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INTRODUCTION

The contribution of His Royal Highness Sultan Azlan Shah in the field of company law has not been extensive. The reason for this was the paucity of corporate litigation during His Royal Highness' tenure as a judge.

In certain of the cases the judicial observations and exposition of the law have significant implications for the future development of the law.[1] The main areas which had been the subject of His Royal Highness' judgments were:

[1]The decisions are excerpted below with accompanying notes highlighting its significance.

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Directors

(i) The authority and powers of a director to borrow money for the purposes of the company: *Sin Chai v Pahang Lin Siong Motor Co Ltd*[2]; (ii) The criminal liability of directors under sections 134 and 135 of the Companies Act, 1965: *Raja Nong Chik* v PP[3]; (iii) The position of directors in respect of holding interest in a rival company and the duty of disclosure: *Shanghai Hall Ltd* v *Chong Mun Foo & Ors*[4]; (iv) The proper election of directors at the Annual General Meeting of a company and the validity of the appointment in relation to section 128 of the Companies Act, 1965: *Solaippan & Ors* v *Lim Yoke Fan & Ors*[5].

Shares

(i) The transmission of shares from the deceased owner to his personal representative and the rectification of the share register: *In re LY Swee & Co Ltd*[6]; (ii) The rectification of the share register under section 162 of the Companies Act, 1965: *In re Len Chee Omnibus Co Ltd*[7]; (iii) Whether a company can take unilateral action in the rectification of the share register where there are serious issues in dispute: *Central Securities (Holdings) Bhd* v *Haron bin Mohd Zaid*[8].

The remaining two decisions included are on the winding-up of a company under the Companies Ordinance (*In re Fair Insurance Co Ltd*[9]) and on the creation of charges under section 80 of the Companies Ordinance and the relevant Land Code: *Zeno Ltd* v *Prefabricated Construction Co (Malaya) Ltd & Anor.*[10]

Sultan Azlan Shah's judicial approach in corporate cases display clarity of logic, a firm grasp of the essentials and an illimitable understanding of the interelationship of principles of law and norms of corporate practice. Two examples which demonstrate this are the cases of *Raja Nong Chik* v *PP*[11] and *Central Securities (Holdings) Bhd* v *Haron bin Mohd Zaid.*[12]

In *Raja Nong Chik* v *PP*[13] the opening remarks of the judgment are characteristic of a judge who holds the highest esteem of the purposes of the Law and its interelationship with morality:

> The commercial morality expected of company directors is too well-known to be reiterated. Directors are expected to observe a high standard of conduct in connection with dealings with their own shares ... Recognition of this requirement is given statutory recognition by section 135 of the Companies Act.

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[2](1966) 4 MC 65.
[3][1971] 1 MLJ 190.
[4][1967] 2 MLJ 254.
[5][1967] 2 MLJ 7.
[6][1968] 2 MLJ 104.
[7][1969] 2 MLJ 202.
[8][1979] 2 MLJ 114.
[9][1969] 2 MLJ 114.
[10][1967] 2 MLJ 104.
[11][1971] 1 MLJ 190.
[12][1979] 2 MLJ 244.
[13][1971] 1 MLJ 190.

The perspective taken in the above pronouncement is salubrious for its sensitivity of commercial morality. In the field of corporate law this sensitivity cannot be overstated and when judicially expressed has always been well-received by juristic opinion.[14]

His Royal Highness Sultan Azlan Shah did not encounter any difficulties when considering the legal issues in a complex corporate dispute. For example in *Central Securities (Holdings) Bhd* v *Haron bin Mohamed Zaid*[15] the variegated issues of civil procedure, rescission of a contract of sale of shares, the application of equitable and restitutionary doctrines together with statutory interpretation were unravelled in a masterful fashion which demonstrated judicial acumen not only in the realm of abstract law but also an understanding of the complex realities of corporate organisation.

The ability of a commercial law judge in the handling of issues of law and fact is of paramount importance in the fair adjudication of commercial disputes. Sultan Azlan Shah's ability as a judge in this perspective cannot be gainsaid. His Royal Highness's "premature" retirement from the highest judicial office in our land is indeed a signal loss to the healthy development of a corpus of judicial decisions in the sphere of corporate law and practice.

DECISIONS AND COMMENTS

DIRECTORS

(a) Disclosure of rival interest

Shanghai Hall Ltd

v

Chong Mun Foo & Ors

[1967] 1 MLJ 254 High Court, Kuala Lumpur

Cases referred to:-

(1) *Wenlock* v *Moloney* [1965] 1 WLR 1238 at 1243.

