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ON APPEAL  
FROM THE FEDERAL COURT OF MALAYSIA

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BETWEEN:

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
3. JOSEPH JACOB DAVID also known as  
JACOB JOSEPH as Administrator with  
Will annexed of the Estate of John  
David deceased Respondents

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SUPPLEMENTAL CASE FOR THE APPELLANTS

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1. The Appellants respectfully refer to their Case Record  
herein.
2. It is respectfully submitted that this appeal does  
not concern the setting aside of a sale and transfer  
which have already taken place. It is an appeal, it  
is submitted, where the Appellants are trying to  
prevent the performance of a conditional agreement

for sale purportedly made by an administrator acting by his attorney. In such a case, the correct principle is that the smallness of the interest of the Third Appellant ("Felixia") is irrelevant, it is respectfully submitted. The Appellants will refer to section 52 of the Specific Relief Act 1950 (revised as Act 137 of the Laws of Malaysia with effect from the 1st July, 1974, being previously known as the Specific Relief (Malay States) Ordinance No. 29 of 1950), the following parts whereof are relevant:

"52. (1) Subject to the other provisions contained in, or referred to by, this Chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication."

.....

"(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases:

(a) where the defendant is trustee of the property for the plaintiff;

"ILLUSTRATIONS"

- (b) A trustee threatens a breach of trust. His co-trustees, if any, should, and the the beneficial owners may, sue for an injunction to prevent the breach.
- (f) A, a trustee for B, is about to make an imprudent sale of a small part of the trust-property. B may sue for an injunction to restrain the sale, even though compensation in money would have afforded him adequate relief."

3. The effect of illustrations in stat<sup>u</sup>tes has been considered by the Privy Council in Muralidhar Chatterjee v. International Film Company Limited (1942) L.R. 70 Indian Appeals 35; in giving the judgment of the Board Sir George Rankin said at page 46: "Nor can the illustration be ignored or brushed aside because it is not part of the body of the section".
4. It is respectfully submitted that the principle to be derived from illustration (f) to Section 52 of the Specific Relief Act 1950 is applicable not merely to the grant of injunctions but also to the making of

all Orders to prevent in advance the making of an imprudent sale of trust property.

5. Section 3(1) of the Trustee Act 1949 (revised as Act 208 of the Laws of Malaysia with effect from the 15th November 1978 - being previously known as the Trustee Ordinance No. 66 of 1949) provides inter alia:-

"3(1). In this Act, unless the context otherwise requires -

"'trust' does not include the duties of charge, but with this exception the expressions 'trust' and 'trustee' extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incidental to the office of a personal representative, and 'trustee', where the context admits, includes a personal representative, and 'new trustee' includes an additional trustee;"

"'trust for sale', in relation to land, means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without power at discretion to postpone the sale; 'trustees for sale' means the persons (including a personal representative) holding land on trust for sale."

6. Personal representatives in Malaysian law do not have absolute powers to sell or transfer any immovable property forming part of the deceased's estate. Section 60 (1) (3) (4) and (6) of the Probate and Administration Act 1959 (revised as Act 97 of the Laws of Malaysia with effect from 1st November 1972 - being previously known as the Probate and Administration Ordinance No. 35 of 1959 and that section was previously numbered as 59) provides:-

"60. (1) In dealing with the property of the deceased his personal representative shall comply with this section."  
.....

"(3) A personal representative may charge, mortgage or otherwise dispose of all or any property vested in him, as he may think proper, subject to any restriction which may be imposed in this behalf by the will of the deceased, and subject to this section: Provided that an executor may dispose of any property notwithstanding any restriction so imposed, if he does so in accordance with an order of the court."

"(4) An administrator may not, without the previous permission of the Court -

(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property situate in any State and for the time being vested in him; or

(b) lease any such property for a term exceeding five years." .....

"(6) The disposal of property by a personal representative in contravention of this section shall be voidable at the instance of any other person interested in the property."

7. Section 68 (1) and (7) of the said Probate and Administration Act 1959 provides -

"68. (1) On the death of a person intestate as to any property, the property shall be held by his personal representative -

(a) as to the immovable property upon trust, subject to section 60, to sell the same; and

(b) as to the movable property upon trust to call in, sell and convert into money such part thereof as may not consist of money,

with power to postpone the sale and conversion for such a period as the personal representatives, without being liable to account, may think proper, and so that any revisionary interest be not sold until it falls into possession, unless the personal representatives see special reason for sale."

