

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

- 1. GAN KHAY BENG
- 2. BEE CHUAN RUBBER FACTORY SDN. BHD.
- 3. FELIXIA d/o Varnakulasinghe Appellants

- and -

- 10 1. NG LIT CHENG alias NG YAM CHEE
 - 2. E.P.E. ANANDA (deceased)
 - 3. JOSEPH JACOB DAVID also known as
JACOB JOSEPH as Administrator with Will
annexed of the Estate of John David deceased
- Respondents

CASE FOR THE APPELLANTS

Record

- 1. This is an appeal from the Judgment of the Federal Court of Malaysia (Gill, C.J., Ong Hock Sim and Raja Azlan Shah, F.JJ.) dated the 7th July, 1977 allowing the First Respondent's appeal in Federal Court Civil Appeal No. 19 of 1976 and the Second and Third Respondents' appeals in Federal Court Civil Appeal No. 48 of 1976 from the Order of Ajaib Singh, J. dated the 8th January, 1976, setting aside his earlier Order of the 25th November, 1974, whereby leave was granted pursuant to section 60(4) of the Probate and Administration Act, 1959 (No. 35 of 1959) for the sale to the First Respondent of certain land in Malaysia belonging to the estate of John David deceased by the Third Respondent as the deceased's personal representative acting through his attorney, the Second Respondent, and restoring the Order of Sale of Ajaib Singh, J. dated the 25th November, 1974 and further ordering the costs of the appeals in the Federal Court and in the Court below to be paid by the Appellants.
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 - 30
 - 2. On the 13th April, 1920 one John David ("the deceased") who died on the 29th June, 1920, executed a will
- pp. 108 - 122
& 123 - 124
- pp. 65 - 66
& p. 80
pp. 19 - 20
- pp. 19 - 20
- p. 3 11.13-16
28-40

Record

- p. 4
11.23-26
3. Elizabeth Muttama had three sons. One of the three sons, A.N.V. Singh, had five children including the Third Appellant ("Felixia"). Elizabeth Muttama died intestate. 10
- p. 21
11.21-25
p. 27
11.26-32
p.67
11.10-11
p.70 11.9-10
4. In 1967, A.N.V. Singh who lived in Malaysia had arranged the sale of the said land and on the 20th November, 1967 the Third Respondent ("J.J. David") who lived in Ceylon wrote to one Dato Athi Nahappan ("Nahappan") of Athi Nahappan & Co., Advocates and Solicitors in Kuala Lumpur, with a view to appointing Nahappan as his attorney to effect the necessary sale of the said land. 20
- Exhibit
Fl p. 24
11.26-33
5. By letter, dated the 5th January, 1968, J.J. David informed Nahappan that according to A.N.V. Singh one Pereira was prepared to purchase the land for \$98,000 and referred to the fact that as one of the legatees he was entitled to ask for Letters of Administration and enclosed a draft Power of Attorney. On the 18th March, 1968 J.J. David granted a Power of Attorney to Nahappan following a letter from Nahappan to J.J. David, dated the 8th March, 1968 enclosing a further draft and saying that after registration of the Power of Attorney "we shall proceed to apply for Administration with the Will annexed and to take steps to sell" the said land. There was some delay and on the 22nd January, 1969 J.J. David wrote to Nahappan to expedite the matter as "the prospective buyer would be discouraged". In March and April, 1969 Nahappan through his firm wrote to A.N.V. Singh concerning the obtaining of Elizabeth Muttama's death certificate to facilitate the granting of Letters of Administration. 30
- Exhibit
A p.143
6. On the 22nd September, 1970, Letters of Administration with the Will annexed were granted out of the Registry of the High Court at Seremban to J.J. David by his Attorney, Nahappan. 40
- pp. 60-63
- Exhibit C
p. 145
7. According to the Second Respondent ("Ananda") who later became J.J. David's attorney, J.J. David told him that the First Appellant ("Gan") had trespassed on the said land since 1968. J.J. David in his Statement of Defence dated the 23rd April, 1975 in Civil Suit No. 45 of 1975 pleaded that Gan and the Second Appellant ("Bee Chuan") "illegally broke and entered upon the said land in or about the year 1968 and continued and continue to trespass 50
- Exhibit B
p. 144
- Exhibits D
and E
pp. 146 & 147
- pp. 8-11
- p. 69
1.37 -
p. 70
1.8
- p. 45
11.10 - 16