(2) *London and Mashonaland Exploration Co Ltd* v *New Mashonaland Exploration Co Ltd* [1891] WN 165.

RAJA AZLAN SHAH J: This is an application by the defendants to strike out the statement of claim under O 25r4. The principle to be applied is well established. If authority be needed for what may be considered as

[14]Compare Laskin J of the Supreme Court of Canada in *Canadian Aero Services Ltd* v *O'Malley* (1973) 40 DLR 3d 371. See Beck (1975) 53 Can Bar Rev. 771; Prentice 37 MLR 468.

axiomatic, I need only refer to the recent case of *Wenlock* v *Moloney*[1] where Danckwerts LJ said:

> Under the rule (i.e. O 25r4) it had to appear on the face of the plaintiff's pleading that the action could not succeed or was objectionable for some other reason. No evidence could be filed ... But, as the procedure was of a summary nature, the party was not to be deprived of his right to have his case tried by a proper trial unless the matter was clear.

The circumstances giving rise to the application are as follows. The plaintiffs are an incorporated company carrying on the business of a restaurant and bar in Kuala Lumpur. In September 1965, the three defendants, who were then the directors of the plaintiffs (the first defendant was also the managing director), promoted a rival company called Lu Kok Restaurant Ltd carrying on similar business on the mezzanine floor immediately below the plaintiffs. The plaintiffs now allege that the defendants had not disclosed the nature of their interests in the rival company and they accordingly contend that the defendants were by their conduct fraudulent and constituted a breach of a director's duty towards the plaintiffs.

The only question to be determined here is whether a director of a company is prohibited from becoming a director of a rival company. The case of *London and Mashonaland Exploration Co Ltd* v *New Mashonaland Exploration Co Ltd*[2] is in point. There it was held that in the absence of a prohibition appearing in the regulations of the company, a director is at liberty to become a director of a rival company. The paramount consideration in such a case as this is to consider whether the articles of association, which govern the arrangement of members *inter se,* contain any such prohibition. Article 94, which is the dominating provision for present purposes, is quite explicit and hardly requires discussion. Under that article, a director can hold office or place of profit under the company (of which he is a director) or under any other company in which the company is a shareholder. Secondly, a director can contract with the company as a vendor or a purchaser or otherwise and such contract or arrangement is not void. He is not liable to account in those circumstances. But the article stipulates that when such contract or arrangement is first considered at the directors' meeting, he must disclose the nature of his interest; in any other case at the first meeting of directors after the interest was acquired. If a director has already an interest in a contract or arrangement with the company he must make a disclosure at the first meeting of directors. In all those circumstances he has no right to vote for the simple reason that he is an interested party, but that prohibition may be suspended or released by a general meeting.

In my view the present facts as appearing in the statement of claim are not caught by the article (see paras 3,4 and 5). The defendants have not entered into a business contract or arrangement with the plaintiffs. Nor have they any interest in any contract or arrangement between the plaintiffs and the Lu Kok Restaurant.

It now remains to deal with the cause of action contained in

paragraph 7 of the claim. It reads:

> On or about July 1965 the first defendant in the capacity of managing director of the plaintiff deliberately induced the staff of the plaintiff including the cooks, waitresses and waiters to terminate their contracts of service with the plaintiff. As a result of the first defendant's inducement about 25 employees of the plaintiff resigned from the service. The defendants offered to re-employ those resigned at a higher scale of salary with the object to cause further loss and damages to the plaintiff.

It was said on behalf of defendant No1 that the pleading does not disclose any cause of action for, as it stands, the 25 employees of the plaintiffs "resigned from service". From that, counsel wants me to infer that there was a lawful termination of service, it being settled law that if the termination of service is in itself lawful, no liability could be imputed to defendant No 1. However, it is not within my province at this stage to enquire into that question. That has to be gone into by the trial judge after hearing evidence and drawing proper inferences from them. To my mind, paragraph 7 *supra* is unhappily worded. It is bad pleading. Nonetheless it discloses some cause of action, that is, procuring or inducing a breach of contract or interfering with contractual obligations. This is not a case of a servant leaving the plaintiffs' service but an exodus of twenty-five servants. There may be something in it. That is for the trial judge to decide. I therefore give leave to amend the said paragraph. It was submitted by counsel for defendant No 1 that to allow that would be a substantial departure from the original cause of action as pleaded and therefore the rules of pleading would not permit such amendment. I do not agree with that proposition. In my view, there is no substantial departure from the original cause of action envisaged in paragraph 7.

