plaintiff's Solicitors	30th May 1960	112
P.1 (16)	Letter: Defendants' Solicitors to Plaintiff's Solicitors	3rd June 1960	118
P.1 (17)	Letter: Plaintiff's Solicitors to Defendants' Solicitors	7th June 1960	119
P.1 (18-23)	Valuation	11th July 1960	124
P.1 (24)	Letter: Defendants' Solicitors to Plaintiff's Solicitors	20th July 1960	132
P.1 (25)	Letter: Defendants' Solicitors to Plaintiff's Solicitors	27th July 1960	133
P.1 (26)	Letter: Plaintiff's Solicitors to Defendants' Solicitors	10th August 1960	134
P.1 (27)	Letter: Defendants' Solicitors to Plaintiff's Solicitors	11th August 1960	135
P.1 (28)	Letter: Plaintiff's Solicitors to Defendants' Solicitors	13th August 1960	137
P.1 (29)	Letter: Plaintiff's Solicitors to Defendants' Solicitors	17th August 1960	138

Exhibit Mark	Description of Document	Date	Page
P.1 (30)	Telegram: Defendants' Solicitors to Plaintiff's Solicitors	19th August 1960	139
P.1 (31)	Letter: Defendants' Solicitors to Plaintiff's Solicitors	19th August 1960	139
P.1 (32)	Letter: Defendants' Solicitors to Plaintiff's Solicitors	22nd August 1960	141
P.1 (33)	Letter: Plaintiff's Solicitors to Defendants' Solicitors	25th August 1960	141
P.1 (34)	Letter: Defendants' Solicitors to Plaintiff's Solicitors	29th August 1960	143
P.1 (35-37)	Amended Draft Agreement between Defendants and Plaintiff	29th August 1960	144
P.1 (38)	Letter: Plaintiff's Solicitors to Defendants' Solicitors	1st September 1960	147
P.1 (39)	Letter: Plaintiff's Solicitors to Defendants' Solicitors	12th November 1960	148
P.1 (40)	Letter: Defendants' Solicitors to Plaintiff's Solicitors	1st December 1960	149
P.3	Plan		150
D.4	Draft Agreement between Plaintiff and Austral Asian Plantations Ltd	1960	151
	Exhibits not transmitted to the Judicial Committee of the Privy Council and not printed in this record		
P.2	Memorandum of Articles		

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

IN THE COURT OF APPEAL AT KUALA LUMPUR

B E T W E E N

HERBERT GEORGE WARREN

Appellant
(Plaintiff)

- and -

TAY SAY GEOK
LIM SIEW CHENG
NG MEI
LIM CHENG WAU

Respondents
(Defendants)

10

RECORD OF PROCEEDINGS

NO. 1

ENDORSEMENT OF WRIT OF SUMMONS

IN THE SUPREME COURT OF THE FEDERATION OF MALAYA

In the
High Court

IN THE HIGH COURT OF KUALA LUMPUR

Civil Suit No. 494/1960

No. 1

Between

Endorsement
of Writ of
Summons
22nd November
1960

20

Herbert George Warren ... Plaintiff

And

1. Tay Say Geok
2. Lim Siew Cheng
3. Ng Mei
4. Lim Cheng Wau ... Defendants

In the
High Court

No. 1

The Plaintiff's claim is for repayment of the sum of \$90,000 paid by the Plaintiff to the Defendants by way of deposit and in part payment of the purchase price under a contract for the purchase of land.

Endorsement
of Writ of
Summons

Sgd/: Shearn Delamore & Co.

Plaintiff's Solicitors

22nd November
1960
continued

This writ is accompanied by a Statement of Claim.

No.2

NO.2

10

Statement
of Claim
21st November
1960

STATEMENT OF CLAIM

1. By a contract in writing dated the 31st day of May 1960 and made at Kuala Lumpur between the Plaintiff and the Defendants the Defendants agreed to sell and the Plaintiff agreed to purchase the lands situated in the mukim of Lendu, Malacca in area 496 acres 1 rood 00 poles more or less and more particularly described in the schedule hereto at a price of \$1,800 (Dollars eighteen hundred) per acre.

20

2. The Plaintiff paid to the Defendants prior to the execution of the said contract the sum of \$90,000 in part payment of the said purchase price and it was provided that the balance of the said purchase price should be paid on or before the 8th day of August 1960.

3. By the said contract it was provided "inter alia" that if the purchaser failed to complete the purchase in accordance with the agreement then the aforesaid sum of \$90,000 would be considered as liquidated damages and would be forfeited to the Vendors.

30

4. Time was not of the essence of the said contract and the Defendants did not by notice or otherwise make it so.

5. The Plaintiff did not pay the balance of the said purchase price on or before the 8th day of August 1960 or before the Defendants

wrongfully rescinded the said contract as hereinafter appears.

In the
High Court

No. 2

Statement
of Claim
21st November
1960
continued

10 6. On or about the 10th August 1960 the Plaintiff through his solicitors made certain proposals for the variation of the contract. By letter dated the 11th August the Defendants through their solicitors indicated that the proposals were acceptable to their clients subject to certain additional terms and asked that a draft of the proposed supplemental agreement be prepared and forwarded to them for approval.

20 7. On or about the 17th August 1960 the Plaintiff through his solicitors forwarded a draft of the proposed supplemental agreement to the Defendants solicitors. This draft provided "inter alia" for the payment by the Plaintiff to the Defendants on or before the execution of the supplemental agreement of a further sum of \$35,000 of which the sum of \$30,000 was expressed to be by way of further deposit and in part payment of the purchase price.

8. At or about 2.25 p.m. on the 19th August the Defendants through their solicitors despatched the following telegram to the Plaintiff's solicitors:-

"YOUR LETTER SEVENTEENTH AUGUST
DRAFT AGREEMENT UNACCEPTABLE PARAGRAPH
FOUR NEVER AGREED TO BY OUR CLIENT NOR
HIS REPRESENTATIVE STOP UNLESS DOLLARS
THIRTY FIVE THOUSAND FIVE HUNDRED PAID
TO US IN CASH OR BANKDRAFT IN NAME OF
ALLEN GLEDHILL AND BALL BEFORE ONE
POST MERIDIEM TWENTIETH AUGUST TO-
MORROW IN TERMS OF YOUR LETTER TENTH
AUGUST AND OUR REPLY ELEVENTH AUGUST
DOLLARS NINETY THOUSAND WILL BE FOR-
FEITED PURSUANT AGREEMENT OF THIRTY
FIRST MAY
GLEDHILL"

30

In the
High Court

No.2

Statement
of Claim
21st November
1960
continued

9. The Plaintiff did not pay the sum of \$35,500 to the Defendants on the 20th day of August as demanded whereupon the Defendants wrongfully rescinded the said contract and forfeited the said sum of \$90,000.

10. The Plaintiff will contend that by reason of the foregoing the Defendants have wrongfully forfeited the sum of \$90,000 paid by the Plaintiff to the Defendants and the Defendants are bound to repay the same to the Plaintiff. 10

11. In the alternative the Plaintiff will contend that:-

- (a) Stipulations in the said contract as to liquidated damages are in the nature of a penalty
- (b) The Defendants are not entitled to retain the said sum of \$90,000 or any part thereof such sum being a penalty 20

AND THE PLAINTIFF CLAIMS:-

- (a) \$90,000
- (b) Interest thereon at the rate of 6% per annum from 20.8.60 until realisation
- (c) Costs
- (d) Further and other relief

SCHEDULE

Lot No.	Area	Title	Names
	A.R.P.		
694	346. 0. 20	99 year lease	Tay Say Geok
298 & 299	17. 2. 10.2	SG.No.27256	Tay Say Geok
296 & 297	10. 1. 07.2	SG.No.27409	Lim Cheng Wau

30

Lot No.	Area	Title	Names	In the High Court
293	98. 3. 21	SG.No.24486	Tay Say Geok	_____
295	7. 0. 18	SG.No.27410	Ng Mei	No. 2
294 (II)	13. 0. 19	SG.No.30165	Lim Siew Cheng	State- ment of Claim
294 (I)	3. 0. 25	SG.No.30121	Ng Mei	21st November 1960

Dated this 21st day of November 1960

Sgd/: Shearn Delamore & Co.

Plaintiff's Solicitors

continued

NO. 3

10

DEFENCE AND COUNTERCLAIM

No. 3

1. Paragraph 1, 2 and 3 of the Statement of Claim are admitted. The said contract further provides:-

Defence
and
Counter-
claim
6th
February
1961

(a) by clause 3 that the purchase should be completed and the balance of the purchase money should be paid on or before the 7th day of August 1960 at the office of the Vendors' Solicitors.

20

(b) by clause 5 that the Purchaser should as from the date of the said agreement be at liberty to enter into possession of the property sold and maintain the same and all buildings and machinery at his cost and expense in their then state or condition but that if the property building or machinery should be damaged by fire or other inevitable accident the Vendors should be under no obligation to restore the same nor should such event be a ground for the non completion of purchase.

30

(c) by clause 8 that if the Purchaser should fail to complete in accordance with the said agreement the deposit of Dollars Ninety thousand (\$90,000/-) paid by the Purchaser on or before the execution of the said agreement should be considered as liquidated damages and

In the
High Court

No. 3

Defence and
counterclaim
6th February
1961
continued

should be forfeited to the Vendors and the Purchaser should thereupon surrender possession of the property buildings and machinery to the Vendors and the said agreement should be at an end. The Purchaser did not enter into possession of the property.

2. Paragraph 4 of the Statement of Claim is denied. Time was of the essence of the contract from the beginning as the subject matter of the sale was a rubber estate and the value of rubber varies from time to time. The negotiations for the sale were conducted by Tay Say Keng the brother of the 1st Defendant as broker entitled to 2% commission. The first draft contract named the 20th day of July 1960 as the date for the payment of the balance of the purchase price but at the request of the Plaintiff it was subsequently agreed that the date should be altered to the 8th August (though this was typed as 7th August) as he required nine weeks to get the money after payment of the deposit. The Defendants having granted to the Plaintiff the right to immediate possession of tap-pable trees the parties were entitled to and did in fact regard the date for payment of the balance of the purchase price as of the essence of the contract. 10
3. On or about the 7th June 1960 the Defendants' Solicitors duly forwarded the title deeds of the property to the Plaintiff's Solicitors. 20
4. As to paragraph 5 it is admitted that the Plaintiff did not pay the balance of the said purchase price on or before the 8th day of August 1960 or at all but the Defendants deny that they wrongfully rescinded the said contract or rescinded it at all. 30
5. On or about the 20th July 1960 the Defendants' Solicitors reminded the Plaintiff's Solicitors of the date of completion but on the said date of completion the Plaintiff wilfully and in breach of the said agreement defaulted and the said agreement accordingly went off, lapsed or came to an end. 40
6. Paragraph 6 is admitted. Upon the 8th day of August 1960 the broker Tay Say Keng (a

brother of the 1st Defendant) in the presence of Madam Cheng Moon alias Alice Chang, and Gan Lye Gee and two Indian Gentlemen friends of the Plaintiff approached the Plaintiff at the Plaintiff's house. The Plaintiff acknowledged that the said agreement had expired and suggested the terms upon which the said agreement could be revived as follows:-

In the
High Court

No. 3

Defence and
counterclaim
6th February
1961
continued

- 10 (a) The Plaintiff was to pay a further deposit of \$30,000/-,
- (b) The time for completion was to be extended until the 7th October 1960.
- (c) Interest on the balance of the purchase price was to be paid by the Plaintiff to the defendants at 80 cents per \$100/- per month.
- 20 (d) Such interest was to be calculated up to 7th October 1960 and \$10,000/- thereof to be paid on the 7th October 1960, the balance to be paid immediately.
- (e) \$3,000/- was to be paid by the Plaintiff to the Defendants for weeding.
- (f) Time was to be the essence of the Contract but in the event of the Contract being terminated for non payment of the balance of the purchase price the \$10,000/- was to be paid by the purchaser in any event.

30 7. As a consequence of the said interview the Plaintiff's Solicitors wrote the letter dated the 10th August 1960 making proposals inter alia to extend the time which had lapsed.

40 8. By their Solicitors letter dated the 11th August 1960 the Defendant accepted the proposals provided that it was understood that two sums of \$3,000/- each for weeding and maintenance payable on 31st August and 30th September should be paid by the Plaintiff in any event even if he made default in payment of the balance of the purchase money and that time should be expressed to be of the essence of the contract and that the acceptance date should be deemed to have been the 8th day of August 1960.

In the
High Court

No. 3

Defence and
counterclaim
6th February
1961
continued

9. Paragraph 7 of the Statement of Claim is admitted. The said Clause 4 was as follows:-

Prior to the date hereinafter fixed for the completion of the purchase the Vendors will at the request of the Purchaser execute and deliver to the Purchaser his nominee or nominees a proper conveyance or conveyances and assignment of all or any of the said lands more particularly described in the First Schedule to the principal agreement upon payment to the Vendors of the pro rata purchase price of \$1,800/- per acre or such increased price as the Purchaser shall have arranged to sell any such part or parts of the said land to a sub-purchaser and any such excess price shall be retained by the Vendors to account of the balance payable on completion but shall not be considered as further deposit.

10

This Clause had never been mentioned or suggested before.

20

10. At the said meeting at the Plaintiff's house on the 8th day of August 1960 the Plaintiff and S.Sathappan P.J.K. verbally promised to meet the said Tay Say Keng at Malacca at the offices of the Solicitors for the Defendants and to pay the additional sums referred to therein on the 19th day of August 1960. On the 19th day of August 1960 the Plaintiff and the said S.Sathappan did not meet the said Tay Say Keng as promised or come to the said Solicitors offices.

30

11. Paragraph 8 of the Statement of Claim is admitted.

12. As to paragraph 9 and 10 it is admitted that the Plaintiff did not pay the sum of \$35,500 to the Defendants on the 20th day of August as demanded but for the reasons stated in paragraph 5 hereof it is denied that the Defendants wrongfully rescinded the said contract or rescinded it at all. It is further denied that the Defendants forfeited the sum of \$90,000/- wrongfully or at all. It was the Plaintiff who forfeited the sum of \$90,000/- to the Defendants the contract having gone off by reason of the default of the Purchaser and by reason of the express terms of the contract as aforesaid and accordingly the Defendants are not bound to repay the same or any part thereof to the Plaintiff.

40

13. On the 25th August 1960 the Plaintiff's Solicitors returned the title deeds relating to the property sold to the Defendants' Solicitors and at the same time alleged that the said agreement was still in existence and requested the Defendants' Solicitors to return the draft Supplementary agreement on the 19th August 1960.

In the
High Court

No. 3

Defence and
counterclaim
6th February
1961

continued

10 14. The Defendants' Solicitors informed the Plaintiff's Solicitors that the original agreement had lapsed and offered to negotiate a fresh agreement and duly returned the draft Supplementary agreement with the said proposed clause 4 deleted and other amendments which were minor and consequential. The Defendants were then and still are willing to sell the said lands to the Plaintiff. If as is denied the said contract has not lapsed the Defendants counterclaim for specific performance of the said contract

20 15. The alternative plea in Paragraph 11 is denied.

COUNTERCLAIM

The Defendants repeat their Defence and Counterclaim:

- 30 (1) Specific performance of the said agreement.
- (2) All necessary and consequential accounts directions and enquiries.
- (3) Damages for breach of contract in lieu of or in addition to specific performance.

Alternatively:

- (4) Rescission of the said agreement and a declaration that the deposit of \$90,000/- has been forfeited to the Plaintiff. In any event:
- (5) Further or other relief.
- (6) Costs.

40 Dated and Delivered this 6th day of February 1961.

Sgd/: Allen Gledhill & Ball
Solicitors for the Defendants.

In the
High Court

No. 3

Defence and
counterclaim
6th February
1961
continued

This Defence and Counterclaim is filed
by Messrs. Allen Gledhill and Ball Advocates
& Solicitors of No. 4 Church Lane, Malacca,
on behalf of the abovenamed Defendants.

To the abovenamed Plaintiff and/or
his Solicitors Messrs. Shearn Delamore & Co.
The Eastern Bank Building, 2 The Embankment
(2nd Floor), Kuala Lumpur.

No. 4

Reply and
Defence to
counterclaim
14th February
1961.

NO. 4

REPLY AND DEFENCE TO COUNTERCLAIM

10

Reply

1. The Plaintiff joins issue with the
Defendants on their defence herein in so
far as the same consists of admission.

Defence to Counterclaim

2. The Plaintiff repeats his Statement
of Claim herein.

3. The Defendants having elected to re-
scind the contract albeit wrongfully cannot
now claim specific performance of the same
and the Plaintiff is released from his
obligations thereunder.

20

Delivered this 14th day of February
1961.

Sgd/: Shearn Delamore & Co.

Solicitors for the Plaintiff.

This reply and Defence to Counter-
claim is filed by Messrs. Shearn Delamore
& Co., Advocates & Solicitors of No. 2,
The Embankment, Kuala Lumpur on behalf of
the abovenamed Plaintiff.

30

To the abovenamed Defendants and/or
their Solicitors Messrs. Allen Gledhill and
Ball, No. 4 Church Lane, Malacca.

NO. 5

In the
High CourtNOTES OF EVIDENCE OF
HERBERT GEORGE WARRENPlaintiff's
Evidence

(9th April 1962)

For Plaintiff - R.H.V.Rintoul

For Defendants - H.B.Ball

No. 5

Mr.Rintoul - Action to recover \$90,000/-
depositNotes of
Evidence of
Herbert George
Warren
10th April
1962

Agreement dated 31.4.61

10

(At the request of Mr.Ball - correction on
page 8 of bundle of pleadings, paragraph 5.
Amended and agreed to by Mr.Rintoul - date
29th July changed to 20th July).

Examination

Amended accordingly. Intld: A.M.

(Here follows Plaintiff's Councils' Opening
Submission).

TUESDAY 10th APRIL, 1962

C.S.494/60 contd.

Court resumes at 9.30 a.m.

20

Counsel as before

Mr. Rintoul calls -

B.W.1 Herbert George Warren affirmed states in
English

Chartered Accountant residing at No.189 Ampang
Road, Kuala Lumpur. Partner in Kang, Warren & Khoo
and they are successors to Messrs. Y.C. Kang &
Warren. The firm is a firm of accountants, audi-
tors and company secretaries.

30

I was approached by Mr. Tay Say Keng and one
Mr. Williams. Tay Say Keng asked me if I had any
clients who were interested in buying a rubber
estate. Tay Say Keng had an option which he
showed to me early in 1960.

At page 1 of Ex.P.1 was that option he showed me.

In the
High Court

Plaintiff's
Evidence

No. 5

Notes of
Evidence of
Herbert
George Warren
10th April
1962
Examination
continued

I told him I could introduce him to Mr. Williams who would be interested in such business. Mr. Williams was then a director of Price Williams & Co. Ltd. Mr. Williams is in fact Price Williams. He met Tay Say Keng and me at my house. I know Mr. Williams visited the estate after he had seen Mr. Tay Say Keng. As a result I suggested to Mr. Williams that he contact Mr. S. Jegarja then in England. He is now in the witness room. I telephoned to him in London. I told him there was an estate which is in good condition and that Mr. Williams was going to London and would meet him.

10

In few days later I received a cable - page 2 of Ex.P.1. Shortly after that I received instructions to form a company to be called Austral Asia Plantation Ltd. Accordingly I wrote to the Registrar of Companies if that name was available. Copy of letter is at page 3. Messrs. Shearn, Delamore & Co sent that letter. The company was eventually formed and I witnessed the signature of the signatories.

20

Ex.P.2

I filed the documents for registration of the company. This is the Memorandum and Articles of Association of the company. (Marked Ex.P.2). I gave instruction to Messrs. Shearn, Delamore & Co to negotiate in reference to the contract.

30

I left the wording of the agreement to Messrs. Shearn Delamore & Co. Finally I was present when a cheque for \$90,000/- was handed to Mr. Ball and a copy of the agreement signed by me on Saturday or 28th May.

The \$90,000/- came as a remittance from Mr. Raja drawn on Hongkong & Shanghai Bank at Singapore. The cheque was for \$120,000/-. We put the cheque into our joint account. Myself and Mr. Williams and you made out a cheque for \$90,000/- in favour of the defendants' solicitors. The agreement I signed is at pages 5 to 8 of Bundle of Documents.

40

Reference Clause 3 - the arrangement was purchase money to be paid on or before 7th May. The company would raise

capital and pay the purchase price and run the business. Approach was made to Indian Oversea Bank for a loan.

In the
High Court

10 A valuation of the estate was made by a Chinese gentleman nominated by the Indian Oversea Bank. This is the gentleman (identifies Chung Fook Sung). A valuation was in fact prepared by the gentleman. It is at pages 18 to 22 of the Bundle (Ex.P.1). There was a plan attached to the report. This is report and plan. (Marked Ex.P.3). Apart from the bank I also made enquiries with a view of raising funds. I contacted Mr. Sathappan of Seremban, who had experience of buying and selling rubber estates in that area. I know him personally. He is a State and Town Councillor. There were some small lots on the estate and I thought we could dispose of those. By small lots I mean the small acreages on the estate. I saw Mr. Sathappan. He said in time that could be done. I arranged a meeting with Mr. Sathappan and Mr. Tay Say Keng.

Plaintiff's
Evidence

No. 5

Notes of
Evidence of
Herbert
George Warren
10th April
1962
Examination
continued

30 I did not pay the balance of the purchase price on the 7th August as provided in the agreement. A meeting was arranged at my house on 8th August. I was there and Mr. Tay Say Keng and a Chinese lady Madam Cheng Moy. There was another Chinese, whose name I don't know. Mr. Sathappan also attended. Using my memory another Indian came with Mr. Sathappan but was not present at the meeting. He waited outside. The interview was done in the Malay language and also English mixed. There was no interpreter. We just talked away in English and Malay. Mr. Sathappan, whose Malay is better than mine, was telling me Madam Cheng knew spoke English and Mr. Tay Say Keng spoke Malay and English. As far as I was concerned I was quite clear as to the discussion as to the extension of time of payment and of certain matter. I made some rough notes at the meeting. Next morning I went to Messrs. Shearn Delamore & Co with Mr. Sathappan and told them what happened at the meeting. I am looking at page 26 of Ex.P.1. That is letter from Messrs. Shearn Delamore & Co to Allen Gledhill & Ball. All the points in the letter were discussed at the meeting. During the talk Mr. Tay Say Keng rang up Malacca and spoke in Chinese. I understood he was speaking to Mr. Tay Say Geok. He rang up at least 3 times. He was acting as

40

In the
High Court

Plaintiff's
Evidence

No. 5

Notes of
Evidence of
Herbert
George Warren
10th April
1962
Examination
continued

representative of 1st Defendant and he apparently rang up the latter to get instructions.

Messrs. Shearn Delamore & Co. showed me letter at page 27. There was a difference between me and the others e.g. as to payment of \$35,500/-. They asked for a Supplemental Agreement. A Supplemental Agreement at page 35 in black ink was submitted. Messrs. Allen Gledhill & Ball struck off paragraph 4. My idea of paragraph 4 was to enable me to sell the small acreages at a profit and use the purchase price of the small acreages as part of my purchase price. The defendants' solicitors took objection to that paragraph. To my memory that paragraph 4 was agreed at the meeting and I was to hand over the purchase price of the small lots whenever I got it to the vendor. I say this was discussed at the meeting. Mr. Tay Say Keng understood this point and agreed to it. Mr. Tay Say Keng appeared certain the matter should proceed on that line. Madam Cheng took a small part at the meeting. What conversation passed between her and Mr. Tay Say Keng in Chinese I would not know.

10

20

On 19th I was advised of the telegram at page 30 in the late afternoon. It was a Friday.

30

According to meeting of 8th I was to pay \$35,500/-. The money was available to pay that sum. We still had \$30,000/- from \$120,000 sent from London. By this time Mr. Raja was backing the enterprise and money could be made available to pay the \$35,500/-. I did not pay that sum to Messrs. Shearn Delamore & Co.

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Messrs. Allen Gledhill & Ball returned the draft Supplemental Agreement with amendment.

My client was not prepared to make the amendment to the draft agreement. I told Messrs. Shearn Delamore & Co, to take proceedings to recover the \$90,000.

Paragraph 5 of Ex.p.1 - we never went into possession of the property.

In the High Court

Re. paragraph 10 of defence - I never made the statement alleged in that paragraph i.e. that I would pay the additional sum as stated. I made it quite clear that I would handle everything through my solicitors.

Plaintiff's Evidence

No.5

Intld: A.M.

Notes of Evidence of Herbert George Warren
10th April 1962
Examination continued

Cross-Examination

Cross-Examination

- 10 XXND by Ball I am not calling Mr. Williams and doing so on advice. I don't know where he is. I have not had any communication for many months. He was company director but cannot say as to financial standing. I introduced him as an estate broker. I was approached by Madam Cheng first. Williams, Madam Cheng and Tay Say Keng and I first.
- 20 I knew Williams in the army in 1945. I don't think it is necessary to contact Mr. Williams. The option says balance must be paid within one month. Originally when the date of completion was fixed I thought I could by then have funds. In the original draft done by my solicitors the date of completion was 20th July. I did not fix the date but I was then expecting a cheque from London to cover that sum.
- 30 I had a personal letter from Mr. Williams. Later date was fixed for 7th August. Mr. Williams and Mr. Raja were present when the date was fixed. The agreement was signed on 31st May 1960. I signed as an agent. Page 2 of Bundle - telegram instructing me to negotiate. "Arranged" there means as arranged on the telephone. The capital on registration was \$11 for each member. No shares have been allotted. I was secretary and still secretary of the company, which was never operated. There was a directors' meeting.

In the
High Court

Plaintiff's
Evidence

No. 5

Notes of
Evidence of
Herbert
George Warren
10th April,
1962

Cross-
examination
continued

There was a resolution made but never carried out because the purchase fell through. The valuation was made on instruction of the Indian Oversea Bank. It was asked by the Bank to authorise Cheng to make the valuation. I have no correspondence with the Bank as secretary. I don't know who had paid Cheng. I have been away on leave. I did not pay him myself. The valuation was made for obtaining a loan. Not to my knowledge it was made for resale to the company. The resale price to the company was to be \$2,300/-.

10

There was a draft agreement in the form of notes for selling the estate to the company. It was in the form of notes only. I had nothing to do with it. All I knew about the valuation was that the bank asked me if I would give authority to make valuation of the estate. I don't know what the words "Agreement of Sale between parties not yet signed" at page 18 mean.

20

I did not make the approach myself to the Indian Oversea Bank. Mr. Jeyaraja made the approach. It was not Mr. Jeyaraja alone who was going to buy. It was perhaps a syndicate, I don't know who got the original Ex.P.3. The stamp duties were the only other expenses paid in connection with the company. No account books have been opened. I think Mr. Raja was negotiating with the bank on behalf of the company. There was written agreement between me and the nominee of the company or with my principal. I had the money from the person. I regarded Mr. Raja as my principal. He was the person who told you to negotiate. I did not regard Mr. Williams as my principal in spite of telegram (page 2). Mr. Williams was acting as broker. I was myself acting as local agent. I have no memorandum in writing between Mr. Raja and myself. Mr. Williams is director of the company. I have not got one cent. In fact I have paid the fees. At \$2,300/- an acre the purchase price would be \$1,141,375/- 10%

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of that would be \$114,375/-. Cheque for \$120,000/- would be more than enough to cover a deposit at 10%.

In the High Court

Intld. A.M.

Plaintiff's Evidence

11.30 a.m. short adjournment

No. 5

Intld. A.M.

Notes of Evidence of Herbert George Warren 10th April 1962

12.06 p.m. resumed

Cross-examination continued

Counsel as before

P.W.1 Herbert George Warren (on former oath)

10 (Shown draft between Austral Asia Plantations Ltd. and Warren marked Ex.D.4)
 This is a draft of agreement. It was never executed since the company did not go into business. Purchase price to be \$2,300/- and deposit to be \$120,000/-. Mr. Raja came to know of the price I agreed to pay. The difference of \$500/- per acre was to be Mr. Williams'. I cannot say if Mr. Jeyaraja agreed to pay \$500/- an acre. There was a meeting of the directors. I was present at
 20 that meeting. The price was discussed. Two prices were discussed - at \$1,800/- and \$2,300/- per acre. The company would have bought at \$2,300/- per acre. The company would go ahead provided it could get finance but finance was not so readily forthcoming. Purely to help them I went to see Mr. Sathappan and introduced him to Mr. Jeyaraja. I reported that given time he could sell off
 30 the small acreages and that would in some way assist the formation of the company. I cannot tell what effort has been made by the bank to give help to the company. I made no other effort to get finance for the company.