Record

- therein". Bee Chuan of which Gan is and was at all material times the Managing Director own certain land situated adjacent to the said land and had been interest in purchasing the said land since 1964. p. 40
11.17 - 23
8. In April, 1974 according to Gan, Nahappan as J.J. David's attorney offered to sell the said land to Gan and Bee Chuan at a price as valued by a qualified surveyor, the sale being subject to the approval of the court. In letters dated the 15th April, 1974 Nahappan confirmed that in consideration of Gan and Bee Chuan carrying out certain specified development to the said land he had agreed as J.J. David's attorney to grant to Gan and Bee Chuan a first preference to purchase the said land on the said terms and further confirming to Gan that as soon as the issue document of title was obtained an agreement for the sale of the said land on the above terms would be made with Gan. Thus Gan maintains that he has a registrable and caveatable interest in the said land. Gan and Bee Chuan entered upon the land and expended a considerable amount of money time and labour in developing the said land and thus in enhancing its value. p. 33
11.14 - 45
Exhibit GKB2
p. 51
Exhibit F2 & F3
pp. 25 & 26
- 10
9. On the 8th July, 1974 by a Deed of Revocation signed by J.J. David he revoked the Power of Attorney granted by him to Nahappan and on the 5th August, 1974 appointed Ananda as his attorney instead. p. 33
11.42 - 46
p. 33
11.34 - 41
p. 40
11.23 - 47
- 20
10. On the 26th August, 1974, the said land was transmitted to J.J. David as personal representative of the deceased pursuant to section 346 of the National Land Code (Act 56 of 1965). p. 6
11.17 - 20
- 30
11. On the 29th August, 1974, Ananda obtained a valuation of the said land by a First Class Appraiser in the sum of only \$75,000 on the basis that it would not be feasible to turn the said land into housing lots unless they were amalgamated with certain adjoining lots. p. 4
11.27 - 31
- 40
12. On the 2nd September, 1974, J.J. David by his attorney Ananda executed an agreement to sell the said land to the First Respondent ("NG Lit Cheng") at the price of \$110,000 (some 46% in excess of the valuation price) subject to J.J. David obtaining the approval of the Court as he was bound to do under Section 60(4) of the Probate and Administration Act. Exhibit
EPEAL
pp. 31 - 32
p. 29
11.17 - 23
13. On an unspecified date (which would appear to have been in the period between Ananda's appointment on the 5th August 1974 and 2nd September 1974) according to Ananda in his affidavit affirmed on the 1st April, 1975, Gan made an offer to him to purchase the said land at a price of \$15,000 per acre making a total price of \$56,250. p. 4
11.32 - 39
Exhibit C

pp. 11 - 14
- p. 29
11.11 - 15

Record

p. 4
11.40 - end
pp. 15 - 18

14. On the 3rd, 9th and 19th October, 1974 letters of consent were given by certain beneficiaries entitled in total to $\frac{12}{16}$ (twelve sixteenths) of the said land to the sale to Ng Lit Cheng at a price of \$110,000.

p. 41
p. 57
11.47 - 55

15. On the 9th October, 1974, Gan in order to protect the interests in the said land of himself and Bee Chuan (referred to in paragraph 8 above) lodged a Private Caveat on the said land pursuant to section 322 of the National Land Code with the effect, inter alia of prohibiting the endorsement or entry on the register document of title to the said land of any instrument of dealing executed by or on behalf of the proprietor thereof and any certificate of sale relating thereto.

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p. 57
11.47 - 55
p. 69
11.16 - 20
p. 99
11.1 - 9

16. On or about the 9th November, 1974, Ananda received formal notification issued by the Land Office on that date that the said caveat had been lodged. Ananda thus knew about the caveat before he obtained the order for sale on the 25th November, 1974 and may have known about it before taking out the Originating Summons on the 11th November, 1974.

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pp. 1 - 2

17. On the 11th November, 1974, J.J. David by his attorney Ananda took out an ex parte Originating Summons No. 79 of 1974 pursuant to section 60(4) of the Probate and Administration Act 1959 and to the Rules of the Supreme Court Order 55 rule 3(1)(f) for the approval by the Court of the sale to Ng Lit Cheng. Ananda's affidavit in support sworn on the 9th November, 1974, did not disclose any of the following matters, namely:

- (1) the fact that Elizabeth Muttama had three sons one of whom was A.N.V. Singh;
- (2) the fact that an offer had been made for the said land in 1968 in the sum of \$98,000;
- (3) any or any independent valuation of the said land;
- (4) any evidence that the price of \$110,000 was the best obtainable.

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18. Between the 11th and 25th November, 1974 (assuming that Ananda did not know of the said caveat until after the 11th November, 1974) no disclosure of the said caveat was made to the Court. Nor did Ananda take any steps to inform Gan or Bee Chuan of the pending Originating Summons or to effect service of the summons upon them as, it will be submitted, was required by Order 55 rules 3 and 5. Gan and Bee Chuan thus had no knowledge of the proceedings until after the Order of Sale was made on the 25th November, 1974. Further the Court was deprived of the opportunity of considering pursuant to Order 55 rule 6 whether to direct that they should be served.

