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1967/22

No. 6 of 1965

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N KEPONG PROSPECTING LIMITED
Appellant

- and -

S.K. JAGATHEESAN
TSANG TAK CHUEN
K.W. LIU
CH'NG KEE HUAT
PASUBATHY JAGATHEESAN
LIU WAI SIONG
C.K. LIU Third Parties
S.Y. TSANG Appellants

- and -

A.E. SCHMIDT (since deceased)
and MARJORIE SCHMIDT (Widow)
substituted for A.E. Schmidt
deceased Respondent

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
18 MAR 1968
25 RUSSELL SQUARE
LONDON, W.C.1.

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C A S E

ON BEHALF OF THE APPELLANT KEPONG
PROSPECTING LIMITED

RECORD

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1. This is an Appeal from a Judgment of the Federal Court of Malaysia (Thomson Lord President, Syed Sheh Barakbah C.J., High Court in Malaya, and Tan Ah Tah J., Federal Court Malaysia) given on the 1st June 1964, whereby the said Court allowed an appeal against a Judgment of Hashim J. given on the 14th October 1963 in an action brought by A.E. Schmidt against this Appellant and whereby the said Court ordered that this Appellant do pay to the said p.157 p.117

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A.E. Schmidt a tribute of one per centum of the selling price of all ore sold from certain lands at Bukit Kepong in the State of Johore therein mentioned and that in default of agreement an account be taken of all moneys payable by this Appellant to the said A.E. Schmidt and whereby the said Court ordered that this Appellant was entitled to be indemnified by the Third Party Appellants against all liability to the said A.E. Schmidt under the said judgment.

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2. During the year 1953 one Tan Chew Seah (hereinafter called "Tan") applied to the Government of the State of Johore for permission to prospect for iron ore over certain land at Bukit Kepong near Johore. The said A.E. Schmidt (who was a Consulting Engineer and who is hereinafter called "Schmidt") assisted Tan in negotiating the grant of a permit. On the 25th November 1953 a Prospecting Permit (numbered 10/53) over one thousand acres of State land at Bukit Kepong was granted to Tan. By a letter dated the 2nd December 1953 and written by Tan to Schmidt, Tan agreed with Schmidt as follows: "I hereby agree to ensure that you are paid one per cent. (1%) of the selling price of all ore that may be sold from any portion of the said land. This is in payment for the work you have done in assisting to obtain the Prospecting Permit and any work you may do in assisting to have mining operations started up".

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3. On the 11th July 1954 Tan executed a Power of Attorney whereby he appointed Schmidt to be his Attorney with authority (amongst other things) to contract for the disposal of all or any part of his mining properties (which expression was therein defined to include any Prospecting Permit) to any company for such consideration and subject to such conditions as Schmidt should think proper and to promote or join with others in promoting or forming a company with limited liability with the object of acquiring and working all or any part of his mining properties and to agree and settle on his behalf the Memorandum and Articles of

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Association of such company and to contract with such company notwithstanding that Schmidt might be a promoter of or trustee for such company or be or about to become interested or concerned

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therein as shareholder director or manager, and to sign in his name as director or proposed director of any such company as aforesaid and subscribe his name to the Memorandum and Articles of Association of any such company as aforesaid.

10 4. This Appellant was incorporated on the 27th July 1954 with a view to taking over the benefit of the Prospecting Permit and mining any deposits of iron ore that might be discovered. The first Directors of this Appellant were Schmidt, Tan, N.A. Marjoribanks, Lee Kok Peng, Chua Kwang Song, Chan Cheow Kiat and Gwee Yam Keng. The first meeting of the Board of Directors of this Appellant was held on the 31st July 1954. At that meeting the appointment of the first Directors of this Appellant was approved and the Directors resolved to adopt an agreement (hereinafter called "the 1954 Agreement") dated the 31st July 20 1954 and made between Tan of the one part and this Appellant of the other part. By the said resolution Schmidt and the said Lee Kok Peng and the Secretary of this Appellant Leong Kum Weng were authorised to execute the 1954 Agreement on behalf of this Appellant. The 1954 Agreement was executed by Schmidt on behalf of Tan as his Attorney.

