

4/84

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA (APPELLATE
JURISDICTION)

B E T W E E N :

PANG CHOON KONG Appellant (Defendant)

- AND -

10 (1) CHEW TENG CHEONG
(2) LOH KIAN TEE Respondents (Plaintiffs)

CASE FOR THE RESPONDENTS

RECORD

1. In this case the following expressions have the following meanings:

"the Agreement Area" has the meaning given in paragraph 6 below

"the 1966 Agreement" means the agreement dated 1st October 1966 made between (1) the State Government and (2) the Thirty Licensees 79

20 "the Agency Agreement" means the agreement dated 29th March 1973 made between (1) Pang (2) Chang and (3) Lim 94

"Au" means Au Ah Wah

"Bertapak" means the company Syarikat Bertapak Sdn. Bhd.

"Chang" means Chang Lun Yuan

"the Commission Agreement" means the agreement dated 31st March 1973 made between (1) Pang and (2) the Plaintiffs

30 "the 18000 acres" has the meaning given in paragraph 8 below

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	"exploitation licences" has the meaning given in paragraph 6 (i) below	
	"the Forest Department" means the Forest Department of the State Government	
	"Hayati" means the company Syarikat Hayati Sdn. Bhd.	
	"Lim" means Lim Chung Hai	
	"Lin" means the first plaintiff Lin Wyen Pang	
114, 122 and 130	"the May 1974 Agreement" means the 3 agreements mentioned in paragraph 19 below	10
106	"the November 1973 Agreement" means the agreement dated 10th November 1973 made between (1) the State Government and (2) the Thirty Licensees	
	"Pang" means the defendant Pang Choon Kong (the Appellant in this Appeal)	
100	"the Pang September Agreement" means the agreement dated 7th September 1973 made between (1) Pang and Chang and (2) Au.	20
	"the Plaintiffs" means Lin and the Respondents	
104, 115 and 112	"the Rescission Agreement" means the agreement between (1) Au and (2) Pang dated 7th September 1973 and mentioned in paragraph 16(1) below.	
	"the Respondents" means the Plaintiffs Chew Teng Cheong and Loh Kian Tee (but does not include the Plaintiff Lin)	
90	"the Sale Agreement" means the agreement dated 20th March 1973 made between (1) Au and (2) Pang.	30
	"Sastiva" means the company Syarikat Sastiva Bhara Sdn. Bhd.	
	"the September Agreements" means the Rescission Agreement, the Pang September Agreement, the Tan September Agreement and the 12th September Agreement	
	"the State Government" means the Government of the State of Pahang	40
	"Tan" means Tan Seng Eng (also known as Tan Chong Chu)	

"the Thirty Licensees" means those persons who RECORD
jointly entered into the 1966 Agreement with
the State Government (and whose names appear in
Appendix A to that agreement)

"the Three Companies" means Bertapak, Hyati and 86
Sastiva

10 "the 12th September Agreement" means the 104
agreement dated 12th September 1973 made
between (1) Ten and (2) Pang and Chang
(mentioned in paragraph 17 below)

"the Tan September Agreement" means the 102
agreement dated 7th September 1973 made between
(1) Tan and (2) Au

20 2. This is an Appeal from an Order dated 8th
February 1981 of the Federal Court of Malaysia
(Raja Azlan Shah C.J., Abdul Hamid F.J. and Mohd.
Yusoff bin Mohamed J.) allowing an appeal from the
dismissal by Syed Othman J. on 31st December 1979
of the Plaintiffs' claim for \$900,000, costs and
further or other relief.

3. The Appeal to the Federal Court was brought by
Chew Teng Cheong and Loh Kian Tee who are two only
of the three Plaintiffs in the action (the third
Plaintiff being Lin Wyen Pang); those two Plaintiffs
are accordingly the only Respondents to this Appeal.
There is only one Defendant to the action, Pang
Choon Kong, who was the respondent to the Appeal
to the Federal Court and is the Appellant in this
Appeal.

30 4. The issue in this Appeal is whether or not the
Respondents are entitled to payment of \$900,000
from the Appellant Pang under the Commission
Agreement and in particular whether or not there
was fulfilment of the condition upon which that
\$900,000 was payable under the Commission Agreement.

Events up to 31st March 1973: the 1966 Agreement;
the Sale Agreement: the Commission Agreement

5. The matters in paragraphs 6 to 11 below are
common ground for the purposes of this Appeal.

40 6. By the 1966 Agreement the State Government
agreed to permit the Thirty Licensees to work 79
24,000 acres of forest (therein and hereinafter
called "the Agreement Area" for the purpose of
felling, logging and removing timber. The
following provisions of the 1966 Agreement are
particularly material:

(i) The exploitation of the rights granted to the

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Thirty Licensees could only be done pursuant to successive licences opening up areas of forest within the Agreement Area and issued by the State Forest Officer under the Forest Rules 1935: clauses 2 & 3. (Licences of this type are hereinafter called "exploitation licences").