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Record

19. On the 15th November, 1974, Gan obtained a valuation of the said land by a First Class Appraiser and Auctioneer in the sum of \$151,000, being the current market value on the basis that the said land was suitable for building development. pp. 52 - 55
20. On the 25th November, 1974 at an ex parte hearing Ajaib Singh, J. ordered the said land to be sold to Ng Lit Cheng at the price of \$110,000 pursuant to the Agreement dated the 2nd September, 1974. pp. 19 - 20
- 10 21. On the 7th February, 1975, Felixia (A.N.V. Singh's daughter) took out a Notice of Motion in Originating Summons 79 of 1974 applying for the said Order of Sale to be set aside. In her affidavit in support affirmed on the 31st January, 1975, she made a number of points including the following: pp. 4 - 5
p. 66
pp. 21 - 24
- (1) that J.J. David and Ananda ought to have been aware of her father, A.N.V. Singh's interest in the said land which should have been disclosed in Ananda's affidavit of 9th November, 1974 and A.N.V. Singh's beneficiaries ought to have been made parties to the application to approve the sale to Ng Lit Cheng; pp. 21
1.36 -
p. 22
1.12
- 20 (2) that J.J. David should have satisfied the Court as to the steps taken to ascertain who the beneficiaries were and their whereabouts and, where appropriate, the dates and places of the devisees' death; p. 22
11.13 - 28
- (3) that J.J. David was bound to satisfy the Court that it was in the best interest of the devisees and beneficiaries to sell the land and at the particular price; p. 22
11.29 - 37
- 30 (4) that J.J. David was bound to satisfy the Court that the price of \$110,000 was the best price available by disclosing to the Court other offers which had been made for the said land and by having the sale price itself supported by a qualified valuer's report; p. 22
11.38 - 49
- (5) that no valuation of any kind was produced in support of the application; p. 23
11.7 - 9
- (6) that she had been advised by her Solicitors that Nahappan had agreed in April, 1974 to sell the land to Gan at a price to be valued by a qualified valuer and that Ananda should have disclosed this to the Court; p. 23
11.10 - 22
- 40 (7) that she believed the value of the land in September, 1974 to be in the region of \$150,000. p. 23
11.28 - 32
22. By his affidavit in answer affirmed on the 1st April, 1975 Ananda made the following principal points, namely: pp. 27 - 31

Record

- p. 27
11.25 - 32 (1) that he was prepared to admit that Felixia's father was the son of Elizabeth Muttama, but that as he was one of three sons he was entitled to a one third share in his mother's estate (her share in the said land being only one sixteenth), she having died, intestate;
- p. 27
1.42 -
p. 28 1.20 (2) that the beneficiaries of Elizabeth Muttama were not known to J.J. David or himself, with the exception of A.N.V. Singh who died in 1970 and at whose only known address Ananda had called before affirming his affidavit of 9th November, 1974 without being able to obtain any information as to his family's whereabouts; 10
- p. 28
11.19 - 48 (3) that the proceedings concerned the converting of immovable property into money leaving open the question of the proper distribution of that money;
- p. 29
11.11 - 29 (4) that the price of \$110,000 was a fair and proper price having regard to Gan's offer of \$56,250 made to him and to the valuation of \$75,000 obtained by him on the 29th August, 1974; 20
- p. 29
11.33 - 48 (5) that neither J.J. David nor he had any knowledge of the alleged prior contract with Gan and Bee Chuan, that J.J. David denied that any such contract was ever made and that these matters would be dealt with in other proceedings to be commenced by Gan and Bee Chuan;
- p. 29
1.49 -
p. 30 1.1 (6) that neither J.J. David nor he had any knowledge of the alleged prior sale when the application to the Court was made;
- p. 30
1.10 -
p. 31 1.1 (7) that the Court did not concern itself with trifles, Felixia's interest in the said land amounting to no more than a 1/240 share, she being entitled as one of five children to a 1/5 share of her father's 1/3 share of Elizabeth Muttama's 1/16 share in the said land. 30
- pp. 37 - 38 23. Civil Suit No. 45 of 1975 was commenced by Writ dated the 4th March, 1975 by Gan and Bee Chuan against J.J. David claiming, inter alia, an order that the Order of Sale dated the 25th November, 1974 be set aside and an injunction restraining J.J. David from disposing of the said land to any person other than Gan and Bee Chuan. On the 7th March, 1975, the Caveat was extended by order of the Court in Originating Summons 19 of 1975. 40
- p. 38
11.10 - 15,
24 - 30
p. 69
11.23 - 26
- pp. 66 - 69 24. On the 19th May, 1975 the hearing before Ajaib Singh, J. of Felixia's Notice of Motion in Originating Summons No. 79 of 1974 commenced. The hearing continued on the 7th June, and 29th August, 1975 and concluded on the 8th January, 1976, applications being made by Ng Lit
- pp. 69 - 70
pp. 71 - 72
pp. 75 - 80

Record

Cheng and Gan (and Bee Chuan) on the 20th September and 2nd October 1975 respectively to be joined as Respondents in Originating Summons No. 79 of 1974, both such applications being granted.