"(7) Where the deceased leaves a will, this section has effect subject to the will."

8. The Last Will dated 13th April 1920 of John David the deceased does not expressly confer any power of sale pp.10-11 but directs distribution in certain proportions. The administrator's power to sell or transfer in the instant case is that derived from section 60 and is subject to the prohibition and qualification in sub-section (4) and is subject to sub-section (6).
9. The phrase "any other person interested in the property" in sub-section (6) of the said Section 60 includes, it is respectfully submitted, not only beneficiaries but also persons like the First and Second Appellants ("Gan and Bee Chuan") who have prior equity in time over the First Respondent "Ng Lit<sup>1</sup>Cheng" (if Ng Lit Cheng has<sup>1</sup>

any equity) because of the contingent contract made with Gan and Bee Chuan by the Administrator acting by the attorney named in the Letters of Administration Dato Athi Nahappan ("Nahappan") and/or because of the estoppel against the Third Respondent (J.J. David") created by the conduct of his attorney, Nahappan.

p.9 11.14  
-16

10. By paragraph 1 of the said Last Will the deceased had appointed his brother Francis Daniel David to be executor and trustee of the Will. Francis Daniel David obtained grant of probate at Seremban on 28.4.1922. Francis Daniel David died in 1944 not having fully administered the estate of the deceased.

p.10 11  
25-27

p.60 11  
35-41

p.61 11  
1-6

11. The Third Respondent J.J. David had granted a Power of Attorney dated 18th March 1968 to Nahappan to obtain letters of administration, etc. to the estate of the deceased. At page 61 lines 18-34 J.J. David grants the power as follows:-

pp.60-6

p.61 11  
18-34

"NOW THIS DEED WITNESSETH that I the said JOSEPH JACOB DAVID also known as JACOB JOSEPH hereby appoint DATO ATHI NAHAPPAN .... to be my lawful attorney for



me and in my name or in his own name or otherwise as the law may require to do all the following deeds and things or any of them, that is to say:-

"1. To apply for and obtain from the proper Court or other authority having jurisdiction in the premises a Grant of Letters of Administration de bonis non with the Will annexed of the estate of the said John David deceased."

12. The word "of" appearing in line 25 in the Record in the above passage reads as "or" in the photostat of that power of attorney forming part of the Federal Court of Appeal Record in Federal Court Civil Appeal No. 19 of 1976. The word "note" appearing in line 27 in the Record does not appear in the said photostat.

13. Section 16 of the said Probate and Administration Act 1959 provides inter alia:-

"16. Where -

..."(d) all the executors die ..... before having administered all the estate of the deceased; ..... letters of administration with the will annexed may be granted to such person or persons as the Court deems fittest to administer the estate:

"Provided that a prior right to the grant shall belong to the following persons in the following order:

.....

(iii) such person or persons, being beneficiaries under the will, as would have been entitled to a grant of letters of administration if the deceased had died intestate;

(iv) a legatee having a beneficial interest;"

14. Section 29 of the said Probate and Administration Act 1959 provides inter alia:-

"29. Where a person who would be entitled to representation is absent from Malaysia, the following provisions shall apply:

(a) where an executor appointed by a will is absent from Malaysia, and there is no other executor within Malaysia willing to act, letters of administration with the will annexed may be granted to a duly authorised attorney of the absent executor, limited until he obtains probate for himself, and in the meantime to any purpose to which the attorney's authority is limited;

(b) where any person to whom letters of administration with the will annexed might be granted under section 16 is absent from Malaysia, letters of administration with the will annexed may be granted to his duly authorised attorney, limited as described in paragraph (a)."

15. Section 30 of the said Probate and Administration Act 1959, except the proviso thereto which is irrelevant for present purposes, provides -

"30. In granting administration the Court shall have regard to the rights of all persons interested in the estate of the deceased person or in the proceeds of sale thereof, and, in particular, administration with the will annexed, may be granted to a devisee or legatee; and in regard to land settled previously to the death of the deceased, and not by his will, administration may be granted to the trustees of the settlement; and any such administration may be limited in any way the Court thinks fit."