Ex.D.4

Reference letter at page 24 - reference date of completion of purchase: I immediately

In the
High Court

Plaintiff's
Evidence

No. 5

Notes of
Evidence of
Herbert
George Warren
10th April
1962

Cross-
examination
continued

communicated to Mr. Raja and also Mr. Williams and Mr. Sathappan. The company did not hold a meeting to consider that letter.

Reference letter at page 25 - that letter was shown to me. It was apparent at that time that there might be delay in completing the purchase. I cannot say if at that time it would be possible at all to raise money to pay the purchase price. There was nothing in writing about the situation as on 27th July.

I had no prospects of completing the purchase myself on 8th or any other date. I myself had no possibility of completing the purchase. I never intended that I personally should buy the rubber estate. I don't know what happened to that proposal in the letter (at page 24).

As to conference on 8th August - I made some written notes. I have not got them now. I made some notes just for the purpose of informing Messrs. Shearn Delamore & Co. I destroyed them after that.

Letter of 11th August - page 26 It did not propose Clause 4 of draft of Supplemental Agreement. Letter completely disclosed what was discussed as to actual sum of money mentioned. I discussed paragraph 4 of draft agreement with my lawyer. I don't know why it was mentioned in that letter except perhaps it was intended to mention only definite sums of money. Proposal at paragraph 4 was discussed at the meeting. I mentioned paragraph 4 to my lawyer before it was written. I never asked my lawyer to send letter at page 29 after date of letter at page 27. Not to my knowledge that Mr. Sathappan or Mr. Raja gave further instructions to the lawyer to send letter at page 29. I did not think paragraph 4 was important. It was merely logical.

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When the small lots were sold the purchase price would be passed to the Vendor. The price of the small acreages to the Vendor would be ₹270,000/-. We hope to sell them and get a minimum of ₹400,000/- at ₹2,500/- per acre.

10 Some of them could fetch ₹2,800/-. If the small acreages were sold the balance of the area would be less saleable i.e. would be less profitable to sell because the price of the balance per acre would be less than those of the small acreages. The latter were near the road. If we were given the opportunity to sell the small acreages the company would be in a position to operate the larger area.

Intld: A.M.

Adjourned to 2.30 p.m.

Intld: A.M.

Court resumes at 2.30 p.m.

Counsel as before

20 P.W.1 Herbert George Warren (on former oath)

XXND by Mr. Ball (continued) ₹35,500/- were for getting extension of time. The basis of that payment could be payment of interest and maintenance cost but not so specifically stated. We thought it would be a good thing to do so. I did not say failure to pay caused considerable loss to the plaintiff.

30 The defendants would get interest on investment of the balance of the purchase price if it were paid. It was of great importance that I should find money before date fixed for its payment. I have advised my client accordingly. Buying a rubber estate with young plants is buying because we might sell it again. I call it an investment.

40 To my recollection a cheque was drawn for ₹35,500/- and signed by me and Mr. Williams but was not presented to the lawyer. The cheque was drawn on Saturday morning the day following the receipt of the telegram. (Telegram received on Friday 19th) After discussion with Mr. Jeyaraja and Mr. Sathappan after

In the
High Court

Plaintiff's
Evidence

No. 5

Notes of
Evidence of
Herbert
George Warren
10th April
1962

Cross-
examination
continued

In the
High Court

Plaintiff's
Evidence

No. 5

Notes of
Evidence of
Herbert
George Warren
10th April,
1962

Cross-
examination
continued

the amendment of the Supplemental Agreement we found it was unacceptable. They decided that if they could not dispose of the small acreages, it would be difficult for the company to operate. Without the opportunity of selling small acreages we would find it difficult to get finance. Mr. Jeyaraja, Mr. Sathappan, myself and Mr. Rawson were present at the meeting. The cheque for \$35,500/- would have been a good cheque. Afterwards it was torn up. We did not get in contact with the defendants' solicitors after receiving the telegram because there would be no point in proceeding with the matter. (Shown last sentence in last paragraph of letter of page 33 of the Bundle). My reading of that paragraph is that parties concerned wish to revert to draft Supplemental contract with paragraph 4. I did not give instruction in that matter in that paragraph. I was frustrated because the defendants would not agree to Clause 4. I saw letter at page 34 but the thing had gone out of my hand. I was consulted about it. I did not take any part between 1st September 1960 until 12th November 1960. I don't know why no reply was sent to letter on page 34.

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Reference paragraph 14 of the defence - offer that they were still willing to sell the said land to the plaintiff. I was then in England. I went to England after signing the writ. I am not in a position to buy the rubber estate. I was only acting on behalf of my principal. The offer made to me now is a surprise to me.

Intld. A.M.

40

Re-
Examination

Re-Examined

Re-examined by Mr. Rintoul The capital of Austral Asia Plantations Ltd. - it is quite usual to incorporate a private company with the signatory's shares. It is usual for the directors to have a

share of whatever value. The capital of the company is \$2 million divided into 20,000 shares of \$100/- each.

I have known Mr. Jeyaraja for about 10 years. I would be prepared to accept his word.

10 He is Director of another company of which my firm are secretaries. I was never interested in buying the estate myself. I was buying it for someone in England. I said letter at page 26 did not mention paragraph 4 of draft Supplemental Agreement because that was concerned with specific sums of money. The total purchase price to be found was \$90,000/- and \$90,000/- had been paid giving balance \$847,800/-. At \$2,500/- an acre price would be \$375,000/- for sale of the small acreages. That would leave about \$472,800/- for 346 acres. That comes to about \$1,300/- per acre.

20 Letter at page 34 - I was told about it but did not instruct. Mr. Jeyaraja must have done so.

Intld: A.M.

NO. 6

NOTES OF EVIDENCE OF CHONG FOOK SUNG

P.W.2 Chong Fook Sung affirmed states in English

30 Living at No. 9 Court of Justice Road, Kuala Lumpur, and have been since 1952. I have been working as a Valuer in 1942. I am licensed for the State of Malacca. In 1960 I was called by the Indian Oversea Bank to put up a valuation to an estate in Lendu, Malacca. I valued the estate. Ex.P.3 is a copy of my valuation. The particulars of the land are set out in the titles. I went with Mr. Raja and Mr.Sathappan. Mr. Raja is in the witness room now with his leg in plaster. (Identifies Mr.S.Sathappan).

40 When I visited it it was not in tapping. See my report (at page 21). By March 1962 about 284 acres would be in tapping and that would be in addition to 142. If estate were handed over

In the
High Court

Plaintiff's
Evidence

No. 5

Notes of
Evidence of
Herbert
George Warren
10th April
1962 Re-
examination
continued

No.6

Notes of
Evidence of
Chong Fook
Sung.
10th April
1962
Examination

In the
High Court

Plaintiff's
Evidence

No.6

Notes of
Evidence of
Chong Fook
Sung.
10th April
1962
examination
continued

Cross-
examination

now the trees would be more matured. The price of rubber - July 1960 price of rubber was \$1.08. I value the estate at \$2,300/- according to the size. The price of a rubber estate varies with the price of rubber to a certain extent.

Intld: A.M.

Cross-Examination

XXND by Mr. Bell. I was first issued with a licence in Malacca in 1950 and have had it continuously. I have no office at Malacca. In Malacca I have had two or three valuations to do every year. Ex.P.3 was made on instruction for the Indian Oversea Bank.

10

Mr. B.S.S.Rai, the Manager of the Bank asked me to go to Malacca with Mr. Raja. I have not been paid yet. I sent my bill to the Austral Asia Plantations Co. Ltd. I have based my valuation on this estate on the average price of rubber at \$1/-. That expectation had not materialised. If actual production on 80 acres for last year was 24,221 lbs. I would be disappointed. It happened that something I got wrong. The figures under "Consideration" in Ex.P.3 - I think one of the directors of the company gave these figures to me. I think it was Mr. Williams. No letter accompanying the agreement from which I got the figures. That was the only occasion I met him.

20

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Intld: A.M.

RE-EXAMINED

Mismanagement would affect production.
Low crop may be due to inefficient management.

Intld: A.M.

Released

Intld: A.M.

In the
High Court

Plaintiff's
Evidence

No. 6

Notes of
Evidence of
Chong Fook
Sung
10th April
1962
Re-examination

NO. 7

Plaintiff's Evidence

NOTES OF EVIDENCE OF SATHAPPAN

s/o K.R.S. SATAPPA CHETTIAR

P.W.3 Sathappan s/o K.R.S.Satappa Chettiar

affirmed states in English

No. 7
Plaintiff's
Evidence

Notes of
Evidence of
Sathappan s/o
K.R.S.Satappa
Chettiar
10th April
1962
Examination

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Living at No. 33C House Road, Seremban.
Member of Negri Sembilan State Assembly. I am
also a rubber planter. I know the plaintiff -
have known him for the last 6 or 7 years. One
day the plaintiff came to my office in the
morning and asked for my opinion about this
estate in Lendu. That was in July 1960. He
gave particulars and plans of the estate. I
said I must inspect the land. A few days
later I inspected the estate with Mr. Williams
who came with the plaintiff and Mr. Jeyaraja
and Mr. Cheng (P.W.2). Mr. Jeyaraja is now in
the witness room with his leg in plaster.

(Shown Ex.P.3). I see plan of the
estate. I told Mr. Warren that the small
grants could be sold and the big lease 346
acres to be kept by them. It could be a
good "buy". I told them if they could get
2 months' extension of the period in the
agreement from time it expired I could sell
the small grants. I expected it could be
sold at \$2,500/- per acre.

In the
High Court

Plaintiff's
Evidence

No. 7

Notes of
Evidence of
Sathappan
s/o K.R.S.
Satappa
Chettiar
10th April
1962
examination
continued

Small grants are easier to sell than big grants. By small grants I mean those small acreages held under separate titles. I went 4 times to the land with prospective buyers. I did not sell them because I did not get the extension of time.

On 8th August 1960, I went to the plaintiff's house. I arrived at 7 p.m. The Plaintiff asked me to go. When I got there Tay Say Keng, Madam Cheng, a Chinese gentleman, a conductor of the estate accompanied Mr. Tay Say Keng. They were in the witness room yesterday. I took a clerk from my office. I cannot remember which one of them. He did not take part in the proceedings. The subject of the discussion was: Mr. Warren asked for extension of time.

10

Mr. Say Keng rang up Malacca 3 times. First he phoned up after Mr. Warren asked for 2 months' time and Mr. Warren agreed to pay. He rang up Malacca. He was talking in Chinese. I did not understand him. They asked a certain sum for maintenance of estate. Mr. Warren agreed to pay \$3,000/- to maintain estate. Mr. Tay Say Keng rang up again. It was then agreed that the plaintiff should pay \$35,500/- to the vendor through the purchaser's lawyer or I and the plaintiff would go ourselves to Malacca and pay the money.

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Mr. Say Keng spoke mixed Malay and English. I did the same thing. Madam Cheng spoke English very well. The Chinese gentleman - the conductor - also spoke English. At times Madam Cheng and Mr. Tay Say Keng spoke in Chinese together but I could not what about. After that meeting we went to the office of Messrs. Shearn Delamore & Co and met Mr. Rawson. The plaintiff instructed Mr. Rawson to write the vendor's lawyer and presented a cheque to Mr. Rawson for \$35,500/-. That was on the same day of the meeting or on the following day for which Mr. Rawson gave a receipt.

40

Letter at page 26 - This would seem to contain all the instructions given by the Plaintiff. Those terms were agreed

at the meeting of the 8th. I am looking at page 36 and Clause 4 now struck out. The matter stated in that paragraph was discussed at the meeting of the 8th. Mr. Tay Say Keng said he would speak with his brother and make him agree. He said actually "Saya boleh chakap saya brother dia boleh agree".

In the
High Court

Plaintiff's
Evidence

10 Telegram at page 30 and letters at page 31 and page 32 - the day after the arrival of the telegram I came to Kuala Lumpur and saw the plaintiff. We then went to see Mr. Rawson. Since the extension was not given, the thing stopped.

No.7

Notes of
Evidence of
Sathappan
s/o K.R.S.
Satappa
Chettiar
10th April,
1962
examination
continued

20 Letter at page 34 - it was exactly that. A day was fixed for us to pay the \$35,500/- The day for the payment was not fixed. It was fixed when we got to our lawyer on 10th or to Malacca. It was in the afternoon when Mr. Rawson read the letter. Since the vendors were not willing to extend the time I ceased to have further interest. I don't know if \$90,000/- were forfeited or not.

In January or February 1961, Mr. Raja came to my place and asked me to go to Malacca. We passed the estate. It was a selected tapping - some trees were tapped i.e. grown-up trees.

30 There was spot marking on the trees - to show which area on the bark of the tree tapping should be done. I showed the trees that had been tapped 4 or 5 months. A spot marking is generally for a month's tapping. So if there had been 4 markings, tapping had been done 4 months. A spot of about 1 cm. is marked on the bark. Each spot means tapping for one month. It also shows which place to tap.

Intld: A.M.

No. XXN by defence.

Intld: A.M.

Witness released.

40 Intld: A.M.

Adjourned to 9.30 a.m.

Intld: A.M.

In the
High Court

NO. 8

Plaintiff's
Evidence

NOTES OF EVIDENCE OF SEGRAM JEYARAJA

WEDNESDAY 11th APRIL 1962

No.8

COURT resumes at 9.30 a.m.

Notes of
Evidence of
Segram
Jeyaraja
11th April
1962
Examination

Counsel as before

Mr. Rintoul calls -

P.W.4 Segram Jeyaraja affirmed states in
English

Living at No. Lorong Yat Fung Seng. 10
I am a company director i.e. Managing
Director of Asia Trading Ltd. at Loke Yew
Building, Kuala Lumpur.

I know the plaintiff for about 12
years. In 1960 I also knew a man named
Williams. I have no idea where he is
now. In May 1960 I was staying in London.
I received a telephone call from the plain-
tiff. He told me that there was an estate 20
for sale and Mr. Williams would be going
to London to explain details of the estate.
He said it was a good proposition. He
said Mr. Williams would be in London. I
was also Director of Asia Trading Corporation.
Y.C. Kand and Warren were the Secretaries and
the plaintiff was one of the partners. Mr.
Williams arrived in London and I met him. We
discussed the proposition.

After discussion it was agreed to send
a telegram to the plaintiff. I was to give 30
about \$120,000/-. He told me that it was
towards deposit for the purchase of the
estate. Mr. Williams said it would be more
or less about that sum. I wrote a cheque
for that amount. I remained in England.
Pending my return I left the negotiation to
the plaintiff. I returned to Malaya about
28th June. On my return I signed as one of
the subscribers to the Memorandum and
Articles of Association of the Austral Asia 40
Plantations Ltd. That was Ex.P.2.

10 It was with the intention of forming a company, with a view of taking over this rubber estate and also buying and reselling rubber estates. On my way back to Kuala Lumpur I stopped at _____ and Madras. I stopped at Madras to meet Chairman of the Indian Oversea Bank, a friend of mine, and I thought we might need money in buying the estate. We discussed the financing of the estate. The Chairman was willing and asked me to contact the local Manager and to make a formal report to the Chairman at Madras. The local manager instructed Chong Fook Sung, who was here yesterday, to make a valuation of the estate.

Chong made a valuation, which was shown to me by the Manager of the Bank.

20 (Shown page 18, Ex.P.3). This is the valuation. I asked the Chairman at Madras for between \$400,000/- and \$500,000/-. After I arrived at Kuala Lumpur was told by the plaintiff that we could sell the small lots. P.W.3 said he could sell the small lots.

I was shown agreement made between the plaintiff and the defendants - the same at page 5 - page 8 of the Bundle. I first saw about first week of July. (Referred to paragraph 3 of agreement).

30 I knew about that first week in July. Since I had just arrived from London the vendors would give reasonable time to pay. I asked for extension of time - a further two months. I told the plaintiff to ask for it. If they had given me that extension I could have completed the agreement. I went to the estate with the vendors and also P.W.3. They were all young trees.

Intld: A.M.

Cross-Examined

40 XXND by Mr. Ball Look at page 2 - Mr. Williams told me the price was \$2,000/- per acre. No written contract between me and Mr. Williams. He gave a formal receipt for the money I gave him. Receipt did not mention purchase price. Messrs. Shearn Delamore & Co. has got it. (Mr. Rintoul promised to search for it). This was a big transaction. I did not consider formal contract between me and Mr. Williams necessary. I

In the
High Court

Plaintiff's
Evidence

No.8

Notes of
Evidence of
Segram
Jeyaraja
11th April
1962
examination
continued

Cross-
examination

In the
High Court

Plaintiff's
Evidence

No.8

Notes of
Evidence of
Segram
Jeyaraja
11th April
1962
Cross-
examination
continued

had confidence in him and the plaintiff's firm. According to agreement at page 5 price was \$1,800/- but company to buy at \$2,300/-. I knew that all the time as a fact.

Ex.D.4 is draft contract between the plaintiff and Austral Asia Plantations Co. Ltd. and the price there is \$2,300/- per acre and deposit raised was \$120,000/-. The \$120,000/- I sent from London was on the basis of Ex.D.4. \$120,000/- would be about 10% of the purchase price.

10

The company was immediately formed and held a formal meeting in the first week of July. The subscribing members had an informal discussion and decided to ask for extension of time. Mr. Williams and I were present as members and the plaintiff as Secretary but no resolution was adopted. I never signed it. By then I knew that the price was \$1,800/-. I told Mr. Williams that the difference was too much. I insisted on seeing the original agreement. I saw it. We had a discussion. The plaintiff prepared minutes but not signed.

20

I was shown Ex.D.4 by Mr. Williams. I asked to see the agreement between the plaintiff and the vendors of the estate. I saw it. When I discovered the difference of \$500/- per acre I asked the plaintiff and he told me that that was for commission for Mr. Williams. I refused to sign. Ex. D.4 because I thought Mr. Williams should not get so much commission, being himself a Director of Austral Asia Plantations Co.Ltd. I never visited the estate with Mr. Ng.Chee Yee and I don't know Ong Kim nor discussed the matter with either. I had visited the estate. I know nothing about rubber estates. I thought \$2,300 was a good price. Price was then I think \$1.20. Price today is about 80 to 90 cents.

30

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Reference page 24 of the Bundle - I cannot say if I saw it or told of its contents. I cannot remember now, but I knew of it a day or two, perhaps after 20th July. It was a surprise to me because negotiation was still going on.

Q. With reference to last paragraph page 24 of the Bundle, were you definite you could not have paid on 8th August?

In the High Court

A. No letter was sent in reply to that effect because there was negotiation.

Plaintiff's Evidence

Q. But negotiation did not start until after 8th?

No.8

A. I know nothing about this. Mr. Williams was handling it.

Notes of Evidence of Segram

10 When I came to know of letter on page 24 I told our solicitors to arrange further discussion with the owner.

Jeyaraja
11th April
1962

(Shown page 25). I was informed of it. To the best of my memory there was an arrangement to meet the vendor's brother, Tay Say Keng. I was not at the discussion at the plaintiff's house. I remember seeing letter at page 26 but cannot say if it was in draft or not. I remember discussing with Mr. Rawson about sending this letter before it was sent. We discussed paragraph 4 of the draft Supplemental Agreement but I don't know why it was not put in the letter (page 26). I cannot understand why.

CROSS-examination continued

20 I was shown letter on page 27. We instructed our lawyer. Since we had to pay another \$35,500/- we wanted to make sure of the extension of time and also paragraph 4, the latter of which was absent in letter on page 26. I remember it was Saturday. I think on 20th August we sent a cheque through Warren to Mr. Rawson about mid-day for \$35,500/-. It was paid on a cheque out of joint account of Warren and Williams. I had nothing to do with drawing up the cheque. I saw the cheque for \$35,500/-. Mr. Warren and Mr. Sathappan were taking it to Mr. Rawson. I was consulted about the cheque. I think the cheque for \$35,500/- was to be taken on Saturday, 20th August. I cannot remember if that was in connection with telegram on page 30. I did not see the telegram but was told of it.

30 I saw letter at page 31 but cannot remember when I gave instructions to sending letter at page 33. Last paragraph - I think "contract" means the agreement to buy and sell was still

In the High Court

Plaintiff's Evidence

No.8

Notes of Evidence of Segram Jeyaraja 11th April 1962 cross-examination continued

there. We had every intention to carry on with the contract if we were given the extension and paragraph 4 of Supplemental Agreement. Paragraph 4 was important to us because if we could sell the small acreages we would have enough to pay for the balance.

Intld: A.M.

11.20 a.m.

Short adjournment

10

Intld: A.M.

11.45 a.m. resumed

Counsel as before

P.W.4 Segram Jeyaraja (on former oath)

XXN by Mr. Ball (contd)

(Referred to letter at page 34) I saw it. I see (35). I did not take a decision that the lawyer should not write to you. I gave this letter (at page 34) my consideration. We discussed with Mr. Rawson, our solicitor, and since they were forfeiting our money of \$90,000/- so I did not wish to continue with it. If the original agreement had been revised on terms in the draft Supplemental Agreement I would have credit of \$90,000/- But Clause 4 was not accepted by the vendors and that was the reason why we did not continue with it.

20

I was shown the defence (at page 11). I do not consider we should take up offer now because the rubber has been tapped and that the price of rubber is less than it was in 1960.

30

Intld: A.M.

Re-examination

Re-Examined

Re-examined by Mr. Rintoul. I would agree to carry on with the purchase at \$1,800/- but Mr. Williams' commission would be straightened out.

impression that they were forfeiting the entire \$90,000/- and on that we were to start again.

In the High Court

Intld: A.M.

Plaintiff's Evidence

That concludes plaintiff's case.

No.8

Intld: A.M.

Notes of Evidence of Segrara Jeyaraja 11th April 1962 Re-examination continued

(Here follows the Defendants' Counsels' Opening Submission).

NO. 9

Defendants' Evidence

NOTES OF EVIDENCE OF

TAY SAY GEOK

No.9

10 Thursday 12th April 1962
Court resumes at 9.30 a.m.
Counsel as before

Notes of Evidence of Tay Say Geok 12th April 1962 examination

Mr. Rintoul - I ask for leave for plaintiff to leave Court on some important Personal matter - to see the Minister of Finance.

Intld: A.M.

Plaintiff allowed to leave.

Intld: A.M.

20 (Here the Defendants' Counsel continued his Opening Submission)

1st Defendant: Tay Say Geok affirmed states in Hokkien

Living at No. 488 Tenquera Road Malacca, Land proprietor. The 2nd and 3rd defendants

In the High Court

are my wives. 4th defendant is my daughter-in-law.

Defendants' Evidence

No. 9

Notes of Evidence of Tay Say Geok 12th April 1962 examination continued

(Referred to X.P.1) Option I gave to Mr. Tay Say Keng on 9th May 1960 to sell my lands. Say Keng is my younger brother. Option was valid until 31st May 1960, and the time I set for balance of purchase price within one month from date of deposit. A few days later my brother told me sale likely to succeed.

10

Page 5 is the agreement. Time fixed for payment of balance of purchase price to be paid was not later than 7th August 1960.

Page 24 - I gave consent to my solicitors to say all those in the letter.

Page 25 - I knew of (25). I was willing to meet Warren but wished to know what was to be discussed. Then I heard nothing more. Nothing was paid on 7th or 8th August. On 8th August my younger brother told me by telephone from Mr. Warren's house that Mr. Warren would like an extension of time of the agreement. I agreed provided time not to be too long. If long I would like to have interest and additional deposit and also allowances for doing weeding on the estate. I received telephone calls 3 times from my brother. I remember being told by solicitors of contents of (26). I gave instruction to reply as in (27). Generally speaking I accepted conditions mentioned in (26).

20

30

Letter (29) sending draft agreement together with paragraph 4 - I remember contents of paragraph 4. Paragraph 4 said that the purchaser had a right to sell certain part of my estate just as he liked to which I disagreed.

40

Telegram (30) was sent on 19th August. I gave instruction that it be sent. I recollect that the telegram stated that with reference to contents of letter of 10th August plaintiff was requested to pay \$35,500/- on the following

10 day failing which deposit of \$90,000/- would be forfeited. No reply to telegram was received on 20th. On 22nd August I asked for return of title deeds. On that day I would be willing to sell my estate if purchaser would pay for it. (Read to him last paragraph of (33)). I knew of that. As a result of that I gave instruction to return draft Supplemental Agreement with amendments. (Read paragraph 7 of draft Supplemental Agreement). That is correct. By that if draft accepted the first agreement would still be valid i.e. the \$90,000/- I had would still be credited to the plaintiff.

Reference paragraph 14 of defence - I was still then willing to sell the estate and I still am.

Intld: A.M.

Cross-Examined

20 XXND. by Mr. Rintoul On 8th August I told my brother to say that I agreed to extension of time. I needed money and I wanted to sell my estate. I agreed that I would not suffer any injustice by granting extension of time.

30 In 1960 I got no income at all from the estate. I was explained contents of agreement at page 5. I cannot remember if I suggested any amendments to the draft. Since I cannot remember there could not be anything important in the amendment I had no points so far as I remember to make to draft.

Intld: A.M.

Mr. Ball wishes to put in amended draft.

I will consider that when and if I think necessary.

Intld: A.M.

40 I did not know that there was going to be a meeting between Say Keng and Warren and others at Warren's house in regard to extension. I only knew of it when Say Keng telephoned me from Warren's house. That was in the evening or afternoon. I straightaway agreed to an extension on principle. I was called to the telephone twice more and they arose out of question of extension of time and conditions. My brother did not tell me anything

In the
High Court

Defendants'
Evidence

No. 9

Notes of
Evidence of
Tay Say Geok
12th April
1962
examination
continued

Cross-
Examination

In the
High Court

Defendants'
Evidence

No. 9

Notes of
Evidence of
Tay Say Geok
12th April
1962
cross-
examination
continued

about letting the plaintiff sell parts of my estate. The first time I knew about it was when I was shown paragraph 4. I told my brother after that if I did that it would mean a loss to me. (27) was written on my instructions. (Read penultimate paragraph of (27)). I gave instructions to my lawyer to reply that I do not know the subtleties of law. At the third telephone message from my brother on 8th my brother told me that Mr. Warren agreed to pay \$35,500/- on or before 19th August. The date of payment was omitted in letter (27). I knew my solicitor was asking for a draft agreement.

10

Q. Did anyone ever tell you that \$35,500/- would be payable on the signing of the Supplement Agreement?

A. I was told so by a clerk of my solicitors.

20

I was told that before I send the telegram. I was told of it on 11th August. I said "Yes". i.e. I agreed. I did not know if draft agreement had been returned to the plaintiff's solicitor by 19th. It was my idea of limiting the time of payment on the following day by sending telegram, because I wanted the money. On 17th or 18th I saw the draft agreement. I rejected paragraph 4 and told my solicitors to return it. That was a day or two before I sent the telegram. I made a special visit on 19th and instructed them to send the telegram. The sending of the telegram has nothing to do with paragraph 4. I sent the telegram because I failed to receive the money on 19th. My brother told me that it was promised I got the money on 19th.

30

Q. How is it that paragraph 4 was referred to in the telegram when you told us it had nothing to do with it?

40

A. That was my solicitors idea.

Q. Why was it not mentioned in the telegram that payment of \$35,500/- was promised you?

A. My solicitors might have forgotten it.

The whole object of my going to solicitors' office was to send telegram complaining that I had not been paid that day. I agree that it would raise a good deal of confusion if the date 19th August was mentioned in the telegram. Not true telegram was sent the same day the draft Supplemental Agreement was discussed between me and Mr. Ball. I saw Mr. Ball's clerk about sending the telegram. I don't know if Mr. Ball or another assistant saw telegram before it was sent. I don't know at what time it was sent. I went to the solicitors' office at about 10 a.m. I saw one of the clerks. I know bank closes at 3 p.m. I did not instruct my solicitors to ask for cash or bank draft. I did want something before 1.00 p.m. the next day. My idea in sending telegram was to make plaintiff pay as quickly as possible. It was stated in telegram I would keep \$90,000/- if \$35,500/- was not paid. I wanted the \$35,500/-.