In the circumstances defendant No 3's application is allowed with costs.

With regard to the application of defendants Nos 1 and 2, I allow their application in the same way as that of defendant No 3. In respect of that application concerning paragraph 7 of the claim, I hold that there is some cause of action disclosed. Here I will order no costs, and costs will be costs in the cause.

Order accordingly.

Morris Edgar & TK Tang for the Plaintiffs.
Zain Azahari Zainal Abidin for the Defendants.

Notes

(i) See casenote YK Loke, 'Disclosure of a Director's Interest in a Rival Company' (1967) 9 Mal LR 343.

(ii) With the proliferation of interlocking directorships in the Malaysian corporate scene, the judicial approval given by the adoption of the decision in *London Mashonaland* v *New Mashonaland* [1891] WN 165 in the present case is of practical

significance. Emphasis is again focussed on the scope of the articles of association and where there is an absence of a prohibition a director is permitted to hold interest in a rival company. See further *Bell* v *Lever* [1932] AC 195; *SCWS* v *Meyer* [1959] AC 324; *The Charterbridge Case* [1969] 2 All ER 1185; *Lindgren* v *L & P Estates* [1968] 1 All ER 917.

(iii) Compare the effect of the emergent doctrine of corporate opportunity: *Industrial Development Consultants* v *Cooley* [1972] 2 All ER 162; *Canachai Aero* v *O'Malley* (1973) 40 DLR 3d 371 and *Queensland Mines* v *Hudson* (1978) ALR 1.

(iv) Compare also the impact of the new disclosure provisions contained in: section 6A, 134 & 135 of the Companies (Amendment) Act, 1984.

(b) Criminal liability of directors

Raja Nong Chik
v
Public Prosecutor

[1971] 1 MLJ 190 High Court, Kuala Lumpur.

RAJA AZLAN SHAH J (delivering oral judgment): The commercial morality expected of company directors is too well-known to be reiterated. Directors are expected to observe a high standard of conduct in connection with dealings with their own shares. They may buy or sell shares in the company in the ordinary course and the fact that they usually know more about their company than the other party to the transaction is no bar; but when they do buy or transfer shares, they have to notify the company in writing within seven days of the occurrence. Recognition of this requirement is given statutory recognition by section 135 of the Companies Act 1965.

In the present case there were resolutions passed by the board of directors with regard to the acquisition and transfer of shares. The company therefore knew of the occurrence of this event. In my view section 134 is directed against directors who bought or transferred shares without the knowledge of the company. Without such knowledge the company would not be in a position to fulfil the requirement of section 134.

Even though the appellant had pleaded guilty to the charge it is the bounden duty of the prosecution to acquaint the court with the full facts so that in an appeal such as the present, the appeal court will be in a position to consider the matter. In the present case not only were the facts not fully presented but it is unfortunate that the learned president

took extraneous things into consideration. Had the lower court known about the facts regarding the acquisitions and transfers, he might have taken a different view in assessing sentence. For these reasons I take the view that the sentence imposed by the learned president was excessive. I will reduce the fine to a sum of $1,000 or 6 months' imprisonment in default.

Sentence varied.

Raja Abdul Aziz Addruse for the Appellant.
Ajaib Singh (Deputy Public Prosecutor) for the Respondent.

Notes

(i) See further P Pillai 'Commercial Morality of Directors' [1972] 1 MLJ xi.
(ii) Sections 134 and 135 of the Companies Act 1965 have been replaced with statutory provisions that have a much wider ramification under the Companies (Amendment) Act 1984. The new law has yet to be brought into effect. The oral judgment of His Lordship is a fine example of a short but judicious observation. It emphasised the high standard expected of directors in their conduct in connection with dealings with their own shares whilst balancing this with the actual facts at hand where the company was clearly cognisant of the director's share dealings through the resolution passed by the board of directors.
(iii) Although the law has been amended the observations of His Lordship is nevertheless appropriate in so far that it may well provide a guide to the judicial attitude that could be taken in the interpretation of the new sections.

(c) Authority and power of directors to borrow money

Sin Chai
v
Pahang Lin Siong Motor Co Ltd

(1966) 4 MC 65 High Court, Raub

Case referred to :-
(1) *Bannatyne* v *D&C MacIver* [1906] 1 KB 103, 109.