16. It is respectfully submitted that the said Sections 16, 29 and 30 in effect provide that when the person entitled

to representation is absent from Malaysia (as in the instant case where J.J. David was resident in and was in Sri Lanka) the letters of administration should be granted to his attorney. Possibly letters of administration may be granted to the absent person also. J.J. David was a person entitled to obtain letters of administration under paragraph (iv) and possibly paragraph (iii) of the proviso to the said Section 16. Nahappan was his attorney under the power of attorney dated 8th March 1968.

pp.60-63

17. The letters of administration with will annexed dated

15th October 1973 which is at pages 8 and 9 of the

pp.8-9

Record states at page 9 lines 9-19 that:

p.9 ll.  
9-19

"administration of all the movable and immovable property in Malaysia which by law devolves to and vests in the personal representative of the said deceased was granted by this Court ~~to~~ Joseph Jacob David also known as Jacob Joseph by his attorney Dato Athi Nahappan (Power of Attorney No.380/1965) of No.45 Jalan Melayu, Kuala Lumpur ~~that~~

(a) Legatee named in the said Will

(b) A nephew of the said Deceased".

The number "380/1965" of the Power of Attorney to Dato Athi Nahappan quoted above from page 9 line 15 of the F.C. Record is a misprint for "330/1968" as will be apparent from page 6 line 16 which refers to the Power of Attorney to Dato Athi Nahappan as "Power of Attorney No. 330/1968". The photostat copies of the said letters of administration in the Federal Court Appeal Records in both the Federal Court Civil Appeal No. 19 of 1976 and Federal Court Civil Appeal No. 48 of 1976 also show the number as "330/1968".

18. The said letters of administration with will annexed is on Form No. 11 (in the First Schedule to the Probate and Administration Rules 1961 being Legal Notification No. 44 of 1962) but with a variation to the said Form. The said Form No. 11 is the form for "Grant of Letters of Administration with the Will Annexed". The words "by his attorney Dato Athi Nahappan (Power of Attorney No. 330/1968)" which follow the words "To Joseph Jacob David also known as Jacob Joseph" qualifies the grant made to Joseph Jacob David also known as Jacob Joseph. Rule 29 (1) and (2) of the said Probate and Administration Rules 1961 provides:-

"29. (1) Probate of a will or letters of administration which may be granted in accordance with the Act and these Rules shall be in the name of the High Court and under the seal of the Court. Every such grant shall be prepared by a Registrar.

(2) The forms of grant made shall be in accordance with Forms 10, 11, 12 or 13 with such variations as the Registrar may approve to fit the circumstances of the case."

19. It is apparent therefore that the Senior Assistant Registrar of the High Court at Seremban who comes within the definition of "Registrar" in Rule 2 of the said Rules exercised his powers under the above-quoted Rule 29 (1) and (2) to prepare and to approve a grant with a variation to Form 11 to fit the circumstances of the case by adding the words "by his attorney Dato Athi Nahappan (Power of Attorney No. 330/1968)" immediately after the words "To Joseph Jacob David also known as Jacob Joseph". It is, therefore, respectfully submitted that under the said letters of administration with will annexed dated 15th October 1973 J.J. David can act by his attorney Nahappan only and cannot act either

personally or through another attorney appointed by J.J. David so long as the said letters of administration remains unrevoked or unamended. In other words, the acting by Nahappan/<sup>as</sup>his attorney is an integral and essential part of the power of administration <sup>purportedly</sup> granted to J.J. David. The said Senior Assistant Registrar may also have taken into account for the purpose of approving the said variation of the said Form No. 11 the following paragraphs Nos. 3, 4 and 5 in the said Power of Attorney to Nahappan pp.61-62 at pages 61-62 of the Record.

20. There is no provision in West Malaysian written law to the same effect as the third paragraph of subsection (2) of section 124 of the Law of Property Act 1925 of England [ *concerning, where appropriate, the treating of acts done under the grant as done under the power of attorney.* ]
21. The said Probate and Administration Act 1959 and the said Probate and Administration Rules 1961 vest in the Court (and not in the administrator or anyone else) the power to revoke or amend letters of administration.
22. Section 34 of the said Probate and Administration Act 1959 provides :-

"34. Any probate or letters of administration may be revoked or amended for any sufficient cause."

23. Rule 44 (1) and (2) of the said Probate and Administration Rules 1961 provides:-

"44. (1) An application to revoke or amend grants of probate or letters of administration may be made to the Court by motion, supported by affidavit setting out the facts.