I would suffer no loss if I had given plaintiff 14 days' notice instead of 24 hours in telegram. (3rd paragraph of (34) read and interpreted to witness). I understand contents of paragraph 3. \$90,000/- should be confiscated because the date of payment of balance under first agreement had long expired. If the Supplemental Agreement were signed \$90,000/- would be credited to plaintiff. If \$35,500/- were paid I would consider crediting \$35,500/-.

Intld: A.M.

Short adjournment

Intld: A.M.

Resumed

1st Defendant: Tay Say Geok (on former oath)

Cross-examination (contd) In August 1960 the estate consisted of rubber not yet tapped. Considerable number of these in clone R.R.R.I. I started tapping in November 1960 and have been tapping since. I cannot remember what was price of rubber in August

In the
High Court

Defendants'
Evidence

No.9

Notes of
Evidence of
Tay Say Geok
12th April
1962
cross-
examination
continued

In the
High Court

Defendants'
Evidence

No.9

Notes of
Evidence of
Tay Say Geok
12th April
1962
cross-
examination
continued

1960. It was higher than it is today. I am willing to sell my estate at the same price though price of rubber lower and I have been tapping it. I have not paid my brother any commission - not even 2% on \$90,000/-. I would pay only if sale is completed. I did not know Madam Cheng until these few days.

Intld: A.M.

No Re-Examination

10

Intld: A.M.

NO.10

NOTES OF EVIDENCE OF TAY SAY KENG

No.10

Notes of
Evidence of
Tay Say Keng
12th April
1962
Examination

D.W.2. Tay Say Keng affirmed states in Hokkien

Living at Chuan Moh Sin Estate, Segamat. Manager of that estate. (Referred to Option at page 1). This is the option for the sale of this estate given to me by the 1st defendant, my brother.

20

On 9th May 1960 after receiving option I rang up a woman, Cheng Moy alias Cheng, now in the witness room. She lived at Kuala Lumpur. I informed her of this option. She told me she had a buyer at Kuala Lumpur. I came to Kuala Lumpur with Gan Lye Gee of Malacca. We saw Cheng Moy. We went to the plaintiff's house and there we saw the plaintiff and another European gentleman - can't remember his name. There were the 5 of us - Gan, Cheng Moy, myself, the plaintiff and another European. We talked about the estate. I handed the plaintiff the option and he gave me \$1/- as option money. He said he had a buyer. I told him the buyer could communicate through his solicitor to the owners solicitor at Malacca. We left the house. I heard an

30

40

agreement was concluded between the parties. I know the agreement expired on 7th or 8th August. I came to Kuala Lumpur with Gan Lye Gee - can't remember the date but about time agreement expired. Madam Cheng Moy took us to the plaintiff's house. It was in the afternoon. The plaintiff said he knew agreement expired. I asked him why balance of purchase price was not paid up. He told me he could not help it. He said he was not the purchaser. The purchaser failed to send money and so he could not complete the purchase. The plaintiff rang up and soon 2 Indian gentlemen came. One of them was P.W.3. Can't remember the other. The latter soon left. Only 5 persons remained. Four of us sat together - the lady was somewhere else. We talked about this estate. The plaintiff, P.W.3 and I talked. Gan was present but did not talk. The plaintiff said he had no money to pay unless he was given extension of time. I asked how long. He wanted 4 months' time. I telephoned my brother in Malacca from the house. He agreed to two months' extension and provide the plaintiff paid additional deposit and interest at Bank rate and expenses for weeding of estate. I told the plaintiff and Sathappan what my brother had said. The plaintiff and Sathappan calculated the interest and weeding expenses. The plaintiff agreed to pay:

- (1) Additional deposit of \$30,000/-
- (2) \$12,500/- as interest
- (3) \$3,000/- was weeding expenses.

I rang up my brother again. He agreed with the figures, but wanted to know when he could have the money. I told the plaintiff about it and the plaintiff discussed the matter with P.W.3, after which the plaintiff said we had to make another agreement. The plaintiff also said that he could pay the total sum of \$35,500/- on or before 19th August either through his solicitors or personally to my brother's solicitors in Malacca. I told the plaintiff to get his solicitor to write to the defendants' solicitor what he (the plaintiff) had promised. He agreed. Nothing was discussed then about sale of the defendants' estate by parts. Probably I had promised to mention about it to my brother and that I have forgotten.

In the
High Court

Defendants'
Evidence

No.10

Notes of
Evidence of
Tay Say Keng
12th April
1962
examination
continued

Intld: A.M.

In the
High Court

Cross-Examined

Defendants'
Evidence

No.10

Notes of
Evidence of
Tay Say Keng
12th April
1962
Cross-
examination

XXND by Mr. Rintoul - The sale of small parts may well have been discussed but I have forgotten if that happened. I did not tell my brother or ring up from the house. I went to the plaintiff's house on 8th of my own accord because I wanted to see the purchase through. I am certain that Sathappan (P.W.3) and the plaintiff agreed that \$35,500/- must be paid, before 19th August. If P.W.3 said otherwise I am definite I am right. I contradict his evidence. The conversation was in the Malay language. I told the defendant that \$35,500/- was to be paid on 19th August at the third telephone conversation. I cannot remember if I accompanied my brother to his solicitors about a letter from the plaintiff's solicitor. The defendant mentioned about letter (26) to me. My brother told me contents of (26) were correct but draft agreement was not i.e. paragraph 4. I don't know why the date of payment of \$35,500/- was not mentioned in (26). I had been to office of Allen Gledhill & Ball after the 8th August in connection with this matter. I went alone. I did not know that a telegram like that at page 30 of the Agreed Bundle was sent. I cannot remember the actual words used by the plaintiff in the agreement to payment of \$35,500/- on 19th. He spoke in Malay. P.W.3 also agreed. What are stated in paragraph 10 of defence are correct, but I cannot remember words they used. It was a firm agreement that they were to meet me at Malacca at the lawyer's office and pay the money there or pay through their solicitors. Paragraph 10 of defence is slightly inaccurate. I went to the lawyer's office at Malacca - can't remember time, and whether morning or afternoon. I remember going to office but can't remember whom I saw.

Q. Was your brother there?

A. Can't remember.

Intld: A.M.

No Re-examination

Intld: A.M.

Adjournment to 2.30 p.m.

Intld: A.M.

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JUDGMENT OF MR. JUSTICE AZMI

No.11

Judgment of
Mr. Justice
Azmi
23rd June,
1962

By an agreement dated 31st August 1960 signed by the plaintiff at Kuala Lumpur and by the defendants at Malacca, the defendants agreed to sell and the plaintiff to purchase certain lands situated in Malacca.

10 The lands were planted with young and yet untappable rubber and consist of one big lot of about 346 acres held under a 99 year lease and 4 other lots held under various State Grants ranging in areas from about 98 acres to about 3 acres totalling about 150 acres.

The agreement contains, inter alia, the following provisions:-

Clause 1. The price of the land to be \$1,800/- per acre.

20 Clause 2. The purchaser to pay \$90,000/- upon or before execution of the agreement by way of deposit and in part payment of the purchase price.

Clause 3. The balance of the purchase price to be paid on or before the 7th August 1960 at the office of the vendors' solicitors.

30 Clause 5. The purchaser to enter into possession from the date of execution of the agreement and maintain the estate and buildings etc.

Clause 6. Parties to pay quit rents, assessments etc., for 1960 in equal shares.

40 Clause 8. If the purchaser should fail to complete the purchase according to the agreement the deposit of \$90,000/- paid by the purchaser to be considered as liquidated damages and shall be forfeited to the vendor.

The plaintiff paid the deposit of \$90,000/- but failed to pay the balance of the purchase price on the 8th August 1960.

In the
High Court

No. 11

Judgment of
Mr. Justice
Azmi
23rd June
1962
continued

I will now refer to the pleadings. The plaintiff alleges (paragraph 4 of the Statement of Claim) that time was not of the essence of the said contract and the defendants did not by notice or otherwise make it so. The defendants, however, insist that time was of the essence of the contract from the beginning and set out the facts in support of their contention in paragraph 2 of the Statement of Defence namely:-

10

(a) The subject matter was rubber estate and the value of rubber varies from time to time.

(b) The payment of the balance of the purchase price, at the request of the plaintiff, was altered from 20th July 1960 to 8th August 1960;

(c) The fact that immediate possession of the land was given to the plaintiff.

20

The Statement of Claim, after referring to the supplemental agreement by the parties to make certain variation in the original contract, namely, that the plaintiff was to pay the defendants \$35,500/-, of which \$30,000/- was expressed to be by way of further deposit and in part payment of the purchase price, goes on to say that the defendants have wrongfully rescinded the contract and forfeited the deposit of \$90,000/- by their telegram dated the 19th August 1960.

30

The defendants denied that they had wrongfully rescinded the contract and they also referred to Clause 4 of the supplemental agreement, which they denied was mentioned at the meeting between the plaintiff and the defendants' agents.

In their counterclaim, the defendants ask for specific performance of the contract or damages in lieu of specific performance and rescission of the contract and declaration that the \$90,000/- deposit has been forfeited to them.

40

It was agreed that the issues should be as follows:-

- | | | |
|----|--|--|
| 10 | <p>(1) Was time of the essence of the contract in the agreement dated 30th May 1961?</p> <p>(2) Did time ever become the essence of the contract in course of the negotiation?</p> <p>(3) Was or was not the position in law that upon failure to complete the agreement on the date stated in the contract, the contract terminated and the deposit was forfeited?</p> <p>(4) Are the defendants now entitled to specific performance or damages?</p> | <p>In the
High Court</p> <hr/> <p>No.11</p> <p>Judgment of
Mr. Justice
Azmi
23rd June
1962
continued</p> |
|----|--|--|

I will now refer to the facts of the case. Tay Say Keng (D.W.2) obtained an option on the 9th May 1960, authorising him to sell the said rubber estate at \$1,800/- an acre for which he would be given a 2% commission. The option expired at the end of the month.

20 The contract was executed on the 31st of May 1960, and the deposit of \$90,000/- duly paid by the plaintiff to the defendants.

30 In the meantime, a company was formed under the name of Austral Asia Plantations Ltd., with a capital of \$2 million divided into 20,000 shares of \$100/- each. The subscribers were Mr. S. Jeyaraja (P.W.4) and one Mr. W.P. Williams. The object of the company, among other things was to purchase the said rubber land and run the same as a rubber estate.

40 Before the contract was signed the plaintiff acting on the instruction of Mr. Jeyaraja, negotiated for the purchase of the lands and received \$120,000/- from Mr. Jeyaraja, the amount being based on the purchase price of \$2,300/- an acre. A valuation of the lands was made by Mr. Cheng Fook Sung (P.W.2) who considered that the price of \$1,141,375/- or \$2,300/- an acre, was not an unreasonable one in view of the fact that it would take about five years to recover the capital of \$1,141,375/- and also to the condition of the trees and their clones and also of the price of rubber then.

In the
High Court

No.11

Judgment of
Mr. Justice
Azmi
23rd June
1962
continued

The plaintiff failed to pay the balance of the purchase price on or before the 7th August 1960, as agreed in the contract.

On the 8th August a meeting was held in the plaintiff's house, attended by Mr. Tay Say Keng, acting on behalf of the 1st defendant, his own brother, and the plaintiff. There were other persons present, among whom was Mr. Sathappan (P.W.3).

10

During the course of the discussion, Mr. Tay Say Keng had occasion to speak to the 1st defendant, then at his house in Malacca, by telephone for instructions on matters arising at the meeting before he expressed agreement to them. It was agreed at the meeting that the plaintiff should be given time to pay the balance of the purchase price on certain conditions. It is, however, not disputed as to the following conditions:-

20

(a) The plaintiff to pay to the defendants \$12,500/- in three payments on the following dates:-

(i) \$2,500/- on acceptance date:

(ii) \$5,000/- on or before 31st August 1960:

(iii) \$5,000/- on or before 30th September 1960.

30

These sums are interest on the balance of the purchase price.

(b) The plaintiff to pay a sum of \$30,000/- by way of further deposit and the balance of the purchase price to be paid on the extended date:

(c) The plaintiff also to pay a deposit of \$3,000/- on acceptance date by way of deposit to cover cost of weeding and maintenance of the rubber lands.

40

It is relevant to note that in paragraph 3 of the letter dated 11th

August 1960, the defendants' solicitors expressed the wish that time should be expressed to be of the essence of the contract and that the acceptance date shall be deemed to have been the 8th August 1960. It also requested Messrs. Shearn Delamore & Co to put up a draft supplemental agreement.

In the
High Court

No. 11

Judgment of
Mr. Justice
Azmi
23rd June
1962
continued

10 The draft agreement was accordingly sent with the letter dated the 17th August 1960 (at page 29 of the agreed bundle). Paragraph 2 of this letter says as follows:-

"With regard to paragraph 4 of the enclosed draft we are instructed that this proposal has been agreed in principle with the representative of your clients. We are further instructed to suggest that the date for final completion be 18th October as stated in paragraph 5 of the enclosed draft".

20 In paragraph 3 the letter goes on to say that Messrs. Shearn Delamore & Co will engross the agreement as soon as the draft is acceptable and after it had been executed by the defendants and on the execution of the agreement a cheque for \$35,500/- would then be sent.

It is convenient at this stage to make my decisions on the fact regarding this controversial paragraph 4 of the supplemental agreement. The said paragraph 4 reads as follows:-

30 "Prior to the date hereinafter fixed for the completion of the purchase the Vendors will at the request of the Purchaser execute and deliver to the Purchaser his nominee or nominees a proper conveyance or conveyances and assignment of all or any of the said lands more particularly described in the first schedule to the principal agreement upon payment to the vendors of the pro rata purchase price of \$1,800/- per acre or such increased price as the Purchaser shall have arranged to sell any such part or parts of the said land to a subpurchaser and any such excess price shall be retained by the Vendors to account of the balance payable on completion but shall not be considered as further deposit".

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In the
High Court

—————
No.11
Judgment of
Mr. Justice
Azmi
23rd June
1962
continued

It would be seen that this paragraph would have given authority to the plaintiff to sell, prior to the date of the final payment of the purchase price, any parts of the lands at any price provided that the plaintiff would pay to the defendants at the agreed price of \$1,800/- per acre, and any amount in excess of that price would be kept by the plaintiff for himself. Any such payment made to the defendants would be on account of the balance of the purchase price.

10

The defendants denied knowledge of any such proposal. The plaintiff himself said:-

"To my memory that paragraph 4 was agreed at the meeting and I was to hand over the purchase price for the small lots whenever I got it to the vendors".

Mr. Sathappan (P.W.3) in his evidence however, said as follows:-

20

"The matter stated in that paragraph 4 was discussed at the meeting of the 8th. Mr. Tay Say Keng said he would speak with his brother and make him agree".

Mr. Tay Say Keng (D.W.2) in his evidence said that the sale of the small parts might well have been discussed but he had forgotten if that happened. He never told his brother or rang him up from the house about this.

30

In view of Mr. Sathappan's evidence and the fact that nothing was mentioned in the plaintiff's solicitors' letter of the 10th August of this very important matter, I have come to the view that this matter had not yet become, at the time of the meeting of 8th August, a condition to be embodied in the supplemental agreement.

40

The next question I have to decide on the facts is as to the question as to when the sum of \$35,500/- was to be paid by the plaintiff to the defendants.

The plaintiff himself said that he still had \$30,000/- out of the \$20,000/- sent him by Mr. Jeyaraja and it could be made available to pay the \$35,500/-. But he went on to say, "I did not pay that sum to Shearn Delamore". He, however, denied that he ever said that he would pay the additional \$35,500/- on the 19th day of August 1960, because he maintained that he made it clear that any payment was to be made through his solicitors.

In the
High Court

No. 11

Judgment of
Mr. Justice
Azmi
23rd June
1962
continued

10

The plaintiff however, in cross examination said that a cheque was drawn up and signed by him and Mr. Williams for \$35,500/- but they never got in contact with the defendants' solicitors after receiving the telegram because in his view, there would be no point in proceeding with the matter.

20

Now Mr. Sathappan said he was present at the meeting and that after the meeting he and others went to the office of Messrs. Shearn Delamore & Co and there met Mr. Rawson of that firm and the plaintiff instructed Mr. Rawson to write to the vendors' solicitors and then gave Mr. Rawson the cheque for \$35,500/-. That happened either on the 19th or the 20th August.

30

I would come, without hesitation to the view that the sum of \$35,500/- would not become payable until the date of the execution of the supplemental agreement though it was apparent that the defendants would prefer that date to be 19th or 20th August 1960.

40

I will now refer to the issues. As to the first issue, Mr. Rintoul said that time was not of the essence of the contract. There was nothing in the agreement itself to make that as a condition though the defendants did express a wish that time be of the essence of the contract in their solicitors' letter of the 11th August 1960. He maintained that it was the defendants, who asked the plaintiff's solicitors to put up the draft of the supplemental agreement and yet the telegram dated the 19th August 1960, gave the plaintiff less than 48 hours to pay the \$35,500/-. If the telegram were notice to make time of the essence of the contract, then he submitted that the time given was unreasonable. The rubber on the lands was still young rubber and could not yet be tapped. He would maintain then that time was

In the
High Court

No.11

Judgment of
Mr. Justice
Azmi
23rd June
1962
continued

never intended to be of the essence of the contract. He would go further and say that in the circumstances of the case the lands should be regarded the same as a dwelling house in the case of Smith v Hamilton (1951) 1 Ch.Div. page 174. Harman J. at page 179 says:-

"... and unless there was something special, the time limited in the conditions of sale for completion was not a date which, in the words of the old law, was of the essence of the contract. In other words, the equitable view which now prevails and has prevailed for a long time in the case of real estate, is that the court looks to the substance of the matter, and will not allow the existence of the dates to alter the general view that the contract is to be performed if it is just and equitable so to do, notwithstanding that time may be overrun in certain respects.

10

20

There are circumstances in which time can be said to be of the essence of the contract from the beginning. It is well known that time may be of the essence of a sale of licensed premises, or of a shop as going concern or perhaps, it may be so on a sale of animals when they are in a certain place. But it would need very special circumstances to make time of the essence of the contract on a sale of an ordinary private dwelling house with vacant possession".

30

Mr. Ball on the other hand, sought to distinguish this present case from Smith v Hamilton (supra) by saying that in this case there was no question of a resale as in Smith v Hamilton. And again in the present case the defendants were seeking specific performance but not in Smith v Hamilton's case.

40

Mr. Ball submitted the following facts to show that it was the intention of the parties that time was of the essence of the contract:-

- (1) The subject matter of the sale was a rubber estate;
- (2) The price of rubber varies from time to time;
- (3) The date of completion of the contract extended to 8th August 1960;
- (4) Possession of the rubber estate to be handed to the plaintiff on execution of the agreement.

In the
High Court

No. 11

Judgment of
Mr. Justice
Azmi
23rd June
1962
continued

10 In my opinion, there are no attendant cir-
cumstances from which I could gather and hold
that time was of the essence of the contract.
The rubber trees were still immature and, in-
deed, according to the valuer it would not be
until 1964 that the estate could be brought to
full tapping. I am inclined to agree with Mr.
Rintoul that the fact that the defendants wished
to make time of the essence of the contract in
their solicitors' letter of the 11th August 1960
would negative their suggestion that time had been
20 of the essence of the contract from the beginning.
I would, therefore, come to the conclusion that
time was not of the essence of the contract.

30 Now with reference to the second issue,
namely whether time ever became the essence of
the contract during the course of the negotia-
tion, Mr. Rintoul maintained that it never did
and he said if it was contended that time did
become of the essence of the contract by reason
of the notice given in the telegram he would
say that the time given being less than 48
hours was unreasonable.

I would put the answer to the question also
in the negative. I do not think it was the in-
tention of the defendants to make time of the
essence of the contract by notice.

40 The third issue is: Was or was not the
position in law that upon failure to complete
the agreement on the date stated in the contract,
the contract terminated and the deposit was for-
feited?

On the question of whether the contract has
been terminated and, if so, when, it is inter-

In the
High Court

No.11

Judgment of
Mr. Justice
Azmi
23rd June
1962
continued

esting to see that from Messrs. Shearn Delamore & Co's letter dated the 25th August 1960 they maintained that the contract was still in existence on that date.

On the other hand, Messrs. Allen Gledhill & Ball, in their letter of the 29th August 1960 in reply to the above, stated that "It is difficult to see how your client can claim that there can have been any revival of the original contract which has lapsed".

10

Mr. Ball referred me to the following passages from Howe v Smith (27 Ch. D. page 89):-

(i) (At page 94):

"Where a purchaser is in default and the seller has not parted with the subject matter of the contract, it is clear that the purchaser could not recover the deposit, for he cannot by his own default, acquire a right to rescind the contract".

20

(ii) (At page 95):-

"The trustee refuses to perform the contract, and then says, give me back my deposit. There is no ground for such claim".

(iii) (At page 96):-

"He was not ready with the money in order to purchase the estate, and at the time when the action was commenced if the vendor had said, 'Where is your money? Produce it, and then I will make the conveyance', he would not have been able to produce the money".

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(iv) (At page 97) where Bowen, L.J. says:-

"The question as to the right of the purchaser to the return of

40

the deposit money must, in each case, be a question of the conditions of the contract ..."

In the
High Court

(v) (At page 99):-

No. 11

"The Plaintiff ... did not pay the balance of his purchase money ... and he has been guilty of such delay and neglect in completing that ... he has lost all right to the specific performance of the contract in equity".

Judgment of
Mr. Justice
Azmi
23rd June
1962
continued

10

Mr. Ball submits that:-

- (1) The parties' legal right was a legal contractual right up to the date fixed for completion of the contract:
- (2) The parties' rights are equitable rights as to specific performance.

Mr. Ball went further to say that in Howe v Smith no stipulation was made as to forfeiture of the deposit whereas in the present case there was.

20

Mr. Ball also referred me to passages from Stickney v Keeble & Anor., reported in 1915 A.C. page 386.

(i) (At page 395):-

"It is right to state at the outset that the purchaser, Mr. Stickney, was throughout able and willing to carry out his contract".

(ii) (At page 400):-

"I will merely observe that the date fixed for completion in a contract for the sale of land is no less a part of the contract than any other clause, but equity will grant relief where a party seeks to make an unfair use of the letter of his contract in this respect, having regard to the state of the law relating to real property in England. It is safe to say that this relief will always be refused when to grant it would be essentially unfair".

30

40

In the
High Court

No.11

Judgment of
Mr. Justice
Azmi
23rd June
1962
continued

(iii) (At page 402):-

"Now, as a matter of construction merely, I apprehend the words must have the same meaning in equity as at law. The rights and remedies consequent on that construction may be different in the two jurisdictions, but the grammatical meaning of the expression is the same in each. And if this be so, time is part of the contract, and if there is a failure to perform within the time the contract is broken in equity no less than in law".

10

Mr. Ball therefore, submitted that in the present case the defendants should be allowed to plead their lawful right and it would be interfered against only if it could be shown to have interfered with some equitable reason. Finally, after citing further passages at pages 405, 406 and 411 Mr. Ball said that it would be unjust to allow the purchaser to recover the money deposited as a guarantee for due performance of the very contract which he himself, the depositor, had failed to perform.

20

In my view, there is no doubt at all that the defendants, through their solicitors, by their telegram of the 19th August 1960, had put an end to the contract probably under Clause 8 of the contract, and mainly, I think, because of the plaintiff's attempt to include Clause 4 of the Supplemental Agreement. I have held that time was not of the essence of the contract and has never been so and also that there has been no unreasonable delay by the plaintiff in that he expected that he would be given time, on certain terms, until the Supplemental Agreement has been executed. He would, if he had asked for specific performance, undoubtedly have a good case.

30

40

For these reasons, I would hold that the plaintiff would be entitled to the return of the deposit in terms of his prayer, namely:-

(a) \$90,000/-;

- (b) Interest thereon at the rate of 6% per annum from 20.8.60 until realisation;
- (c) costs.

In the High Court

No.11

Judgment of Mr. Justice Azmi
23rd June 1962
continued

For the same reasons, the defendants' counterclaim would be dismissed.

Sgd: Illegible

J U D G E

FEDERATION OF MALAYA

10 Ipoh. 23rd June 1962.

NO.12

No.12

Order of Court

Order of Court
23rd June 1962

BEFORE THE HONOURABLE MR. JUSTICE AZMI,
JUDGE, FEDERATION OF MALAYA.

IN OPEN COURT

This 23rd day of June, 1962

O R D E R

20 THIS SUIT coming on for hearing on the 9th, 10th, 11th and 12th days of April 1962 in the presence of Mr. R.H.V. Rintoul of Counsel for the Plaintiff and Mr. H.B. Ball of Counsel for the Defendants AND UPON HEARING the arguments of both counsel this suit was adjourned for judgment AND this suit coming on for judgment on the 23rd day of June 1962 in the presence of Mrs. Chan Mo Yin of Counsel for the Plaintiff and Mr. Joseph Lye of Counsel for the Defendants IT IS ORDERED that the Defendants do pay to the Plaintiff the sum of \$90,000/- with interest

30 thereon at the rate of 6% per annum from the 28th day of August 1960 to the date of realisation AND IT IS ORDERED that the Defendants do pay to

In the
High Court

No.12

Order of
Court
23rd June
1962
continued

the Plaintiff the costs of this suit as
taxed by the proper officer of this Court
AND IT IS FURTHER ORDERED that the
counterclaim herein be and is hereby dis-
missed.

Given under my hand and the Seal
of the Court this 23rd day of June 1962.

Sgd. Au Ah Wah

Senior Asst. Registrar.

High Court

10

(L.S)

Kuala Lumpur

In the
Court of
Appeal

NO.13

Notice of Appeal

Order 58 Rule 1(3)

No.13

Form 19

Notice of
Appeal
10th July
1962

NOTICE OF APPEAL

IN THE SUPREME COURT OF THE FEDERATION OF
MALAYA IN THE COURT OF APPEAL AT KUALA
LUMPUR

Civil Appeal No. 34 of 1962

20

Between

1. Tay Say Geok
2. Lim Siew Cheng
3. Ng Mei
4. Lim Cheng Wau

Appellants

and

Herbert George Warren

Respondent

(In the matter of Kuala Lumpur Civil
Suit No. 494 of 1960

In the
Court of
Appeal

Between

Herbert George Warren Plaintiff

No.13

and

1. Tay Say Geok
2. Lim Siew Cheng
3. Ng Mei
4. Lim Cheng Wau Defendants)

Notice of
Appeal
10th July
1962
continued

10

NOTICE OF APPEAL

20

TAKE NOTICE that we Tay Say Geok, Lim Siew Cheng, Ng Mei and Lim Cheng Wau the above-named Defendants being dissatisfied with the decision of the Honourable Justice Azmi given at Kuala Lumpur on the 23rd day of June 1962 appeal to the Court of Appeal against the whole of the said decision whereby it was ordered that the Defendants should pay to the Plaintiff the sum of \$90,000/- with interest thereon at the rate of 6% per annum from the 28th day of August 1960 to the date of realisation and that the counterclaim herein should be dismissed and that the Defendants should pay to the Plaintiff the costs of the suit as taxed by the proper officer of the Court.

Dated this 10th day of July 1962

Sgd. Allen Gledhill & Ball

Solicitors for the Appellants.

30

To the Registrar,
Supreme Court, Kuala Lumpur.
and to Messrs. Shearn Delamore & Co.,
No. 2, The Embankment, Kuala Lumpur.

The address for service of the abovenamed Appellants or their solicitors Messrs. Allen Gledhill & Ball is No. 4, Church Lane, Malacca, P.O.Box 69, Telephone 327.

In the
Court of
Appeal

NO. 14

MEMORANDUM OF APPEAL

—————
No.14

Form No. 21
(Order 58, rule 22(3))

Memorandum
of Appeal
18th August
1962

Tay Say Geok, Lim Siew Cheng, Ng Mei and Lim Cheng Wau the appellants abovenamed, appeal to the Court of Appeal against the whole of the decision of the Honourable Mr. Justice Azmi given at Kuala Lumpur on the 23rd day of June 1962 on the following grounds: 10

The points of law or fact which are alleged to have been wrongly decided.