p. 73
p. 95
11.1 - 19
pp. 73 - 75
p. 95
11.20 - 44

25. On the 19th May and 7th June, 1975, Ananda was cross-examined on his affidavit of 1st April, 1975. He said that J.J. David had informed him that Elizabeth Muttama had three sons and that according to his information all three were dead. He produced two letters from J.J. David dated respectively the 18th and 25th October, 1974. Ananda told his solicitors of the death of A.N.V. Singh. Ananda is recorded as saying that he knew about the caveat before agreeing to sell the land: this would appear to be an error and should refer to his knowledge of the caveat either before taking out the Originating Summons on the 11th November, 1974 or at least before obtaining the Order of Sale on the 25th November, 1974. The Caveat had been extended by the Court on 7th March, 1975 Gan having commenced Civil Suit No. 45 of 1975 against J.J. David. A.N.V. Singh had informed J.J. David in 1968 of Gan's occupation of the said land and A.N.V. Singh had apparently written to Gan requesting him to quit the said land. In answer to the Court, Ananda said that the said land had not yet been sold: there was the agreement to sell to Ng Lit Cheng. There was a caveat on the land.

pp. 67 - 70
p. 67
11.10 - 16
11.20 - 21
p. 67
11.27 - 28
p. 68
11.20 - 22
p. 69
11.17 - 20
p. 99
11.1 - 5
p. 69
11.23-26

26. On the 29th August, 1975 Felixia was cross-examined. She said that she was not objecting to the said land being sold, only to the price. When it was put to her that she would get \$305.20 if the said land was sold for \$110,000 and \$419.44 if sold for \$151,000, she said that she had worked out her share at about \$2,000. She produced her parents' marriage certificate and her own birth certificate: her parents married after her father had retired.

p. 69
1.35 -
p. 70 1.8
p. 70
11.13 - 15

27. On the 20th September, 1975, Ng Lit Cheng was added as a Respondent to Originating Summons No. 79 of 1974 to give him an opportunity of opposing Felixia's application to set aside the Order of Sale of 25th November, 1974. In support of the application Ng Lit Cheng filed an affidavit affirmed on the 11th September, 1975. He filed a further affidavit affirmed on the 27th September, 1975.

p. 71
11.25 - 28
Exhibit 1
p. 141
Exhibit 2
p. 142
p. 71
11.32 - 34

28. On the 2nd October, 1975 Gan and Bee Chuan were added as Respondents to Originating Summons No. 79 of 1974.

p. 73
p. 95
11.1 - 19
Supplemental
record
pp. 5 - 7 &
9 - 11

29. On the 2nd December, 1975 Gan affirmed an affidavit supporting Felixia's application of 7th February,

pp. 73 - 75
p. 95
11.19 - 44
pp. 32 - 36
p. 33
11.2 - 4

Record

Exhibit GBK 1	1975. He exhibited the Bundle of Pleadings in Civil Suit	
pp. 35 - 50	No. 45 of 1975, the Letter of 15th April, 1974 from	
p. 33	Nahappan to him and a valuation by a qualified valuer	
11.30 - 32	dated the 15th November, 1955. He said that he and Bee	
Exhibit GBK 2	Chuan had a proprietary interest in the said land which	
p. 51	J.J. David and Ananda were estopped from denying. The	
p. 34	Order of Sale of 25th November, 1974 was bad in law and	
11.31 - 33	irregular because Gan's proprietary interest was not	
Exhibit GBK 3	disclosed to the Court, because no proper valuation	
p. 52 - 55	was obtained or put before the Court and because the	10
p. 33 last	price of \$110,000 was far below the market price of the	
line -	said land. Gan said that J.J. David and Ananda were fully	
p. 34 1.7	aware of the agreement and undertaking given by Nahappan	
p. 34	and that Gan and Bee Chuan had expended money in improving	
11.8 - 9	the land. On the 10th December, 1974, Gan sent a cheque	
p. 34	for \$15,000, he said in error, to Ananda although in fact	
11.10 - 11	it was sent to Nahappan as the letter at p. 63 of the	
p. 34	Record shows. Gan said that he and Bee Chuan were	
11.12 - 19	ready, able and willing to fulfil their obligation	
p. 34	with regard to purchasing the said land.	20
11.26 - 30		
Exhibit EA2		
pp. 63 - 64		
p. 34		
11.38 - 40		
pp. 56 - 60	30. On the 2nd January, 1976 Ananda affirmed an affidavit	
p. 56	in answer to that of Gan. He said that the alleged offer	
11.33 - 44	was disputed and would have to be strictly proved. He	
p. 57	exhibited Nahappan's Power of Attorney and said that	
11.4 - 13	Nahappan did not have the power to sell. He denied that	30
p. 57	any estoppel arose on the facts. Ananda accepted that Gan	
11.34 - 37	had lodged a private caveat on the 9th October, 1974	
p. 57	but that the first information Ananda received of it was	
11.46 - 55	the formal notification issued to him by the Land	
Not in the	Office dated the 9th November, 1974. In fact the letter	
Record	of 10th December, 1974 was addressed and sent to	
p. 57 1.55-	Nahappan. Ananda said that when the Order of Sale was	
p. 58 1.17	made on the 25th November, 1974 he had no knowledge of	
p. 58	the alleged contract relied on by Gan and Bee Chuan.	
11.28 - 34	Ananda said that it was oppressive for Gan to raise the	40
p. 57	same issues both in Civil Suit No. 45 of 1975 and in the	
1.21 -	present proceedings and that J.J. David was not opposed	
p. 58 1.7	to the early disposal of all outstanding issues by a	
	consolidation of Felixia's application with the hearing	
	of Civil Suit No. 45 of 1975.	
pp. 76 - 79	31. The hearing before Ajaib Singh, J. continued	
p. 76	on the 8th January, 1976. One S. Periasamy, an Advocate	
11.24 - 30	and Solicitor whose firm had taken over Messrs. Nahappan	
Exhibits A	& Co. at the beginning of 1975 was called on behalf of	
to E	Felixia. He had with him the file relating to the affairs	
pp.143 - 147	of the estate of John David. He produced certain letters	50
	between J.J. David, Nahappan and A.N.V. Singh in 1968 and	
	1969 (all referred to in paragraph 5 above) including	