p.172-8

30 5. By the 1954 Agreement it was recited that Tan (therein referred to as "the Permit Holder") desired that this Appellant (therein referred to as "the Company") should work his rights under the said Prospecting Permit and any mining lease or mining certificate to be granted in the future in respect of the land included therein or in respect of any neighbouring land included in the same mining project (therein together referred to as "the said land") and that he had agreed with Schmidt that in consideration of 40 services rendered by Schmidt in the past, the present, and to be rendered in the future, he, the Permit Holder, would ensure that Schmidt was paid one per cent. of the selling price of all ore that might be sold from any portion of the said land and that the Company had agreed to take over his obligation to Schmidt in consideration of the said agreement with the modifications thereafter appearing, and it was

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agreed between Tan and this Appellant that for the consideration therein mentioned Tan would permit this Appellant to prospect and work the said lands, whether under the said Prospecting Permit or any future licence, mining lease or mining certificate. Clause 4 of the 1954 Agreement was in the following terms:

"The Company shall take over the obligation of the Permit Holder to pay A.E. Schmidt 1% of the selling price of all ore that may be sold from any portion of the 1,000 acres of State Land at Bukit Kepong with the following modifications:-

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- (1) the obligation shall be extended so as to include the said land as defined in this Agreement, and
- (2) the tribute of 1% shall be payable on the selling price of the ore as shown in the Company's records."

p.12-14

6. By an Agreement (hereinafter called "the 1955 Agreement") expressed to be made on the 26th September 1955 between this Appellant (therein referred to as "the Company") of the one part and Schmidt (therein referred to as "the Consulting Engineer") of the other part, the 1954 Agreement was recited and it was further recited that it was deemed advisable that this Appellant should enter into a Supplementary Agreement with the Consulting Engineer. The operative clauses of the 1955 Agreement were in the following terms:-

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"I. The Company shall in consideration of the services rendered by the Consulting Engineer for and on behalf of the Company prior to its formation, after incorporation, and for future services pay to the Consulting Engineer 1% (one per cent) of all ore that may be won from any portion of the said land (which expression shall bear the same meaning as given in the said agreement) by way of tribute which said tribute of 1% being calculated on the selling price of the ore as shown in the Company's records.

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II. The Company's obligation as aforesaid shall in any event continue until the said land is worked out and shall not cease in the event of the death or retirement of the Consulting Engineer before that happening.

10 III. The obligations herein contained shall be binding on the successors in title assigns and personal representatives of the parties hereto as the case may be."

7. A meeting of the Board of Directors of this Appellant was held on the 26th September 1955. At the said meeting it was resolved that the 1955 Agreement be approved and executed. At the said meeting it was also resolved that the appointment of one D.G. Ironside as proxy for and on behalf of the said N.A. Marjoribanks (one of the Directors of this Appellant) between 1st October 1955 and 31st December 1955 be approved.

p.179

20 8. The 1955 Agreement was signed by Schmidt in the presence of the said Leong Kum Weng and the Seal of this Appellant was affixed thereto in the presence of the said D.G. Ironside and Tan.

9. Article 101 of the Articles of Association of this Appellant is in the following terms:-

30 "The Seal of the Company shall be affixed to any instrument in the presence of at least one Director and of the Managing Director or a permanent Director and the said Director and Managing Directors shall sign every instrument to which the Seal shall be so affixed in the presence of each other and in favour of any purchaser or person bona fide dealing with the Company, such signatures shall be conclusive of the same that the Seal has been properly affixed."

p.120

10. In December 1955 a further Prospecting Permit (numbered 3/55) was granted to Tan in respect of 1,200 acres of land at Bukit Pasol.

40 11. From the date of the incorporation of the Company until the 1st March 1956 some prospecting was carried out by this Appellant on the land comprised in the said Prospecting Permits.