1. The learned judge wrongly decided that it was agreed that the issues should be limited to the four set out in the judgment. A further issue was submitted at the trial namely "Has the Plaintiff pleaded and proved such facts as might induce the Court to interfere with the legal position?" 20
2. In finding the facts in preparation for the exercise of his equitable discretion to interfere with the legal position the learned judge omitted to consider the following points of fact:-
 - (i) that the respondent himself had no prospects of completing the purchase himself on 8th August or any other date. 30
 - (ii) that the respondent had made no memorandum in writing with Mr. Jeyaraja (P.W.4) or with Austral Asia Plantations Ltd.
 - (iii) that Austral Asia Plantations Ltd. had never issued any shares or passed any resolution to purchase the property.
 - (iv) that before the expiration of the time limited in the telegram of 19th August, 1960 the \$35,500/- was ready in the 40

hands of the Respondent's Solicitors but that Mr. Jeyaraja (P.W4) had decided not to proceed with the purchase in the terms of the original contract because he could not obtain the variation set out in the proposed clause 4 of the proposed supplemental agreement.

In the
Court of
Appeal

No.14

Memorandum
of Appeal
18th August
1962
continued

- 10 (v) that the Vendor was under no equitable duty to agree to the said variation.
3. The learned judge wrongly decided that at the meeting held on the 8th August 1960, Mr. Tay Say Keng was acting on behalf of the 1st appellant.
4. The learned judge wrongly decided that the defendants through their Solicitors by the telegram of the 19th August 1960 had put an end to the contract. Time was of the essence of the contract. Even if time was not of the essence, it was nevertheless part of the contract and as there was a failure to perform within the time, the contract had already been broken by the Respondent and was at an end in equity no less than in law before the telegram was sent.
- 20
5. As the Appellant neither by the said telegram nor otherwise ever refused to carry out their equitable obligations or sought to make any unfair use of the letter of their contract in respect of the date fixed for completion, it was essentially unfair to grant the relief prayed for by the Respondent.
- 30
6. As the Appellants as vendors were at all times and still are able and willing to carry out their contract and as the Respondent had decided to abandon his equitable right to specific performance of the contract before the expiration of the time limited in the telegram there was no ground for the claim to the return of the deposit.
- 40
7. As the Appellants by their Solicitors' letter dated 29th August 1960 indicated their willingness to resume the original contractual relations upon terms already agreed to by the Respondent and as the Respondent did not

In the
Court of
Appeal

No. 14

Memorandum
of Appeal
18th August
1962
continued

conclude the supplemental contract or pay the balance of his purchase money, the Respondent has been guilty of such delay and neglect that he has lost all right to the specific performance of the contract in equity or to the return of the deposit.

8. For these reasons the learned judge ought to have made the declaration prayed for by the Defendants. 10

Dated this 18th day of August 1962.

Sgd. Allen Gledhill & Ball
Solicitors for the Appellants.

To:

THE REGISTRAR,
SUPREME COURT,
KUALA LUMPUR.

And to

Messrs. Shearn Delamore & Co.
No 2, The Embankment,
Kuala Lumpur. 20

The address for service of the appellants or their Solicitors Messrs. Allen, Gledhill & Ball is No. 4 Church Lane, Malacca, P.O.Box 69, Telephone 237.

No. 15

Notes of
Argument
recorded
by Thomson
C.J.
4th December
1962

NO. 15

NOTES OF ARGUMENT RECORDED BY THOMSON C.J.

Cor: Thomson C.J.
Hill, J.A.
Syed Sheh Barakbah J.A. 30

4th December 1962

For Appts: H.H.Sault & H.B.Ball

For Respt: R.Ramani, R.H.V.Rintoul and
C. Selvarajah

Sault

Defts owned a rubber estate of 500 acres (346 + 6 other lots).

1st Deft: controlled the property and has given an option to (D.W2) to sell (p.109). It lasted for a month and buyer was to pay 10% down and balance within a month.

He contacted Ptff: and a telephone message to London was sent to P.W4 Jeyaraja. Warren was acting for Jeyaraja.
Warren in consequence bought.

10

Negotiations took place and originally date for completion was to be 20th July but this was put back to 7th August.

Agreement is at p.113 dd. 31.5.60
Clauses 2, 3 and 8 are important.

Agreement made in Malacca. English law applies. (Ramani: I agree).

20

The words "at an end" in clause 8 are important. It is similar to clause 10 in the agreement in question in: Yeow Kim Pong Realty Ltd. v Ng Kim Pong (1962) M.L.J. 118.

Privy Council upheld decision of this Court that clause 10 in that case made time the essence of the contract.

30

20.7.60 Defts' solicitors wrote to Ptff: (p.132) as to payment. They wrote again on 27.7.60 (p.133) as to a meeting. There was no answer but on 8.8.60 a meeting took place in Kuala Lumpur between Ptff: and P.W3 and two of the Dfts. At this meeting a request was made for 2 months extension to pay balance of purchase price. Defts: agreed to terms proposed by Ptff: These are at p.134 - letter from Ptff's solicitors to Defts' solicitors dd. 10.8.60. Whole case turns on interpretation of "acceptance date" in that letter.

40

Defts' reply is at p.135 dd. 11.8.60 but letter was acknowledged on 13.8.60 (p.137) without reference to the point raised. They wrote a further letter on 17.8.60 (p.138).

In the
Court of
Appeal

No. 15

Notes of
Argument
recorded
by Thomson
C.J.
4th December
1962
continued

In the
Court of
Appeal

That suggested 18.10.60 as date for completion. It also introduced a new clause - payment on execution.

No. 15.

That offer was refused by telegram dd. 19.8.60 (p.139).

Notes of
Argument
recorded
by Thomson
C.J.
4th December
1962
continued

Draft Agreement mentioned in letter dd. 17.8.60 is at p.144 and that was amended in red (underlined) by vendors' solicitors. It will be noted clause 4 is struck out (p.146).

10

Azmi, J. held clause 4 was never agreed as part of the agreement. 2nd clause 4 talks about completion on 18th October which makes acceptance date 18th August on their own showing.

So by 19th August at latest they should have sent us a cheque for \$35,500 to obtain an extension for 2 months.

Oral evidence does not help much. Pp. 13, 14, 19, 24, 34, 38 suggest that if they could not get their clause 4 (as to selling small areas) they wanted to abandon the contract.

20

They made a condition that they should be allowed to complete on a date fixed by them but accepted by us at 18.10.60.

It is a conditional sale - condition that by 19th August they should pay \$35,500. They failed to pay that and so broke the condition. So on authority of:

30

Aberfoyle Plantations Ltd v Khaw Bian Cheng

(1960) M.L.J. 47 the terms could not be extended.

So we were quite entitled to send our telegram of 19.8.60. The telegram did not bring the money.

25.8.60 Ptff's solicitors wrote to Defts' solicitors (p.141). Took the view that original contract was still in existence.

We amended the supplemental agreement and returned it as suggested on 29.8.60 p.143.

40

This was acknowledged on 1.9.60 (p.147), but they did not write again as promised. Later on 12.11.60 (p.108) they threatened proceedings to recover the \$90,000 deposit.

In the
Court of
Appeal

Statement of Claim contains no reference to negotiations after 19.8.60. See - Bullen & Leake (11th Ed) p.369. Howe v Smith (1884) 27 Ch. 89, 96.

No. 15

Notes of
Argument
recorded
by Thomson
C.J.
4th December
1962
continued

10

Here they were never ready with the money.

Memorandum of Appeal

Ground 4

Time was of the essence of the contract. Agreement of 31.5.60 is at p.113 - clauses 2, 3 and 8.

That agreement came into being as a result of negotiations which started with the "option" dd. 9.5.60. Time was limited in that "option".

20

Date of completion first put at 20.7.60 - see Defence at p.6 - but this was altered to 8th (or 7th) August at request of Ptff. See p.15. Letter dd. 20.7.60 (p. 132) deals with the point. Correspondence following that letter shows Ptff. was well aware that he had to complete on the fixed date. See Ptff's evidence pp.19 - 20.

30

Ptff. himself proposed dates to get the time extended. Throughout the negotiations all the emphasis was on time though it was not "expressed" to be of the essence.

"Time" may arise from nature of the property as well as from being expressed or from attendant circumstances.

Yeow Kim Pong Realty Ltd v Ng Kim Pong (1962) M.L.J. 118, 120;

Ayadurai v Lim Hye (1959) M.L.J. 143, 145.

Jamshed Khodaram Irani v Burjorji Dhunjibhai 43, I.A. 26, 33, 34.

In the
Court of
Appeal

Aberfoyle Plantations Ltd v Khaw Bian
Cheng (1960) M.L.J. 47.

Here Ptff: had not the money to complete.

No. 15

Soper v Arnold (1889) 14 A.C. 429, 435
as to purpose of deposit when purchaser
has not the money to pay.

Notes of
Argument
recorded
by Thomson
C.J.
4th December
1962
continued

In the present case time was of the
essence. This is clear from the terms, the
language, from the conduct of the parties.
Being a rubber estate the property had to
be looked after, i.e. weeded.

10

Grounds 1, 2(i), (iv) & (v) 6 and 7

As to new issue see p. 77 (not printed).
Had Ptff. pleaded and proved facts to induce
Court to interfere with legal position?

Had he proved ready and willing to
complete? Defts. always were - p.9. On
the evidence generally - pp. 12, 13, 14, 15,
et seq.

They decided to sue for the \$90,000
on receipt of the telegram of 19.8.60 (p.15).
No shares were allotted in Coy which has
never operated (p.15).

20

Coy could not get finance (p.18).

Final basis of small lots business
is at p.19.

Decision to withdraw is at p.20.
Judge mentions that (pp. 44-45) but does
not deal with its effect.

Ptff. said he was not in a position
to buy and the offer to perform was a sur-
prise to him (p.20).

30

There was nothing about agency on
the pleadings. Raja's evidence at p.26.

Only intended to carry on with the
contract if given extension and clause 4
of Supplemental Agreement. "Clause 4
was not accepted that was the
reason we did not continue".

On the law -

English & Empire Digest Vol.40 No. 2027 (Howe v Smith)

Halsbury XXXIV p. 241
Deposit is guarantee for performance.

Harold Wood Brick Co.Ltd. v Ferris
(1935) 2 K.B. 198, 202.

Grounds 2(ii)

10 There was no memorandum in writing with the Coy. There was an agreement that was not signed.

Ground 2(iii)

Coy had issued no shares.

Ground 3

It is against evidence that Tay Say Keng was acting on behalf of the Appt. (see pp. 34, 42).

Ground 5

20 Appts. never refused to carry out their obligations.

Other side conceded "Acceptance date" must be at latest August 18th. It is they who decided not to go on.

Ground 6

They abandoned their claim before the time mentioned in the telegram expired.

Finally I stand on -

Yeow Kim Pong Realty Ltd v Ng Kim Pong (1962)
M.L.J. 118.

30 Time was of the essence and Ptff. abandoned the contract before the expiration of the time.

Case for Appts.

In the
Court of
Appeal

No. 15

Notes of
Argument
recorded
by Thomson
C.J.
4th December
1962
continued

In the
Court of
Appeal

No. 15

Notes of
Argument
recorded
by Thomson
C.J.
4th December
1962
continued

Ramani: Neither of the local P.C.
cases is of assistance.

Aberfoyle is a case of a con-
ditional contract.

Yeow Kim Pong is of only limited
assistance.

Rights were created in third parties and
it only says you must look at the sur-
rounding circumstances.

J. has come to specific findings
of fact.

10

This appeal involves consideration
of five propositions of law.

(1) When is time said to be of the
essence of a contract. Is it of
the essence when there is a com-
pletion date given.

(2) If time is not expressed to be of
the essence what are the circumstances
in which one party can unilaterally
impose that time shall be of the es-
sence. This only arises when other
party has been guilty of part delay.

20

(3) Assuming that a right has accrued
what would be the quantum of notice
to make the notice reasonable.

(4) By the telegram of 19th August did
the vendors put an end to the con-
tract? If so were they justified?

(5) If in a case which the Court is
satisfied the vendor has unreasonably
put an end to the contract has not
the purchaser the right to recover
his deposit or sue for damages for
breach?

30

This action is a common law action
for return of a deposit for a contract
that was broken by the vendors.

Goes through evidence.

The evidence does not support the argument for a change of date from 23rd July to 7th (or 8th) August. Ptff. was not Xd.

In the
Court of
Appeal

An agreed date of completion can never be of the essence of a contract.

No. 15

Robert v Berry 43 E.R. 112, 114.

Jamshed v Burjorji 43 I.A. 26

Smith v Hamilton (1951) Ch. 174

10

In re Sandwell Park Colliery Co
Field v The Company (1929) 1 Ch.
277, 282.

Notes of
Argument
recorded
by Thomson
C.J.
4th December
1962
continued

Harold Wood Brick Co. v Ferrie (1935)
2 K.B. 198, 206

These cases answer any suggestion that time was of the essence.

See Defts' evidence (p.33 et seq).

Adjd. to 5.12.62.

5th December, 1962

20 Ramani: In what circumstances can one party make time of the essence by notice:

Green v Sevin 13 Ch. 589, 594, 599.

Smith v Hamilton (1951) Ch.174, 179

Stickney v Keeble (1915) A.C. 386

Howe v Smith 27 Ch. D. 89

As to the facts -

Property described by valuer at p. 124 - estate was not being tapped.

After meeting of 8th August - Rawson wrote letter of 10th August (p.134).

5th December
1962

30

The letter dd. 22.8.60 (p.141) puts an end to the contract.

They did not return amended draft till 29.8.60 (p.143).

In the
Court of
Appeal

No. 15

Notes of
Argument
recorded
by Thomson
C.J.
5th December
1962
continued

The telegram of 19th August was an unduly precipitous reaction.

Harold Wood Brick Co v Ferris
(1935) 2 K.B. 198, 205.

Lovelock v Franklyn 115 E.R.916.

As to legal rights of purchaser -

Lloyd v Collett 29 E.R. 992

Ex parte Hawkins 31 E.R. 356.

Purchaser could treat contract as subsisting and sue for specific performance or accept the vendor's repudiation and sue for damages.

10

Halsbury (3rd Ed) Vol.34 p.337 S 571

Howe v Smith 27 Ch. D.89, 91, 103.

Mayson v Clouet (1924) A.C.980, 984.

No notice was given making time the essence of the contract.

Rights were where vendor is in default are discussed in:

Stickney v Keeble (1915) A.C. 386
411, 416.

20

Here it was the vendor who was in default.

Clause 8 of the original agreement made the deposit liquidated damages - could only forfeit if right to damages arose.

Dies v British & International
Mining & Finance Corpn. Ltd.
(1939) 1 K.B. 724, 744.

Pye v Br. Automobile Commercial
Syndicate Ltd (1906) 1 K.B. 425

30

As to time I omitted -

Re Barr's Contract (1956) 2 A.E.R. 853.

Claim based on vendors' repudiation of the contract.

In the
Court of
Appeal

Ball:

No. 15

We reply to some extent on:

Aberfoyle

That depends on view taken of negotiations subsequent to 7th August.

Notes of
Argument
recorded
by Thomson
C.J.
5th December
1962
continued

10 August. Acceptance date might be 8th or 18th

In the Yeow Kim Pong case the clause in question was the same as clause 8 in the present agreement.

Howe v Smith 27 Ch. D.89

Court must look at actual words of the contract.

Purchaser was entitled to resale on giving up deposit and vendor had no right to specific performance.

20 So the equities were not equal and that should be considered, e.g. also property had to be maintained.

It is not our case that we attempted by the telegram to make time of the essence.

If this is a common law action time is of the essence - see endorsement on writ at p. 2. On that S 5 of S.C. is allegation of breach both in law and in equity.

Howe v Smith 27 Ch. D. 89.

30 In the S.C. there is no allegation of any breach by the vendors.

S.C. stops at 20.8.60. But by Stickney v Keeble later conduct had to be considered.

In the reply the statements in the Defence are in effect admitted.

In the
Court of
Appeal

As to nature of claim - equitable
or common law.

Stockloser v Johnson (1954) 1 A.E.R.
630, 637.

No. 15

Notes of
Argument
recorded
by Thomson
C.J.
5th December
1962
continued

Ramani did not deal with conduct of
purchaser and their intentions. When
purchasers could not get clause 4 they did
not intend to go on with the contract at
all.

Letter dd. 29.8.60 (p.143).

C. A. V.

10

Intld. J.B.T.
5.12.62.

For Appts. Sault

For Respt. K.A. Menon

Judgment per C.J.

28th February
1963

Appeal allowed with costs. Deposit
to Appts.

Banker's receipt for \$102,200 in
Court as against stay of execution to be
endorsed over by Registrar to Appts. by
way of payment out.

20

Intld. J.B.T.
28.2.63.

No. 16

NO. 16

Notes of
Argument
recorded by
Hill, J.A.
4th December
1962

NOTES OF ARGUMENT RECORDED BY HILL, J.A.

Coram: Thomson C.J.
Hill, J.A.
Barakbah J.A.

4th December 1962

Sault with Ball for Appellants

30

Ramani with Rintoul for Respondents

Sault: Deals with facts - Appellant's own one large and six small lots - Option p.109 - Warren acted for Jeyaraja - who agreed to purchase - original date of completion 20th July - then to 2nd August - Agreement P.113 - S 2P. 114 - deposit S 3 7th August 1960. S.8 P. 115 - Conceded that English law applies contract in Malacca - refers to 1962 M.L.J. Vol. 28 p. 118 - with reference to last six words of S8. in pari materia with S10 above - time therefore essence of contract.

In the Court of Appeal

No.16

Notes of Argument recorded by Hill, J.A. 4th December 1962 continued

10 Letter 20th July P.132 - no answer given to letter P.133 - Meeting took place in Kuala Lumpur between Warren and Sathappan - Accountant request for 2 months' delay made - Defendant agreed - terms at P.134 - Acceptance date the trouble.

20 Reply P.135 - Acceptance date fixed at 8th August - the date of the meeting. Acceptance P.137 - bare and no objection. Letter 17th August P.138 - 18th October suggested as date of final completion. Supplementary agreement at P.144 was one referred to in P.138 - Azmi J held deleted clause 4 had never been agreed to - Work took 2 months from 18th October - 18th August - on their own showing. Cheque for \$35,000 due therefore on 19th August to obtain extension of 2 months.

30 Plaintiff's evidence P. 4 I6 P. 17L32 P.19C. If Clause 4 not in Plaintiff could not go on.

Sathappan P.24L14- money was available.

Conditional Sale - \$35,000 by 18th August.

They failed to pay and broke the condition.

Aberfoyle Plantations Ltd v Khaw Bian Cheng 1960 26 M.L.J. 47 - (iii) in headnote.

Telegram had no effect.

40 Letter 25th August 1960 P.141. D was complied with. Letter P.143. This acknowledged P.147. That was the end of the correspondence as far as negotiations were concerned. Last letter P.148. P.37 L.39- further re Plaintiff's ability to pay.

Statement of Claim P. 2 S9 ends matter - no statement on further negotiations - No statement of being ready and willing to complete contract.

In the
Court of
Appeal

No.16

Notes of
Argument
recorded by
Hill, J.A.
4th December
1962
continued

Bullen & Leake 11th Ed. 369. 1884 27 Ch.
89 - Howe v Smith

Memorandum of Appeal P.54 -

Ground 1 - 2(i) (iii) (v) 6 & 7 together.

Take ground 4 first - P.113 S 2, 3 and 8.

Agreement preceded by certain negotiations.
Started off by option P.109. First date
of completion 20th July - P.6 L16. Ex-
tended to 7th August P.15 L.19 Plaintiff's
evidence.

10

8th August confirmed P. 132. Plaintiff
well aware he had to complete on this
date - primary not secondary important.
P.19.L30. Plaintiff proposed certain pay-
ments to get time extended - they knew
the date's importance.

P.136 - "expressed" - so as not to lose
the benefit. Time can be by express
stipulation, nature of property, attendant
circumstances.

20

1962 M.L.J. P.120 - words used by Privy
Council Yeow Kim Pong Ltd v Ng Kim Pong
- *pari materia*.

1959 25 M.L.J. 145 - S.Ayadurai v Lim Hye
p. 144.

1916 43 I.A. 26 - Jamshed Khadaram Irani v
Burjorji Dhunjibhai.

In present case Plaintiff did not have the
money to pay.

1889 14 A.C. 429 - Soper (Pauper) v Arnold
and Another

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Conduct of parties - asking for an extension
nature of property etc., all point to im-
portance of time.

Ground 1, 2(i) (iv) (v) 6 and 7

Ground 1 etc. P. 77 D.B - 5th issue stated.
Plaintiff must prove ready and willing to
complete.

Defence always were - P.9 L.5. P.12 L.8 -
 Plaintiff's evidence. P.12 ₹90,000/-
 from Raja, B.C.D. P.14 L.12 - Sale of small acre-
 ages. P.14 L.41 - 15 L.20.

In the
 Court of
 Appeal

P.15 L.30 - signed as agent. A 5 ₹11 capital for
 each member - Resale ₹2,300/- D.5. P.16 L.28.
 re Company or Syndicate. Agreement on P.151
 never executed. Evidence P.17.

No. 16

10

P.18 L.10 - purchase price - no prospects him-
 self - no intention - P.19A Sale of small areas.

Notes of
 Argument
 recorded by
 Hill, J.A.
 4th December
 1962
 continued

P.19 L.14 mentioned at P.44 of a judgment.
 No finding of fact.

P.20 - Clause 4 - "gone out of my hands".

P.20 - offer a surprise.

P.21 - not buying for himself. (nothing
 said about agency until introduced in evidence).

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Sathappan - P.24 - present at meeting. Jeyaraja
 - P.26 L.29 - P.27 P.27 A.3 - extension. P.29 L.21
 P.30 L.4 - carry on if given extension. Clause 4
 importance to them. P.30 L.28 - non acceptance
 of Clause 4 reason for not continuing.

Defendant still ready to sell. Halesbury 3rd Ed.
 Vol. XIV - Equity English & Empire Digest (40)
 241. 1935 K.B.D. 198 - Harold Wood Brick Co.
Ltd. v Ferris.

Ground 2(ii) - P.17 - draft Agreement 151(iii)
 - Company did no business.

Ground 3 - P.33 - 34 - Judge held Tay was the
 agent - P.42.

30

Ground 5 - extension agreed to - but parties
 had decided not to proceed before 18th August

Ground 6 - relies on Aberfoyle case - asks
 Court to find time was essence and that Plain-
 tiff abandoned contract because he could not
 get Clause 4, not ready to carry out their part.
 Very doubtful if Warren was true buyer.

40

Ramani: Warren is Plaintiff and is no one's
 agent - Neither of the Privy Council cases of
 any assistance - Aberfoyle a conditional con-
 tract. Yeow Kim Pong, limited extent if to

In the
Court of
Appeal

No.16

Notes of
Argument
recorded by
Hill, J.A.
4th December
1962
continued

look at circumstances re time.

Findings of fact by trial judge - P.
44L16- 45. See P.37 L.50.

P.45 L28- finding of fact C.
P.46 L44- finding of fact re time C - D
- 47 L.37.

P.20L.25 -L70.

5 propositions of law involved.

1. When is time said to be of the
essence of a contract. 10
Does completion date make time
of the essence.

2. If time not expressed what are
circumstances in which one party
can unilaterally impose it.

3. Assuming that a right has ac-
crued to one of the parties what
quantum is necessary to make a
notice reasonable.

4. Did or not Vendors put an end 20
to contract by the telegram - had
they justification.

5. If Court is satisfied that ven-
dor has put an end to contract has
not purchaser the right to recover
his money or damages. Action was
a common law action.

P. 15 - 16- re change of date from 20th
July to 8th August - a mere agreed date
of completion - this can never be time 30
being the essence.

Roberts v Benny 43 E.R. 110 (115-6)
Chancery. 43 I.A. 26 - A.I.R. P.C.
(1916) 83. Jamshed Khodaram Irani v
Burjorji Dhunjibhai. Followed by
1951 Ch. D. 174 - Smith v Hamilton. 1929
1 Ch. D. 277 - Sandwell Park Colliery
Co. Field v The Company

1935 2 K.B. 198 Harold Wood Brick Co.
v Ferris (206). 40

Evidence P.33 L20 - E.33 L36 - meeting.
P.35 L11 - telegram - C.

In the
Court of
Appeal

To 10 a.m.

No. 16

Notes of
Argument
recorded by
Nill, J.A.
4th December
1962
continued

5th December 1962

Ramani: Point 2 et seq.

Green v Sevin 13 Ch. D. 589 (599).

5th December
1962

Stickney v Keeble 1915 A.C. 386.

Smith v Hamilton say clear facts of
their case (181) (183 bottom).

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Statement of Service 21st November
1960. Report 124 et seq. Letters at 132
and 133 - 27th July. Letter 134 - of 10th
August - made proposal. Reply 135 - asks
for supplementary agreement. Agreement sent
on 18th August by letter 138. Telegram and
covering letter 139 - 140. Follow up 140 -
put an end to contract on 22nd August 1960 -
all rights ended. Draft agreement returned
on 29th August - P.143. Fresh offer made.

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Clause 4 Vendor to get all the purchase price.
Telegram precipitate reaction. 1935 2 K.B.
198 Harold Wood Brick Co v Ferris. Lovelock
v Franklyn 115 E.R. 916. 29 E.R. 992 - Lloyd
& another v Collett (31 E.R. 356).

30

After 22nd August Plaintiff could sue
for specific performance or accept repudiation
and sue for damages and return of deposit. 34
Halsbury 3rd Ed. p. 337 S 571. twin remedy -
27 Ch. D. 89 Howe & Smith 95. Mayson v
Clouett & Another (1924) A.C. 480. No notice
in telegram making time essence 1915 A.C. 411 -
416. Stickney v Keeble.

In the
Court of
Appeal

No.16.

Notes of
Argument
recorded by
Hill, J.A.
5th December
1962
continued

Clause 8 of Agreement - P. 115 - Liquidated damages - damages must be suffered - Dies and Another v British & International Mining and Finance Corporation Ltd. 1939 1 K.B. 724 (744).

Vendor unlawfully put an end to the contract and wrongfully forfeited the deposit. Barr's Contract (1956) 2 A.E.R. 853.

Ball: Acceptance dates 8 or 18th August. 10
Following Howe & Smith actual words of contract must be looked at. Are equities equal if time is disregarded. Purchaser can breach contract and lose deposit if he wishes.

Contract ended on 7th August in Defendant's case.

Not defendant's case that telegram tried to make time the essence.

If case at common law - question of breach of contract. 20

No allegation in Statement of Service of breach by Defendant.

Conduct of parties before and after relevant.

Stockloser v Johnson - (1954) 1 A.E.R. 630 (637) - on Common Law or Equity - forfeiture clause or not.

When Plaintiff could not get Clause 4 he had no intention of going on. 30

Therefore no claim.

Letter - 29th August - P. 143 - see P. 146 - 7.

C. A. V.

Sd: R.D.R. Hill

NO. 17

NOTES OF ARGUMENT RECORDED BY BARAKBAH J.A.In the
Court of
AppealCoram: Thomson C.J.
Hill, J.A.
Barakbah J.A.

No. 17

Notes of
Argument
recorded by
Barakbah
J.A.
4th December
1962.4th December 1962.

Sault with Ball for Appellants

Ramani with Rintoul and Selvarajah for Respon-
dent.10 Sault: Defendants owner of rubber estates to-
gether with 6 lots.1st Defendant gave option to his half-
brother authority for one month. 10% down and
balance within 1 month. DW 2. contacted the
Defendant 1 and telegram sent to Defendant 3.20 Defendant 3 - making purchase on behalf
of Jeyaraja. Mr. Warren agreed to purchase the
estate - date of completion - 20th July 1960 -
extended to 7th August 1960. Agreement on p.
119.

p. 114 - Clause 2

Clause 3

p. 115 - Clause 8

Land in Malacca - English Law applies (conceded)

"This agreement shall be at an end". pari
materia with Clause 10 in Yeow Kim Pong v Ng.
Kim Pong 1962 M.L.J. 118, 119 - 1st column F.30 p. 115 - 2nd column - D. 20th July 1960 - De-
fendants' Solicitors wrote to the Plaintiff -
p. 132. Letter - p. 133 - no reply given. On
8th August 1960 meeting took place between
Plaintiff and Sathappan. Request extension of
2 months made at the meeting.Letter from Plaintiff's Solicitors - p. 134
Clause A - p. 134.