(2) Upon any such action the Court may deal with the matter summarily or may order the matter to proceed as an action."

24. No application has been made to the High Court to amend or revoke the said letters of administration. In fact, the copy of the said letters of administration was pp.8-11 produced to Court by the Second Respondent ("Ananda") as an exhibit to his affidavit dated 9th November 1974 in support of the Originating Summons applying for an pp.3-5 order to sell lot No. 368<sup>( "the said land" )</sup>. Therefore, it is respect- p.2 fully submitted on the basis of the copy of the said letters of administration produced by Ananda himself which does not show any amendment by deletion of the



words "by his attorney Dato Athi Nahappan (Power of Attorney No. 330/1968)" the said Originating Summons should have been dismissed. If J.J. David had wanted Nahappan to cease to act in the matter of the administration of the deceased's estate and had wanted Ananda to act instead he should have made an application to <sup>the</sup> Court under the said Rule 44 to amend under the said Section 34 the said letters of administration by deleting therein the words "by his attorney Dato Athi Nahappan(Power of Attorney No. 330/1968)".

25. It is respectfully submitted that, having regard to the fact that the said letters of administration have not been amended by such deletion the alleged agreement <sup>by</sup> dated 2nd September 1974 signed/Ananda as the act and deed of J.J. David and by Ng Lit Cheng is not an act binding on the estate of the deceased and is not a valid agreement between Ng Lit Cheng and a person entitled to act under the said letters of administration on behalf of the deceased's estate. These are matters appearing on the face of the documents produced by Ananda and by Ng Lit Cheng and in the light of the relevant written law of Malaysia quoted above. It is submitted that the said Originating Summons should,

therefore, have been dismissed and/or the High Court was right in setting aside by its inter partes order of 8th January 1976 its ex parte order of 25th November 1974.

26. Section 64 (1), (2) and (3) of the said Probate and Administration Act 1959 provides:-

"64. (1) Every person making or permitting to be made any payment or disposition in good faith under probate or letters of administration shall be indemnified and protected in so doing, notwithstanding any defect or circumstances whatsoever affecting the validity of the probate and letters of administration.

(2) Where a grant of representation is revoked, all payments and dispositions made in good faith to a personal representative under the grant before the revocation thereof are a valid discharge to the person making the same; and the personal representative who acted under the revoked representation may retain and reimburse himself in respect of any payments or dispositions made by him which the person to whom representation is afterwards granted might have properly made.

(3) All transfers and conveyances of any interest in movable and immovable property made to a purchaser either before or after the commencement of this Act by a person to whom probate or letters of administration have been granted are valid, notwithstanding any subsequent revocation or variation either before or after the commencement of this Act, of the probate or administration."

27. Having regard to the said section 64 (1), (2) and (3) and the non-deletion by a Court of the words "by his attorney Dato Athi Nahappan (Power of Attorney No. 330/1968)", it is respectfully submitted that any payment or disposition made by Ng Lit Cheng to Ananda or to J.J. David (if Ng Lit Cheng in fact did so) or otherwise was not a payment or disposition under the said letters of administration and is not protected by the said Section 64 (1). It is further respectfully submitted that if the said agreement dated 2nd September 1976 could otherwise have conveyed any equitable or other interest in the said land to Ng Lit Cheng it would not be valid under or protected by the said

Section 64 (3). It is thus submitted that the said Originating Summons should have been dismissed on the face of the documents produced by Ananda and in the light of the above-quoted relevant written law of Malaysia.

28. Gan and Bee Chuan's letter on the letterhead of Bee Chuan signed by Gan dated the 10th December 1974 pp.63-64 refers to Nahappan as "the Attorney of the above estate" and refers to the valuation of the land in question at S151,000/- and to the expenditure of a lot of money by Gan and Bee Chuan to develop the land with Nahappan's assurance that the land would be sold to them. The reference to that assurance was a reference to, inter alia, the earlier oral promises of Nahappan and letters of Athi Nahappan & Co. to Gan and Bee Chuan. Gan and Bee Chuan's said letter of the 10th December 1974 states in its penultimate paragraph as follows:-
- p.64 l. 13

"In the circumstances we are enclosing herewith a cheque for \$15,100.00 being the deposit and we are

ever ready and willing to pay the balance of the purchase price to you as solicitors of your client upon obtaining the order of sale in our favour."