RAJA AZLAN SHAH J (delivering oral judgment): The plaintiff in this case is a rubber dealer in Raub. The defendants are the Pahang Lin Siong Motor Co Ltd, registered under the Companies Ordinance, 1940.

The plaintiff claims against the defendant company a sum of $5,000

which he alleged was loaned to the company. He alleged that on March 11, 1963 three directors of the company, Soam Nath Goshi, Yap Kow and Briam Singh (who was also the managing director) came to his shop and asked for a loan of $5,000 saying that the company was in financial difficulties and needed the money to turn over. Perhaps Soam Nath's evidence put the matter clearly. He testified that the company had issued some post-dated cheques and needed the money to meet them. In other words, if the plaintiff's story is to be believed, the loan was needed to be utilised for the company's purposes. The plaintiff agreed to the request for the loan and he accordingly handed to Soam Nath a cash cheque dated March 10, 1963 for $5,000 drawn by one Ong Seng Hin on the Mercantile Bank, Raub. Putting the matter shortly, the plaintiff was given as security two post-dated cheques of the company which were valid for six months. In addition, an official receipt of the company, signed by Soam Nath and Briam Singh and dated March 11, 1963, was given to the plaintiff. On the same day the cheque was duly credited into the company's bank account. The two post-dated cheques lapsed, and it was alleged that another two post-dated cheques were given to the plaintiff dated March 24, 1964. The plaintiff presented these two cheques for payment at the Mercantile Bank, Raub, on July 24,1964 but they were dishonoured by non-acceptance, the reason being that they had "exceeded arrangements". On the same day the plaintiff met Soam Nath and was told that the company had no money. Thereupon the plaintiff issued the present writ. Mr Wong Yoke Kee, the cashier of the Mercantile Bank, Raub, gave evidence to the effect that Exhibit P1, the cash cheque for $5,000, was credited into the company's account. Soam Nath substantiated the plaintiff's evidence in respect of the loan transaction made on March 11, 1963. With regard to the two post-dated cheques he stated that he filled the bodies of these cheques and S Suppiah, Ng Joo Khoo, and Balwant Singh, all directors of the company, were signatories to these cheques. He further stated that the above loan was approved at a directors' meeting and that the loan was not repaid. In cross-examination he said that the loan was not entered in the company's books. Marimuthu, the cashier, gave evidence to the effect that in his absence Soam Nath carried on his duties as cashier. That is the gist of his evidence as far as is relevant in the present case.

Therefore the plaintiff's case as I see it, after eliminating all non-essentials, boils down to this. On March 11, 1963 three directors of the company negotiated with the plaintiff for a loan which was required by the company to meet its post-dated cheques which had been issued to other person or persons. A receipt and two post-dated cheques of the company were given to the plaintiff as security. In due course these cheques were presented for payment but were dishonoured by non-acceptance.

The defendant company denied liability. Their main contention was that the loan was given to Soam Nath without the authority of the company. Their contention was based on the premise that the alleged loan was not entered in the company's books. I accept that the books did not contain any entry with regard to the alleged loan. Briam Singh,

managing director at the relevant time, gave evidence. He admitted that together with Soam Nath and Yap Kow he went to see the plaintiff about a loan on behalf of the company, but he said that it was Soam Nath who actually received the money from the plaintiff. He stated that he did not see whether it was a cash loan or a cheque loan. He admitted that Exhibit P1, the cash cheque, was credited into the company's account but contended that there was no proof that the said cheque was the loan taken from the plaintiff on March 11, 1963 because he alleged that such a loan was not entered in the company's books. For present consideration my duty is quite clear. I have to decide whether there was a loan made to Soam Nath or to the three of them on behalf of the company and for the purposes of the company. Whatever internal arrangements there were between the members of the company is no concern of the plaintiff and this court. The plaintiff is not required to enquire into the regularity of the internal proceedings of the company. If the three directors had abused their powers I have no doubt that the company will take the necessary steps to remedy the situation. The plaintiff said that he gave a loan of $5,000 on the date in question to Soam Nath for the purposes of the company. I need only enquire whether Soam Nath had authority to negotiate for such a loan. In view of Article 37 of the Articles of Association the position is clear. The Article reads as follows:

> The directors may from time to time without the sanction previously given of a general meeting issue debentures, debenture stock, bonds, obligations or other securities of the company either specifically charged upon any property of the company or not so charged for such amounts and to such extent as they may from time to time determine, provided that the total amount of the loans so raised shall not at any time exceed the total amount for the time being of the issued shares of the company.

