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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

KIM GUAN AND COMPANY
SENDIRIAN BERHAD

Appellant
(Plaintiff)

- and -

YONG NYEE FAN & SONS
SENDIRIAN BERHAD

Respondent
(Defendant)

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CASE FOR THE APPELLANTS

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1. This is an appeal from a judgment of the Federal Court of Malaysia holden at Ipoh dated the 15th November 1978 allowing the Respondents' appeal from a judgment in favour of the Appellants dated the 14th December 1976 of the High Court at Ipoh (Datuk Hashim Yeop A. Sani J) declaring that the Respondents hold an undivided 19/56ths share in land at 26 Hugh Low Street, Ipoh, in trust for the Appellants and declaring that the remaining 37/56ths share is held by the Respondents in trust for the Appellants subject to the payment to the Respondents of a sum of 45,000 dollars and ordering the Respondents to transfer the whole of the property to the Appellants free from encumbrances on payment to the Respondents of the sum of 45,000 dollars.

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2. The Appellants began as a partnership business dealing in textiles carried on under the name or style of Kim Guan & Co. at 65 Hugh Low Street, Ipoh.

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On 12th February 1955 the partnership was converted into a limited company incorporated under the name of Kim Guan & Co. Sendirian Berhad (namely the Appellants) having its registered office at 26, Hugh Low Street.

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The first directors of the Appellants were Yap Fook Sen

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(Yap), Tan Phang Nam (Tan) and Yong Nyee Fan who died in 1960 (the late Yong). Some time in 1954 Yap, Tan and the late Yong became interested in the said property 26, Hugh Low Street (the house) which was then occupied by Chop Tong and Chin Woh as tenants.

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The house was purchased on 28th October 1954 for the sum of 35,000 dollars in the name of the Respondents and on or before the same date Yap and Tan paid 19,000 dollars to Chop Tong and Chin Woh for possession (known as tea money), on behalf of the new company (the Appellants) not yet formed and thereafter the house was occupied by the Appellants after its incorporation as aforesaid

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3. The Appellants allege that the arrangements for the purchase of the house made in 1954 between Yap, Tan and the late Yong were :

(a) the said partnership was to be converted into a new company (the Appellants) the promoters of which were to be and were Yap, Tan and the late Yong.

(b) The late Yong would pay the purchase price of 35,000 dollars for the house on behalf of the new company and Yap and Tan would pay the said sum of 19,000 dollars tea money similarly on behalf of the new company.

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(c) The house would be held upon trust for the new company.

(d) The late Yong and his nominees were to be allotted 99,000 dollars out of the share capital of 299,000 dollars in the new company.

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Pursuant to such arrangements Yap and Tan duly paid the tea money to the tenants aforesaid and obtained vacant possession of the house and the house was duly purchased for the sum of 35,000 dollars on the 28th October 1954 as aforementioned and the company was duly formed and the shares allotted as aforesaid on the 25th February 1955.

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In the event Yap and Tan discovered for the first time on the 15th February 1955 that the house had been purchased in the name of the Respondents when the late Yong presented a bill for rent from the Respondents in the form of a receipt. The Respondents were a company controlled by the late Yong and his family.

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to the Appellants free from all encumbrances on payment to the Respondents of the sum of 45, 000 dollars

4 together with ancillary relief.

7. The action came on for hearing in the High Court at Ipoh before Datuk Hashim Yeop A. Sani J in October 1976 and the Learned Judge gave judgment on the 14th December 1976. He first of all set out the history of the claim chronologically and referred to the classes of documents inconsistent with the evidence on behalf of the Appellants in detail including the receipts for rent given by the Respondents to the Appellants for what the Appellants alleged was interest on the sum outstanding for the house.

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In order to reconcile the oral evidence with the documentary evidence the Learned Judge then made findings on the credibility of the witnesses concerned and concluded that the evidence given on behalf of the Appellants seemed to him more probable.