That letter may properly be regarded as a continued recognition of and reliance on Nahappan by Gan and Bee Chuan as the only person entitled to act in Malaysia so as to bind the deceased's estate under the said letters of administration. Whether consciously or unconsciously they were then acting according to the status of Nahappan in the written law of Malaysia. It is submitted that they are protected by the said Section 64 (1) and (3) of the Probate and Administration Act 1959. (The figure "\$181,000.00" at page 64 line 11 is a misprint in the Record for the figure "\$151,000.00".).

29. The Appellants will respectfully refer to the case of Pipon v. Wallis reported in (1793) 1 Lee = 161 E.R. 148. The report says: "Mary Berkeley, deceased, lived in Jersey, made her will there 23rd Feb., 1740, and appointed Mr. Le Geyt and Mr. Pipon executors; they both living in Jersey, gave letter of attorney to

Mr. Wallis to take administration with the will annexed for their use and benefit. Wallis took administration in 1741 ...." Later Le Geyt died. "Pipon is now come to England, and has cited Wallis to bring in the administration and show cause why it should not be revoked, and probate of the will granted to him as surviving executor." Wallis objected saying that "the administration cum testamento is granted absolutely to Wallis and cannot be revoked". The report says: "JUDGMENT - SIR GEORGE LEE. I was of opinion, that though the administration was granted absolutely, yet the foundation of it, the letter of attorney, was revocable; that the administrator was only an agent for the executor; that when the executor desired probate the Court was bound to grant it to him, and therefore I revoked the administration, and decreed probate to Pipon, but without costs."

30. It is therefore respectfully submitted that unless and until a motion is made to the High Court under the said Rule 44 and the High Court amends under the said Section 34 the said letters of administration by deleting therefrom the words "by his Attorney Dato Athi Nahappan

(Power of Attorney No. 330/1968)" it is not open to J.J. David to act personally or by any attorney other than Nahappan in the administration of the estate of the deceased.

31. The above-quoted Section 52 (1), 3(a), and illustrations (b) and (f) thereunder in the Specific Relief Act 1950, Section 16 (d) and paragraphs (iii) and (iv) of the proviso thereto, Section 29 (a) and (b), and Section 30 and Section 34 of our Probate and Administration Act 1959 and Rules 29 (1) and (2) and 44 (1) and (2) of our Probate and Administration Rules 1961 and their effect on the documents produced and on the evidence adduced and on the case were not argued in the Courts below. Nevertheless, it is respectfully submitted that those provisions of the written law and their effect on the case may still be argued in the Privy Council. In the case of Sri Sri Shiba Prasad Singh v. Maharaja Srish Chandra Nandi and Another (1949) L.R. 76 Indian Appeals 244 (P.C.) the last two paragraphs of the headnote on page 244 states:

"Although it appeared that the question whether s.72 of the Indian Contract Act was applicable to this case was not argued, or only faintly argued, before both courts below, the Board were unable to exclude from their consideration the provisions of a public statute. Decree of the High Court (1942) I.L.R. 22 Pat. 220, affirmed in part and reversed in part."

Lord Reid said at page 252:

"The learned Chief Justice appears to have overlooked the provisions of s.72 of the Indian Contract Act. This section was only mentioned in passing by the Subordinate Judge, and it would seem that it was not argued, or only faintly argued, before the Subordinate Judge or in the High Court that s.72 applied to this case. The appellant, the Respondent in the cross-appeal, submitted to their Lordships that in these circumstances their Lordships should not now receive an argument based on s.72, but their Lordships are unable to exclude from their consideration the provisions of a public statute. It is regrettable that their Lordships do not have the assistance of the views of the High Court on this matter.



Their Lordships impute no blame to the learned judges of the High Court, but they feel bound to consider the argument which has now been adduced."

32. In connection with taking the above elaborated new points based on the provisions of Malaysian public statutes and subsidiary legislation, it may be borne in mind that Federal Court Civil Appeal No. 19 of 1976 was not an appeal by J.J. David or by Ananda. It was an appeal by Ng Lit Cheng who is the person alleged to have entered into an agreement dated 2nd September 1974 with J.J. David acting by Ananda for the purchase of the said land belonging to the estate of the deceased. Federal Court Civil Appeal No.19 of 1976 was thus an appeal by Ng Lit Cheng, an intending purchaser. If he was adversely affected by the Order of the High Court dated 8th January 1976 and was entitled to be heard as to the correctness of that High Court Order even when J.J. David was not the Appellant, it is respectfully submitted that Gan and Bee Chuan (who were also intending purchasers with a written promise for consideration by the administrator's attorney named in the letter of