(ii) The area within the Agreement Area to be opened up annually for exploitation was to be not less than 1,000 acres of productive forest: clause 2. 10

(iii) The Thirty Licensees were not to assign, sub-let, or transfer the whole or any part of their rights under the 1966 Agreement to any other person whatsoever without first obtaining the written consent of the Menteri Besar on behalf of the State Government: clause 16.

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11.24-6

7. By March 1973 6,000 acres of the Agreement Area had been cleared pursuant to exploitation licenses. 20

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8. The Sale Agreement was made on 20th March 1973 between (1) Au and (2) Pang. It recited that Au had the rights over 18,000 acres of forest land ("the 18,000 acres") for the purpose of logging. The 18,000 acres were the unexploited part of the Agreement Area remaining after exploitation of 6,000 acres as mentioned in paragraph 7 above. The Sale Agreement recited further that Pang was desirous of acquiring all the rights from Au in respect of the logging rights over the 18,000 acres. When the Sale Agreement was made Au did not own the said rights over the 18,000 acres. None of those rights had ever been assigned, sub-let or transferred by the Thirty Licensees or any of them. As the Trial Judge found, these facts were known to all concerned. 30

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11.29-39

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9. The Sale Agreement nevertheless provided (inter alia) as follows: 40

(i) Au agreed to transfer all his rights (sic) to Pang on the terms of the Sale Agreement: clause 1.

(ii) Pang agreed to pay \$1,200,000 to stakeholders for (sic) Au of which \$120,000 was to be and was in fact paid on the signature of the Sale Agreement: clause 2.

- (iii) Au agreed to form a limited company for Pang and after such company had been duly registered Au should endeavour to obtain the approval of the State Government and the consent of the Thirty Licensees to enter into an agreement in the name of the company and the State Government so that the company itself should have the sole right over the 18,000 acres: clauses 3 and 4.
- 10 (iv) The Thirty Licensees should have one share each in the said company and Au should obtain the transfer of all such shares to the name of Pang or his nominees. The consideration for such transfer was to be paid by Pang to Au on the signing of the transfers by the Thirty Licensees: clause 5. 91
- 20 (v) The said consideration should be the sum of \$1,200,000 (less the said \$120,000 paid as mentioned in (ii) above) and was expressed to be provided by Pang to Au for the purpose of paying off the Thirty Licensees for the transfer of their respective shares as aforesaid: clause 6.
- 30 (vi) Pang (and the company, though it was not a party to the Sale Agreement and was in fact not yet in existence) agreed or were expressed to agree to pay to Au \$80,000 for every exploitation licence of 1,000 acres issued by the Forest Department from time to time: clause 7.
- (vii) Au agreed and undertook to obtain the approval of the State Government and the consent of the Thirty Licensees to enter into an agreement as mentioned in Clause 4 of the Sale Agreement (see sub-paragraph 9 (iii) above) within a period of three months: clause 10. 92
- 40 (viii) If Au was unable to obtain the approval of the State Government and the consent of the Thirty Licensees to enter into the said agreement within the specified period of three months Au was to return forthwith the sum of \$120,000 (less \$5,000 as expenses): clause 11. 92
- 50 10. The Agency Agreement was dated 29th March 1973 and made between (1) Pang (2) Chang and (3) Lim. It recited Pang's having entered into the Sale Agreement and the Commission Agreement (though the Commission Agreement bears a later date than the Agency Agreement) and that Pang, Chang and Lim were jointly responsible for any liabilities and benefits under the Sale Agreement and the Commission Agreement. The operative parts then made provision 94

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(inter alia) for the division between Pang, Chang and Lim of the outgoings and profits in relation to the Sale Agreement and the Commission Agreement.

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11. The Commission Agreement was made on 31st March 1973 between (1) Pang and (2) the Plaintiffs. It recited: Pang's having entered into the Sale Agreement with Au; that the plaintiffs were responsible for the securing of the subject matter of the Sale Agreement; and that the plaintiffs had agreed to assign directly and allow Pang to enter into the Sale Agreement with Au and to take the benefit of the 18,000 acres. The operative parts of the Commission Agreement were then as follows:

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1. In consideration of the Second, Third and Fourth Parties relinquishing the rights to the 18,000 acres of forest land the subject matter of the said contract between the First Party and Au Ah Wah dated 20th day of March, 1973 the First Party hereby covenants with the Second, Third and Fourth Parties as follows:

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(a) to pay the sum of Dollars Fifty (\$50.00) per acre on the said forest land of 18,000 acres that is:

Dollars Nine hundred thousand (\$900,000.00) to the Second, Third and Fourth Parties in equal shares upon the performance of the said contract between Au Ah Wah and Pang Choon Kong that is to say upon payment of the entire consideration of \$1.2 million to Au Ah Wah subject to the following terms;

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(b) to pay the Second, Third and Fourth Parties the sum of Dollars Five Hundred and Forty thousand (\$540,000/-) as aforesaid within two (2) weeks on the performance of the contract with Au Ah Wah; provided that the licence to fell timber for the first thousand acres be issued by the relevant Authorities;

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(c) to pay the Second, Third and Fourth Parties the sum of Dollars Three hundred and Sixty thousand (\$360,000/-) within six (6) months after the first payment of the Dollars Five hundred and Forty thousand (\$540,000.00) as aforesaid and provided always that the licence to fell timber on the first thousand acres shall be granted pursuant to the said contract between the First Party and Au Ah Wah and the First Party shall issue a post-dated cheque within six (6) months upon the

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first payment of the \$540,000.00 to the Second, RECORD
Third and Fourth Parties, in equal shares.

2. The Second, Third and Fourth Parties covenant with the First Party as follows:-

- (a) to receive the sum of Dollars Nine hundred thousand (\$900,000.00) upon the performance of the contract entered between the First Party and Au Ah Wah in terms as stipulated.

COMMON GROUND

10 12. The matters in paragraphs 13 to 19 below are common ground for the purpose of this appeal.

Events after 31st March 1973

13. The agreement contemplated by clause 4 of the Sale Agreement (see paragraph 9 (iii) above) was not made within the period of three months specified in clause 10 of the Sale Agreement (see paragraph 10(vii) above).

20 14. In a letter to Au dated 16th August 1973 Messrs. 99 Ong Ban Chai & Co the solicitors then acting for Pang referred to the Sale Agreement, stated that the period of three months as stipulated in clause 10 thereof had expired and stated that unless Au completed his part of the bargain within one week from the date of receipt of that letter, Pang would treat the Sale Agreement as lapsed and request Au to refund all the moneys received by him.

30 15. No such agreement as contemplated by clause 4 of the Sale Agreement was made within the further period laid down in the said letter dated 16th August 1973.

16. On 7th September 1973 the following written agreements were made:

- (1) The Rescission Agreement: An agreement between 104
(1) Au and (2) Pang which, apart from the date and signature of the parties, was as follows:

40 "We, the undersigned hereby agree that the agreement made between us on the 20th March, 1973 concerning the forest area in the Mukim of Bera wherein the sum of \$120,000 was mentioned therein be rescinded."

- (2) The Pang September Agreement: An agreement 100
between (1) Pang and Chang and (2) Au which recited the making of the Sale Agreement and the desire of Pang and Au to rescind the Sale Agreement and provided (inter alia) in the operative parts as follows:

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- (i) Au acknowledged receipt of \$120,000 from Pang pursuant to the Sale Agreement: clause 1.
- 101 (ii) Pang and Chang agreed to advance a further \$150,000 to Au on the signing of the Pang September Agreement: clause 2.
- (iii) Au agreed to pay the said \$150,000 as to \$10,000 each to fifteen of the Thirty Licensees (the said fifteen not being named): clause 3. 10
- 101 (iv) Pang and Chang agreed to pay a further \$825,000 to Au for the purpose of payment as to \$55,000 each to the said fifteen licensees after the first exploitation licence had been issued and the shares "of the company" (which was not defined and not mentioned elsewhere in the Pang September Agreement) had been transferred to Pang and Chang: clause 4. 20
- (v) If the State Government cancelled the Sale Agreement Au would refund \$135,000 to Pang and Chang, and the Pang September Agreement should lapse: clause 5a.
- (vi) Pang and Chang agreed to pay Au \$80,000 for every exploitation licence of 1,000 acres, with the sum of \$120,000 mentioned in clause 1 (see sub-paragraph (i) above) being treated as an advance payment towards this obligation: clause 6. 30
- 102 (3) The Tan September Agreement: An agreement between Tan Seng Eng (also known as Tan Chong Chu) and (2) Au which recited as follows:
- "WHEREAS: /Au/ is able to get the signatures of the 15 forest licensees of the 24,000 acres (6,000 acres of which have been worked out) of forest land in the Mukim of Bera, Temerloh for the rights to work the said forest and WHEREAS /Au/ is also able to obtain the signatures of the similar of forest licensees (sic)" 40
- The operative parts of the Tan September Agreement then provided (inter alia) as follows:
- 102 (i) In consideration of Pang and Chang agreeing to advance \$150,000 to Au /i.e. under the Pang September agreement/ Au undertook to pay the \$150,000 to 15 forest licensees at

the rate of \$10,000 each: clause 1. (This obligation duplicated Au's obligation under clause 3 of the Pang September Agreement).