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In the course of so doing the Learned Judge:

(i) quoted a passage from the evidence of Yap in which he stated, inter alia, that Yong had told him he was a court interpreter before, he was also c. c. in a legal firm (from which it is apparent that Yong spoke English fluently);

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(ii) stated that Yong was a member of the State legislature and therefore must have been highly regarded by members of his community and in fact in the words of Yap, Yong was a "leader" and "adviser" to them;

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(iii) found that Yap and Tan did not understand English and although the proceedings of the directors' meetings of the Appellants during the material times must therefore have been in the Hakka language, the Minutes were recorded in English by the company secretary, Yong Toong Liew, a daughter of Yong;

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(iv) stated that it could be seen from the very beginning right up to the time of his death that Yong was a dominant figure in the affairs of the Appellants, and apparently not only dominant in the affairs of the Appellants but also in the affairs of the family

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10 company, the Respondents. Yong Su Hian himself said that his father "was the moving spirit" although he disagreed that he continued to be so after the father ceased to be a director. Evidence adduced would indicate that Yong exercised considerable influence in the management of the Respondents until he died. It was an admitted fact that most, if not all, the shares of the Respondents were in reality paid for by Yong on behalf of the close members of his family including Yong Su Hian his son, and Yong Toong Liew. his daughter.

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On this basis the Learned Judge found that the Respondents had acquired the house as a constructive trustee. After considering and rejecting the Respondents' plea of laches the Learned Judge then found :

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20 (a) Yap, Tan and the late Yong had in fact agreed between them prior to the formation of the Appellants that the following expenditure should be made on behalf of the proposed company, that is to say, the late Yong to pay first for the purchase of the house in the sum of 35, 000 dollars and Yap and Tan to pay to the tenant of the premises for vacant possession 19, 000 dollars. It was agreed between the parties concerned that in addition to the purchase price of 35, 000 dollars a further sum of a round figure of 2, 000 dollars was to be added as expenditure incidental to the purchase, also to be regarded as paid on behalf of the proposed company and these payments were in fact made.

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30 (b) Some time between the directors' meeting of the Appellants held on 28th January 1957 and the directors meeting held on 5th February 1957 the parties concerned also mutually agreed that the sum of 37, 000 dollars be increased to 45, 000 dollars following the increase in the value of the house.

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(c) The increase from 45, 000 dollars to 70, 000 dollars proposed by the said Yong Su Hian in 1961 was not agreed to by the other parties concerned.

40 3. Based upon the said findings set out in the preceding paragraph the Learned Judge then allowed the Appellants' case and made the following orders:

(1) it was thereby declared that the Respondents held

RECORD

an undivided 19/56ths share in the house in trust for the Appellants;

(2) it was thereby also declared that the Respondents held the remaining undivided 37/56ths in the house in trust for the Appellants subject to the payment by the Appellants to the Respondents of 45,000 dollars;

(3) it was thereby ordered that the Respondents do transfer the whole of the house to the Appellants free from all encumbrances upon payment of the said 45,000 dollars;

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(4) the Respondents' counterclaim was thereby dismissed;

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(5) Costs of the Appellants.

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9. By a Notice of Appeal dated the 10th January 1977 the Respondents appealed to the Federal Court in Malaya at Kuala Lumpur. By an order of the Federal Court of Malaysia holden at Ipoh dated the 14th February 1978 the Respondents were given leave to add further grounds of appeal. The appeal came before the Federal Court of Malaysia holden at Ipoh before Chang Min Tat and Syed Othman F.J.J. and Eusoffe Abdoolcader J. who gave judgment of the 15th November 1978.

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10. The judgment of the Federal Court was given by Chang Min Tat F.J. who after reciting the facts including the two Minutes of the Appellants which constitute the 1957 settlement turned to the oral evidence.

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The court then said, inter alia:

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(a) the claim of a trust was based on the oral evidence entirely of Yap and Tan;

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(b) all the documentary evidence from the absence of any mention by the Appellants or from the positive assertions by the Respondents was against a trust;

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(c) the approach of the trial judge to the evidence was not right in the somewhat special circumstances of the case;

(d) whilst hesitating from differing with the trial judge's findings of fact it was not a matter of credibility but