Record

the letter of 5th January, 1968 from J.J. David referring to an offer by one Pereira of \$98,000 for the said land. The witness was referred to a letter dated the 18th December, 1974 from Messrs. Chan & Chia acting for the estate of the deceased making certain allegations "that the whole thing was bogus": the witness said that his firm did not reply to it as they were no longer solicitors to the estate. When his firm took over Nahappan's firm, Nahappan had already ceased practice.

Exhibit A
p. 143
Not in the
Record
p. 77
1.30 -
p. 78 1.15
p. 79
11.4 - 9

10 32. Following submissions by counsel for Felixia J.J. David, Ng Lit Cheng and Gan (including Bee Chuan), Ajaib Singh, J. ordered that the Court's Order of Sale of 25th November, 1974 be set aside and ordered Ananda personally to pay the costs of Felixia, Gan and Bee Chuan and Ng Lit Cheng to pay costs of the proceedings from the date of his being made a party.

20 33. Ng Lit Cheng and Ananda (with leave) appealed to the Federal Court of Malaysia and on the 27th October, 1976, Ajaib Singh, J. delivered his Grounds of Judgment. After summarizing the history of the proceedings, the learned Judge repeated at p. 97 11.18 - 19 of the Record what appears to be an error as to the date when Ananda acquired knowledge of the caveat. That apparent error is then corrected on p. 99 11.1 - 5 of the Record when the learned Judge says that Ananda "admitted that he was aware of a caveat on the land before he himself obtained an order for sale."

pp. 80 - 89

pp. 90 - 100
pp. 90 - 97

30 34. The learned Judge in a passage set out in full in the Judgment of the Federal Court said that he was satisfied from the evidence before him that J.J. David through his attorney, Ananda, had failed to bring to the notice of the court all the material and relevant facts. The learned Judge's reasons may be summarized as follows:-

p. 98
1.36 -
p. 100 1.8
p. 98
11.36 - 39

40 (1) that Ananda ought to have known through J.J. David that a prior offer for the sale of the said land existed, but this fact was not disclosed to the court. J.J. David at any rate knew about this offer and it was his duty to bring it to the notice of the court. In his submissions to the learned Judge recorded at p. 79 of the Record, counsel for Felixia referred to the letter dated the 5th January, 1968 and the offer of \$98,000 made by one Pereira at about that time/;

p. 98
11.40 - 47

p. 79
11.13 - 23

(2) that no valuation was produced to the court although one existed for \$75,000. It was incumbent on Ananda to disclose the valuation whether it was more or less than the contracted price;