In the
Court of
Appeal

No. 17

Notes of
Argument
recorded by
Barakbah
J.A.
4th December
1962
continued

Clause B.

Extended for 2 months from Acceptance date.
Acceptance date - 8th August 1960. Letter
p. 138 - suggests final completion on 18th
October 1960 - not acceptance date. Tele-
gram - p. 139.

Draft Supplementary agreement - p. 144. p.
146 para. 4. Judge held that para. 4 had
never been agreed.

Extended date should be 18th October 1960. 10
So by 19th October 1960 they should have
sent us \$35,500.

p. 13.

p. 14.

p. 14.

p. 19 - 20.

If they could not get Clause 4 in, there
was no point in carrying out the con-
tract.

p. 24. 20

p. 24.

Time essence of the contract. Extended date
18th October 1960 fixed by Purchaser on
which to pay \$35,500/-. Failed to pay and
broke the condition.

Aberfoyle Plantations Ltd's case 1960 M.L.J 47.
Telegram did not bring forth the money.
Letter p. 141. Supplementary agreement was
sent back. p. 143.

p. 147 - Purchaser did not write. 30

p. 148.

p. 37 - C.

Statement of Claim - p. 2.

No mention that Purchaser is willing and
ready to complete the contract.

Bullen and Leake p. 369 bottom. Howe v Smith (1884) 27 Ch. 89, 96. They were never ready with money. Memorandum of Appeal.

In the
Court of
Appeal

Ground 4.

Agreement p. 113 Clauses 2, 3 and 8. Came into being as a result of certain negotiations.

Option p. 109 - time limited in option and life is limited.

10 Date of completion - 20th July 1960 - p. 6 -
D later date fixed for 7th August 1960 - p.15.
Letter - p. 132.

It was of primary importance that Plaintiff had to complete on the date - pp.19-20 Plaintiff actually proposed certain payments in order to get time extended. Letter - p. 134.

Even if not expressed in usual expression yet it can be by express stipulation, by nature of property or by attendant circumstances.

1962 M.L.J. 120. Yeow Kim Pong v Ng. Kim Pong
20 1959 M.L.J. 143, 145 - S. Ayadurai v Lim Hye
Aberfoyle's case.

Jamshed's case (1915 - 1916) 43 I. Appeal 26, 33.

Plaintiff had not the money to complete.

Soper (Pauper) v Arnold - (1889) 14 AC 429, 435

Time is of the essence of the contract - conduct of the parties by asking for an extension shown this. Estate not like an empty house. Estate has to be weeded.

Grounds 1, 2(i) (iv) (v) 6 and 7

30 P. 54 - Ground 1.

P. 77 (not printed in this Record)

Purchaser must plead.

Willing and ready to complete.

Defendant - ready and willing to complete.

No. 17

Notes of
Argument
recorded by
Barakbah
J.A.
4th December
1962
continued

In the
Court of
Appeal

No. 17

Notes of
Argument
recorded by
Barakbah
J.A.
4th December
1962
continued

P. 9 - L.16

P. 12 - ..

P. 12

P. 14.L 12 - make use of vendor's property
to pay purchase price.

P. 14, 16.

P. 16 - 17

P. 17

P. 18

P. 19

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P. 144. L. 11) Judge appreciates the
point but didn't come to any finding.

P. 20 ..

Nothing said about agency in pleadings
until introduced in evidence.

P. 26

P. 27

P. 28 - ..

P. 29

P. 29

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P. 36

P. 32

Halsbury 3rd Ed. Vol. 34 - p. 241.

Harold Wood Brick Co v. Ferris (1935)
2 K.B. 198, 202.

Time of the essence of the contract.
Ground 2(ii) p. 17 - p. 49; .. 2(iii)
Acceptance date - 18th August 1960.

Ground 6 - 1962 M.L.J. 118 - Yeow Kim Pong
Question whether Warren was the purchaser
was doubtful - He was being financed.

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Aberfoyle and Yeow Kim Pong - no assistance.

In the
Court of
Appeal

Ramani: Aberfoyle - case of conditional contract. Yeow Kim Pong - attendant circumstances to decide if time is of the essence of the contract.

No. 17

Judge's judgment. Five propositions of law.

Notes of
Argument
recorded by
Barakbah
J.A.
4th December
1962
continued

1. When is time said to be of the essence of the contract.

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The completion date mentioned, does it make time the essence.

2. If time is not expressed to be the essence what are the circumstances in which one party can unilaterally impose it. It will arise if there is delay.

3. Assuming that right has accrued what would be the quantum of notice.

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4. By the telegram, did or did not the vendors put an end to the contract. Had they any reason or justification to have done so.

5. If in a case where the vendor has put an end to the contract has not the purchaser to get back the deposit or the right to sue.

This is Common Law action for return of deposit or contract broken by vendor.

1. - P. 6.

Change of date from 20th July 1960 to 8th August 1960.

30

P. 15.

Agreed date of completion can never be in law the essence of contract.

Robert v Berry 43 E.R. 112, 114.

Jarmshed Khodaram Irani v Burjorji Dhunjibhai
43 I.A. 26, 32.

In the
Court of
Appeal

No. 17

Notes of
Argument
recorded by
Barakbah
J.A.
4th December
1962
continued

Smith v Hamilton (1951) Ch. D. 174

Re Sandwell Park Colliery Field v The
Company (1929 1 Ch. D. 277, 282.

Harold Wood Brick Co v Ferris (1935) 2 K.B.
206 P. 80, 81, 83.

Adjourned till 10.00 a.m. tomorrow.

Sd. S.S. Barakbah
4.12.62.

5th December 1962

Counsel as before

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Ramani: Green v Sevin - 13 C.D. 589, 599
601.

5th December
1962

Smith v Hamilton - (1951) 1 Ch. 175, 179

Stickney v Keeble - (1915) A.C. 386

Writ issued on 22nd November 1960.

Pp. 126 - 130.

Estate not in tapping - no labour force.

P.133, P.134, P.135, P.135, P.138, P.139,
P.141.

Letter p. 141 purports to put an end to
the Contract p. 143.

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P. 145 - Amended Draft.

Telegram precipitate re-action.

Harold Wood Brick Co v Ferris (1935)
2 K.B. 198, 205 (bottom)

Lovelock v Franklyn 115 E.R. 916.
Legal rights of a purchaser.

Lloyd v Collett - 29 E.R.992, 31 E.R. 356.

Purchaser can:

Treat the contract as subsisting and sue for specific performance, or accept the repudiation and sue for damages and return of the deposit. 34 Halsbury 3rd Ed. p. 337 para. 571. Howe v Smith - 27 Ch. D. 89, 91, 92, 103. Mayson v Clouet - (1924) A.C. 980,984. No notice given making time the essence of the contract even if the telegram was sent. Stickney v Keeble - 1915 A.C. 386, 411.

In the
Court of
Appeal

No. 17

Notes of
Argument
recorded by
Barakbah
J.A.
5th December -
1962
continued

- 10 Clause 8 of agreement - p.145. Right to forfeit would only arise if there is occasion to regard it as liquidated damages -
Proof of damages.

Dies and Another v British & International Mining and Finance Corporation Ltd -(1939)
1 K.B. 724, 744.

Time not having been the essence and no notice given, the vendor put an end to the contract and has wrongly forfeited the deposit.

- 20 Re Barr's Contract - (1956) 2 A.E.R. 853. Vendor created the situation by repudiating the contract.

Ball: Aberfoyle and Yeow Kim Pong's case.
On true construction of contract it came to end on 18th August 1960 and the vendor had a right to the deposit.

- 30 Property had to be maintained and one could not expect the vendor to go on looking after the estate in the hope that the purchaser would purchase it. Not our case to make time the essence of the telegram.

No allegation of breach of contract on our part. Whether Common Law or equitable claim.

Stockloser v Johnson - (1954) 1 A.E.R. 630, 637 - F. Conduct of purchaser and their intentions They did not intend to go on when they did not get clause 4.

Letter - p.143.

C. A. V.

Sd. S.S. Barakbah

In the
Court of
Appeal

NO. 18

JUDGMENT OF THOMSON, C.J

No. 18

Coram: Thomson C.J.
Hill, J.A.
Syed Sheh Barakbah J.A.

Judgment
of Chief
Justice
Thomson
28th February
1963

The appellants in this case are the owners of seven pieces of land in the State of Malacca. These pieces of land, which I shall call 'the land', vary in size from 7 to 346 acres and are held on separate titles but geographically they form a single homogeneous area of some 496 acres which has been planted and is used as a single rubber estate. Throughout the transactions with which we are concerned the first appellant, Mr. Tay Say Geok (whom I shall call 'the vendor') has acted on behalf of the other appellants, who are his two wives and his daughter-in-law, and for the purpose of these proceedings the land can be conveniently treated as his. The respondent (whom I shall call 'the purchaser') is a chartered accountant in Kuala Lumpur.

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Early in 1960 the vendor was minded to sell the land and he authorised his brother, Mr. Tay Say Keng, to act on his behalf to find a purchaser. He gave his brother a so-called 'option document' which fixed a price of \$1,800 an acre and which stated (sic) 'if this sale is put through the buyer has to pay 10% deposit down first and the balance to be paid within one month'.

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Some time in May 1960 Mr. Tay Say Keng got in touch with the purchaser who expressed interest in the proposed sale and there was a meeting between them at which a Mr. Williams and a Madam Cheng, neither of whom has been called as a witness, were also present. There was some discussion of a general nature at that meeting and in the event the purchaser paid Mr. Tay Say Keng \$1 and was handed the so-called "option document" in return.

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The purchaser then telephoned a Mr. Raja who was at the time in London and told him that there was a rubber estate for sale

and that Mr. Williams would be going to London and would discuss the matter with him. What happened between Mr. Raja and Mr. Williams in London is not altogether clear, but it is plain that Mr. Raja became interested in the purchase of the estate, though at this stage he was under the impression that the price asked was not ~~£~~1,800 an acre but ~~£~~2,300 an acre. It would appear that some sort of arrangement had been made, to which Mr. Raja was not a party, by which the estate would be purchased, presumably by the purchaser, at a price of ~~£~~1,800 an acre and then transferred at a price of ~~£~~2,300 an acre to a company called Austral Asia Plantations Limited which was to be formed and in which Mr. Raja was to have a large interest. There was some suggestion that the profit on this transaction, that is to say the difference between ~~£~~1,800 and ~~£~~2,300 an acre, was to be some sort of a commission for Mr. Williams. The evidence regarding this is somewhat meagre and confused and ~~as it~~ does not affect the issues in the case as it now stands little useful purpose would be served by examining it very closely.

Whatever happened in London, however, Mr. Williams sent the following telegram to the purchaser in Kuala Lumpur, which was received on 17th May 1960:-

"BID AS ARRANGED SUBJECT TO CONTRACT
DEPOSIT ON SIGNING CONTRACT TELE-
PHONING YOUR HOUSE 17TH WILLIAMS"

On 19th May the purchaser's solicitors wrote to the vendor's solicitors a letter enclosing a draft contract for the purchase of the land by the purchaser and stating that their client was arranging for a deposit to be made and asking to have the titles for inspection. There followed some discussion between the two solicitors as to terms of the contract and in the event, on 28th May, the purchaser's solicitors paid ~~£~~90,000 to the vendor's solicitors, that being approximately 10% of the agreed purchase price which was in the neighbourhood of ~~£~~893,000, and on 31st May the parties executed the contract.

It is to be noted here that this ~~£~~90,000 was part of the proceeds of a cheque for ~~£~~120,000 that the purchaser had had from

In the
Court of
Appeal

No. 18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

In the
Court of
Appeal

No. 18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

Mr. Raja. It is also to be observed that \$120,000 is a little more than 10% of what Mr. Raja originally thought was the total purchase price, that is something in the neighbourhood of \$1,120,000.

The purchaser has at all times taken the attitude that he had no intention of buying the land for himself, and indeed at his very first meeting with the vendor's brother when he received the "option document" he said he had a buyer whom he did not then name. Nevertheless there is no mention of that in the contract which he and the vendor and the members of the vendor's family executed on 31st May 1960. That contract recited that the vendor's had agreed to sell and the purchaser, who was described as such, had agreed to buy the pieces of land specified in the Schedule and amounting to 496 acres 1 rood at a price of \$1,800 an acre. By Clause 3 \$90,000 was to be paid on or before the execution of the contract "by way of deposit and in part payment of the said purchase price". The purchase was to be completed and the balance of the purchase money paid on or before 7th August 1960. The purchaser was to be at liberty to enter into possession of the property on execution of the contract. The only other provision which is material here is Clause 8 which reads as follows:-

"If the Purchaser shall fail to complete the purchase in accordance with this agreement then the deposit of dollars Ninety thousand (\$90,000) paid by the Purchaser on or before the execution of this agreement shall be considered as liquidated damages and shall be forfeited to the Vendors and the Purchaser shall thereupon surrender possession of the said property buildings and machinery to the Vendors and this agreement shall be at an end".

The position at this stage was thus that the purchaser had to pay some \$800,000, being the balance of the purchase price, on or before 7th August. It is clear, however, that either he did not have the money or that he was not prepared to pay it or that Mr. Raja was not prepared to provide it. The Austral Asia Plantations Limited was

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formed, though it does not appear to have played any significant part in the affair, and the Indian Overseas Bank was approached for a loan with what success is not stated on the evidence.

In the
Court of
Appeal

No. 18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

10 Eventually consideration was given to the possibility of an arrangement of a sort that is not uncommon among persons engaged in what is somewhat curiously called land development and to which I shall, for convenience, refer as the "instalment sales arrangement". In this country it is well known that small pieces of rubber land which are held on good separate titles are saleable at a much higher price per acre than larger pieces. After discussing the matter with an experienced land broker from Seremban, the purchaser and Mr. Raja concluded that if they could sell off the smaller pieces of land comprised in the vendor's land before having to pay the whole of the purchase price the proceeds, which might well be as high as \$2,800 an acre, would go a long way towards making up the total purchase price and in the event they would have acquired the larger pieces at a comparatively small price per acre and with a much lower cash outlay than would otherwise have been necessary and these larger pieces could then have been operated as a rubber estate by Austral Asia Plantations Limited.

30 In the meantime, on 20th July the vendor's solicitors wrote to the purchaser's solicitors regarding the draft conveyance and in the course of this letter they said:-

"You will recollect that the date of completion of purchase has been fixed for the 8th proximo.

40 As our client expects payment of the balance of the purchase money on that date, we shall be glad if you will now let us have the draft conveyancefor our approval in readiness for completing the matter on the 8th August 1960".

I pause here to observe that it is common ground that in this letter "8th August" is a mistake and the date should be "7th

In the
Court of
Appeal

No. 18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

August" but that the point has no bearing on the case as a whole.

The reply to that letter of 20th July is not in evidence. It would appear that the purchaser's solicitors asked for an interview to be arranged between them and the vendor but there is nothing to show whether that interview ever took place and if it took place what was discussed at it.

Then on 8th August, that is the day after the date for completion under the contract, there was a meeting at the purchaser's house between him and the vendor's brother. The broker from Seremban was also present as was Madam Cheng. The question of paying the balance of the purchase price was discussed. The purchaser said he could not pay unless he was given an extension of time and after one or two telephone conversations between the vendor's brother and the vendor, who was in Malacca, it was agreed that some extension of time should be given on the purchaser making certain payments. The question of the instalment sales arrangement was also discussed at this meeting but it is not at all clear as to whether it was mentioned in the course of the telephone conversations between the vendor and his brother which were in Chinese. The recollection on the point of the broker from Seremban was that the brother had said he would "speak with his brother and make him agree".

Be that as it may, the purchaser gave instructions to his solicitors and on 10th August they wrote a letter to the vendor's solicitors. As it is important not only for what it contains but also for what it does not contain it must be quoted in full. It reads:-

"In consequence of certain discussions that have taken place between our clients and representatives of your clients we are instructed to make the following proposal with regard to the completion of the above purchase.

In consideration of the payment of the sum of \$12,500/- in manner following, that is to say:-

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- (1) As to \$2,500/- thereof upon your clients acceptance of this proposal (hereinafter called the Acceptance Date).
- (2) As to \$5,000/- thereof on or before the 31st August 1960.
- (3) As to the balance of \$5,000/- on or before the 30th September 1960.

In the
Court of
Appeal

No. 18

Judgment
of Chief
Justice
Thomson
28th February
1963

continued

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Your clients will agree to extend the time for the completion of the said purchase for a period of two months from the Acceptance Date, subject to the following conditions:-

- A. The purchaser shall pay to the vendors the sum of Thirty thousand dollars (\$30,000) on the Acceptance Date by way of further deposit and in part payment of the purchase price and the balance shall be paid on the extended date fixed for the completion of the purchase.
- B. The purchaser shall pay to the vendors the sum of \$3,000/- on the Acceptance Date by way of deposit to cover the cost of weeding and maintenance of the rubber lands agreed to be sold for the period from the Acceptance Date to the extended date for completion. The vendors will account to the purchaser for the said sum of \$3,000/- and refund to the purchaser on completion the balance if any remaining in their hands.
- C. The sum of \$12,500/- hereinbefore referred to is payable in addition to the purchase price and is not in part payment thereof.

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We should be glad to hear from you at your early convenience that the above proposals are acceptable to your clients".

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That letter has been quoted in toto and it will be observed that there is not a word in it regarding the proposed instalment sales arrangement though at the time the purchaser said in evidence he had discussed it with the writer. The letter asked for the time and it offers to pay for the time but the money

In the
Court of
Appeal

No. 18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

mentioned in it is payment for time and not payment for time plus acceptance by the vendor of the instalment sales arrangement.

The following day the vendor's solicitors replied in the following terms:-

"We have seen our client thereon who accepts the terms contained in your letter subject to the following:-

It is to be understood that the two sums of \$5,000/- each payable on 31st August and 30th September should be paid by your client in any event - i.e. even if he makes default in payment of the balance of the purchase money.

10

The amount thereof payable by your client now will be \$35,500/- made up as follows:-

(1) Further deposit	...	\$30,000/-	
(2) Cost of weeding and maintenance	...	\$3,000/-	20
(3) To A/c of the sum payable as consideration for extension of time		<u>\$2,500/-</u>	
		<u>\$35,500/-</u>	

It is desired that time should be expressed to be of the essence of the contract and that the acceptance date shall be deemed to have been the 8th day of August 1960.

30

We shall therefore be glad if you will prepare a supplemental agreement on the above lines and let us have draft thereof for approval".

That said in effect "we will give you time to pay if you pay for it".

Then on 17th August the purchaser's solicitors wrote as follows:-

"Further to your letter of the 11th instant, we now enclose a draft of the supplemental agreement for your approval.

In the
Court of
Appeal

10 With regard to Para 4 of the enclosed draft, we are instructed that this proposal has been agreed in principle with the representative of your clients. We are further instructed to suggest that the date for final completion should be the 18th of October as stated in Para. 5 of the enclosed draft.

No. 18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

If the draft is acceptable to you, we will engross the same forthwith and have it executed by our client and send the same to you for execution by your clients together with a cheque for \$35,500/- being the amount payable thereunder on execution, upon your undertaking to hold the same pending execution by your clients".

20 The draft contract was enclosed. It embodied the terms contained in the letter of 10th August, it provided that the date of completion under the original contract should be 18th October (and not 7th August) and it provided that time should be of the essence of the original contract. It also included, however, a Clause which embodied the instalment sales arrangement. That Clause read as follows:-

30 "4. Prior to the date hereinafter fixed for the completion of the purchase the Vendors will at the request of the Purchaser execute and deliver to the Purchaser his nominee or nominees a proper conveyance or conveyances and assignment of all or any of the said lands more particularly described in the First Schedule to the principal agreement upon payment to the vendors of the pro rata purchase price of \$,800/- per acre or such increased price as the Purchaser shall have arranged to sell any
40 such part or parts of the said land to a sub-purchaser and any such excess price shall be retained by the Vendors to account of the balance payable on completion but shall not be considered as further deposit".

The reaction of the vendor was immediate and unmistakable. On the 19th August his solicitors addressed the following telegram to the purchaser's solicitors, the terms of which were confirmed by letter the same day:-

In the Court of Appeal

No. 18

Judgment of Chief Justice Thomson 28th February 1963 continued

"YOUR LETTER SEVENTEEN AUGUST DRAFT AGREEMENT UNACCEPTABLE PARAGRAPH FOUR NEVER AGREED TO BY OUR CLIENT NOR HIS REPRESENTATIVE STOP UNLESS DOLLARS THIRTY FIVE THOUSAND FIVE HUNDRED PAID TO US IN CASH OR BANKDRAFT IN NAME OF ALLEN GLEDHILL AND BALL BEFORE ONE POST MERIDIEN TWENTIETH AUGUST TOMORROW IN TERMS OF YOUR LETTER TENTH AUGUST AND OUR REPLY ELEVENTH AUGUST DOLLARS NINETY THOUSAND WILL BE FORFEITED PURSUANT AGREEMENT OF THIRTY FIRST".

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In other words, the vendor was not prepared to accept the instalment sales arrangement but he was prepared to give time if it was paid for and what he insisted on was not immediate payment of the whole balance of the purchase price but immediate payment of the money that had been offered for extension of time in the letter of 10th August.

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The purchaser did not regard the demand for immediate payment of the \$35,500 with which he was both able and willing to comply, as in any way unreasonable. What he did object to was the rejection of the instalment sales arrangement. That is clear from what followed.

The following morning a cheque was drawn by the purchaser and Mr. Williams for \$35,500 and a meeting was held between the purchaser and Mr. Raja and the land broker and the purchaser's solicitors. The purchaser's evidence as to that meeting was as follows:-

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"After discussion after the amendment of the Supplemental Agreement we found it was unacceptable. They decided that if they could not dispose of the small acreages, it would be difficult for the company to operate. Without the opportunity of selling small acreages we would find it difficult to get finance The cheque for \$35,500/- would have been a good cheque. Afterwards it was torn up. We did not get in contact with the defendants' solicitors after receiving the

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telegram because there would be no point in proceeding with the matter".

In the
Court of
Appeal

10 In accordance with the decision made at that meeting no reply was sent to the telegram of 19th August and on 22nd August the vendor's solicitors asked for the return of the titles. On 25th August the purchaser's solicitors replied to the effect that time was not of the essence of the contract and that in their view objection to the Clause in the draft contract submitted by them did not entitle the vendor to rescind the original contract and forfeit the deposit. On 29th August the vendor's solicitors replied insisting on their right to forfeit the deposit but saying that, without prejudice to their contention that they were entitled to do so, they were prepared to negotiate a fresh contract. To that end they returned the draft contract which had been sent to them on 17th August with a number of suggested amendments, the only one of which of importance being the deletion of the objectionable Clause 4.

No. 18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

20 There was no reply to that letter and on 22nd November 1960, the purchaser commenced the present proceedings in which he claimed the return of his deposit of \$90,000 but did not claim specific performance of the agreement to sell the land. The vendor counterclaimed for specific performance of the contract of 31st May or alternatively rescission of the contract and a declaration that the \$90,000 deposit was forfeited.

30 The only other fact that calls for mention is that at no time did the purchaser enter into possession of the land although under the contract of 31st May 1960, he was at liberty to do so as from that date.

40 In the event Azmi J., gave judgment for the purchaser as prayed. He was of the opinion that there were no circumstances from which he could hold that time was of the essence of the contract and that the telegram of 19th August did not have the effect of making time of the essence. He concluded as follows:-

"In my view, there is no doubt at all that the defendants, through their solicitors, by their telegram of the 19th August 1960, had put an end to the contract probably under Clause

In the
Court of
Appeal

No. 18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

8 of the contract, and mainly, I think, because of the plaintiff's attempt to include Clause 4 of the Supplemental Agreement. I have held that time was not of the essence of the contract and has never been so and also that there has been no unreasonable delay by the plaintiff in that he expected that he would be given time, on certain terms, until the Supplemental Agreement has been executed. He would, if he had asked for specific performance, undoubtedly have a good case.

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For these reasons, I would hold that the plaintiff would be entitled to the return of the deposit in terms of his prayer".

Against that decision the vendor has now appealed.

Now this is not an action for specific performance, it is an action for return of a deposit and, as Cotton L.J. observed in the case of Howe v Smith (1) that is "essentially a claim at Common Law". Regarding the case in the first place from that point of view there is little room for doubt as to the legal rights and obligations of the parties. The obligation of the purchaser under the contract of 31st May was to pay "the balance of the purchase money", which was approximately \$800,000, at the office of the vendor's solicitors on or before 7th August 1960. If that obligation was not discharged then, by reason of Clause 8, the contract was at an end and the deposit of \$90,000 became forfeited to the vendor. It is common ground that that obligation to pay \$800,000 was not discharged on 7th August 1960 or at any other time. On 7th August 1960 the purchaser either did not have \$800,000 or he did have it but was not prepared to pay it to the vendor. His attitude was that he wanted either a new contract or a modification of the old contract (it is immaterial in which way it is

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(1) (1884) 27 Ch. D. 89, 92.

regarded) which would include a provision which in effect, would allow him to sell some of the land piecemeal and so acquire some of the money to pay for the balance. For such a contract he was prepared to pay an additional monetary consideration. There was, of course, nothing wrong in this. The new contract might well have turned out to be as advantageous to the vendor as the old one. Nevertheless it was a different contract. It is merely playing with words to say that what was involved was some discussion as to the method of performance. There is all the difference in the world between \$800,000 paid in one lump sum on the nail and \$800,000 paid in instalments and in the way suggested; and that was the difference between what the vendor had contracted to get and what the purchaser proposed he should get for his land.

In the
Court of
Appeal

No.18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

20 In the circumstances the vendor was entirely within his legal rights in treating the contract at an end and the deposit as forfeited and the only question which calls for consideration is how far the legal rights of the parties are modified by the rules of equity.

30 Both at the trial and in this Court a great deal of attention was devoted to a discussion of the equitable rule that in contracts for the sale of land provisions as to the time of performance are not to be strictly construed unless time is expressly made of the essence of the contract.

In England, the application of that rule is now governed by section 41 of the Law of Property Act 1925, which replaced section 25(7) of the Judicature Act 1873 and which reads as follows:-

40 "Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules".

For myself, however, I must confess to some doubt as to how far the rule has any application in this country.

In the
Court of
Appeal

No. 18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

In our legislation there is nothing corresponding to section 41 of the Law of Property Act and if the rule applies at all it is by reason of section 3 of the Civil Law Ordinance 1956, which reads as follows:-

"(1) Save in so far as other provision has been made or may hereafter be made by any written law in force in the Federation or any part thereof, the Court shall apply the common law of England and the rules of equity as administered in England at the date of the coming into force of this Ordinance:

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Provided always that the said common law and rules of equity shall be applied so far only as the circumstances of the States comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

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(2) Subject to the express provisions of this Ordinance or any other written law in force in the Federation or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail".

It may well be that the rule with which we are here concerned comes within the proviso to sub-section (1) of that section. It is said by the learned author of Williams on "Vendor and Purchaser" (3rd Ed. p. 53) that:-

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"When one considers all the delays that have been condoned in equity on the ground that time is not of the essence of a contract to sell land, it appears very questionable whether this doctrine has really conferred any benefit upon the community".

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And in this country it must indeed be a little difficult for a person like the vendor to

whom Henry II is probably but a name, who may not have heard of the Statute of Uses and who may seldom read the works of the late Professor Maitland to understand why the terms of a contract should be sacrosanct except when it relates to the sale of land.

In the
Court of
Appeal

No. 18

10 Be that as it may, however, in the past it has been assumed, rather than held by the Courts here that the rule is of local application (see Lai Choon v Fong Chow (2)) and the question has not been raised by either side in the present case. Moreover, in England as Lord Loreburn, L.C., pointed out in the case of Stickney v Keeble (3), the rule is connected with "the state of the law relating to real property" in that country and it is possible to argue that in this country the position may be different in the States of Malacca and Penang from what it is in the other States where the basis of the land law is the Torrens system of Registration of Title and where the law of contract is set out in a statutory code. In the

20 circumstances I Propose to deal with the present case on the assumption that the rule does apply.