10 (ii) In the event of Au failing to pay \$150,000 to the fifteen forest licensees Au undertook to refund the \$150,000 to Pang and Chang (which obligation duplicated an obligation of Au under clause 7 of the Pang September agreement). If Au failed to make such refund Tan was to pay such sum to Pang and Chang but recover the same amount from Au: clause 2. 103

(iii) Au agreed that the forest area of the said 15 forest licensees should be worked by Pang and Chang in any event: clause 3. 103

(iv) Clauses 4 and 5 stated as follows: 103

20 "4. Tan agrees and undertakes that the forest area of his 15 forest licensees shall likewise join up with the forest area of 15 forest licensees belonging to /Au/ provided that in the event of the Governmental Authorities allowing a split up, then /Tan/ shall be at liberty to work the forest area belonging to his 15 forest licensees but the forest area belonging to the 15 forest licences of /Au/ shall in any event be worked by /Pang and Chang/.

5. In the event that there is a split-up, then clause 2 shall not operate and /Tan/ shall be absolved from liability."

30 17. On 12th September 1973 a written agreement was made between (1) Tan and (2) Pang and Chang ("the 12th September Agreement") which recited that Tan had proposed to Pang and Chang to enter into the Pang September Agreement and that Pang and Chang had done so. The operative parts of the 12th September Agreement were as follows: 104

40 "In consideration of /Pang and Chang/ entering into an agreement with Au Ah Wah on 7th September, 1973 /i.e. the Pang September Agreement/ /Tan/ undertakes to pay the sum of \$150,000 only to /Pang and Chang/ in the event that /Au/ should fail to secure the necessary signatures of the application for a forest concession and/or fail to secure the approval of the relevant authorities for the forest licences; provided always that in the event that if there is a split-up of the entire forest concession into two or three parties /Tan/ shall then be absolved from any liability towards /Pang and Chang/ in any event."

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18. The November 1973 Agreement: An agreement dated 10th November 1973 made between (1) the State Government and (2) the Thirty Licensees by which (after recital of the 1966 Agreement - which was given the wrong date 1st August 1966 - and of the fact that 6,000 acres of the Agreement Area had already been felled, logged and removed and that the parties to the 1966 Agreement, who were the same as the parties to the November 1973 agreement, desired to terminate the 1966 Agreement subject to the terms and conditions thereafter mentioned) it was agreed (inter alia) as follows:

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(i) The 1966 Agreement should be terminated.

(ii) The State Government should enter into separate agreements with three companies Hayati, Bertapak and Sastiva after the termination of the 1966 Agreement for the purpose of felling and logging timber in the 18,000 acres and removing timber therefrom.

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114,112,
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19. The May 1974 Agreements: These three agreements were all dated 27th May 1974. One was made between (1) the State Government and (2) Hayati and related to 6,000 of the 18,000 acres; another was made between (1) the State Government and (2) Bertapak and related to 4,800 of the 18,000 acres; and the third was made between (1) the State Government and (2) Sastiva and related to 7,200 of the 18,000 acres. Except for the difference in parties and acreages the three agreements were in identical terms. Each recited (inter alia) the 1966 Agreement and then provided in clause 2 that the State Government should permit the company in question to work the acreage in question for the purpose of felling and logging timber therein and removing timber therefrom. Clause 3 provided that the area of forest to be opened annually by the State Government for exploitation should be not more than 1,000 acres for 1974 and 1975 and not more than 500 acres thereafter. Clause 15 provided that the licensee should not assign, lease, sub-let, sub-contract or transfer or otherwise dispose of the whole or any part of its rights under the agreement without prior written consent of the Menteri Besar of Pahang. (Each of the May 1974 Agreements also recited that the State Government agreed to enter into an agreement with the company in question in pursuance of clause 2 of the 1966 Agreement, defined as "the old agreement". The Respondents

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say that this recital indicated that the definition of the 1966 Agreement as "the old agreement" was an error and that the parties to the May 1974 Agreements obviously intended that recital and the definition "the old agreement" to relate to the November 1973 Agreement.)

The position by the end of 1974

10 20. The position by the 27th May 1974 was therefore that all the logging rights which had been the subject matter of the Sale Agreement had become vested in one or other of the Three Companies.

21. The Three Companies each obtained a first exploitation licence some time in 1974, according to the uncontradicted evidence of the P.W.3 the Deputy Director of Forestry, Pahang. 19

Judgment of Syed Othman J.