p. 98
11.47 - end

(3) that Ananda had admitted that he was aware of the

points, namely :-

- (1) On the 7th February, 1976, Sidney Augustin's firm as solicitors for Gan and Bee Chuan was served by Ng Lit Cheng's solicitors with a copy of Ng Lit Cheng's Notice of Appeal to the Federal Court dated the 3rd February, 1976; pp. 80 - 81
- 10 (2) On the 2nd March, 1976 Sidney Augustin's firm received a letter dated the 27th February, 1976 from Ng Lit Cheng's Solicitors requesting their consent for an extension of time within which to file the Appeal Record in Federal Court Civil Appeal No. 19 of 1976. Sidney Augustin's firm duly consented;
- (3) On the 20th December, 1976 Sidney Augustin's firm was served with a copy of the Appeal Record in F.C.C.A. No. 19 of 1976 which contained a Memorandum of Appeal addressed to his firm;
- 20 (4) On the 12th February, 1977 Sidney Augustin's firm received from Ng Lit Cheng's Solicitors a copy of a Notice of Motion dated the 5th February, 1977 in F.C.C.A. No. 19 of 1976 which was addressed inter alios to his firm;
- 30 (5) On the 26th May, 1977, Sidney Augustin was present in the Federal Court of Malaysia at the hearing of F.C.C.A. No. 19 of 1976 as counsel for Gan and Bee Chuan to make submissions on their behalf. Counsel for Ng Lit Cheng objected to counsel appearing and arguing in F.C.C.A. No. 19 of 1976 on behalf of Gan and Bee Chuan. The Federal Court did not permit Sidney Augustin to make any submissions on behalf of Gan and Bee Chuan in F.C.C.A. No. 19 of 1976 on the ground that Gan and Bee Chuan had not applied to be made Respondents to the F.C.C.A. No. 19 of 1976.
38. The Federal Court of Malaysia allowed Ng Lit Cheng's appeal (F.C.C.A. No. 19 of 1976) and ordered that the Order of Sale dated the 25th November, 1974 be restored and further ordered Felixia to pay Ng Lit Cheng's costs and those of J.J. David. The Judgment of the Federal Court (Gill, C.J. Ong Hock Sim and Raja Azlan Shah, F.J.J.) was delivered by Gill, C.J. on the 7th July, 1977. After summarizing the history of the proceedings before Ajaib Singh, J. and the affidavit and oral evidence, the learned Chief Justice considered Ananda's offer for the consolidation of Felixia's application with Civil Suit No. 45 of 1975. The Chief Justice then set out in full the learned Judge's reasons for setting aside the Order of Sale. The Chief Justice considered first the position as to the beneficiaries and concluded that the learned
- p. 124
- 40 pp. 109 - 122
- pp. 109 - 115 1.30
- p. 115
- 11.31 - 52
- p. 116
- 1.5 -
- p. 117
- 1.43

Record

p. 118 11.45 - 52	Judge had overlooked the fact that the application was for the sale of the only asset belonging to the estate and not for distribution of the estate which was an entirely different matter. The learned Chief Justice did not think there was any stringent rule of law or procedure requiring all beneficiaries to be served, especially if they were descendants of the beneficiaries named in the will and their whereabouts were unknown, when an application was made to the court to convert land into money for purposes of distribution.	10
p. 119 11.5 - 37 p. 119 11.38-50	39. The learned Chief Justice did not see how in the circumstances non-disclosure of Gan's offer of \$56,250 or the valuation at \$75,000 was in any way material. The Chief Justice said that Ananda clearly had no personal interest in the matter and he did not think that in the circumstances he could agree with the learned Judge's view that Ananda's application was not made in good faith. The learned Chief Justice then referred to certain of Ng Lit Cheng's grounds of appeal and gave his opinion that the order appealed from (i.e. setting aside the Order of Sale) should not have been made pending the trial of Civil Suit No. 45 of 1975.	20
p. 119 11.50 - 51		
p. 120 11.10 - 40		
p. 120 11.41 - 42 p. 120 11.42 - 44 p. 120 1.45 - p. 121 1.14	40. The learned Chief Justice said that Gan and Bee Chuan were not parties to these proceedings. He said that he did not need to consider Felixia's counsel's written submissions in detail. He distinguished two authorities cited to the Court on the basis that there was a clear distinction to be drawn between the position of a potential purchaser from the estate of an intestate deceased whose contract could only be conditional until the Court approved the sale and the position of a purchaser whose contract had already been confirmed by a court order. In the Chief Justice's view the invention by Gan and Bee Chuan in Felixia's application would by itself have been of no consequence. The Chief Justice said he was therefore compelled to say that the learned Judge had misdirected himself in taking into consideration the non-disclosure by Ananda of the offer of \$56,250 and the alleged contract with Nahappan, the previous attorney. The Chief Justice considered the effect of non-service on Felixia. He said that the offer of a much higher price by Gan after the Order of Sale had been passed and perfected was wholly irrelevant. The learned Chief Justice concluded that the order of sale had been wrongly set aside and ordered Felixia to pay Ng Lit Cheng's costs. He further ordered that Felixia should pay the costs of J.J. David "who is but a nominal party to these proceedings and has not contested the appeal".	30
p. 121 11.16 - 20 p. 121 11.20 - 26		
p. 121 11.26 - 48 p. 121 11.33 - 36 p. 121 1.49 - p. 122 1.7		40
pp. 125 - 127 pp. 128 - 129	41. The Federal Court of Malaysia allowed Ananda's appeal which was confined to Ajaib Singh, J.'s order that	50

Record

Ananda should pay the costs in the court below personally. In the learned Chief Justice's view, the order for costs against Ananda personally could not possibly stand having regard to the fact that he was the attorney and consequently the agent of a disclosed principal and was not even the administrator of the estate of the deceased. Accordingly, the Chief Justice set aside the order appealed from and ordered Felixia, Gan and Bee Chuan to pay the costs of Ananda and Ng Lit Cheng in the court below and in F.C.C.A. No. 48 of 1976.