administration) were entitled to be heard in opposition to such an appeal. But Gan and Bee Chuan were not named as parties to the said Federal Court Civil Appeal No.19 of 1976 by Ng Lit Cheng. However, Ng Lit Cheng's solicitors served on Gan and Bee Chuan's solicitors Messrs. Augustin-Negrin & Co. a copy of the Federal Court Appeal Record in that Federal Court Civil Appeal No.19 of 1976. Federal Court (Civil Appeals) (Transitional) Rules 1963 being Legal Notification No. 242 of 1963 which regulated civil appeals from the High Court to the Federal Court from 16.9.1963 to 30.6.1980 said in Rule 7: "Notice of appeal shall be served on all parties directly affected by the appeal or their solicitors respectively at the time of filing the notice of appeal. It shall not be necessary to serve parties not so affected". Therefore, Mr. Sidney Augustin appeared in the Federal Court at the hearing of Federal Court Civil Appeal No.19 of 1976 as counsel for Gan and Bee Chuan to submit arguments in opposition to that appeal. Gan has affirmed to an affidavit on the 17th August 1977 on behalf of Gan and Bee Chuan in support of their Notice of Motion (subsequently dated by the Chief Registrar of the Federal

Court on 18th October 1977) applying for conditional leave to appeal to His Majesty the Yang Dipertuan Agung. The said Notice of Motion is at pages 130-132 of the Record. But the said affidavit has not been included in the Record. In paragraph 9 of the said affidavit Gan has affirmed:

"9. Counsel on behalf of the abovenamed Second Applicant and me, namely Mr. Sidney Augustin was present in the Federal Court of Malaysia at the hearing of the said Federal Court Civil Appeal No.19 of 1976 but was not allowed by the Federal Court of Malaysia to make any submission on behalf of the abovenamed Second Applicant and me opposing the said Appeal. The ground on which our Counsel was not allowed by the Federal Court of Malaysia to make submissions was that we had not applied to the Federal Court of Malaysia to be made respondents to the said appeal."

33. It is respectfully submitted that Gan and Bee Chuan became parties to the said Federal Court Civil Appeal No.19 of 1976 when their solicitors were served with the Federal Court Appeal Record in that appeal by Ng Lit Cheng's solicitors; there was no need for Gan and

Bee Chuan to apply to the Federal Court to be made respondents to that appeal.

34. It is respectfully submitted that in view of the fact that counsel for Gan and Bee Chuan was not allowed to make submissions at the Federal Court hearing of Ng Lit Cheng's Federal Court Civil Appeal No. 19 of 1976 the Privy Council should hear the effect in this appeal of the above-quoted provisions of the public statutes and subsidiary legislation of Malaysia, notwithstanding the fact that such effect was not considered in the Courts below.
35. It is respectfully submitted that the learned Chief Justice erred in treating the intervention of Gan and Bee Chuan as an intervention "in the proceedings for the setting aside of the sale". No sale had in fact taken place. At most, the First Respondent had a conditional contract, if it was valid, for the purchase of the land.
36. It is respectfully submitted that the learned Chief Justice erred in holding at page 120 lines 22-40:

"I am also inclined to agree with the contention on behalf of the appellant that upon the approval by the court of the sale agreement the appellant's rights in the land crystallised and that the administrator thereafter held the land in trust for him. It was further contended on behalf of the appellant that the proprietary rights which he had thus acquired could not be taken away except by way of a fresh suit instituted for that purpose. Gan Khay Beng and Bee Chuan Rubber Factory Sendirian Berhad, who were allowed to intervene in the proceedings, had in fact filed a civil suit for that purpose before the order setting aside the sale was made. I am therefore of the opinion that the order appealed from should not have been made pending the trial of that civil suit."