20 22. The learned judge gave judgment on the 31st December 1979. He first very briefly summarised the plaintiffs' claim and then mentioned the following points raised by way of defence: 15 51,11.13-34

(1) The logging rights did not belong to Au when the Sale Agreement was made, but belonged to Thirty Licensees. 51,11.38-39

(2) The Sale Agreement was conditional on Au obtaining the consent of the Thirty Licensees and the approval of the State Government, which Au failed to do. 51,11.40-43

(3) The Sale Agreement was bad in law as it conferred no rights on the defendant, Pang. 52,11.1-3

30 (4) Pang had not purchased the logging rights from Au. 52,11.5-6

(5) The Commission Agreement was made subject to the Sale Agreement being successfully implemented and a licence to fell timber (i.e. an exploitation licence) for 1,000 acres being granted by the authorities, and those two conditions had not been fulfilled. 52,11.6-11

(6) The Commission Agreement was bad in law. 52,11.11-13

40 23. The judgment of the learned judge then summarised the evidence in support of the plaintiffs' and the defendant's cases respectively. The learned judge next summarised the arguments for the plaintiffs and the defendant based on that evidence. 52,1.14-56 1.39 56,1.40-58 1.17

24. The learned judge reached the following conclusions:

(1) Au had no logging rights when he entered into the Sale Agreement. 60,11.22-30

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- 60,11.35-41 (2) Clause 5 of the Sale Agreement, which stipulated that the Thirty Licensees should have one share each in the company to be formed and that Au should obtain the transfer of all shares into the name of Pang or his nominees, was never performed.
- 61,11.3-16 (3) There was no evidence to show that the State Government would have transferred the logging rights to the plaintiffs in place of Au and even if he could have sold the rights Au could not have agreed to transfer such rights to the plaintiffs. 10
- 62,11.1-6 (4) No evidence had been adduced to show that Pang was in fact issued with an exploitation licence, but the evidence showed that the licences were issued to the three companies.
- 62,11.12-17 (5) The defendant did receive some benefit from an undisclosed indirect interest in the forest concession but not in the form of any assignment mentioned in the Commission Agreement and the plaintiffs played no part at all in that. 20
- 62,11.19-22 (6) He did not accept that Chang and Lim Chung Hai were nominees of the defendant (notwithstanding the Agency Agreement).
- 62,11.29-34 (7) He accepted the evidence of Au and Tan that the 12 licensees who formed Sastiva gave Tan a contract and that Au had no hand in the formation of Sastiva. 30
- 62,1.46-63,1.13 (8) Pang had to pay more than contemplated by the Sale Agreement and the Commission Agreement to obtain the interest in the forest concession which he did enjoy.
- 63,1.25-27 25. The learned Judge finally stated that for the foregoing reasons he could not see the plaintiffs could be entitled in law or equity to any commission.

Judgment of the Federal Court

- 68 26. On 8th February 1981 Raja Azlan Shah CJ delivered the judgment of the Federal Court. 40
- 70,1.27-29 27. The Federal Court said that it was clear that the claim of the Respondents depended on the proper construction to be given to the Commission Agreement. The Respondents say that that was entirely correct.

28. The Federal Court, after reciting clause 1 of the Commission Agreement, stated that as they read the Commission Agreement the payment of \$900,000 under that agreement was to be made in two stages and was dependent on:

70,1.34-71,1.52

(i) the transfer of Au's rights; and

71,11.45-46

(ii) the issue of a licence, the licence being absolutely necessary to give validity to the transfer as the original licence was personal to the holder and it was forbidden by law and by the licence itself to transfer assign or otherwise part with it to third parties.

71,11.46-52

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(In respect of (ii) the Federal Court had fallen into some confusion. Although it was correct that a licence for assignment of the logging rights was necessary (because of clause 16 of the 1966 Agreement) the licence on the issue of which the payment under the Commission Agreement was conditional was an exploitation licence for the first 1,000 acres. But this confusion does not affect the validity of the Federal Court's conclusions on the case.)

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29. The Federal Court considered the defence that Au had no rights to the timber land in question because they belonged to the Thirty Licensees.

72,11.5-8

The Federal Court concluded that the Sale Agreement was clearly for the transfer of the Thirty Licensees' interests, rights and titles to the

72,11.42-45

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land and that it had been represented that Au had the means of effecting the said transfer, if not of enforcing it. The Federal Court did not state in terms that they rejected this defence but by implication they must have done because they reversed the judgment below. The Respondents say that in rejecting the said defence the Federal Court was clearly right because the Sale Agreement itself (particularly clauses 4, 5, 6, 8, 10 and 11) made it unequivocally clear that the rights being sold were not actually vested in Au but were vested in and intended by the parties to the Sale Agreement to be transferred by the Thirty Licensees. The Sale Agreement involved a quite common feature of commercial property agreements, namely an agreement to sell by a party who at the time of the agreement is not (or not apparently) the owner of the property agreed to be sold.