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

30 It is important, however, to be clear as to what the so-called rule is, for it is certainly not a sort of rogue's charter which says that in every contract for the sale of land there is an implied condition that any term relating to time is to be treated as giving either of the parties as much latitude as to the time of performance of his obligations as he may find convenient irrespective of the views of the other.

40 A simple statement of the rule in its modern form is to be found in the judgment of Lord Parker of Waddington in the case of Stickney v Keeble (Supra at p. 415). His Lordship pointed out that in a contract for the sale or purchase of land the time fixed by the parties for the completion was at law always regarded as essential.

"In such cases, however, equity having a concurrent jurisdiction did not look upon the

(2) 5 F.M.S.L.R. 233.

(3) (1915) A.C. 386, 400.

In the
Court of
Appeal

No. 18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure.

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That is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract".

To discover, then, the scope of the rule we must look to the cases in which the Court of Chancery would have interfered with the process of the Courts of Common Law prior to 1873, and these cases are set out in the following passage from the judgment of Lord Cairns in Tilley v Thomas (4) quoted by Viscount Haldane in the Privy Council case of Jamshed Khodaram Irani v Burjorji Dhunjibhai (5):-

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"A Court of Equity will indeed relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract; either for completion or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in Roberts v Berry (6)) there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances', which would make it inequitable to interfere with and modify the legal right. That is what is meant and all that is meant, when it is said that in equity time is not of the essence of the contract. Of the three grounds mentioned by Lord Justice Turner 'express stipulations' requires no comment.

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(4) (1867-68) L.R. 3 Ch. 61.

(5) 43 I.A. 26, 32.

(6) 3 D.M. & G. 284, 289.

The 'nature of the property' is illustrated by the case of reversions, trusts, or trades, The 'surrounding circumstances' must depend on the facts of each particular case".

In the
Court of
Appeal

So much for the rule that time is not of the essence of a contract for the sale of land.

No. 18

10 The present case, however, is not a straightforward case as to the application of that rule.

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

What the purchaser was asking for here was not specific performance of the contract, it was the return of his deposit and that depends on the question of whether in all the circumstances a Court of Equity would have relieved him from forfeiture of his deposit.

20 Now, with great respect, I cannot accept the view of Azmi J., that if the purchaser had asked for specific performance he would have had a good case. He would have had a bad case for the simple reason that at no time was he ready or willing to perform his own obligation under the contract which, apart from any question of time, was to pay some \$800,000. It is true he was prepared to make arrangements which were designed to ensure that the vendor should eventually receive the whole of the purchase money but he was not ready or willing to put the money on the table.

30 And strictly speaking his legal obligation was to put the money on the table. It is well settled that in the case of a sale of land the vendor is only bound to accept legal tender (see Williams "Vendor and Purchaser" 3rd Ed. p. 698). He is not bound to accept a banker's draft or a cheque. Many of us have heard from elderly solicitors nostalgic reminiscences of how they used to accompany their masters on such occasions to the office
40 of the vendor's solicitors carrying a bag of golden sovereigns. In the words of Lindley L.J. in the case of Pape v Westacott (7):-

(7) (1894) 1 Q.B. 272, 278.

In the
Court of
Appeal

No. 18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

"Let us take a case that lawyers are familiar with - the sale of real property. Let us take the case of a solicitor who is entrusted by the vendor with the completion of the transaction. Is that solicitor justified by the ordinary course of business or the ordinary habits of men in parting with the conveyance and the title deeds in exchange for a promise to pay or a cheque? Certainly not".

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Now, under the instalment sales arrangement proposed and insisted on by the purchaser the vendor might have been as well off in the end as if he had received payment for all the land and conveyed it all on the same day. But he might not have been. In every executory contract for sale the vendor takes the ordinary commercial risk that the purchaser will not perform his part. He may attempt to repudiate or he may go bankrupt or for some other reason he may be unable to perform his part. That is the ordinary risk of the market, and if it occurs the vendor must look elsewhere for a market for his land or his goods. He still has his land and if he suffers loss he has his action for damages for what it is worth.

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In the present case the position under the original contract was that the vendor did not have to convey any of the land till he had the full purchase price. If anything went wrong he still had his land and he had his deposit which would compensate him, at least to some extent, for any loss of profit he might suffer from having to sell elsewhere at a lower price. Under the proposed instalment sales arrangement, however, he was to convey the smaller but more valuable pieces of the land to third parties as and when such third parties were introduced to him by the purchaser. It is true the purchase money for these small pieces was to be paid to him but if after he had parted with them the purchaser had then refused or failed to pay the balance of the agreed purchase price he would have been left with the larger pieces and to sell them without the

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attractive small pieces might well have been a more difficult task than to sell all the seven pieces together and the financial outcome would have been to some extent dependent on the price of rubber land which is something which is affected by the current price of the commodity. (If that statement requires supporting evidence it is to be found in the valuer's report). The risk involved in terms of money might not have turned out to be any greater than the risk involved in the original arrangement. That is a matter for speculation and the purchaser's view clearly was that it was no greater, because he clearly thought he would come out of the matter with profit if the new arrangement was accepted. But it was a different risk and it was for the vendor to say whether or not he was prepared to accept it.

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It may be that if after the dispute in August, 1960, the purchaser had taken up the attitude that if he could not have the original contract varied in accordance with his wishes he insisted on standing on that contract as it stood and if he had been willing to pay the balance of the purchase money he would have been successful in obtaining specific performance.

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But that is not what has happened. He is not asking for specific performance. He is asking in effect to be off with his bargain, to be relieved from forfeiture of the security he has given for its performance and to get back the money that has already been paid in part payment. This demand has been based on the ground that the vendor was not entitled to treat the contract at an end by reason of his failure to comply with his legal obligation under it because in equity so much of that obligation as consisted in payment on a fixed day was not binding on him. But clearly his real case is that a Court of Equity would and should relieve him from the forfeiture which he had incurred in law.

Now, the case of Steedman v Drinkle (8) is some authority for the proposition that the fact that a plaintiff is not entitled to

(8) (1916) A.C. 275.

In the
Court of
Appeal

No. 18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

In the
Court of
Appeal

No. 18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

specific performance will not of itself necessarily prevent him from obtaining relief from forfeiture of an instalment he has paid towards the purchase price, though as was pointed out by Farwell J., in the case of Mussen v Van Diemen's Land Co. (9) it may be that "that case really turns on the particular circumstances there existing". Nevertheless I can see no ground in the present case on which equity would have given or should give relief.

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At this stage I would quote the following further passage from the judgment of Lord Parker of Waddington in the case of Stickney v Keeble (Supra at p.417). In it he discusses section 25(7) of the Judicature Act 1873, but his observations are of general application.

"It means, in my opinion, that where equity would prior to the Act have, for the purposes of decreeing its own remedies, disregarded a stipulation as to time and restrained an action at law based on the breach thereof, the Courts constituted by the Act are for the purpose of giving common law relief to disregard it in like manner. In considering whether it would give relief by restraining proceedings at law the Court of Chancery took cognizance of everything which had happened up to the date of the decree, and in applying s.25 sub.s.7, of the Act, everything up to the date of the judgment ought, in my opinion, to be similarly taken into account. The section cannot in my opinion mean that the rules as to time laid down by Courts of Equity in certain cases, for certain purposes, and under certain circumstances only, shall be applied generally and without inquiry whether the particular case, purpose, or circumstances are such that equity would have applied the rules. If since the Judicature Acts the Court is asked to disregard a stipulation as to time in an action for common law relief, and it be established that equity would not under the then existing circumstances

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have prior to the Act granted specific performance or restrained the action, the section can in my opinion, have no application, otherwise the stipulation in question would not, as provided in the section, receive the same effect as it would prior to the Act have received in equity".

In the
Court of
Appeal

No. 18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

10 The truth here is that ever since he
failed to comply with his legal obligation to
pay the purchaser has in effect wanted indul-
gence not only as to time (which equity might
have given him) but as to the very nature of
that obligation. He has throughout insisted
that he is entitled to some relief as to the
very nature of his obligation and that he is
not prepared to go on with the contract unless
he gets it. In the circumstances I do not
think he is entitled to rely on the argument
that he might have been entitled to relief as
20 to time alone to support his present claim to
the return of the money paid as part payment
and deposit, which is what he is asking for.
This is really based on the contention that al-
though the vendor may have been justified by law
in treating the contract as at an end when the
purchaser made it clear that he was not prepared
to go on unless not only in his own time but
also in his own way which involved a material
variation of his own obligation nevertheless
30 the vendor's action in doing so was so uncon-
scionable as to invoke the interference of
equity.

In the case of Scott v Alvarez (10) it
was said by Rigby L.J:-

"the question to what extent a Court
of Equity will go is very largely one
of authority as to what has been done
before".

40 That case, incidentally, is one which
illustrates the extent to which a Court of Equity
will not go. It was a case where a vendor was
refused specific performance of a contract be-
cause he could not make out a good title.

(10) (1895) 2 Ch. 603, 615.

In the
Court of
Appeal

No.18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

Yet the purchaser was refused the return of his deposit because by reason of a clause in the contract the purchaser was precluded from making enquiries as to the period during which the defects in the chain of title were found to exist.

For myself I can find no authority to show that the Court should go as far as it is asked to go here and my view on principle is that it would be wrong to do so.

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I find support for that view in what was said in the cases of Musson v Van Diemen's Land Co. (Supra) and Stockloser v Johnson (11). The facts of these cases were, of course, different from the facts here. In particular in both cases the party asking for relief had been in possession of at least part of the property concerned. Nevertheless the principles involved were the same.

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In Mussen v Van Diemen's Land Co. there was a contract for the sale of a number of pieces of land and for payment by specified instalments. Two of the pieces of land were conveyed to the purchaser and at the time of the conveyance the total payments made by him came to more than the sum of the prices attributed to these two pieces of land in the schedule to the contract. Thereafter the purchaser owing to financial difficulties made no further payments and after a time the vendor in accordance with the terms of the contract rescinded the contract and entered into possession of the land that had not been conveyed. After some considerable time the purchaser sued for the difference between what he had paid and the land that had been conveyed to him. It was held that he should not be allowed to do so and Farwell J., said (at p. 217):-

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"it is no ground for giving relief to a person from the effect of the contract which he himself has made to say that he has, through no fault of

the defendant whatsoever, found himself in difficulties, or that it may turn out to be not a good bargain from his point of view, Considerations of that sort are wholly irrelevant. It matters not, so long as nothing has been done which can be said to be the fault of the defendant. The mere fact that the plaintiff finds himself in difficulties is in itself no ground for invoking the assistance of equity. He must have known when he entered into it that, if he found himself for any reason in the unfortunate position in which he was in 1931, he would lose the money which he had already paid. Both sides must have realised that, and must have intended that result. How can it be said that, because that event has happened, it is unconscionable for the defendants to retain the money? I know of no case in which such a claim has been successfully made, with the possible exception of one case to which I must refer in a moment".

That case was the case of Steedman v Drinkle, which has already been mentioned, which in His Lordship's view was a case where the Privy Council "treated the matter as though the appellants were ready and willing to perform the contract and the respondents were refusing to permit specific performance, and the court itself was unable to decree specific performance because of the terms of the contract". He then went on (at p. 217):-

"There are cases in which there has been failure to pay instalments or to complete the contract, or where there has been some breach of some term of the contract, and the plaintiff then comes forward and says 'I am here and now ready and willing to complete the contract, and to pay the price stipulated by the contract, and to carry out the terms of the contract, and then the court has said that it is inequitable and against conscience that the defendant should refuse to complete the contract and retain the money which has been paid. The courts say that that is not conscionable. They say that, since the contract is to be performed it is unconscionable to make the plaintiff pay over again the whole of the purchase price

In the
Court of
Appeal

No.18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

In the
Court of
Appeal

No. 18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

stipulated by the agreement, but the defendant is bound to treat the money which has already been paid as part payment of the purchase price".

In the case of Stockloser v Johnson the defendant had sold to the plaintiff some plant and machinery and the benefit of certain hiring agreements. The price was payable by instalments and the contract between the parties provided that in default of an instalment the defendant was to be entitled to re-take the subject matter and that in such event all payments made should be forfeited to the vendor. The purchaser defaulted in payment of some instalments and the vendor rescinded the contract and treated the instalments already paid as forfeited. The purchaser brought an action which was unsuccessful to recover the amount thus treated as forfeited on the ground that its retention by the vendor amounted to the exaction of a penalty. In the Court of Appeal all three Judges, though they did not altogether agree as to the extent of the equitable jurisdiction to give relief in such a case agreed that to invoke the aid of that jurisdiction a plaintiff must show that there is something "unconscionable" about allowing the defendant to retain the money he has forfeited. They also showed substantial agreement with the judgment of Farwell J., in Mussen v Van Diemen's Land Co.

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Somervell L.J. referred to the judgment of Romer L.J., which he had read and said this (at p. 634):-

"Romer L.J. comes to the conclusion that after rescission by the vendor relief would be given only if there were some special circumstance, such as fraud, sharp practice, or other unconscionable conduct, and that before rescission a buyer would only get relief if willing and able to complete. In other words, the only relief would be further time. I think that the statements of the law in the cases to which I will refer indicate a wider jurisdiction.

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I think they indicate that the court would have power to give relief against the enforcement of the forfeiture provisions although there was no sharp practice by the vendor, and although the purchaser was not able to find the balance. It would, of course, have to be shown that the retention of the instalments was unconscionable, in all the circumstances".

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Denning L.J. said (at p. 637) there was "a plain distinction between penalty cases, strictly so called, and cases like the present. He went on:-

"In the present case, however, the defendant is not seeking to exact a penalty. He only wants to keep money which already belongs to him. The money was handed to him in part payment of the purchase price and, as soon as it was paid, it belonged to him absolutely. He did not obtain it by extortion or oppression or anything of that sort, and there is an express clause, - a forfeiture clause if you please - permitting him to keep it".

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Later he said:

"When there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause), then the buyer who is in default cannot recover the money at law at all. He may, however have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit

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.....
Two things are necessary: first, the forfeiture clause must be of a penal nature, in the sense that the sum forfeited must be out of all proportion to the damage; and, secondly it must be unconscionable for the seller to retain the money".

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In the Court of Appeal

No. 18

Judgment of Chief Justice Thomson
28th February 1963
continued

In the
Court of
Appeal

No. 18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

The views of Romer L.J. have already been indicated in the quotation from the judgment of Somervell, L.J. but in relation to the question of hard bargains he said this (at p. 641):-

"If one of the terms which the vendor requires is unacceptable to the purchaser, he is under no compulsion to accept it. He can either keep his money and forego the property or he can purchase a similar property from some other vendor who is more tolerant in his approach to the conditions of sale. If a man agrees to buy property by instalments which he will forfeit to the vendor if he cannot continue them to completion, he knows perfectly well the risk which he is taking and I do not know what right he has to appeal to equity if that risk does in fact ripen into actuality. That was the view which Farwell J., expressed without hesitation in Mussen's case, and I respectfully and entirely agree with it".

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20

In all that I can find nothing to support the purchaser in the present case. The amount involved is not disproportionate. It is 10% of the purchase price which is the usual amount of the deposit in a contract for the sale of land. The purchaser knew he would lose it if he did not complete. There is no suggestion of any imposition or sharp practice or anything of the sort. In view of the purchaser's conduct it is difficult to see any ground on which it can be said that the vendor's action in retaining the money is unconscionable.

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For these reasons I would allow the appeal with costs and order Judgment to be entered for the appellants (that is the vendor) with costs. As regards the counterclaim, I do not propose to deal with it beyond saying that the claim for a declaration is now otiose and that in my opinion the vendor in the light of all that

40

happened was not entitled to specific performance. It would appear that, at any rate up to the time of trial, he had not put it out of his power to perform his part in that he had not sold the land to another purchaser. Nevertheless he has from the beginning taken up the attitude that he was relying on his own legal rights and the purchaser's lack of equitable rights and in my view he should be held to that election.

In the
Court of
Appeal

No.18

Judgment
of Chief
Justice
Thomson
28th February
1963
continued

10

Sgd/: J.B. THOMSON
Chief Justice
Federation of Malaya.

Kuala Lumpur
28th February 1963.

Messrs. W.H. Sault and H.B. Ball for appellants.
Messrs. R. Ramani, R.H.V. Rintoul and C. Selvarajah
for respondent.

Hill J.A. and
Syed Sheh Barakbah J.A., concurred.

20

NO. 19

No. 19

ORDER OF THE COURT OF APPEAL

BEFORE:

THE HONOURABLE DATO SIR JAMES THOMSON,
P.M.N., P.J.K., CHIEF JUSTICE FEDERATION
OF MALAYA

THE HONOURABLE MR. JUSTICE HILL, B.D.L.
JUDGE OF APPEAL, FEDERATION OF MALAYA

AND

THE HONOURABLE MR. JUSTICE SYED SHEH
BARAKBAH, B.D.L. JUDGE OF APPEAL, FEDERATION
OF MALAYA.

30

IN OPEN COURT

In the
Court of
Appeal

This 28th day of February 1963

O R D E R

No. 19
Order of
the Court
of Appeal
28th February
1963
continued

THIS APPEAL coming on for hearing on the 3rd, 4th and 5th days of December 1962 in the presence of Mr. W.H.Sault and Mr. H.B.Ball of Counsel for the Appellants and Mr. R. Ramani, Mr. R.H.V.Rintoul and Mr. Selvaraja of Counsel for the Respondent AND UPON READING the Record of Appeal filed herein AND UPON HEARING the Arguments of Counsel for both parties as aforesaid: 10

THIS COURT DID ORDER that this Appeal should stand for judgment.

AND THIS APPEAL coming for judgment this day in the presence of Counsel for the Appellants and for the Respondent:

THIS COURT DO TH ORDER that this Appeal from the Judgment of the Honourable Mr. Justice Azmi made herein on the 23rd day of June 1962 be and is hereby allowed 20

AND IT IS ORDERED that the said Judgment of the Honourable Mr. Justice Azmi be and is hereby set aside

AND IT IS FURTHER ORDERED that the Appellants' Costs of this Appeal and of Kuala Lumpur Civil Suit No. 494/1960 be taxed by the proper officer of the Court and paid by the Respondent to the Appellants

AND IT IS FURTHER ORDERED that the sum of \$500/- (Dollars Five hundred only) deposited by the Appellants in the High Court at Kuala Lumpur as security for Costs of this Appeal be paid out to the Appellants' Solicitors: 30

AND IT IS LASTLY ORDERED that the fixed Deposit for \$103,222/- deposited with the Registrar of the Supreme Court of Kuala Lumpur be endorsed by the

Registrar to the abovementioned Tay Say Geok.

Given under my hand and the seal
of the Court this 28th day of February 1963.

(L.S.)

Sgd/: Raja Azlan Shah
REGISTRAR
COURT OF APPEAL
FEDERATION OF MALAYA

In the
Court of
Appeal

No. 19

Order of
the Court
of Appeal
28th February
1963
continued

NO. 20

No. 20

ORDER GRANTING FINAL LEAVING TO
APPEAL

Final Order
granting Final
Leave to
Appeal
28th August
1963.

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IN THE SUPREME COURT OF THE FEDERATION OF MALAYA

IN THE COURT OF APPEAL AT KUALA LUMPUR

FEDERATION OF MALAYA CIVIL APPEAL NO.34 OF 1962

Between

- 1. Tay Say Geok
- 2. Lim Siew Cheng
- 3. Ng Mei
- 4. Lim Cheng Wau ... Appellants

And

- 20 Herbert George Warren ... Respondent

(In the Matter of Kuala Lumpur High Court
Civil Suit No. 494 of 1960

Between

- Herbert George Warren ... Plaintiff

And

- 1. Tay Say Geok
- 2. Lim Siew Cheng
- 3. Ng Mei
- 4. Lim Cheng Wau ... Defendants)

30

CORAM: THE HONOURABLE DATO SIR JAMES THOMSON
P.M.N., P.J.K., CHIEF JUSTICE,
FEDERATION OF MALAYA

In the
Court of
Appeal

THE HONOURABLE MR. JUSTICE SYED SHEH
BARAKBAH B.D.L. JUDGE OF APPEAL
FEDERATION OF MALAYA: and

No. 20

THE HONOURABLE MR. JUSTICE HILL
JUDGE, FEDERATION OF MALAYA

Final Order
granting Final
Leave to
Appeal
28th August
1963
continued

IN OPEN COURT

This 28th day of August 1963.

O R D E R

UPON MOTION made unto the Court this day AND UPON READING the Notice of Motion dated the 17th day of August 1963 and the Affidavit of Herbert George Warren affirmed on the 16th day of August 1963 and filed herein AND UPON HEARING Mr. K.A. Menon of Counsel for the abovenamed Respondent and upon his intimation of the Court that Mr. H.B. Ball of Counsel for the Appellants had no objection to this application:

10

IT IS ORDERED that final leave be and is hereby granted to the abovenamed Respondent to appeal to His Majesty the Yang di-Pertuan Agong against the judgment of the Court of Appeal herein dated the 28th day of February 1963:

20

AND IT IS ORDERED that the costs of this application be costs in this Appeal.

GIVEN under my hand and the seal of the Court this 28th day of August 1963.

(SEAL) Sgd/: RAJA AZLAN SHAH

REGISTRAR
COURT OF APPEAL
FEDERATION OF MALAYA

30

P.1 (1) Option: Tay Say Geok to Tay Say Keng;
9th May 1960

Exhibits

P.1 (1)

10 I, Tay say Geok, of No. 488 Tranquerah Road, Malacca, owner of rubber land at Mukim of Lendu, Malacca Lots Nos. 694, 298, 297, 296, 299 293, 295, 294(1), 294(11) containing an area of 496 acres 0 rood and 39 poles do hereby authorise Mr. Tay Say Keng to sell the same at the price of Dollars One thousand eight hundred (S1,800/-) per acre. The moveable assets on the said estate are not to be included in the sale and if this sale is put through the buyer has to pay 10% deposit down first and the balance to be paid within one (1) month.

Option:
Tay Say
Geok to
Tay Say
Keng
9th May
1960

This authority is to be in force up to the end of this month. I undertake to pay him a 2% commission if the sale is put through.

Sd. Tay Say Geok

9th May 1960.

20 P.1 (2) Telegram: Williams to Warren
17th May 1960

P.1 (2)

TELECOMMUNICATIONS DEPARTMENT, MALAYA

RECEIVING FORM

TELEGRAPH OFFICE

AM

17 MAY 60

KUALA LUMPUR

APK62 OGX158 LONDON 18 16 1720

To,

Telegram
Williams
to Warren
17th May
1960.

30 WARREN PROFIT KUALALUMPUR -
 BID AS ARRANGED SUBJECT TO CONTRACT DEPOSIT ON
 SIGNING CONTRACT TELEPHONING YOUR HOUSE 17TH
 Williams
 17th MAY 1960

Received at 5A.M. From Apk By Sd.?

Exhibits

P.1 (3) Letter: Plaintiff's Solicitors
to Registrar of Companies, 18th May 1960

P.1 (3)

18th May 1960

Letter:
Plaintiff's
Solicitors
to Registrar
of Companies
18th May
1960

The Registrar of Companies,
Federation of Malaya,
Kuala Lumpur.

Dear Sir,

Austral Asia Plantations Limited
(in formation)

We write to inquire whether there is any objection to the use of the abovenamed for a proposed new company. 10

Yours faithfully,

Sd. Shearn Delamore & Co.

P.1 (4)

P1 Agreed Bundle of Documents (4) 19.5.60

Letter:
Plaintiff's
Solicitors
to Defendants'
Solicitors
19th May
1960

P.1 (4) Letter Plaintiff's Solicitors to
Defendants' Solicitors, 19th May 1960

:prn

SD(RN) 13001

EXPRESS

19th May 1960.

20

Messrs. Allen & Gledhill,
Advocates & Solicitors,
MALACCA,

Dear Sirs,

Sale of 496 acres of rubber
estate - Tay Say Geok

We enclose herewith for your approval a draft agreement for the purchase of the above estate. Our client is arranging for a deposit to be made, and we will contact you immediately this is to hand. Meanwhile, we should be obliged if you would send us the titles for inspection upon the usual undertaking. 30

Yours faithfully,
Sd. Shearn Delamore & Co.

P.1 (9) Letter: Defendants' Solicitors to
Plaintiff's Solicitors, 24th May 1960

Exhibits

ALLEN GLEDHILL & BALL

P.1 (9)

P.O. BOX NO. 69,
2, CHURCH LANE,
TOWN & FORT OF MALACCA.

Letter:
Defendants'
Solicitors
to Plaintiff's
Solicitors
24th May,
1960.

24th May 1960.

REGISTERED AR.

Our Ref: 362/60/K.769/CCB.

10 Messrs. Shearn Delamore & Co,
The Eastern Bank Building,
2, The Embankment (2nd Floor)
Kuala Lumpur.

Dear Sirs,

Sale of 496 acres of Rubber Estate

Tay Say Geok to H. G. Warren

We thank you for your letter of the 19th instant with draft agreement upon which we have now seen our client Mr. Tay Say Geok.

20 As we have made extensive amendments to the draft you sent us we have had the draft re-typed and enclose it herewith for your approval. We have handed a copy to the Broker Mr. Tay Say Keng for him to see your clients thereon.

30 Our client wishes the agreement to be completed not later than the 31st instant - hence we shall be glad if you will see your client thereon at once and if in order have the agreement engrossed and let us have two copies thereof together with the draft for the deposit.

Yours faithfully,

Sd: Allen Gledhill & Ball

Exhibits

P.1 (15) Letter: Defendants' Solicitors
to Plaintiffs Solicitors, 30th May 1960

P.1 (15)

ALLEN GLEDHILL & BALL,

REGISTERED A.R.

Letter:
Defendants'
Solicitors
to Plaintiff's
Solicitors
30th May
1960

P.O. Box No. 69,
2, Church Lane,
Town & Fort of Malacca.

30th May 1960.

Our Ref: 362/60/K.769/CCB.

Your Ref: SD(RN)13001

10

Messrs. Shearn Delamore & Co.,
P.O.Box 138,
Kuala Lumpur.

Dear Sirs,

URGENT

Sale of 496 acres Lendu

Tay Say Geok to H.G. Warren

In reference to the Agreement for
sale executed by your client and the cheque
for \$90,000/- handed to our Mr. Ball last
Saturday, we shall get the Vendors to exe-
cute it and thereafter forward to you your
client's copy thereof.

20

We are having the titles searched
and are obtaining certified abstracts of
certain missing deeds. As soon as these
abstracts are available we shall send you
all the title deeds.

Amongst the properties agreed to
be sold is Statutory Grant 24486 referred
to in paragraph 7 of the Agreement for
sale. Upon searching this title we find
that there is registered against it a
formal Grant of Right of Way over an
access road executed by our client Mr.
Tay Say Geok in favour of Mr. Gan Lap
to which we think we should bring to

30

10 your notice. This agreement was entered into when our client sold his adjoining property to Mr. Gan Lap sometime in 1959. Under this document you will observe that our client is to maintain the access road but the cost of such maintenance and repair is to be paid by both parties namely: our client and Mr. Gan Lap in equal shares. We have called for a signed copy of the right of way and enclose it herewith for your perusal.

As the right of way is over a small portion of the land used as an access road, we trust that the Purchaser has no objection.

Yours faithfully,

Sd: Allen Gledhill & Ball

Exhibits.

P.1 (15)

Letter:
Defendants'
Solicitors
to Plaintiff's
Solicitors
30th May
1960
continued

P.1 (5-8) Agreement between Defendants and Plaintiff, 31st May 1960

P.1 (5-8)

50¢ Stamp
cancelled by

STAMP OFFICE
MALACCA

Agreement
between
Defendants
and
Plaintiff
31st May
1960

20

30

THIS AGREEMENT is made the 31st day of May One thousand nine hundred and sixty (1960) Between TAY SAY GEOK of No. 488, Tranquerah Road, Malacca, LIM SIEW CHENG of the same place Married Woman, NG MEI of No. 308C, Klebang Besar, Malacca, Housewife and LIM CHENG WAU of No. 85, Tranquerah Road, Malacca, Married Woman, (hereinafter collectively called "the Vendors") of the one part and HERBERT GEORGE WARREN of 189, Ampang Road, Kuala Lumpur (hereinafter called "the Purchaser") of the other part.