37. It is respectfully submitted firstly that the reasoning in the above quotation from the learned Chief Justice's judgment is wrong. It is not necessary to file a separate suit to set aside an ex parte order. Prayer No. 1 in the Writ at page 38 and in the Statement of Claim in Civil Suit No.45 of 1975 at page 42 for setting

aside the said ex parte Chambers Order of 25.11.74 in the said Originating Summons No. 79 of 1974 is only a preliminary prayer for the other prayers of which prayers 4 and 5 are the main prayers. In any event, it is submitted, the proper step for an aggrieved party adversely affected by an ex parte order is to apply in the same proceedings as that in which the ex parte order was made to have the ex parte order set aside. A Practice Note in the case of Becker v. Neal and Another (1971) 1 W.L.R. 803 (C.A.), says:-

"LORD DENNING MR made the following statement: Not only may the court set aside an order made ex parte, but where leave is given ex parte it is always within the inherent jurisdiction of the court to revoke that leave if it feels that it gave its original leave under a misapprehension upon new matters being drawn to its attention." Order 32 Rule 6 of the Rules of the High Court 1980 of Malaysia and of the R.S.C. 1965 of England state: "The Court may set aside an order made ex parte." There was no such express rule in the Rules of the Supreme Court 1957 of the Federation of Malaya which were in force in the Federation of Malaya and in West

the 31<sup>st</sup> May,  
Malaya from 1958 till ~~1980~~ 1980 or in the R.S.C. 1883 of  
England. But the Supreme Court Practice 1979 Volume 1  
of England states in paragraph 32/1-6/11 at page 520  
in a commentary on the said Order 32 Rule 6: "Rule 6,  
supra, embodies the fundamental rule of practice that  
a party affected by an ex parte order may apply to the  
Court to discharge it, inasmuch as he has not had an  
opportunity of being heard (see per Cohen, L.J. in  
Boyle v. Sacker (1888) 39 Ch. D.249, 251; H.M.S. Archer  
(1919) P.1.4). Even though there was no rule expressly  
in the R.S.C. 1957 of Malaya corresponding to the  
present Order 32 Rule 6, yet as stated by Lord Denning  
in the above-quoted Practice Note it is part of the  
inherent jurisdiction of the Court.

38. It is respectfully submitted that the learned Chief  
Justice erred in holding at page 119 lines 51-55:  
"In all the circumstances of the case I do not think  
I can agree with the learned Judge's view that the  
Attorney's application was not made in good faith."  
The Attorney referred to in the passage was Ananda.  
In the inter partes proceedings before the High Court

there were not only affidavits but also oral evidence of Ananda and Felixia. The High Court Judge had the advantage of seeing and hearing those witnesses and forming his own firsthand evaluation of them which advantage the Federal Court did not have. It is a question of fact essentially for the trial judge to decide whether Ananda was acting bona fide in making the application in the said Originating Summons dated 11.11.1974 in the name of J.J. David. It is respectfully submitted that the trial judge's finding of fact should not be set aside by an appellate court save in exceptional circumstances and this case has no exceptional circumstances which would justify an appellate court <sup>in</sup> ~~to~~ reversing the finding of fact by the trial judge. The Appellants will rely upon the case of Chow Yee Wah & Anor. v. Choo Ah Pat (1978) 2 M.L.J. 41 (P.C.) Watt or Thomas v. Thomas (1947) A.C. 484 (P.C.), Muthusamy v. Ang Nam Cheow (1979) 2 M.L.J. 271 (P.C.) and Ng Mee Yong and Others v. Letchumanan s/o Velayutham (1980) A.C. 331 (P.C.).



39. The Appellants submit that the evaluation of the affidavit evidence and the oral evidence by Ajaib Singh, J. was justified and is not manifestly wrong and that there is no ground for an appellate court to interfere with the way in which his discretion was exercised to set aside inter partes on 8.1.1976 his ex parte order of 25.11.1974 and thus to refuse the permission required by Section 60 (4) of the Probate and Administration Act 1959 for the administrator to transfer by sale <sup>the said land</sup> ~~any immovable property~~.
40. The first two sentences of the quotation by the learned Chief Justice from the judgment of Ajaib Singh J. at page 116 of the Record read (after substituting the word "through" for the word "thought" which is a misprint in the P.G. Record at page 116 line 6):- "I was satisfied from the evidence before me that the applicant through his attorney had failed to bring to the notice of the court all the material and relevant facts. The present attorney ought to have known through his principal that a prior offer for the sale of land existed but this fact was not disclosed to the court." It is

respectfully submitted that this is plainly right having regard to Section 182 of the Contracts Act 1950 and illustration (a) thereto. That Act was revised as Act 136 of the Laws of Malaysia with effect from 1st July 1974 being previously called the Contracts (Malay States) Ordinance No.14 of 1950. The said Section 182 and illustration (a) thereto read as follows:-

"182. Any notice given to or information obtained by the agent provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

#### ILLUSTRATIONS

(a) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set-off a debt owing to him from C against the price of the goods."