RECORD

- of inferences to be drawn from the evidence; 82 1 4
- (e) even on an ordinary judicial assessment of evidence no trust was established where none was anywhere shown to exist; 82 1 13
- (f) at the time of the alleged promise in 1954 by the late Yong, he was neither a director nor a shareholder in the Respondents; 83 1 43
- (g) the trial judge apparently considered the said Yong Su Hian as not a witness of truth and his evidence was inconsistent, but it is obvious that the Appellants stood to succeed or fall by their own evidence and by such evidence by way of admissions or otherwise from the other side that they could get and they could not succeed merely on the defect of the said Yong Su Hian as a witness or on his default and that of his other witnesses. 85 1 40
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- And the court allowed the appeal with costs there and below.
11. The Appellants respectfully submit that the Federal Court erred in allowing the appeal in that :
- (a) the arrangements found in fact by the trial judge to have subsisted between Yap, Tan and the late Yong concerning the formation of the new company (the Appellants) and the acquisition of the house on behalf of the Appellants was capable in law of forming a constructive trust binding upon the Respondents for whom the late Yong procured the benefit of the contract on the footing that it would be unconscionable in the circumstances to allow the holder of the legal estate to retain the beneficial interest. 56 1 40
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- (b) The bases of fact on which such constructive trust subsisted, namely the arrangements between Yap, Tan and the late Yong in 1954 and 1955. are not "inferences" to be drawn from the evidence, but the findings of fact of the trial judge who had heard the oral evidence and was best able to judge its weight and merit.
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- (c) Whilst the late Yong was not a director or shareholder of the Respondents in 1954 the company was incorporated in his name, he was a director and shareholder from its incorporation in 1952 until some time after 12th January 1953 and before 30th
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November 1954, the members at all material times included members of his family. for instance in 1952 all the shareholders except two were members of his family, and he was able to cause or procure the purchase of the house by the Respondents on the 28th October 1954.

(d) They failed to appreciate that the relationship between Yap, Tan and the late Yong after the agreement to form the Appellants and prior to its formation was that of promoters having a fiduciary position to the new company. Accordingly, by procuring the purchase of the house in the name of the Respondents, with whom he had been and still was associated, contrary to the agreement between the promoters, the late Yong was in breach of that fiduciary relationship and the Respondents were created constructive trustees of the house for the Appellants. 10

Exhibit 10
(1) page 15

(e) Alternatively they failed to appreciate that by Article 88 of the Articles of Association of the Appellants it was declared that the nature of the interest of a director contrary to the company must be disclosed by him at the meeting of the directors at which the contract or arrangement is first taken into consideration if this interest then exists or in any other case at the first meeting of the directors after the acquisition of his interest. Nowhere in the Minutes of the Appellants following the incorporation is any such disclosure noted of the beneficial interest of the Respondents in the house procured for it by the late Yong with the result that the house is impressed with trusts in favour of the Appellants. 20 30

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(f) They found that there was an offer and acceptance for the sale to and purchase by the Appellants to the Respondents of the house for 45,000 dollars recorded in a Minute of the Appellants of 11th March 1970 completion of which was to be deferred at the convenience of the Respondents as is evidenced by a Minute of the Appellants dated 28th July 1957 but failed to appreciate that the Appellants are thereby entitled to a transfer of the house from the Respondents at the said price. 40

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12. On the 9th July 1979 the Federal Court gave the Appellants final leave to appeal to His Majesty the Yang di-Pertuan Agong.

13. The Appellants respectfully submit that the judgement of the Federal Court was wrong and ought to be reversed, and that this appeal ought to be allowed with costs, for the following (among other)

R E A S O N S

1. BECAUSE the Federal Court wrongly concluded that in law the arrangements between Yap, Tan and the late Yong were incapable of constituting a constructive trust binding upon the Respondents.
- 10 2. BECAUSE the trial judge heard the oral evidence and was best able to assess the value of the same but the Federal Court declined to accept his findings of fact.
3. BECAUSE the Federal Court failed to appreciate that Yap, Tan and the late Yong were prior to its incorporation promoters of the Appellants having a fiduciary duty to the Appellants but the late Yong in breach thereof procured a benefit, namely the purchase of the house, for the Respondents, his own and his family company, without disclosing the same.
- 20 4. BECAUSE the Federal Court failed to appreciate that the said Yong as a director of the Appellants on its incorporation and following the purchase of the house by the Respondents but in breach of Article 88 of the Articles of Association of the Appellants failed to disclose such interest at any directors' meeting of the Appellants.
- 30 5. BECAUSE whilst the Federal Court expressly noted the offer and acceptance between the Appellants and Respondents for the sale and purchase of the house for 45,000 dollars in March 1957 (the 1957 settlement) completion whereof was to be postponed at the Respondents' convenience, they failed to appreciate that such contract remained and remains in force capable of performance by the transfer from the Respondents to the Appellants of the same for the said sum in accordance with paragraph C of the prayer for relief of the Statement of Claim herein.
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~~SIR CHARLES FLETCHER COOKE, Q. C.~~

T. Jock Craven.

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SENDIRIAN BERHAD (Plaintiff)

and -

YONG NYEE FAN & SONS Respondent
SENDIRIAN BERHAD (Defendant)

CASE FOR THE APPELLANTS

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