It was argued by counsel that Article 37 reads "Directors" and therefore one director cannot negotiate for a loan. To my mind I think that he has not directed his mind to Article 2 Clause (i) of the Articles of Association which read as follows:

> Words importing the singular number only shall include the plural and vice versa, the masculine includes the feminine, persons include corporations *mutatis mutandis*.

Be that as it may, three directors signed the two post-dated cheques (Exhibit P3) which I hold were given as security for the cash cheque of $5,000. Further, two directors signed Exhibit P2, the official receipt, which I hold was given as security for the cash cheque of $5,000. That being the case, Article 37 has been complied with and the plaintiff is bound to succeed in this case.

Assuming that Soam Nath had no authority to borrow, the plaintiff in my view is entitled in equity to stand in the same position as if the money had originally been borrowed by the company. The principle as stated in *Bannatyne* v *D & C Maclver*[1] is clearly applicable. There Romer LJ said:

> Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority though it turns out that his act has not been authorized, or ratified, or adopted by the principal, then, although the principal cannot be sued at law, yet in equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal.

In the present case it is clear that Soam Nath was the agent of the company. He borrowed a sum of $5,000 from the plaintiff in order to pay the post-dated cheques which the company had earlier issued to other person or persons. In the circumstances the plaintiff also succeeds in equity against the defendant company for such loan. There will be costs against the defendant company.

Claim allowed.

VC George for the Plaintiff.
V Oorjitham for the Defendants.

Notes

(i) The basis for His Lordship's decision is the so-called internal management rule and the construction of the Articles of Association. The more modern approach in ascertaining whether a company is bound by the acts of its directors is through the law of agency: see *Freeman & Lachyer* v *Burkhurst Park Properties (Margel Ltd)* [1964] 1 All ER 630; *Hely Hutchinson* v *Brayhead Ltd* [1968] 1 QB 549. See also the recent Federal Court decision of *Chew Hock San & Ors* v *Connaught Housing Development Sdn Bhd* [1985] 1 MLJ 350.

(ii) The other aspect of this case which illustrates the judicial creativity is the application of the doctrine of subrogation in the area of the acts of the company and its agents. Raja Azlan Shah J (as he then was) applied the decision of *Bannatyre* v *D & C Maclver* [1906] 1 KB 103 in holding that even if the company's agent had no authority to borrow, the plaintiff was entitled in equity to stand in the same position as if the money had originally been borrowed by the company. At the time of this decision such an application of the doctrine of subrogation was innovative. See further Goff & Jones, *The Law of Restitution* (2nd edn) at pp. 406-430.

(d) Election of directors

Solaiappan & Ors
v
Lim Yoke Fan & Ors

[1967] 2 MLJ 7 High Court, Kuala Lumpur

Cases referred to :-
(1) *Re Ovens & King Traders Pty Ltd* [1949] VLR 16.
(2) *Ashbury Railway Carriage & Iron Co* v *Riche* (1875), LR 7 HL 653.
(3) *James* v *Evening Standard Newspaper Co Ltd* (1895), 21 VLR 399.
(4) *Flitcroft's Case* (1882), 21 Ch D 519.
(5) *Payne* v *The Cork Co* [1900] 1 Ch 308.
(6) *Peveril Gold Mines Ltd* [1898] 1 Ch 122.
(7) *Anderson's Case* (1877), 7 Ch D 74.

RAJA AZLAN SHAH J: Insofar as the pleadings that are contained in the statement of claim are concerned, they have been admitted by the defendants save that they say that the appointments of the directors were not properly made, and alternatively the appointments were made under duress and undue influence. Therefore, the issues before the court are two-fold. Firstly, whether the plaintiffs were properly elected directors at the annual general meeting held on 30th September 1966. Secondly, if they were so elected, whether such election was invalidated by reason of duress and undue influence.

I now consider the first issue. In order to do that it is proper to look at the relevant articles of association. Before an annual general meeting is to be validly held, seven clear days' notice to members is required by the articles of association: see article 47. Any member entitled to be present and vote at the meeting may submit any resolution to such meeting provided that at least three days before the day appointed for the meeting he shall serve upon the company a notice in writing signed by him and containing the words of the proposed resolution and stating his intention to submit the same: article 49. If such notice is received before the issue of the notice calling for the meeting, it must be included in the notice. In any other case it must be issued as quickly as possible: article 50 .