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30. The Federal Court then considered the fact that no single company had been formed to which all the Thirty Licensees had transferred their logging rights (as clauses 3 and 4 of the Sale Agreement

73,1.11ff.

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had contemplated should be done). The Federal Court referred to dissensions among the licensees, the fact that in the words of Au twelve licensees had run out on him, the making of the Rescission Agreement and the making of the November 1973 Agreement.

73,1.11ff.

31. The Federal Court then considered in detail the formation of the Three Companies and the effect of the November 1973 Agreement and the May 1974 Agreement. They referred particularly to the following facts:

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73,11.30-34

(i) The sub-division of the whole 18,000 acres among the Three Companies.

73,11.34-38

(ii) That Au had been a witness for all Thirty Licensees' signatures to the November 1973 Agreement, which had been an agreement providing for the allocation of all thirty licences, specified by name of licensee, among the Three Companies.

73,11.46-49

The Federal Court then said that the question whether Pang had acquired any rights over the timber area (i.e. the 18,000 acres) had to be determined by an examination of the composition of the Three Companies. The Respondents submit that this was a correct and sensible approach, and one which the learned judge at first instance ought to have adopted.

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32. The Federal Court made the following observations upon the Three Companies:

74,11.15-20

(i) Bertapak and (ii) Hayarti - In each case the directors and shareholders included several persons with the same surnames as Pang and quite a few of them resided at his address.

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74,11.21-4

(iii) Sastiva - There was what the Federal Court regarded as a curious feature, namely that the directors resided at Pahang but the registered office was in Kuala Lumpur and it had a Chinese secretary. (The Respondents say that the Board should not lightly disregard the importance attached by the Federal Court to this point, bearing in mind the local knowledge and experience of the Federal Court).

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74,11.25-8

33. The Federal Court held that the only conclusion to be drawn from the documentary evidence was that Pang had obtained the logging rights in respect of the 10,800 acres of which Hayati and Bertapak had become the licensees by virtue of the May 1974 Agreements.

34. The same conclusion was reached by the Federal Court in relation to Sastiva, based on the following matters: 74,11.28-38

(i) The point referred to in paragraph 32 (iii) above.

(ii) Pang had admitted in his evidence that he had known that Tan had obtained the licences issued to Sastiva. 74,11.29-31
38,11.38-9

10 (iii) The evidence of the three September Agreements was to the effect that whatever benefits were obtained in the matter by Au and Tan were all passed over to Pang and another (by which the Federal Court must have meant Chang) through the instrumentality of Au. 74,11.31-8

20 35. Accordingly the Federal Court held that Au had effectively performed his contract with Pang and as provided for in the Commission Agreement the rights of the Respondents had accrued. That dealt with the first condition of payment by Pang to the Respondents under the Commission Agreement. The second condition was the issue of the first exploitation licence in respect of 1,000 acres. The Federal Court referred to the evidence of P.W.3, the deputy director of forestry that at the date of the hearing 10,000 of the 18,000 acres had been worked. The uncontradicted evidence of PW3 was also that the first such licences had been issued in 1974, one to each of the Three Companies. 74,11.39-46
74,11.49ff.

The Issues

30 36. The Respondents' case is that the following main issues arise on this Appeal:

(i) Was the Commission Agreement when made a valid and enforceable contract?

(ii) On the true construction of the Commission Agreement and the events which had happened, did the payments therein specified become due from Pang to the Plaintiffs?

Main issue 1:

40 Was the Commission Agreement when made a valid and enforceable contract? 97

37. The Respondents' case is as follows:

a) The only attack made by Pang on the initial validity and enforceability of the Commission Agreement was that it was bad in law as it

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conferred no rights on Pang. This attack was based on the averment that the Plaintiffs gave no consideration because they had no rights to relinquish.

8-9,11-13,
22,29,31,35

b) It is clear from the recitals and clause 1 in the Commission Agreement the Agency Agreement and the evidence of PW1, PW2, PW5 and Pang (DW1) himself that in March 1973 the matter proceeded as follows:

(i) The Commission Agreement put into formal and more detailed terms an agreement reached orally between the plaintiffs and Pang before the Sale Agreement was made.

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(ii) Though the agreed payment by Pang to the Plaintiffs of \$50 per acre was plainly intended primarily as commission for the introduction of Pang to Au by the Plaintiffs, part at least of the consideration given by the Plaintiffs was that they allowed Pang to enter into the Sale Agreement with Au to the exclusion of the Plaintiffs as purchasers or joint purchasers.