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p.182 Workable deposits of ore were discovered but this Appellant had insufficient capital resources to enable it to commence mining operations. At a meeting of the Board of Directors of this Appellant held on the 1st March 1956 Schmidt stated that he would accept 1% tribute on the F.O.B. price of ore mined by this Appellant less Export Duty and the Barge Contract Rate in settlement of this Appellant's obligation under the 1955 Agreement. It was also resolved at the said meeting that this Appellant would proceed with mining operations. 10

p.186-190 12. During 1956 one or more of the Directors of this Appellant approached the Third Party S.K. Jagatheesan and persons associated with him, with a view to persuading them to invest money in this Appellant to enable it to commence mining operations. A meeting of the Board of Directors of this Appellant was held on the 4th August 1956 and was attended by the said S.K. Jagatheesan to discuss these matters. At this meeting it was resolved that 315,000 shares of \$1 each be allotted to the said S.K. Jagatheesan and it was resolved that the following share allotment be approved "To Mr. S.K. Jagatheesan and his Associates not exceeding nine persons in all, 315,000 shares". Following this meeting, disputes arose between the original Directors of this Appellant and the said S.K. Jagatheesan and his associates (namely the others of the Third Party Appellants) concerning the affairs of this Appellant and in particular the control of the Board of Directors thereof. As a result of these disputes, one Lim Ngian Cher, a shareholder of this Appellant, filed an Originating Motion in the High Court at Kuala Lumpur, the reference to the record whereof is "O.M. 6/56". The Third Party Appellants, one L.A.J. Smith and this Appellant were Respondents to the said Motion. By the said Motion the said Lim Ngian Cher prayed that the Register of this Appellant be rectified by deleting the names of the Third Party Appellants and the said L.A.J. Smith as holders of shares of the Company under Section 101 of the Companies Ordinance 1940. 20 30 40

13. The said Motion was heard by Sutherland J. in March 1957. During the hearing a compromise of the said proceedings was negotiated and agreed

between the original shareholders and Directors of this Appellant and the Third Party Appellants. Schmidt was not a party to the said proceedings but was present at the hearing and during the said negotiations. The said compromise was embodied in a Consent Order made on the 27th March 1957 by Sutherland J. By the said Consent Order it was ordered that the Register of this Appellant be rectified by deleting the names of the Third Party Appellants and the said L.A.J. Smith as holders of the shares then registered in their respective names and that the issue of the shares to them be cancelled. It was declared that the Directors of this Appellant were Schmidt, the said N.A. Marjoribanks and others therein named (not including any of the Third Party Appellants). This Appellant was ordered to grant to the Third Party Appellants a sub-lease of land comprised in Mining Certificate No. 547 (which had been granted to this Appellant in respect of land affected by the said Prospecting Permits) or which might thereafter be comprised in any mining certificate granted to this Appellant and it was ordered that a tribute should be paid to this Appellant under any such mining sub-lease. The said Consent Order also contained a provision in the following terms:-

p.213-6

"The agreement between Kepong Prospecting Limited and Tan Chew Seah dated the 31st day of July 1954 whereby 1% of the value of all ore sold from the mining land is to be paid by the Company to Mr. A.E. Schmidt shall be taken over by the Respondents numbered 1 to 7 and 9 but not 8" (namely the Third Party Appellants) "or their nominees and the Respondents numbered 1 to 7 and 9 but not 8 shall indemnify Kepong Prospecting Limited against all claims which may be made against Kepong Prospecting Limited thereunder."

14. A draft of the said Consent Order was approved by the Board of Directors of this Company on the 27th May 1957. Schmidt was then a Director of this Appellant and concurred in approving the said draft.

p.228-9

15. In or about March 1957 it was orally agreed between Schmidt, this Appellant and the Third

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Party Appellants, that any obligation of this Appellant under the 1954 Agreement or the 1955 Agreement to pay tribute to Schmidt would be taken over by the Third Party Appellants.