Pausing there for a moment, it is clear from the evidence that the notice calling for the annual general meeting was dated 8th September 1966 and it is not disputed that article 47 has been complied with. It is also not disputed that the notice of the proposed resolution by Solaiappa dated 26th September 1966 reached the company three days before the appointed day. Article 49 has also been complied with. Since the said notice was not received by the company before the issue of the notice calling for the meeting it was not included in that notice. In the circumstances the company was required to issue it to members as quickly as possible. That was not done.

Continuing with the relevant articles of association, article 51 provides that except for the sanctioning of dividends, the consideration of accounts, balance sheets, the ordinary report of the directors, and election of directors and auditors, all other business is deemed to be special business. Article 54 provides that the chairman may with the consent of the meeting adjourn it from time to time, and article 55 enables one of the other directors present at the meeting to preside if the chairman declines to do so. Article 57 requires the minutes of the proceedings of every general meeting to be signed by the presiding

chairman, and the same shall be conclusive evidence of such proceedings and of the proper election of the chairman.

With regard to the appointment of directors, article 72 provides that one-third or the number nearest to one-third shall retire but shall be eligible for re-election. Article 74 enables the company to alter the qualifications and number of directors and also provides for their removal.

It is clear from article 1 of the company's articles of association that Table A in Schedule B of the Companies Enactment (Cap 58 of the Revised Edition) was not adopted by the said company. Cap 58 has subsequently been succeeded by the Companies Ordinances 1940-1946. These in their turn have now been superceded by the Companies Act, 1965. Under the transitory provisions of section 3 of the Act, in particular sub-section (2) thereof, it provides for the continuity of the state of affairs existing under the repealed laws. Sub-section (2) of section 3 reads as follows:

> (2) Unless the contrary intention appears in this Act:
> (a) all persons, things and circumstances appointed or created by or under any of the repealed or amended written laws or existing or continuing under any of such written laws immediately before the commencement of this Act shall under and subject to this Act continue to have the same status operation and effect as they respectively would have had if such written laws had not been so repealed or amended; and
> (b) in particular and without affecting the generality of the foregoing paragraph, such repeal shall not disturb the continuity of status operation or effect of any Order in Council order rule regulation scale of fees appointment conveyance mortgage deed agreement resolution direction instrument document memorandum articles incorporation nomination affidavit call forfeiture minute assignment register registration transfer list licence certificate security notice compromise arrangement right priority liability duty obligation proceeding matter or thing made done effected given issued passed taken validated entered into executed lodged accrued incurred existing pending or acquired by or under any of such written laws before the commencement of this Act.

That section is taken word for word from section 4 of the Companies Act, 1958 for the State of Victoria. Speaking of the corresponding provision in the 1938 Act, Fullagar J in *Re Ovens & King & Traders Pty Ltd*[1] said at p 21:

> The general purpose of this provision seems plainly to be to continue the state of affairs existing under the repealed Acts, but to continue it under and subject to the new Act. ...such provisions should, I think, be construed liberally.

It is well settled that articles of association are the company's rules of internal management and government. In *Ashbury Railway Carriage & Iron Co* v *Riche,*[2] Lord Cairns described the articles as defining the duties, rights and powers of the governing body as between themselves

and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made. The articles are subordinate to the memorandum: *Ashbury's Case, supra* at p 670. It was held in *James* v *Evening Standard Newspaper Co Ltd*[3] that the articles must be consistent with the Act. So the articles cannot authorise anything which is either expressly or impliedly prohibited by the Act or the memorandum or take away any right conferred by the Act on the company or the shareholders: *Flitcroft's Case,*[4] *Payne* v *The Cork Co,*[5] Peveril Gold Mines Ltd.[6] The Act and memorandum prevail in case of inconsistency: *Anderson's Case.*[7]

From this line of cases it is clear that the articles of association must be read subject to the Act, and I am of the opinion that the phrase, "unless the contrary intention appears in this Act" appearing in sub-section (2) of section 3 can import of no other construction. The somewhat lengthy argument of counsel on behalf of the plaintiffs that the Companies Act does not apply to the articles is therefore not tenable.