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(iii) The phrase "relinquishing their rights" in clause 1 of the Commission Agreement, when construed with reference to the circumstances in which the preceding oral agreement had been made (as in (i) above) was not intended or understood by the parties to mean that the Plaintiffs had any enforceable rights as against any other party in respect of the 18,000 acres. It merely meant that the Plaintiffs had agreed to step aside from the purchase of the logging rights and give up any attempt to participate themselves in such purchase.

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38. Accordingly there was good consideration for Pang's promise to pay \$900,000 under the Commission Agreement. That agreement was never subsequently rescinded or otherwise terminated, or varied.

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Main issue 2:

On the true construction of the Commission Agreement and in the events which have happened, did the payments therein specified become due from Pang to the Plaintiffs?

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39. The Commission Agreement specified two events which had to have occurred before any part of the \$900,000 became payable by Pang to the Plaintiffs:

(1) The performance of the Sale Agreement.

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(2) The issue by the relevant authorities of an exploitation licence for the first 1,000 acres.

40. The Respondents accept that if it is shown that either of those events did not occur this appeal must be allowed. The Respondents also say, however, that the precise requirements of those conditions, particularly condition (1), could be determined only upon a careful examination of all the evidence (and especially the multifarious and interlocking written agreements).

41. Performance of the Sale Agreement

The Respondents accept that the Sale Agreement was never actually performed precisely in accordance with its terms but was rescinded by the Recission Agreement on 7th September 1983. The Respondents' case on this point is as follows:

(A) On its true construction the Commission Agreement did not require, as a condition of payment of \$900,000, the literal performance of the Sale Agreement. For the satisfaction of that condition it was sufficient that Pang (together with Chang and any other parties on whose behalf Pang was also acting) should acquire the said rights either personally or through nominees or through one or more companies substantially on the same financial terms as under the Sale Agreement and in such a way that either: (a) the acquisition of the said rights by Pang was pursuant to arrangements which amounted in substance to a mere variation of the Sale Agreement; or (b) the Sale Agreement could itself be said to be the effective cause of his acquisition of the said rights. In advancing this interpretation of the Commission Agreement, the Respondents rely upon the following matters:

(i) The factual background to the Commission Agreement, and to the Sale Agreement to which it was linked, indicates that the basic intention of the parties to the Commission Agreement was that if Pang obtained the logging rights the Plaintiffs should be paid commission by Pang at the rate of \$50 acre.

(ii) The detailed terms of the Sale Agreement, such as the formation of a company and the three months time limit, were matters which, however appropriate to be included in the contractual arrangements between the buyer and the seller of the rights, could not commercially

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have been regarded as relevant to the entitlement of the Plaintiffs to their commission. (And the parties to the Sale Agreement must have been free to vary the terms thereof in matters of detail without the need to obtain the Plaintiffs' consent).

(iii) If Pang's liability to pay the Plaintiffs under the Commission Agreement could have been avoided merely by variation of the Sale Agreement, the Plaintiffs would have been hopelessly vulnerable to complete loss of their commission. In the absence of some compelling indication to the contrary, the Commission Agreement as a commercial agreement could not reasonably have been intended to have that effect. 10

(iv) Similarly to (iii), if the Plaintiffs' right to payment could have been destroyed by the simple expedient of rescinding and replacing the Sale Agreement when it would have been equally possible for Pang to achieve the same result by a variation, the Plaintiffs would also have been hopelessly vulnerable to loss of their whole commission. 20

(B) The arrangements made on 7th and 12th September 1973 by the Rescission Agreement, the Pang September Agreement, the Tan September Agreement and the 12th September Agreement could easily have been effected by Pang by way of variation of the Sale Agreement, since the Rescission Agreement and the Pang September Agreement were essentially made between the parties to the Sale Agreement, having regard to the terms of the Agency Agreement. In his oral evidence Pang stated that he and Chang were partners in the propped venture. 30

32,11.34-5

(C) The Pang September Agreement was therefore in effect a variation of the Sale Agreement. In particular, the only reasonable inference from the documentary and oral evidence is that after the September Agreements had been made it was still the intention of Pang (and Chang) and Au, as it was then also the intention of Tan, that Pang should acquire the logging rights of all Thirty Licensees in respect of the 18,000 acres. This inference is to be drawn from the fact that otherwise it is either impossible or at least very difficult to explain why Tan became a party to those arrangements. His own explanation is 40 50

47,49

unconvincing. If Tan needed Pang's co-operation, as Tan claimed in his own evidence, it would have been natural for Pang to have insisted that Tan at least used his best endeavours to enable Pang to take over the rights from all Thirty Licensees. In fact, clause 4 of the Tan September Agreement contemplated that in certain circumstances Pang would take over all those rights.