16. Since the date of the said Consent Order ore has been produced and sold from lands comprised in the said mining concession.

p.26 17. Schmidt was dismissed from his office as Managing Director of this Appellant on the 19th May 1957. He ceased to be a Director of this Appellant on the 2nd August 1959. 10

p.2-4 18. By a Specially Endorsed Writ issued on the 24th July 1959 and amended on the 28th June 1960, Schmidt claimed against this Appellant an account of all moneys payable to him under the 1954 Agreement and the 1955 Agreement or one or other of them and payment of the moneys found due upon the taking of such account with interest.

p.34- 8 19. This Appellant delivered a Defence and Counterclaim in the said action. In the said Defence (as amended) it claimed that Schmidt was not authorised to enter into the 1954 Agreement by the said Power of Attorney granted by Tan and also was not entitled to enforce the 1954 Agreement since he was not a party thereto and that in any event Schmidt was only entitled under the 1954 Agreement to receive such payments as were then liable to be made to him by Tan and that Tan was liable (if at all) to make a payment of 1% of the selling price of ore from the said 1,000 acres of land comprised in the said Prospecting Permit 10/53 less usual deductions for export duty, stevedoring, lighterage and charges of a similar nature. This Appellant also claimed that the 1955 Agreement was not properly executed by this Appellant and was not a valid contract enforceable by Schmidt since he gave no consideration therefor and was also void for uncertainty. This Appellant also claimed that the 1954 Agreement and the 1955 Agreement were discharged as against this Appellant by novation by virtue of the said Consent Order or alternatively by the oral agreement referred to in paragraph 15 hereof. By its Counterclaim this Appellant 20 30 40

10 claimed that Schmidt was aware of the course of the negotiations leading up to the said Consent Order and that it was his duty as Managing Director of this Appellant to remind this Appellant of the existence of the 1955 Agreement and to bring the existence of the 1955 Agreement to the notice of this Appellant's legal adviser, that in breach of such duty Schmidt had failed so to remind this Appellant and to bring the 1955 Agreement to the notice of its legal adviser, and that in the premises Schmidt was liable to this Appellant to the extent of any sums payable to Schmidt by this Appellant under the 1955 Agreement.

20 20. This Appellant also issued a Third Party Notice against the Third Party Appellants whereby it claimed to be indemnified by the Third Parties against all liability of this Appellant to Schmidt under the 1954 Agreement or the 1955 Agreement. By its Defence to the said Third Party Claim the Third Party Appellants claimed that the 1954 Agreement was made by Schmidt without the authority of Tan and was not enforceable by Schmidt and also claimed that the Third Parties were not liable to indemnify this Appellant against any liability under the 1955 Agreement. They also claimed that Schmidt ceased to render services to this Appellant on the 27th March 1957 and was not entitled to claim commission thereafter and that if Schmidt was entitled to any commission it was limited by the agreement entered into at the meeting referred to in paragraph 11 hereof which was binding on him by estoppel.

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p.31-2

40 21. The said action came on for hearing before Hashim J. at Kuala Lumpur on the 14th to 17th August and the 5th September 1962 and the 18th to 22nd March and the 17th to 21st June 1963. The said D.C. Ironside gave evidence for Schmidt that he signed the 1955 Agreement after the 1st October 1955. He said that he read the 1955 Agreement but did not notice that it was wrongly dated. Evidence was also given on behalf of this Appellant of the oral agreement referred to in paragraph 15 hereof.

p.70-72

22. Hashim J. gave judgment on the 14th October 1963. In his judgment he said that Schmidt did

p.117-126

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not have power under the said Power of Attorney to execute a document for his own personal benefit and that he exceeded his authority when he executed the 1954 Agreement and that the 1954 Agreement was accordingly void. As to the 1955 Agreement, he rejected the evidence of the said Ironside and said that he was "forced to come to the conclusion" that his evidence was "rather unsatisfactory". He therefore held that the 1955 Agreement was not executed in accordance with Article 101 of the Articles of Association of this Appellant. He dismissed both the claim and the Counterclaim.