WHEREAS the Vendors are registered proprietors of the lands situated in the Mukim of Landu, Malacca, in area 496 acres 1 rood 0 poles more or less and more particularly described in the First Schedule annexed hereto (hereinafter called "the said lands").

40

AND WHEREAS the Vendors have agreed to sell and the purchaser has agreed to purchase

Exhibits

 P.1 (5-8)

 Agreement
 between
 Defendants
 and
 Plaintiff
 31st May
 1960
 continued

free from all incumbrances the said lands together with the buildings, structures and machinery erected thereon and specified in the Second Schedule hereto at the price of Eighteen hundred dollars (\$1800) per acre subject to the terms and conditions hereinafter appearing.

NOW IT IS HEREBY AGREED AS follows:-

1. The Vendors shall sell and the Purchaser shall purchase the said lands and buildings free from incumbrances at a price of eighteen hundred dollars (\$1800) per acre upon and subject to the conditions hereinafter contained. 10
2. The Purchaser shall pay to the Vendors the sum of Dollars Ninety thousand (\$90,000) upon or before the execution of this agreement by way of deposit and in part payment of the said purchase price (the receipt whereof the Vendors hereby acknowledge) and the balance shall be paid on the date fixed for completion of the purchase. 20
3. The Purchase shall be completed and the balance of the purchase money shall be paid on or before the 7th day of August 1960 at the office of the Vendors' Solicitors Messrs. Allen Gledhill & Ball of Malacca. On completion the Vendors will deliver to the Purchaser a proper conveyance or conveyances and assignment of the said lands in favour of the Purchaser or his nominee or nominees free from all encumbrances and the Purchaser will pay to the Vendors the balance purchase price. 30
4. The title relating to Lot 694 firstly described in the First Schedule hereto will be issued to the Vendor Tay Say Geok in the form of a Lease for 99 years subject to an annual quit rent of \$2350/- or such amount as shall be fixed by the Government. In the event of the title being unissued at the date of 40

completion of purchase the Vendor Tay Say Geok shall if required execute in favour of the Purchaser an irrevocable Power of Attorney enabling him to receive the title from the Government when issued and have it assigned to himself.

Exhibits

P.1 (5-8)

5. The Purchaser shall as from the date hereof be at liberty to enter into possession of the property hereby sold and maintain the same and all buildings and machinery thereon at his cost and expense in their present state or condition but if the said property buildings or machinery shall be damaged by fire or other inevitable accident the Vendors shall be under no obligation to restore the same nor shall such event be a ground for the non completion of purchase.
- 10
6. All quit rents assessments medical rates and cesses for the year 1960 shall be paid by the Vendors and the Purchaser in equal shares.
- 20
7. Part of the property hereby sold namely the land which consists of swampy land containing an area of about 2 acres comprised in S.G.24486 is subject to an agreement (in Chinese) dated the 1st January 1957 made between the Vendor Tay Say Geok of the one part and Chong Wee of the other part whereby the said Chong Wee was given licence to cultivate the same with vegetables up to the 31st December 1962.
- 30
8. If the Purchaser shall fail to complete the purchase in accordance with this agreement then the deposit of Dollars Ninety thousand (\$90,000) paid by the Purchaser on or before the execution of this agreement shall be considered as liquidated damages and shall be forfeited to the Vendors and the Purchaser shall thereupon surrender possession of the said property buildings and machinery to the Vendors and this agreement shall be at an end.
- 40
9. The Purchaser shall bear and pay for all the costs and expenses of or inci-

Agreement
between
Defendants
and
Plaintiff
31st May
1960
continued

Exhibits

P.1 (5-8)

Agreement
between
Defendants
and
Plaintiff
31st May
1960
continued

dental to the preparation execution stamping and registration of these presents and of the necessary conveyances and/or assignments or Power of Attorney referred to in Clauses 3 and 4 hereof.

10. The Purchaser shall also bear and pay all costs incurred by the Vendors for approving and settling the conveyance assignments or other documents including their scale costs as Vendors' Solicitors. 10
11. These presents shall be binding upon the executors administrators and assigns of the parties hereto.

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

THE SCHEDULE ABOVE REFERRED TO

FIRST SCHEDULE

20

<u>Lot No.</u>	<u>Area</u>	<u>Title</u>	<u>Names</u>
(1) 694	346.0.20	99 years lease	Tay Say Geok
(2) 298 & 299	17.2.10	S.G.27256	Tay Say Geok
(3) 296 & 297	10.1.07	S.G. No. 27409	Lim Cheng Wau
(4) 293	98.3.21	S.G. No. 24486	Tay Say Geok
(5) 295	7.0.18	S.G. No. 27410	Ng Mei
(6) 294 (11)	13.0.19	S.G. No. 30135	Lim Siew Cheng
(7) 294 (1)	3.0.25	S.G. No. 30121	Ng Mei
Total	496.1.00		

30

SECOND SCHEDULE

Exhibits

	One Milling Shed with 2 hand operated		
Rollers.	One Smoke House		----- P.1 (5-8) -----
	Two Labour Lines		
	One Store House		Agreement between Defendants and Plaintiff 31st May 1960 continued
	SIGNED by the said) TAY SAY GEOK in the) presence of:-)	Sd: Tay Say Geok	
10	Sd: H.B.Ball, Advocates & Solicitors Malacca.		
	SIGNED by the said) LIM SIEW CHENG in) the presence of:-)	Sd. Lim Siew Cheng (in Chinese)	
	Sd. H.B.Ball		
	SIGNED by the said) NG MEI in the) presence of:-)	Sd: Ng Mei (in Chinese)	
20	Sd. H.B.Ball		
	SIGNED by the said) LIM CHENG WAU in the) presence of:-)	Sd: Lim Cheng Wau (in Chinese)	
	Sd. H.B.Ball		
	SIGNED by the said) HERBERT GEORGE WARREN) in the presence of:-)	Sd. H.G. Warren	
30	Sd: D.G. Rawson, Advocate & Solicitor Kuala Lumpur.		

Exhibits

P.1 (16) Letter: Defendants' Solicitors
to Plaintiff's Solicitors, 3rd June 1960

P.1 (16)

ALLEN GLEDHILL & BALL

P.O.Box No. 69,
2, Church Lane,
Town & Fort of Malacca

Letter :
Defendants
Solicitors
to
Plaintiff's
Solicitors
3rd June
1960

Registered

3rd June 1960

Our Ref: 362/60/K.769/Ken.

SD/RN/ 13001

Messrs. Shearn Delamore & Co.
P.O.Box 138,
Kuala Lumpur

10

Dear Sirs,

Sale of 496 acres of Rubber Estates
Tay Say Geok to H. G. Warren

In reference to our letter of the
30th May last we have now had the agreement
for sale executed and stamped and enclose
herewith your client's copy thereof, re-
ceipt of which please acknowledge.

20

We also enclose the plan showing the
right of way handed to us by Messrs. Koh
Kim Leng & Co., who prepared the deed.

This right of way is marked red on
the plan.

We also confirm our telephone con-
versation with your Mr. Rawson as to the
properties excluded from the sale namely:

1. a sum of about \$3,000/- with the
Replanting Board not yet withdrawn
by the Vendor.
2. all moveable property including a
tractor on the estate not provided in
the agreement for sale.

30

We shall be glad if you will con-
firm the exclusion of these assets from
the sale.

In regard to the titles, we are obtaining certain abstracts from the Land Office and as soon as these are issued we shall forward them to you with Schedule thereof.

Yours faithfully,

Sd: Allen Gledhill & Ball

Exhibits

P.1 (16)

Letter :
Defendants
Solicitors
to Plaintiff's
Solicitors
3rd June 1960
continued

P.1 (17) Letter: Plaintiff's Solicitors to
Defendants' Solicitors, 7th June 1960

P.1 (17)

:prn

Letter:
Plaintiff's
Solicitors to
Defendants
Solicitors
7th June 1960

10

362/60/K769/KEN
SD/RN/13001

7th June 1960.

Messrs. Allen Gledhill & Ball,
Advocates & Solicitors,
P.O.Box 69,
Malacca.

Dear Sirs,

Sale of 496 acres of rubber estate
to Mr. H. G. Warren

20

We thank you for your letter of the 3rd instant together with the enclosure thereto upon which we are taking our client's instructions.

We will write to you further in due course.

Yours faithfully,

Sd: Shearn Delamore & Co.

Exhibits

P.1 (10-14) Draft Agreement between Defendants and Plaintiff, 24th June 1960

P.1 (10-14)

File No. 362/60/K.769 24.6.60

DRAFT

Draft Agreement between Defendants and Plaintiff 24th June 1960.

THIS AGREEMENT is made the day of One thousand nine hundred and sixty (1960) Between TAY SAY GEOK of No. 488 Tranquerah Road, Malacca, LIM SIEW CHENG of the same place Married Woman, NG MEI of No. 308C, Klebang Besar, Malacca, Housewife and LIM CHENG WAU of No. 85, Tranquerah Road, Malacca Married Woman (hereinafter collectively called "the Vendors") of the one part and HERBERT GEORGE WARREN of 189, Ampang Road, Kuala Lumpur (hereinafter called "the Purchaser") of the other part.

10

WHEREAS the Vendors are registered proprietors of the lands situated in the mukim of Lendu Malacca in area 496 acres 1 rood 00 poles more or less and more particularly described in the First Schedule annexed hereto (hereinafter called "the said Lands").

20

AND WHEREAS the Vendors have agreed to sell and the Purchaser has agreed to purchase free from all incumbrances the said lands together with the buildings, structures and machinery erected thereon and specified in the Second Schedule hereto at the price of Eighteen hundred dollars (\$1800) per acre subject to the terms and conditions hereinafter appearing.

30

NOW IT IS HEREBY AGREED as follows:

1. The Vendors shall sell and the Purchaser shall purchase the said lands and buildings free from incumbrances at a price of eighteen hundred dollars (\$1800) per acre upon and subject to the conditions hereinafter contained.
2. The purchaser shall pay to the Vendors the sum of Dollars Ninety

40

thousand (₹90,000) upon or before the execution of this agreement by way of deposit and in part payment of the said purchase price (the receipt whereof the Vendors hereby acknowledge) and the balance shall be paid on the date fixed for completion of the purchase.

- 10 3. The purchase shall be completed and the balance of the purchase money shall be paid on or before the 7th day of August 1960 at the office of the Vendors' Solicitors Messrs. Allen Gledhill & Ball of Malacca. On completion the Vendors will deliver to the Purchaser a proper conveyance or conveyances and assignment of the said lands in favour of the Purchaser or his nominee or nominees free from all encumbrances and the Purchaser will pay to the Vendors the balance purchase price.
- 20

4. The title relating to Lot 694 firstly described in the First Schedule hereto will be issued to the Vendor Tay Say Geok in the form of a Lease for 99 years subject to an annual quit rent of ₹2350/- or such amount as shall be fixed by the Government. In the event of the title being unissued at the date of completion of purchase the Vendor Tay Say Geok shall if required execute in favour of the Purchaser an irrevocable Power of Attorney enabling him to receive the title from the Government when issued and have it assigned to himself.
- 30

5. The purchaser shall as from the date hereof be at liberty to enter into possession of the property hereby sold and maintain the same and all buildings and machinery thereon at his cost and expense in their present state or condition but if the said property buildings or machinery shall be damaged by fire or other inevitable accident the Vendors shall be under no obligation to restore the same nor shall such event be a ground for the non completion of purchase.
- 40

Exhibits

P.1 (10-14)

Draft
Agreement
between
Defendants
and
Plaintiff
24th June
1960
continued

Exhibits

P.1 (10-14)

Draft
Agreement
between
Defendants
and
Plaintiff
24th June
1960
continued

6. All quit rents assessments medical rates and cesses for the year 1960 shall be paid by the Vendors and the Purchaser in equal shares.
7. Part of the property hereby sold namely the land which consists of swampy land containing an area of about 2 acres comprised in S.G.24486 is subject to an agreement (in Chinese) dated the 1st January 1957 made between the Vendor Tay Say Geok of the one part and Chong Wee of the other part whereby the said Chong Wee was given licence to cultivate the same with vegetables up to the 31st December 1962. 10
8. If the Purchaser shall fail to complete the purchase in accordance with this agreement then the deposit of Dollars Ninety thousand (\$90,000) paid by the Purchaser on or before the execution of this agreement shall be considered as liquidated damages and shall be forfeited to the Vendors and the Purchaser shall thereupon surrender possession of the said property buildings and machinery to the Vendors and this agreement shall be at an end. 20
9. The Purchaser shall bear and pay for all the costs and expenses of or incidental to the preparation execution stamping and registration of these presents and of the necessary conveyances and or assignments or Power of Attorney referred to in Clauses 3 and 4 hereof. 30
10. The Purchaser shall also bear and pay all costs incurred by the Vendors for approving and settling the conveyance assignments or other documents including their scale costs as Vendors' Solicitors. 40
11. These presents shall be binding upon the executors administrators and

assigns of the parties hereto.

Exhibits

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

P.1 (10-14)

THE SCHEDULE ABOVE REFERRED TO

FIRST SCHEDULE

Draft Agreement between Defendants and Plaintiff 24th June 1960 continued

<u>Lot No.</u>	<u>Area</u>	<u>Title</u>	<u>Names</u>
(1) 694	346.0.20	99 year lease	Tay Say Geok
10 (2) 298 & 299	17.2.10	2 S.G. No. 27256	Tay Say Geok
(3) 296 & 297	10.1.07	2 S.G. No. 27409	Lim Cheng Wau
(4) 293	98.3.21	S.G. No. 24486	Tay Say Geok
(5) 295	7.0.18	S.G. No. 27410	Ng Mei
(6) 294 (11)	13.0.19	S.G. No. 30135	Lim Siew Cheng
(7) 294 (1)	3.0.25	S.G. No. 30121	Ng Mei
Total	496.1.00		

20

SECOND SCHEDULE

One Milling Shed with 2 hand operated Rollers

One Smoke House

Two Labour Lines

One Store House

Signed by the said Tay Say Geok }
in the presence of:-

Signed by the said Lim Siew Cheng }
in the presence of:-

30

Signed by the said Ng Mei in }
the presence of:-

SG. No. 30121	294 (1)	<u>3A.OR.25P</u>	Ng Mei	Exhibits <u>P.1 (18-23)</u>
		<u>496A.1R.00P</u>		

LEASE

Valuation
11th July
1960
continued

10

The title relating to Lot 694 firstly described in the First Schedule hereto will be issued to the Original Vendor Tay Say Geok in the form of a lease for 99 years subject to an annual quit rent of \$2350/- or such amount as shall be fixed by the Government. In the event of the title being unissued at the date of completion of purchase the Vendor shall if required execute in favour of the Purchaser an irrevocable Power of Attorney enabling them to receive the title from the Government when issued and have it assigned to themselves.

20

QUIT RENT The sum of \$2,350.00 per year on lot 694 plus \$6.00 per acre on remaining lots of land.

INTENDING OWNERS Austral Asian Plantations Limited of 44, Pudu Road, Kuala Lumpur.

CONSIDERATION \$1,141,375.00 being the value at \$2,300/- per acre.

AGREEMENT Agreement of sale between parties not yet signed.

30

SITUATION Mukim of Lendu, District of Alor Gajah, State of Malacca.

30

LOCALITY One mile on laterite road off metalled road in Lendu. About 3½ miles from Alor Gajah; about 4 miles from Rumbia; about 17 miles from Malacca; about 35½ miles from Seremban and about 78 miles from Kuala Lumpur.

40

INTERNAL ACCESS Good internal estate road passable by motor traffic. No road toll is required to be paid.

PLAN OF AREA Please see annexure marked "A/2".

Exhibits

P.1 (18-23)

Valuation
11th July
1960
continued

TERRENE Flat to undulating land with an exception of about 70 acres of land on a hill.

DRAINAGE Sufficient earth drains.

WATER SUPPLY Adequate water supply from wells for domestic and industrial needs.

SOIL Soil condition taken as a whole is highly satisfactory.

PLANTING DETAILS Please see annexure marked "A/1". 10

MATURITY OF TREES by the year 1964 all the trees are fully matured and will be brought into full tapping.

TREES AND GROWTHS With the exception of 70 acres planted on the hill, the trees are growing well as seen by their thick foliage, healthy and vigorous canopies and healthy girths. No "dry tops" and "blanks" are seen. "Refills" or "replantings" on about 15 acres of land on the crown of the hill are easily done from adequate supply of bud-wood in the nurseries. 20

Average stand of trees is about 170 trees to an acre and average girth measurements in the 1954 planting are around 18 inches. Following "wintering" next year, a sound programme of manuring and good maintenance will make the trees grow to 22 inches when they will be brought into tapping. 30

Natural cover crops of non leguminous nature are grown and sporadic noxious growths are found which are easily eradicated without costly capital expenditure.

CLONES OF TREES RRIM/621. High yielder but liable to wind damage. Trees are vigorous but tend to lean. 40

RRIM/606. Promising clones because of its attractive habit. Growth

is vigorous and girth increment of tapped trees is good.

Exhibits

RRIM/612 Low yielding clones in the 600 series.

P.1 (18-23)

RRIM/615 No comments.

Valuation
11th July
1960
continued

10

RRIM/605 Promising clone. Growth is average and girth increment of tapped trees is satisfactory. Bark is of average thickness: bark renewal is good. Straight stem, rather low-branching and has balanced wide crown. Foliage usually dark and healthy.

20

RRIM/623 Most vigorous clones of the series. The trees will come into tapping at least 6 months earlier than clones of average vigour like RRIM/501. Girth increment of tapped trees continues to be high. Foliage dense and healthy. Virgin and renewed bark are below average in thickness but bark renewal however is better than others in the same series.

RRIM/603 This clone is very vigorous and has thick corky bark. The crown is wide and heavy. Susceptibility to pink disease is above average.

RRIM/614 Increment of tapped trees is poor. Branching is irregular and sensitive to brown pest.

LCB/1320 No comments.

30

PB/86 Slow starter but steady yielder. Its yield is steady not subject to fluctuation.

ANALYSIS OF CLONES RRIM/612 is low yielding clone in the series.

RRIM/614, 621 and 603 are susceptible to wind damage. However, the trees are well looked after and pruned. Regular pruning is the proved answer to trunk snap and branch damage.

40

Other clones are steady and very high yielding trees.

Exhibits

P.1 (18-23)

Valuation
11th July
1960
continued

The planting of the estate has been carefully planned and it is estimated that clone RRIM/612 takes up about 30 acres. Clones RRIM/614, 621 and 603 take up about 70 acres and other clones in the RRIM/600 series and LCB/1320 clone and PB/86 clone take up the remaining area.

TREES IN TAPPING AND YIELD This is the table:-

<u>YEAR</u>	<u>Average</u> Acres in Tapping	pound per acre Per year	Statis- tical Yield	%	Expected Yield	
1st year 1960						10
2nd year 1961	142 acres	1500	213,000 lbs.	70	149,100 lbs.	20
3rd year 1962	284 acres	1500	426,000 lbs.	70	298,200 lbs.	
4th year 1963	426 acres	1500	639,000 lbs.	70	447,300 lbs.	
5th year 1964	496 acres	1500	744,000 lbs.	70	520,800 lbs.	
Expected yield at end of fifth year					1,415,400 lbs.	30

The statistical analysis of yield, for the purpose of valuation is reduced by 30% for scrap and any unforeseen eventuality.

LABOUR & SUPPLY No problem of labour supply in view of the fact that labour is easily obtainable from Lendu New Village. Alor

Gajah and Rumbia.

Exhibits

MAINTENANCE COST For obvious reason during the "take over" period the estate has been neglected for about two months. As reported earlier, the cost of maintenance is low and general and administration cost, for purpose of valuation, is estimated slightly on a higher scale.

P.1 (18-23)

Valuation
11th July
1960
continued

10 PRODUCTION COSTS The costs of production per pound (comprising Labour, manuring, pruning, spraying arsenic, upkeeping, road, quit rent, health and sanitation, staff and administration) is estimated at .25 Cts. per pound.

PRICE OF RUBBER Taking the average price of rubber at \$1.00 per pound, it is not impossible to make .75 Cts., per pound on profit.

20 RECOVERY OF CAPITAL At the end of five years, in the year 1964, on a crop of 1,415,400 pounds of ribbed smoke sheets, at a profit of .75 cts., per pound, the total income receivable from the estate is the sum of \$1,061,550.00 (purchase price is \$1,141,375.00).

30 OBSERVATIONS There is an acute shortage of land throughout the Federation of Malaya. Fragmentation of estate will bring in better return in quick time on capital investment. Where fragmentation of a large estate depriving mass unemployment should be condemned, the fragmentation of this estate without a labour force today should be encouraged in view of the great demand of rubber land.

It is not unreasonable to expect a value of \$2,400/- to \$3,000 per acre for rubber land, of high yielding strains if each title is under 25 acres per lot.

40 An adjoining estate of about 150 acres with trees of high yielding strains planted about 3 years ago, changed hands at a price reported to be about \$2,400/- per acre but no research into land transaction of this deal has been made at the Land Office suffice to quote one instance of land deal made by three Indian Chettians as follows:-

Exhibits

P.1 (18-23)

Valuation
11th July
1960
continued

Title SG/19120, lot 297, Mukim Cheng, District Malacca, 18A.2R.37P consisting of old seedlings of unselected strains, planted in the year 1939, about 12 miles from this property, sold by AL.RM.Alagappa Chettiar, AL.RM.Ramanathan and AL.A.Annamalai Chettiar in the year 1957 for about \$1,200/- per acre.

VALUATION The sum of \$1,141,375.00 being the value at about \$2,300/- per acre, for this estate, in view of the fact that it takes more or less five years to recover the capital, is not an unreasonable valuation. 10

CAUTION In the granting of a loan in this case it is a calculated risk so long as satisfaction is obtained to ensure that the owners have the means to meet the monthly interest in the interim period.

CHANG FOOK SUNG & CO. 20

Sd. F.S. CHANG

F.S. CHANG

LICENSED FIRST CLASS APPRAISER

MALACCA.

FSC/CSK.

THIS IS THE ANNEXURE MARKED "A/1"

PLANTING DETAILS

Lot	Area	Date of Planting	Clone	Yearly Yield per pound per acre per annum	30
298	15A.3R.31P	1954/55	RRIM 621	1,800	
299	1A.2R.19P	1954/55)			
296	8A.1R.22P	1954/55)	LCB/		
297	1A.3R.25P	1954/55)	1320	1,500	

Lot	Area	Date of Planting	Clone	Yearly Yield per pound per acre per annum	Exhibits	
					P.1 (18-23)	
					Valuation 11th July 1960 continued	
	293	98A.3R.21P	1954/55	RRIM/ 606	1,600	
				RRIM/ 612	1,000	
10				RRIM/ 615	1,200	
				RRIM/ 605	1,800	
				RRIM/ 623	1,900	
				LCB/ 1320	1,500	
	295	7A.OR.18P	1954/55)			
	294	13A.OR.19P	1954/55)			
20	(11)					
	294	3A.OR.25P	1954/55)	PB/86	1,200	
	(1)					
	694	346A.OR.20P	1956/57 /58	RRIM/ 605	1,800	
				RRIM/ 612	1,000	
				RRIM/ 623	1,900	
30				RRIM/ 603	1,600	
				RRIM/ 614	2,000	

496A.1R.00P

YIELDS Average yearly yield in pounds per acre per annum is 21,800 lbs., divided by 14 being 1,557 lbs., or for use of the report, as 1,500 lbs.

Exhibits

P.1 (18-23)

Valuation
11th July
1960
continued

DEFINITIONS RRIM clones are Rubber Research Institute of Malaya 600 series clones.

LCB clones are Lands Caoutchoue Bedrijven clones of Dutch origin.

PB clones are Prang Besar clones.

P.1 (24)

Letter:
Defendants
Solicitors
to Plaintiffs
Solicitors
20th July
1960

P.1 (24) Letter: Defendants' Solicitors
to Plaintiff's Solicitors 20th July 1960

ALLEN GLEDHILL & BALL

P.O.Box 69,
Church Lane,
Town & Fort of Malacca.

10

A.R.Registered

20th July 1960.

Our Ref. 362/60/k/769/Ken.

Your Ref. SD/RN/13001

Messrs. Shearn Delamore & Co,
The Eastern Bank Building,
2, The Embankment (second floor),
Kuala Lumpur.

Dear Sirs,

Sale of 496 acres of Rubber Estate
to H.G.Warren

20

We beg to refer to your letter of 11th June 1960 and shall be glad if you will return us a copy of the schedule of deeds signed by you.

You will recollect that the date of completion of purchase has been fixed for the 8th proximo.

As our client expects payment of the balance of the purchase money on that date, we shall be glad if you will now let us have the draft conveyance and Power of Attorney as regards the unissued title for our approval in readiness for completing the matter on the 8th August 1960.

30

Yours faithfully,
Sd: Allen Gledhill & Ball

P.1 (25) Letter: Defendants' Solicitors to
Plaintiff's Solicitors, 27th July 1960

Exhibits

Allen Gledhill & Ball.

P.O.Box No. 69,
Church Lane,
Town & Fort of
Malacca.

P.1 (25)

27th July 1960

Letter:
Defendants
Solicitors
to Plaintiff's
Solicitors
27th July
1960

A.R.Registered

10 Our Ref. 362/60/K.769/W.
Your Ref. SD(RN) 13001

Messrs. Shearn Delamore & Co,
The Eastern Bank Building,
2, The Embankment (2nd Floor),
Kuala Lumpur.

Dear Sirs,

Sale of 496 acres of Rubber Estate to
H.G.Warren

20 We beg to confirm Mr. Rawson's request
for an interview to be arranged between Mr.
Warren and Mr. Tay Say Geok on Friday or Satur-
day the 29th or the 30th of July.

30 Mr. Tay Say Geok would be willing to
meet Mr. Warren in Malacca on the 2nd or 3rd
of August but would like to be given notice of
the subject matter of the discussions before
the meeting takes place. As Mr. Ball will be
away in Maur on Tuesday the 2nd we should prefer
that the interview should take place on Wednes-
day the 3rd if possible.

Yours faithfully,

Sd. Allen Gledhill & Ball

Exhibits

P.1 (26) Letter: Plaintiff's Solicitors
to Defendants' Solicitors 10th August 1960

P.1 (26)

:prn

10th August 1960.

Letter:
Plaintiff's
Solicitors
to
Defendants'
Solicitors
10th August
1960

362/60/K769/KEN
SD/(RN).13001

Messrs. Allen Gledhill & Ball,
Advocates & Solicitors,
Church Lane,
Malacca.

Dear Sirs,

10

Sale of 496 acres of Rubber
Estate to H. G. Warren

In consequence of certain discussions that have taken place between our clients and representatives of your clients we are instructed to make the following proposal with regard to the completion of the above purchase.

In consideration of the payment of the sum of \$12,500/- in manner following, that is to say:-

20

- (1) As to \$2,500/- thereof upon your clients acceptance of this proposal (hereinafter called the Acceptance Date).
- (2) As to \$5,000/- thereof on or before the 31st August 1960.
- (3) As to the balance of \$5,000/- on or before the 30th September 1960

30

Your clients will agree to extend the time for the completion of the said purchase for a period of two months from the Acceptance Date, subject to the following conditions:-

- (a) The purchaser shall pay to the Vendors the sum of Thirty thousand

dollars (₹30,000) on the Acceptance Date by way of further deposit and in part payment of the purchase price and the balance shall be paid on the extended date fixed for the completion of the purchase.

Exhibits

P.1 (26)

Letter:
Plaintiff's
Solicitors to
Defendants'
Solicitors
10th August
1960
continued

10 (b) The purchaser shall pay to the vendors the sum of ₹3,000/- on the Acceptance Date by way of deposit to cover the cost of weeding and maintenance of the rubber lands agreed to be sold for the period from the Acceptance Date to the extended date for completion. The vendors will account to the purchaser for the said sum of ₹3,000/- and refund to the purchaser on completion the balance if any remaining in their hands.

20 (c) The sum of ₹12,500/- hereinbefore referred to is payable in addition to the purchase price and is not in Part payment thereof.