105,11.15-20

- 10 (D) Chang (who had been an associate or partner of Pang in this transaction) said in his evidence that the reason given by Pang for the Sale Agreement not being able to go on was that the period stipulated in the Sale Agreement had elapsed and there was a change in the purchase price. No other reason was reported by Chang having been given by Pang, and that reason is not convincing. Coupled with the fact that PW6 (Ong Ban Chai) had not been consulted about the preparation of the Pang September Agreement and with the matters in subparagraphs 42 (A), (B) and (C) above, the only reasonable inference is that the September Agreements had been deliberately designed by Pang as an attempt to break the link between Pang's purchase of logging rights and the Sale Agreement, thereby avoiding liability under the Commission Agreement. 27
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- 30 (E) Even if there was no such deliberate design by Pang, the fact that the new arrangements could have been effected by way of a variation of the Sale Agreement and did not involve an increase in the overall price for the acquisition of the rights of the Thirty Licencees, means that acquisition of those rights pursuant to the Pang September Agreement was effective performance of the original Sale Agreement for the purposes of the Commission Agreement.
- 40 (F) The extra payment of \$420,000 to Lam Chit Tong accepted by Syed Othman J as having been paid as described in Pang's evidence and regarded by the learned judge as a material point, is not relevant. The fact that it was necessary for Pang to make a payment to a third party entirely outside Pang's contractual arrangements with Au or any other person does not prevent there having been performance of the Sale Agreement for the purpose of the Commission Agreement. Such payment might have been necessary even if the Sale Agreement had never been rescinded and had been performed literally according to its terms. In those circumstances liability to the plaintiffs under the Commission Agreement would have been indisputable. 34 63
- 50

RECORD

61,1.40

42. The Respondents say that Syed Othman J. adopted a fundamentally wrong approach to the case and asked himself the wrong questions. He failed to appreciate that the essential question was whether the Sale Agreement had been substantially performed and was the effective cause of Pang's acquisition of the logging rights. He based his overall conclusion on the view that the Sale Agreement had been rescinded (which was not a crucial point, given that substantial rather than literal performance of that agreement was the key issue) and on the points summarised in paragraph 24 above, all of which were either bad in principle or not supported by a proper analysis of the evidence.

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43. The Federal Court, on the other hand, correctly identified the essential issues and proceeded correctly to analyse the evidence by reference to those issues. Such analysis included an exercise which the learned judge at first instance should have conducted, if he had properly directed himself and asked himself the right questions, namely a detailed examination of the documentary and other evidence relating to the Three Companies.

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44. In the light of the incorrect approach adopted by Syed Othman J., the Federal Court was entitled and indeed bound to review the whole of the evidence and substitute its own conclusions for those of the learned judge. The conclusions of the Federal Court were supported by the evidence and ought therefore to be upheld in full.

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45. On 7th September 1981 the Federal Court gave final leave to Pang to appeal to His Majesty the Yang di-Pertuan Agong against the whole of the decision of the Federal Court given on 8th February 1981.

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46. The Respondents submit that the judgment of the Federal Court was right, that the order of the Federal Court dated 8th February 1981 should be upheld in full and that this appeal ought to be dismissed with costs, for the following (among other) reasons:

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R E A S O N S

1. BECAUSE the Commission Agreement dated 31st March 1973 was and remained at all times perfectly valid in law.
2. BECAUSE on the true construction of the Commission Agreement and upon the evidence the events upon which the specified payments of \$900,000 fell due did happen.

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3. BECAUSE the learned judge erred in law in failing to appreciate that the essential question was whether the Sale Agreement had been substantially performed, not whether it had been literally performed.
- 10 4. BECAUSE he failed to identify the essential question as in 3 above, the learned judge erred in that he never properly considered whether the Sale Agreement was the effective cause of Pang's acquisition of the logging rights.
5. BECAUSE the Federal Court did adopt the correct approach in law, in that it asked itself whether the Sale Agreement had been substantially performed and had effectively caused Pang to acquire the logging rights.
- 20 6. BECAUSE the Federal Court, having correctly identified the legal issues, properly analysed the evidence by reference to those issues.
7. BECAUSE the Federal Court's conclusions were fully justified by the evidence.
8. BECAUSE the order of the Federal Court dated 8th February 1981 was right.

P.J. MILLETT

NICHOLAS STEWART

No.12 of 1982

IN THE JUDICIAL COMMITTEE OF THE PRIVY
COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

BETWEEN:-

PANG CHOON KONG Appellant (Defendant)

- AND -

(1) CHEW TENG CHEONG

(2) LOH KIAN TEE

Respondents
(Plaintiffs)

CASE FOR THE RESPONDENTS

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