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p.140-156

23. Schmidt appealed from the said judgment. The Appeal was held by the Federal Court of Malaysia between the 2nd and 5th days of March 1964. Judgment was given on the 1st June 1964 by the Lord President, who gave the judgment of the Court. He held that the 1954 Agreement fell within the powers conferred on Schmidt by the said Power of Attorney but that the 1954 Agreement was not enforceable by Schmidt since he was not a party to it. As regards the 1955 Agreement, he held that although dated the 26th September 1955 it must have been executed by this Appellant after the 1st October 1955 and was therefore validly executed in accordance with the Articles of Association of this Appellant. He held that the 1955 Agreement was not a novation of the 1954 Agreement but was a new agreement and that Schmidt gave consideration for the obligation of this Appellant under the 1955 Agreement to pay him a tribute in that the 1955 Agreement discharged an obligation of this Agreement to pay Schmidt for services previously rendered on the basis of a quantum meruit. He held that there was nothing to show that this Appellant had accepted the offer of Schmidt at the meeting of the Board of Directors of this Appellant held on the 1st March 1956 to accept his 1% tribute on the basis that it should be calculated on the f.o.b. price of ore less export duty and the expense of barge transport. He held that the Counterclaim should be dismissed on the grounds first that at the material time Schmidt was not Managing Director of this Appellant, that there was no evidence that anyone was ignorant of the existence of the 1955 Agreement, that there was evidence that

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Schmidt was excluded from the discussions that led to the Consent Order, and that in any event the 1955 Agreement did not affect the position of this Appellant except by making the contractual obligations of this Appellant under the 1954 Agreement directly enforceable by Schmidt. For the last-mentioned reason he held that this Appellant was entitled to an indemnity from the Third Party Appellants.

- 10 24. By an Order of the Federal Court of Malaysia made on the 1st June 1964 it was ordered that this Appellant should pay to Schmidt a tribute of 1% of the selling price of ore sold from the mining land of this Appellant at Bukit Kepong and that in the event of disagreement as to the amount so payable an account be taken by the Court and that a proper person be appointed Receiver and that the costs of the Appeal and of the proceedings before Hashim J. be taxed and
20 paid by this Appellant and it was declared that this Appellant was entitled to be indemnified by the Third Party Appellants against all liability under the said judgment and that this Appellant recover against the Third Party Appellants any amount paid by them under the said judgment and their costs.
25. By a Certificate made in the High Court of Malaya at Kuala Lumpur on the 24th December 1964 it was certified that the result of an account
30 taken pursuant to the said Order of the Federal Court of Malaysia was that Schmidt was entitled under the terms of the said Order to \$251,529.50.
26. Schmidt died on the 1st January 1965 and by a Certificate of the Registrar of the Federal Court of Malaysia given on the 27th July 1965 the Respondent (the sole Executrix and sole beneficiary of the estate of Schmidt) was substituted and entered in the record in place of Schmidt for the purposes of this Appeal. p.160
- 40 27. This Appellant submits that the Order of the Federal Court of Malaysia should be reversed or varied for the following (amongst other) reasons:-
- (1) Because the 1954 Agreement to the extent of the benefit to Schmidt contained in clause 4