I was referred by counsel for the defendants to the provisions of section 128 which in simple language enacts that a public company such as the one under consideration may remove a director before the expiration of his term of office by ordinary resolution but special notice of not less than 28 days is required under section 153. Counsel for the plaintiffs seemed to argue that section 128 is an enabling section, that is, to make it easier to remove directors from office. He took the view that section 128 does not invalidate the articles of association because of the interpretation afforded by sub-section (2) (b) of section 3 of the Act. He based his reasoning on the hypothesis that if a company adopts Table A of the new Act there will always be articles to which section 128 does not apply. As an illustration, counsel referred me to article 69 of Table A in the Fourth Schedule to the Act. In my view the argument is attractive but devoid of merit. The whole case boils upon the interpretation of sub-section (2) (a) and (b) of section 3 of the Act. As has been said earlier in this judgment, the general purpose of section 3 is to continue the state of affairs existing in a company under the repealed laws but under and subject to the new Act. What was the state of affairs then existing prior to the commencement of the Act? I have been told that there were 13 directors. A section of the shareholders, the plaintiffs amongst them, wanted to replace those 13 by a like number. Another section wanted to remove and appoint only 4 of the 13 directors as required under article 71. What actually happened? The first-named plaintiff sent in a notice of resolution proposing to remove all 13 directors and to appoint the same number. In other words, this plaintiff, in addition to the proposal to remove 4 directors which he could validly do under the articles, wanted to remove the remaining 9 directors who, under the articles, were still in office. Had the new Act not been passed I think he could have succeeded because under the Companies Ordinances 1940-1946 there was no corresponding section to section 128 of the new Act. With the coming into force of the new Act we have a new section, that is, section

128 which expressly requires special notice of at least 28 days in order to propose the removal of a director before his term of office expires. That condition precedent, to my mind, was not fulfilled. It may also be worth noting that that section corresponds with and was taken from section 120 of the Companies Act 1958 pertaining to the State of Victoria.In Victoria too that is a new section. It was introduced in that State in the 1958 Act, having been copied from the English Companies Act 1948, section 184.

In the circumstances of this case it does seem to me that the appointment of the directors named in paragraph 10 of the statement of claim was not proper and valid.

With regard to the alternative defence I have no hesitation in coming to the conclusion that there was duress and undue influence.

It was never disputed that the annual general meeting was held at 8.30 pm on 30th September 1966 and continued to the following noon of 1st October 1966. At about 3.00 am of the 1st of October there was a deadlock concerning the election of directors. The two lawyers left the meeting and others did likewise.Some of the shareholders slept in the premises while some went out for tea. The meeting was never formally adjourned although there was a suggestion by the chairman that as the meeting had gone on for such length of time without any decision having been reached it should be adjourned. The plaintiffs and their supporters objected to such adjournment, demanding that the meeting should only end after the election of directors. To my mind they appeared to be persistent in their demand for they refused to allow the buses to take to the road at 6.15 am unless their resolution was carried out. There is evidence, which I accept, that a bus was placed in the gateway so as to prevent the other 20 buses from leaving the premises. There is also evidence, which I accept, that no one dared to remove the bus which caused the obstruction. It would not be unfair to say that at that stage of the so-called meeting, to quote the words of a witness (Sim Sin Choy) there was confusion. No doubt there was no violence, but it is not difficult to imagine the chaotic state of affairs that existed unless the plaintiffs' resolution was passed. That state of affairs continued until 12.00 noon on 1st October 1966 when the presiding chairman declined to take the chair any further and left. A director, Loh Chan, was roused from his sleep at 12.15 pm by the plaintiffs and plaintiff No 1 proposed him as chairman and the proposal was carried. He took the chair and it was then that the present plaintiffs were unanimously elected directors. It may be interesting to note that the company was summoned and fined a sum of $300 for failing to run their buses on the road at 6.15 am on 1st October 1966. The company has been warned against such repetition by the Road Transport Licensing Board.

Those are the facts which I have no reason to reject. The meeting commenced at 8.30pm and at 3.00 am no decision was reached. In those circumstances it should have been adjourned and the articles of association provide for such contingency. However, the suggestion was contumeliously rejected by the plaintiffs and their supporters. In my view, the meeting continued under abnormal and unreasonable cir-

cumstances. It was held under pressure. To my mind, this is a clear case of one party exercising domination over the minds and wills of the other party so that their independence of decision was substantially undermined.

It was said by counsel for the plaintiffs that the present facts do not establish duress or undue influence. I disagree with him. This is a clear case of duress. This is also a clear case of undue influence. The categories of undue influence are never closed. All the circumstances of each case have to be considered to determine whether there is undue influence. For if it were otherwise, the law would fail to protect the ever-expanding interests of the community.