p. 126
11.11 - 26
p. 126
11.27 - 45

pp. 128 -
129
p. 126
1.46 -
p. 127 1.6

42. On the 13th November, 1978, the Federal Court of Malaysia granted Felixia, Gan and Bee Chuan final leave to appeal to the Privy Council in respect of both appeals F.C.C.A. 19 and 48 of 1976.

pp. 137 -
138

43. The Appellants respectfully submit that the Federal Court was wrong in setting aside Ajaib Singh's order dated the 8th January, 1976 and in restoring the order of sale dated the 25th November, 1976. It is respectfully submitted that it was incumbent upon J.J. David and Ananda as his attorney, to effect service of the Originating Summons No. 79 of 1974 pursuant to Order 55 rules 3 and 5 of the Rules of the Supreme Court, 1957 upon Gan and Bee Chuan as persons whose rights or interests were sought to be affected. Alternatively, it was the duty of J.J. David and Ananda to inform the learned Judge of the existence of the caveat to give the Judge an opportunity to consider under Order 55 rule 6 whether to direct that Gan and Bee Chuan should be served with the summons. It is respectfully submitted that it is sufficient to make the order for sale one that was irregularly obtained and one that should be set aside if the Judge would not necessarily have approved the sale in the event of Order 55 rules 3, 5 and/or 6 having being complied with.

44. It is respectfully submitted that it was the duty of J.J. David and Ananda, his attorney to disclose to the Court all relevant matters affecting the best price obtainable for the said land and its market value. It was their duty to obtain the best price possible for the said land in the beneficiaries' interest and to demonstrate to the Court in the light of all the material circumstances that that had been done. It is basic, it is respectfully submitted, that prior offers which may cast light or doubt on the present price sought to be approved or on the land's market value should be disclosed. An independent valuation should be disclosed, the more so if one has actually been obtained as it may, as in this case, itself raise questions both as to its own reliability and that of the price as a guide to market value and the

Record

best price obtainable.

45. It is respectfully submitted that the learned Judge was correct in holding that the prior offer of \$98,000 in 1968 for the said land should have been disclosed. It raised questions as to the reliability both of the valuation at \$75,000 some six years later and of the price of \$110,000 whether as a guide to market value or to the best price obtainable. Such offer of \$98,000 required explanation in those circumstances, it is respectfully submitted, and its existence should have been disclosed to the Court and, if possible, explained. It would appear that the Federal Court made no reference to this matter. 10

46. It is respectfully submitted that it was a matter of prime importance that no valuation of any kind was produced to the Court nor any justification of the price of \$110,000 put forward whether as a proper and sufficient price or as the best obtainable price. The fact that the price of \$110,000 was offered within a matter of days of the valuation of \$75,000, showing an increase of some 46% without any explanation was bound, it is respectfully submitted, to raise questions as to which (if either) was a reliable guide to market value or the best price obtainable. It is respectfully submitted that the learned Judge was correct in holding both that the valuation of \$75,000 should have been disclosed and that it was no answer in the circumstances to say that because the price was for a higher sum there was no call for disclosure of the valuation. 20

47. It is respectfully submitted that J.J. David and/or Ananda should have disclosed the existence of the caveat to the Court quite apart from any duty arising out of Order 55 rule 6. They were aware that Gan and Bee Chuan were in occupation of the said land in 1968. J.J. David apparently knew (according to para. 7(c) of his Statement of Defence in Civil Suit No. 45 of 1975) that Gan and Bee Chuan were carrying out development on the said land with a view to obtaining essential access and services to a housing estate in the course of development on adjacent lands. It is respectfully submitted that the caveat was a relevant fact to be known to the Court as it could have materially affected both the market value of the land and the best price obtainable. It is respectfully submitted that the Court should not have been put in the position of being called on to approve the sale while questions as to the caveat remained undisclosed and unresolved. While it is bound to remain to some extent uncertain what would have happened if Gan and Bee Chuan had been served with the summons or otherwise brought before the Court, it remains the fact that the caveat 30 40 50

was entered more than a month before the summons was taken out. Further, the valuation of the said land at \$151,000 was apparently obtained on the 15th November, 1974 some ten days before the sale at \$110,000 was approved. It is respectfully submitted that it properly open to Felixia to contend that if the caveat had been disclosed to the Court the beneficiaries would probably have been \$41,000 better off by a sale to Gan and Bee Chuan.

10 48. It is respectfully submitted that the learned Judge was correct in his approach to Ananda's failure to make any real attempt to locate all the beneficiaries and particularly to disclose that Elizabeth Muttama had three sons one of whom was A.N.V. Singh.

49. It is respectfully submitted that the learned Judge was entitled to find that in all the circumstances the application was not made in good faith, particularly as the Applicant, J.J. David, and his attorney, Ananda, had failed to disclose all the material and relevant facts as to and affecting the value of the said land.