41. Having regard to the said Section 182 and illustration (a) thereto, it is submitted that the knowledge of Nahappan of his dealings as attorney of J.J. David in respect of the said land with Gan and Bee Chuan should be imputed to J.J. David and he should have brought these dealings to the knowledge of Ananda when J.J. David caused Ananda to institute the ex parte Originating Summons. [Nahappan was a Barrister-at-law and was for many years a practising advocate and solicitor of the High Court in Malaya till he became a Deputy Minister and subsequently a Minister in the Government of Malaysia] Nahappan would have had no personal interest in not bringing to the knowledge of his principal J.J. David the dealings of himself (Nahappan) with Gan and Bee Chuan in respect of the said land which are revealed by the letters at pages 24-26 of the Record. It was his duty to have brought those dealings to the knowledge of his principal <sup>J.J. David</sup> ~~the instant Third Respondent~~ and it is submitted that it may be legitimately inferred that he did so. Most of the sections of the Contracts Act 1950 in Malaysia are a verbatim copy of sections of the Indian Contracts Act 1872. Section 182 of the Contracts

Act 1950 and illustration (a) thereto are the same as section 229 of the Indian Contract Act 1872 and illustration (a) thereto. While referring, inter alia, to the said section 229 the Privy Council held in the judgment delivered by Lord Davey in Raja Rampal Singh v. Balbhadar Singh, (1902) L.R. 29 Indian Appeals 203, in the middle of page 212: "It is not a mere question of constructive notice or inference of fact, but a rule of law which imputes the knowledge of the agent to the principal ....."

42. The learned trial judge who saw and heard Ananda in the witness box held: "With regard to the beneficiaries also I came to the conclusion that the attorney made no real attempt to locate all the beneficiaries to the estate ..." It is respectfully submitted that the relevance of tracing the beneficiaries really lay in tracing the beneficiaries resident in Malaysia. The beneficiaries resident in Malaysia would be in a far better position to ascertain the real value of the land and place it before the court and even to get bidders with higher offers if the Malaysian beneficiaries knew that land belonging to the estate was up for sale.

It was a Malaysian resident, Ananda, who made the application in the Originating Summons in the name of J.J. David. All the letters of consent that were produced were from beneficiaries resident in Sri Lanka: they would not find it easy to ascertain the value of land in Malaysia or to get bidders with higher offers. It is especially in that context that it would have been proper to have traced the beneficiaries resident in Malaysia and served the Originating Summons on them.

43. 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)

REASONS

1. BECAUSE the smallness of the interest of the Third Appellant, Felixia, was irrelevant;
2. BECAUSE it was not open to J.J. David to act personally or by any attorney other than Nahappan in the administration of the deceased's estate, having regard to the terms of the Letters of

Administration with Will Annexed as unamended dated the 15th October, 1973;

3. BECAUSE, if it is correct that J.J. David was obliged to act only by his attorney Nahappan, in the administration of the deceased's estate, the High Court in Malaya at Seremban was bound to dismiss the Originating Summons No. 79 of 1974;
4. BECAUSE Ng Lit Cheng was in no better position than as one of two competing and intending purchasers both of whom had entered into contracts, whether conditional or contingent, with attorneys of J.J. David;
5. BECAUSE the Order dated the 25th November, 1974 was made ex parte and was thus properly open to challenge by any person affected thereby;
6. BECAUSE there was no ground upon which the Federal Court, as an appellate court, could properly interfere with the Order dated the 8th January 1976.

*Stuart M. McKinnon*

STUART McKINNON, Q.C.

*20<sup>th</sup> November, 1981*

IN THE PRIVY COUNCIL

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ON APPEAL FROM THE FEDERAL COURT  
OF MALAYSIA

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BETWEEN:

1. GAN KHAY BENG
2. BEE CHUAN RUBBER FACTORY SDN BHD.
3. FELIXIA

and

1. NG LIT CHENG
2. E.P.E. ANANDA
3. JOSEPH JACOB DAVID

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Draft/

SUPPLEMENTAL CASE FOR THE  
APPELLANTS

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*Settled.  
Frank H. McKinnon  
20th November, 1981*

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