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- thereof was in excess of the authority conferred on him by the said Power of Attorney and was to that extent void;
- (2) Because Schmidt was not a party to the 1954 Agreement and was not entitled to enforce any of the provisions thereof;
 - (3) Because there was no sufficient evidence that the 1955 Agreement was executed otherwise than on the 26th September 1955 and was accordingly not executed in accordance with Article 101 of the Articles of Association of this Appellant; 10
 - (4) Because Schmidt gave no consideration for any obligation purported to be undertaken by this Appellant under the 1955 Agreement and was not entitled to enforce the 1955 Agreement;
 - (5) Because the 1955 Agreement was void for uncertainty;
 - (6) Because any liability of this Appellant under the 1954 Agreement or the 1955 Agreement determined when Schmidt ceased to be the Managing Director of or alternatively employed by this Appellant; 20
 - (7) Because Schmidt was in breach of his duty to this Appellant in failing to draw the attention of this Appellant and its legal advisers to the 1955 Agreement in the course of the negotiations leading to the said Consent Order and accordingly was not entitled to recover from this Appellant under the 1955 Agreement or alternatively was liable to this Appellant to the extent of any sums payable to him by this Appellant under the 1955 Agreement; 30
 - (8) Because Schmidt was entitled to enforce the provisions of the 1954 Agreement or the 1955 Agreement he was bound by his statement at the meeting of the Directors of this Appellant on the 1st March 1956 that he would accept a tribute of 1% on the f.o.b. price of ore on which he was entitled to a tribute less export duty and the barge contract rate. 40

10 (9) Because Schmidt was entitled to recover under the 1954 Agreement only such payments as were liable to be made to him by the said Tan Chew Seah and the said Tan Chew Seah was either not liable to pay anything to Schmidt or alternatively was only liable to pay Schmidt 1 per cent. of the selling price of all ore sold from any portion of the 1,000 comprised in Prospecting Permit 10/53 less the usual deductions in respect of export duty, stevedoring, lighterage, and charges of a similar nature.

(10) Because the 1954 Agreement and the 1955 Agreement were discharged as against this Appellant by novation with the consent of Schmidt by the said Consent Order or alternatively by the oral agreement referred to in paragraph 15 hereof.

20 28. And this Appellant submits that insofar as the Federal Court of Malaysia decided that this Appellant is entitled to be indemnified by the Third Party Appellants against any liability of this Appellant under the 1954 Agreement or the 1955 Agreement to Schmidt, the decision of the Federal Court of Malaysia should be affirmed for the following (among other) reasons:-

30 (1) Because the 1955 Agreement did not impose any new contractual liability on this Appellant but affirmed the 1954 Agreement and made the 1954 Agreement enforceable by Schmidt directly against this Appellant;

(2) Because the purport and intention of the said Consent Order was to impose on the Third Party Appellants an obligation to indemnify this Appellant against any liability to Schmidt in respect of tribute payable to him on ore extracted from all lands comprised in any sub-lease in favour of the Third Party Appellants;

40 (3) Because the Third Party Appellants are estopped by their concurrence in the said Consent Order from denying the validity and enforceability against them of the 1954 Agreement and are estopped by their concurrence in the said Consent Order or

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alternatively by the oral agreement referred to in paragraph 15 hereof either to pay to Schmidt or his estate or to indemnify this Appellant against liability to Schmidt or his estate for the payment of the tribute payable under the 1954 Agreement and the 1955 Agreement.

- (4) Because the judgment of the Federal Court of Malaysia insofar as it was thereby adjudged that the Third Party Appellants were liable to indemnify this Appellant against any liability of this Appellant to Schmidt under the 1954 Agreement or the 1955 Agreement was correct. 10

WHEREFORE THIS APPELLANT HUMBLY PRAYS YOUR MAJESTY THAT THE JUDGMENT AND ORDER OF THE FEDERAL COURT OF MALAYSIA DATED THE FIRST DAY OF JUNE 1954 INsofar AS IT DECLARED THAT THIS APPELLANT WAS LIABLE TO SCHMIDT BE REVERSED AND IF AND SO FAR AS NECESSARY THAT THE SAID JUDGMENT INsofar AS IT DECLARED THAT THE THIRD PARTY APPELLANTS ARE LIABLE TO INDEMNIFY THIS APPELLANT BE AFFIRMED AND THAT YOUR MAJESTY MAY BE GRACIOUSLY PLEASED TO MAKE SUCH FURTHER OR OTHER ORDER INCLUDING ORDERS AS TO COSTS AS TO YOUR MAJESTY MAY APPEAR FIT AND PROPER. 20

JOHN VINELOTT

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C A S E

ON BEHALF OF THE APPELLANT
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