We should be glad to hear from you at your early convenience that the above proposals are acceptable to your clients.

Yours faithfully,

Sd. Shearn Delamore & Co.

P.1 (27) Letter: Defendants' Solicitors to
Plaintiff's Solicitors, 11th August 1960

P.1 (27)

30 ALLEN GLEDHILL & BALL.

P.O.Box No. 69,
Church Lane,
Town & Fort of Malacca.

11th August 1960.

Letter:
Defendants'
Solicitors to
Plaintiff's
Solicitors
11th August
1960

A.R.Registered

Exhibits

Our Ref: 362/60/K.769/Ken.

P.1 (27)

Your Ref: SD(RN)13001,

Letter:
 Defendants'
 Solicitors
 to
 Plaintiff's
 Solicitors
 11th August
 1960
 continued

Messrs. Shearn Delamore & Co,
 The Eastern Bank Building,
 2, The Embankment (2nd Floor),
Kuala Lumpur.

Dear Sirs,

Sale of 496 acres of Rubber Estate
to H.G. Warren

We have received your letter of the
 10th instant.

10

We have seen our client thereon who
 accepts the terms contained in your letter
 subject to the following:-

It is to be understood that the two
 sums of \$5,000/- each payable on 31st August
 and 30th September should be paid by your
 client in any event - i.e. even if he makes
 default in payment of the balance of the pur-
 chase money.

The amount therefore payable by your
 client now will be \$35,500/- made up as fol-
 lows:-

20

1.	Further deposit	\$30,000/-
2.	Cost of weeding and main- tenance	\$3,000/-
3.	To A/c of the sum payable as consideration for ex- tension of time	<u>\$2,500/-</u>
		<u>\$35,500/-</u>

It is desired that time should be ex-
 pressed to be of the essence of the contract

30

Exhibits

P.1 (29) Letter: Plaintiff's Solicitors to Defendants' Solicitors, 17th August 1960

P.1 (29)

:prn

362/60/K/769/Ken

Letter:
Plaintiff's
Solicitors
to
Defendants'
Solicitors
17th August
1960

SD(RN)13001

EXPRESS

17th August 1960.

Messrs. Allen Gledhill & Ball,
Advocates & Solicitors,
P.O.Box No. 69,
Malacca.

10

Dear Sirs,

Sale of 496 acres of Rubber
Estate to H. G. Warren

Further to your letter of the 11th instant, we now enclose a draft of the supplemental agreement for your approval.

With regard to Para 4 of the enclosed draft, we are instructed that this proposal has been agreed in principle with the representative of your clients. We are further instructed to suggest that the date for final completion should be on the 18th of October as stated in Para 5 of the enclosed draft.

20

If the draft is acceptable to you, we will engross the same forthwith and have it executed by our client and send the same to you for execution by your clients together with a cheque for \$35,500 being the amount payable thereunder on execution, upon your undertaking to hold the same pending execution by your clients.

30

Yours faithfully,

Sd. Shearn Delamore & Co.

P.1 (30) Telegram: Defendants' Solicitors to Plaintiff's Solicitors, 19th August 1960

Exhibits

TELECOMMUNICATIONS DEPARTMENT, MALAYA

P.1 (30)

RECEIVING

FORM

TELEGRAPH OFFICE

PM

19th AUG 1960

Telegram:
Defendants'
Solicitors
to Plaintiff's
Solicitors
19th August
1960

KL TX 232/31 MALACCA 80/79 19.2.25 PM = TM 2

"JURES" KUALA LUMPUR

10

= YOUR LETTER SEVENTEEN AUGUST DRAFT AGREEMENT UNACCEPTABLE PARAGRAPH FOUR NEVER AGREED TO BY OUR CLIENT NOR HIS REPRESENTATIVE STOP UNLESS DOLLARS THIRTY FIVE THOUSAND FIVE HUNDRED PAID TO US IN CASH OR BANK-DRAFT IN NAME OF ALLEN GLEDHILL AND BALL BEFORE ONE POST MERIDIAN TWENTIETH AUGUST TOMORROW IN TERMS OF YOUR LETTER TENTH AUGUST AND

20

OUR REPLY ELEVENTH AUGUST DOLLARS NINETY THOUSAND WILL BE FORFEITED PURSUANT AGREEMENT OF THIRTY FIRST

MAY = GLEDHILL

Received at 4.20 p.m. From Copy by YH

P.1 (31) Letter: Defendants' Solicitors to Plaintiff's Solicitors, 19th August 1960

P.1 (31)

ALLEN GLEDHILL & BALL

P.O.Box 69,
Church Lane,
Town & Fort of
Malacca.

30

19th August 1960

Letter:
Defendants'
Solicitors to
Plaintiff's
Solicitors
19th August
1960.

A.R.Registered

EXPRESS

362/60/K.769/W.

SD(RN) 13001

Exhibits

P.1 (31)

Messrs. Shearn Delamore & Co,
The Eastern Bank Building,
2, The Embankment (2nd floor),
Kuala Lumpur.

Dear Sirs,

Letter:
Defendants'
Solicitors
to
Plaintiff's
Solicitors
19th August
1960
continued

We beg to confirm that we sent you
a telegram today as follows:-

"YOUR LETTER SEVENTEEN AUGUST DRAFT
AGREEMENT UNACCEPTABLE PARAGRAPH
FOUR NEVER AGREED TO BY OUR CLIENT
NOR HIS REPRESENTATIVE STOP UNLESS
DOLLARS THIRTY FIVE THOUSAND FIVE
HUNDRED PAID TO US IN CASH OR BANK-
DRAFT IN NAME OF ALLEN GLEDHILL
AND BALL BEFORE ONE POST MERIDIAN
TWENTIETH AUGUST TOMORROW IN TERMS
OF YOUR LETTER TENTH AUGUST AND
OUR REPLY ELEVEN AUGUST DOLLARS
NINETY THOUSAND WILL BE FORFEITED
PURSUANT AGREEMENT OF THIRTY MAY.

10

20

"GLEDHILL"

We regret that the subject matter
of the telegram was not made clear. It
relates to your Reference SD(RN)13001
Sale of 496 acres of Rubber Estate by
Tay Say Geok to H.G.Warren Agreement Dated
31st day of May 1960.

3

We also confirm that we rang up your
chief clerk at 3.30 and read over the tele-
gram to him and explained to him that it is
related to this particular matter.

30

Yours faithfully,

Sd. Allen Gledhill & Ball.

P.1 (32) Letter: Defendants' Solicitors to
Plaintiff's Solicitors, 22nd August 1960

Exhibits

ALLEN GLEDHILL & BALL

P.1 (32)

P.O.Box No. 69,
Church Lane,
Town & Fort of Malacca.

Letter:
Defendants'
Solicitors to
Plaintiff's
Solicitors
22nd August
1960

A.R. Registered

22nd August 1960.

362/60/K.769/CCB

10

Messrs. Shearn Delamore & Co,
The Eastern Bank Building,
2, The Embankment (2nd Floor),
Kuala Lumpur.

Dear Sirs,

Re: Sale of 496 acres of rubber
Estates to H. G. Warren

20

In reference to our telegram and
letter of the 19th instant in which we informed
you that your client's deposit of \$90,000/- has
been forfeited, we shall be glad if you will now
return to us all the title deeds forwarded with
our letter of the 7th June last on the usual
undertaking.

Yours faithfully,

Sd. Allen Gledhill & Ball

P.1 (33) Letter: Plaintiff's Solicitors to
Defendants' Solicitors, 25th August 1960

P.1 (33)

:prn

362/60/K.769/CCB
SD(RN)13001

Letter:
Plaintiff's
Solicitors to
Defendants'
Solicitors
25th August
1960

30

REGISTERED

25th August 1960

Messrs. Allen Gledhill & Ball,
P.O.Box 69,
Malacca.

Exhibits

Dear Sirs,

P.1 (33)

Sale of 496 acres of Rubber Estate
to Mr. H.G.Warren

Letter:
Plaintiff's
Solicitors
to
Defendants'
Solicitors
25th August
1960
continued

We thank you for your letter of the 22nd instant and return herewith the title deeds forwarded under cover of your letter of the 7th June in accordance with our undertaking. Incidentally, we would point out that the Schedule of Deeds is incomplete in that you have omitted a conveyance dated 6.11.40 Reg. No. 1625/40 which we have inserted in the schedule in ink. 10

We regret that we do not agree that you are entitled in the circumstances to rescind the agreement and forfeit the deposit for the following reasons:-

1. Time was not of the essence of the contract.
2. By your letter of the 11th August your clients agreed to certain variations of the original contract and asked that a draft of a supplementary agreement be sent to you for approval. 20
3. A draft was duly sent to you for your approval on the 15th August. If paragraph 4 of the draft was unacceptable to your clients we fail to see why the draft was not returned to us suitably amended, as it would seem that all the other clauses other than Clause 4 were acceptable to your clients. 30
4. Your disagreement with a clause in the draft of a supplementary agreement does not entitle you arbitrarily to rescind the original agreement, the more so when time was not of the essence and had not been made of the essence by reasonable notice, and negotiations were proceeding between the parties for a variation of the original contract. 40

It follows that the contract is still in existence and we should be obliged if you would return the draft supplementary agreement for engrossment and execution.

Yours faithfully,

Sd. Shearn Delamore & Co.

Exhibits

P.1 (33)

Letter:
Plaintiff's
Solicitors to
Defendants'
Solicitors
25th August
1960 contd:

P.1 (34) Letter: Defendants' Solicitors to
Plaintiff's Solicitors, 29th August 1960

P.1 (34)

ALLEN GLEDHILL & BALL,

A.R.Registered

P.O.Box 69,
Church Lane,
Town & Fort of Malacca.

EXPRESS

Letter:
Defendants'
Solicitors to
Plaintiff's
Solicitors
29th August
1960

Our Ref: 362/60/K.769
Your Ref: SD(RN) 13001

Messrs. Shearn Delamore & Co,
The Eastern Bank Building,
2, The Embankment (2nd floor),
Kuala Lumpur.

Dear Sirs,

Sale of 496 acres of Rubber Estate to

Mr. H.G.Warren

We thank you for your letter of 25th August 1960 and for amending the Schedule of Deeds and returning us the title deeds receipt of which we hereby acknowledge.

Regarding the question whether our client is entitled or disentitled to his rights under the Agreement made the 31st day of May 1960, our client does not agree with the propositions set out in your letter. In his view the \$90,000/- was automatically forfeited on your client's failure to complete the purchase in accordance with that agreement.

10

20

30

Exhibits

P.1 (34)

Letter:
Defendants'
Solicitors
to
Plaintiff's
Solicitors
29th August
1960
continued

It is true that by our letter of the 11th August our client agreed to certain fresh proposals but on your client failing to implement the financial side of that proposed agreement within the time suggested by your own client and further failing to take any action on our telephonic and telegraphic communications within the time offered by our client it is difficult to see how your client can claim that there can have been any revival of the original contract which had lapsed. Our client was particularly disturbed in that your client should have sought to introduce a fresh term into the proposed agreement which our client had never agreed to in any way. 10

However, entirely without prejudice to his contention that the \$90,000/- has already been forfeited, our client is prepared to negotiate a fresh agreement and has accordingly proposed amendments to your draft and we now submit that draft as amended in red to you as a fresh offer which if accepted and promptly acted upon by your client will have the effect of reviving the original agreement and placing the parties again on contractual terms. 20

Yours faithfully,

Sd. Allen Gledhill & Ball 30

P.1 (35-37)

Amended
Draft
Agreement
between
Defendants'
and
Plaintiff
29th August
1960

P.1 (35-37) Amended Draft Agreement
between Defendants' and Plaintiff
29th August 1960.

DRAFT 29.8.60.

AMENDED AS IN RED.

Sd. Allen Gledhill & Ball

VENDORS' SOLICITORS

362/60/K.769

AN AGREEMENT made the
day of 1960 BETWEEN TAY SAY GEOK 40
of 488 Tranquerah Road, Malacca, LIM SIEW

CHENG of 488 Tranquerah Road, Malacca, NG MEI, of 308C Klebang Besar, Malacca and LIM CHENG WAU of 85 Tranquerah Road, Malacca, (hereinafter collectively called "the Vendors") of the one part and HERBERT GEORGE WARREN of 189 Ampang Road, Kuala Lumpur, (hereinafter called "the Purchaser") of the other part and supplemental to an agreement (hereinafter called "the principal agreement") dated the 31st day of May 1960 and made between the Vendors of the one part and the said Herbert George Warren of the other part WHEREAS the parties hereto have agreed that the principal agreement shall be varied and modified as hereinafter provided.

10

NOW IT IS HEREBY AGREED BETWEEN THE PARTIES HERETO as follows:-

1. In consideration of the Vendors extending the time for the completion of the purchase and modifying the principal agreement as hereinafter provided, the Purchaser will pay to the Vendors the sum of ₹12,500/- in manner following, that is to say:-

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(a) As to ₹2,500/- thereof not later than the 3rd day of September 1960 or on the execution of this supplemental agreement whichever time shall be earlier.

(b) As to ₹5,000/- thereof on or before the 30th September 1960.

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and (c) As to the balance of ₹5,000/- on or before 18th October 1960.

Provided the abovementioned sums of ₹5,000/- and ₹5,000/- payable under sub-clauses (b) and (c) of this clause shall be payable by the Purchaser to the Vendors in any event notwithstanding that the Purchaser shall have made default in complying with provisions of Clause 5 hereof and the said deposit of ₹90,000/- and ₹30,000/- shall have been forfeited to the Vendors pursuant to Clause 6 hereof.

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2. The Purchaser shall pay to the Vendors the sum of ₹30,000/- not later than the 3rd day of September 1960 or upon or before the execution of this supplementary agreement

Exhibits

P.1 (35-37)

Amended
Draft
Agreement
between
Defendants'
and
Plaintiff
29th August
1960
continued

Exhibits

P.1 (35-37)

Amended
Draft
Agreement
between
Defendants'
and
Plaintiff
29th August
1960
continued

by way of further deposit and in part payment of the purchase price whichever time shall be the earlier (the receipt whereof the Vendors hereby acknowledge).

3. The Purchaser shall pay to the Vendors the sum of ₹3,000/- not later than the 3rd day of September 1960 or upon the execution of this Supplemental agreement by way of deposit to cover the cost of weeding and maintenance of the rubber lands agreed to be sold for the period from the 8th day of August 1960 until the date fixed by these presents for the completion of the purchase and the Vendors will account to the Purchaser on completion for the said sum of ₹3,000/- and will refund to the Purchaser the balance if any remaining in their hands.

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4. Prior to the date hereinafter fixed for the completion of the purchase the Vendors will at the request of the Purchaser execute and deliver to the Purchaser his nominee or nominees a proper conveyance or conveyances and assignment of all or any of the said lands more particularly described in the First Schedule to the principal agreement upon payment to the vendors of the pro rata purchase price of ₹1,800/- per acre or such increased price as the Purchaser shall have arranged to sell any such part or parts of the said land to a sub-purchaser and any such excess price shall be retained by the Vendors to account of the balance payable on completion but shall not be ~~considered as further deposit.~~

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4. The Purchase shall be completed and the balance of the purchase money (if any) shall be paid on or before the 18th day of October 1960 at the office of the Vendors' Solicitors Messrs. Allen Gledhill & Ball of Malacca.

Exhibits

P.1 (35-37)

Amended
Draft
Agreement
between
Defendants'
and
Plaintiff
29th August
1960
continued

5. If the Purchaser shall fail to complete the purchase in accordance with the principal agreement as modified by these presents then both the original deposit of \$90,000/- and the further deposit of \$30,000/- paid by the Purchaser on or before the execution of this agreement shall be considered as liquidated damages and shall be forfeited to the Vendors.

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6. In the construction of this agreement time shall be deemed to be of the essence of the contract.

7. Subject only to the variations herein contained and such other alterations (if any) as shall be necessary to make the Principal Agreement consistent with this agreement the Principal Agreement shall remain in full force and effect and shall be read and construed and be enforceable as if the terms of this agreement were inserted therein by way of addition or substitution as the case may be.

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IN WITNESS WHEREOF etc.

P.1 (38) Letter: Plaintiff's Solicitors to Defendants' Solicitors, 1st September, 1960

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:prn

362/60/K769
SD(RN) 13001

1st September, 1960.

Messrs. Allen Gledhill & Ball,
Advocates & Solicitors,
P.O.Box 69,
Malacca.

Dear Sirs,

P.1 (38)

Letter:
Plaintiff's
Solicitors to
Defendants'
Solicitors
1st September
1960

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Sale of 496 acres of Rubber
Estate to Mr. H.G.Warren

We thank you for your letter

Exhibits

of the 29th ultimo which arrived in the late afternoon of the 30th.

P.1 (38)

We will take our client's instructions as soon as possible and will thereafter write to you immediately.

Letter:
Plaintiff's
Solicitors
to
Defendants'
Solicitors
1st September
1960 contd:

Yours faithfully

Sd. Shearn Delamore & Co.

P.1 (39)

P.1 (39) Letter: Plaintiff's Solicitors
to Defendants' Solicitors, 12th November
1960

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Letter:
Plaintiff's
Solicitors
to
Defendants
Solicitors
12th
November
1960.

SD(RN) 13001

:prn

12th November 1960.

Messrs. Allen Gledhill & Ball,
Advocates & Solicitors,
P.O.Box No. 69,
Malacca.

Dear Sirs,

Sale of 496 acres of Rubber Estate
to Mr. H.G. Warren

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We write to inform you that we have now been instructed to take proceedings against the vendors for the recovery of the sum of \$90,000 paid pursuant to the agreement for sale on the 28th May 1960.

We shall be obliged if you would let us know whether you have instructions to accept service on behalf of the vendors.

Yours faithfully,

Sd: Shearn Delamore & Co.

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P.1 (40) Letter: Defendants' Solicitors to
Plaintiff's Solicitors, 1st December 1960

ALLEN GLEDHILL & BALL,

A.R.Registered

P.O.Box No. 69,
Church Lane,
Town & Fort of Malacca

1st December 1960.

Our Ref. 362/60/K.769/CCB

10 Your Ref: 13001

Messrs. Shearn Delamore & Co,
P.O.Box 138,
Kuala Lumpur.

Dear Sirs,

Sale of 496 acres to Mr.H.G.Warren

We have now received instructions from
our clients to accept service of the Writ of
Summons herein.

Yours faithfully,

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Sd. Allen Gledhill & Ball

Exhibits

P.1 (40)

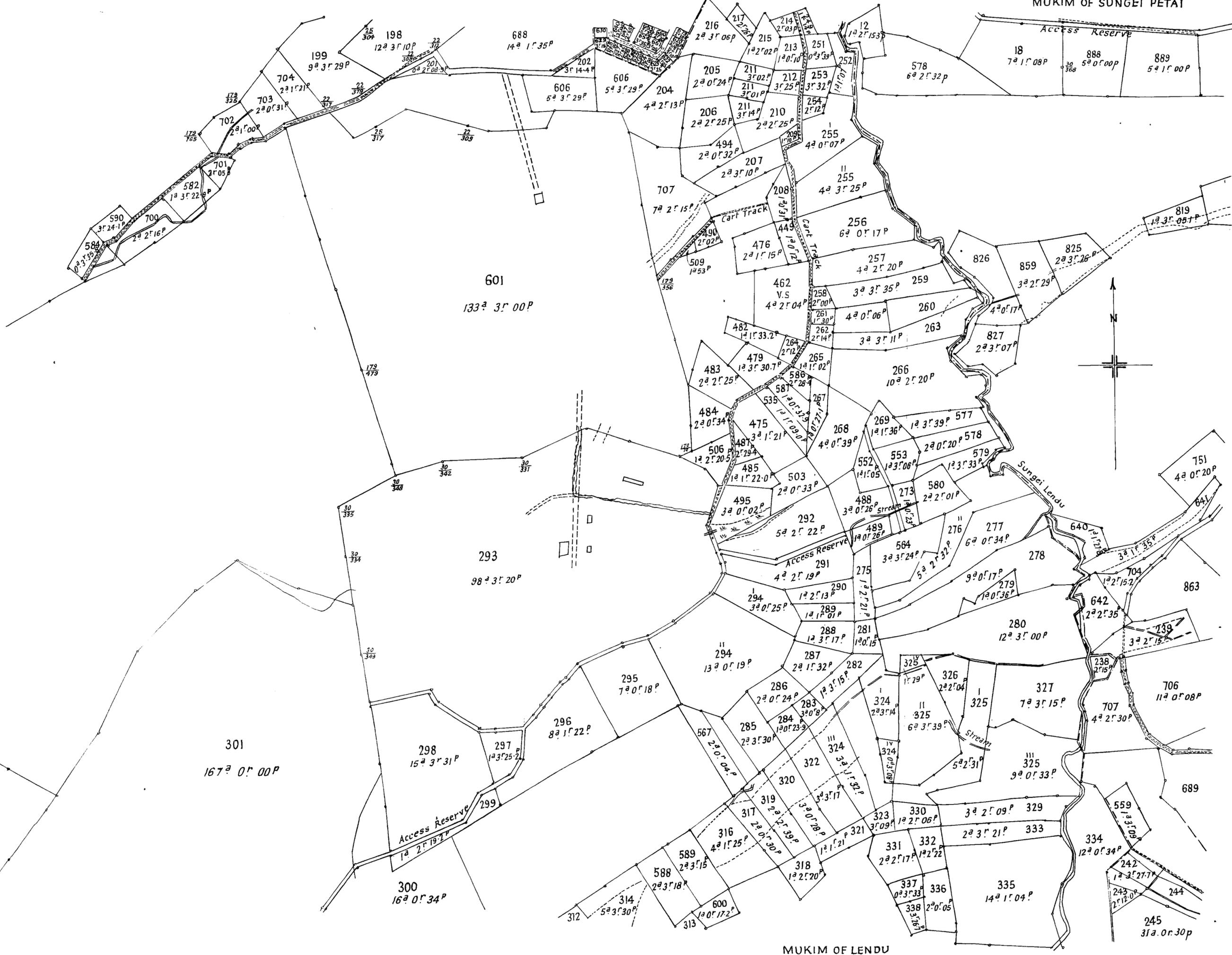
Letter:
Defendants'
Solicitors to
Plaintiff's
Solicitors
1st December
1960

P. 3 Plan

Exhibits

—————
P.3

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Plan



D.4 Draft Agreement between Plaintiff and
Austral Asian Plantation Ltd, 1960

Exhibits

D. 4

Draft
Agreement
between
Plaintiff
and
Austral
Asian
Plantation
Limited
- 1960.

10 THIS AGREEMENT is made the
day of One thousand nine hundred and
sixty (1960) Between HERBERT GEORGE WARREN of
189 Ampang Road, Kuala Lumpur (hereinafter
called "the Vendor") of the one part and
AUSTRAL ASIAN PLANTATION LIMITED a Company
incorporated in the Federation of Malaya and
having their Registered Office at 44 Pudu Road
Kuala Lumpur (hereinafter called "the Purchaser")
of the other part.

WHEREAS the Vendor has agreed to
purchase the lands situated in the Mukim of
Lendu Malacca in area 496 acres 1 rood 00 poles
more or less and more particularly described in
the First Schedule annexed hereto (hereinafter
called "the said lands").

20 AND WHEREAS THE Vendor has agreed to
resell and the Purchaser has agreed to purchase
free from all incumbrances the said lands to-
gether with the buildings, structures and
machinery erected thereon and specified in the
Second Schedule hereto at the price of Two
thousand Three hundred Dollars (\$2,300/-) per
acre subject to the terms and conditions here-
inafter appearing.

NOW IT IS HEREBY AGREED as follows:-

- 30 1. The Vendor shall sell and the Purch-
aser shall purchase the said lands and
buildings free from incumbrances at a price
of Two Thousand three hundred Dollars
(\$2,300/-) per acre upon and subject to the
conditions hereinafter contained.
- 40 2. The Purchaser shall pay to the Vendor
the sum of Dollars One hundred and twenty
thousand (\$120,000) upon or before the ex-
ecution of this agreement by way of deposit
and in part payment of the said purchase
price (the receipt whereof the Vendor here-
by acknowledges) and the balance shall be
paid on the date fixed for the completion
of the purchase.

Exhibits

 D. 4

Draft
 Agreement
 between
 Plaintiff
 and
 Austral
 Asian
 Plantation
 Limited
 - 1960
 continued

3. The purchase shall be completed and the balance of the purchase money shall be paid on or before the 7th day of August 1960 at the office of the original Vendors' Solicitors Messrs. Allen Gledhill & Ball of Malacca. On completion the Vendor will deliver to the Purchaser a proper conveyance or conveyances and assignment of the said lands in favour of the Purchaser or their nominee or nominees free from all encumbrances and the Purchaser will pay to the Vendor the purchase price. 10
4. The title relating to Lot 694 firstly described in the First Schedule hereto will be issued to the Original Vendor Tay Say Geok in the form of a lease for 99 years subject to an annual quit rent of \$2,350/- or such amount as shall be fixed by the Government. In the event of the title being unissued at the date of completion of purchase the Vendor shall if required execute in favour of the Purchaser an irrevocable Power of Attorney enabling them to receive the title from the Government when issued and have it assigned to themselves. 20 30
5. The Purchaser shall as from the date hereof be at liberty to enter into possession of the property hereby sold and maintain the same and all buildings and machinery thereon at their cost and expense in their present state or condition but if the said property buildings or machinery shall be damaged by fire or other inevitable accident the Vendor shall be under no obligation to restore the same nor shall such event be a ground for the non completion of purchase. 40
6. All quit rents assessments medical rates and cesses for the year 1960 shall be paid by the Vendor and the

Purchaser in equal shares.

Exhibits

- 7. Part of the property hereby sold name-ly the land which consists of swampy land containing an area of about 2 acres comprised in S.G.24486 is subject to an agreement (in Chinese) dated the 1st January 1957 made between the original Vendor Tay Say Geok of the one part and Chong Wee of the other part whereby the said Chong Wee was given licence to cultivate the same with vegetables up to the 31st December 1962.
- 8. If the Purchaser shall fail to complete the purchase in accordance with this agreement then the deposit of Dollars One hundred and twenty thousand (\$120,000) paid by the Purchaser on or before the execution of this agreement shall be considered as liquidated damages and shall be forfeited to the Vendor and the Purchaser shall thereupon surrender possession of the said property buildings and machinery to the Vendor and this agreement shall be at an end.
- 9. The Purchaser shall bear and pay for all the costs and expenses of or incidental to the preparation execution stamping and registration of these presents and of the necessary conveyances and or assignments or Power of Attorney referred to in Clauses 4 and 5 hereof.
- 10. The Purchaser shall also bear and pay all costs incurred by the Vendor for approving and settling the conveyance assignments or other documents including their scale costs as Vendors' Solicitors.
- 11. These presents shall be binding upon the executors administrators and assigns of the parties hereto.

D.4

Draft Agreement between Plaintiff and Austral Asian Plantation Limited - 1960 continued

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

Exhibits

THE SCHEDULE ABOVE REFERRED TO

<u>D.4</u>	<u>First Schedule</u>				
	<u>Lot No.</u>	<u>Area</u>	<u>Title</u>	<u>Names</u>	
Draft Agreement between Plaintiff and Austral Asian Plantation Limited - 1960 continued	(1) 694	346.0.20	99 year lease	Tay Say Geok	
	(2) 298 & 299	17.2.10.2	S.G. No. 27256	Tay Say Geok	
	(3) 296 & 297	10.1.07.2	S.G. No. 27409	Lim Cheng Wau	
	(4) 293	98.3.21	S.G. No. 24486	Tay Say Geok	10
	(5) 295	7.0.18	S.G. No. 27410	Ng Mei	
	(6) 294 (11)	13.0.19	S.G. No. 30135	Lim Siew Cheng	
	(7) 294 (1)	3.0.25	S.G. No. 30121	Ng Mei	
Total	496.1.00				

Second Schedule

One Milling Shed with 2 hand operated Rollers 20
 One Smoke House
 Two Labour Lines
 One Store House
 SIGNED by the said HERBERT GEORGE)
 WARREN in the presence of:-)

The Common Seal of AUSTRAL ASIAN)
 PLANTATION LIMITED was hereunto)
 affixed in the presence of:-)