20 50. It is respectfully submitted that the learned Judge was entitled to order that the costs of the proceedings be paid personally by Ananda. It is respectfully submitted that in all the circumstances Ananda owed a duty to the beneficiaries and to the Court to disclose the valuation of \$75,000, and the existence of the caveat. It is respectfully submitted that it was not open to Ananda to say that he was no more than an attorney whose only duty in the circumstances was owed to his principal, J.J. David. Further or alternatively, it is respectfully
30 submitted that J.J. David owed no less a duty to the beneficiaries and to the Court to disclose all material and relevant facts as to and affecting the value of the said land and as he failed to do so it was properly open to the learned Judge to order him to pay the costs of the proceedings personally. Further or alternatively it was properly open to the learned Judge in all the circumstances to order both J.J. David and Ananda to pay the costs of the proceedings personally.

40 51. It is respectfully submitted that the Federal Court should have heard counsel on behalf of Gan and Bee Chuan. It is respectfully submitted that Gan and Bee Chuan were properly parties to F.C.C.A. No. 19 of 1976 whether or not their names actually appeared in the title of the appeal and there were no proper grounds for shutting them out. Further, as they had been served it is respectfully submitted that they were entitled to appear on the hearing of F.C.C.A. No. 19 of 1976 by counsel and be heard. Further, as they had been made parties to the Originating Summons No. 79 of 1974 and there was no
50 appeal from the learned Judge's Order so making them parties,

Record

it is respectfully submitted that it was not open on behalf of Ng Lit Cheng to contend that they should not be heard in F.C.C.A. No. 19 of 1976.

52. It is respectfully submitted that the distinction drawn by the Federal Court between a purchaser whose contract has yet to be approved by the Court and one whose contract has been approved (Record p. 121 11.7-14) is a valid one only if the Court's approval has been regularly obtained. It is respectfully submitted that in all the circumstances, particularly of the non-disclosure of all the material and relevant facts as to and affecting the value of the said land the Order of Sale dated the 25th November, 1974, was not regularly obtained. 10

53. It is respectfully submitted that there was no bar to Felixia's application to have the Order of Sale set aside. It was not open to Ng Lit Cheng to maintain in the circumstances that his proprietary rights could not be taken away except by way of a fresh suit instituted for that purpose.

54. The Appellants respectfully submit that the order of the Federal Court was wrong and ought to be set aside and that this appeal ought to be allowed with costs and the learned Judge's order dated the 8th January 1976 ought to be restored, for the following (among other). 20

R E A S O N S

1. BECAUSE the Order of Sale dated the 25th November, 1974 was not regularly obtained:
2. BECAUSE J.J. David and/or Ananda should have served Gan and Bee Chuan with the Originating Summons No. 79 of 1974 pursuant to Order 55 rules 3 to 5 or disclosed the existence of the caveat to the Court pursuant to Order 55 rule 6 to enable the Court to consider whether to direct service on Gan and Bee Chuan: 30
3. BECAUSE J.J. David and/or Ananda failed to disclose to the Court all the material and relevant facts as to and affecting the value of the said land and the best price obtainable for the same:
4. BECAUSE J.J. David and/or Ananda failed to produce any valuation of the said land to the Court or to disclose the valuation of \$75,000 in fact obtained: 40
5. BECAUSE J.J. David and/or Ananda failed to disclose to the Court material prior offers made to purchase the said land being the offer of \$98,000 made in 1968.

6. BECAUSE J.J. David and/or Ananda failed to disclose the existence of the caveat:
7. BECAUSE J.J. David and/or Ananda failed to make any real attempt to locate all the beneficiaries and particularly to disclose that Elizabeth Muttama had three sons one of whom was A.N.V. Singh:
8. BECAUSE it was properly open to the learned Judge to find, and he correctly found, that in all the circumstances the application for approval of the sale to Ng Lit Cheng was not made in good faith:
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9. BECAUSE it was properly open to the learned Judge to find, and he correctly found, that in all the circumstances Ananda should be ordered to pay the costs of the proceedings personally:
10. BECAUSE the Federal Court wrongly refused to hear counsel on behalf of Gan and Bee Chuan:
11. BECAUSE the Federal Court did not consider the learned Judge's findings that both the offer of \$98,000 in 1968 and the caveat lodged on the 9th October, 1974 should have been disclosed:
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12. BECAUSE the order and judgment of Ajaib Singh, J. (~~apart from the reference to the offer of \$56,250~~) respectively dated the 8th January and 27th October, 1976 setting aside the Order of Sale dated the 25th November, 1974, were right.

STUART McKINNON

V.K. PALASUNTHARAM

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

1. GAN KHAY BENG
2. BEE CHUAN RUBBER FACTORY SDN. BHD.
3. FELIXIA d/o Varnakulasinghe

Appellants

- and -

1. NG LIT CHENG alias NG YAM CHEE
2. E.P.E. ANANDA (deceased)
3. JOSEPH JACOB DAVID also known as
JACOB JOSEPH as Administrator with
Will annexed of the Estate of John
David deceased

Respondents

CASE FOR THE APPELLANTS

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Solicitors for the Appellants