For the above reasons I would dismiss this case with costs.

Claim dismissed.

S Selvarajah & R Padmanabhan for the Plaintiffs.
Morris Edgar & Albert SF Lian for the Defendants.

Note

This decision was affirmed by the Federal Court on appeal, [1968] 2 MLJ 21. In the Federal Court, however, the line of reasoning taken by Raja Azlan Shah J (as he then was) was not followed. The legal issue in question was the power to remove directors. In the Federal Court it was held by Suffian FJ MacIntyre FJ and Azmi CJ (Malaya) that section 128 of the Companies Act, 1965 co-exists with Article 74 of the articles of association of the company in question. Their Lordships also did not deal with the alternative ground of the plaintiffs' case of duress and undue influence.

SHARES
(a) Transmission

Re LY Swee & Co Ltd: Khoo Leong Kee
v
LY Swee & Co Ltd

[1968] 2 MLJ 104 High Court, Kuala Lumpur

Cases referred to:-
(1) *Moodie* v *W & J Shepherd Ltd* [1949] 2 All ER 1044.
(2) *Scott* v *Frank F Scott (London) Ltd* [1940] 3 All ER 508.
(3) *Danish Mercantile Co & Ors* v *Beaumont & Ors* [1951] 1 All ER 95.
(4) *Russian & Bank* v *Comptoir de Mulhouse [1925] AC 112.*
(5) *Simmons* v *Liberal Opinion Ltd* [1911] 1 KB 966.

RAJA AZLAN SHAH J: This is an application for an order to rectify the

register pursuant to the provisions of section 162 of the Companies Act, 1965, by striking out the name of Law Joo Jin, deceased, as holder of 1,400 shares in the respondent company standing at the moment in the name of the said deceased and by inserting in lieu thereof the name of the applicant as the holder of the said shares and other consequential reliefs.

A brief narration of the facts which have led to this unfortunate litigation will explain the position of the parties. The respondent company is a private company incorporated under the Companies Enactment, of which Law Joo Jin, deceased, was the governor and chairman of the board of directors until his death on January 30,1963. He left a trust disposition and settlement dated November 13, 1959 of which the applicant (widow of deceased) is the sole surviving trustee and executrix nominated therein and acting thereunder. The surviving directors are the present applicant, and the deceased's nephews Law Joo Hone and Law Joo Kuen. At the time of his death the deceased owned 1,400 shares of $100 each in the said company which is 91 per cent of the whole share capital. The applicant holds 20 such shares in her own right.

On January 18, 1968 the applicant was served with a writ alleging that a sum of $93,898.94 is due and owing to the respondent company by the estate of the deceased (*vide* Kuala Lumpur Civil Suit No 21 of 1968).

On November 21, 1967 the applicant put forward a resolution at a meeting of the directors that she be registered as a member in respect of the shares registered in the name of the deceased. She principally relied on article 38. The said resolution was not passed as one of the directors, Law Joo Kuen, was of the view that article 19 did not permit the transfer of any shares from any estate which was indebted to the company.

On December 12, 1967 her solicitors wrote to the secretary of the company enclosing the grant of probate and a draft resolution signed by her to be circulated to the other two directors for their signature under article 111 which provides that directors may take decisions by unanimous agreement if the resolution was circulated to them. The resolution taken in November 1967 was confirmed on December 14, 1967. On January 11, 1968 the applicant received a letter from the company's solicitors which stated that the other two directors were not prepared to sign the resolution. Both the resolution and the grant of probate were returned to her.

On January 24, 1968 she initiated the present motion to rectify the register.

In answer to her affidavit in support of her motion, Law Joo Kuen filed an affidavit on behalf of himself and the other director, Law Joo Hone. It is to be observed that this affidavit was not filed on behalf of the company. In that affidavit it was stated that the grant of probate sent to the company did not sufficiently evidence the applicant's right to the shares registered in the deceased's name. Alternatively, it was contended that the said shares be transmitted subject to the company's first and paramount lien pursuant to articles 19 and 39. It was further

alleged that no instrument of transfer in writing of the said shares from the deceased or the applicant had ever been presented to the company. Laches and lack of *bona fides* were also pleaded. These two pleas were, however, not seriously pressed in argument.

The applicant subsequently obtained an amended schedule of properties annexed to the grant of probate which specified the said shares. On March 26, 1968 her solicitors wrote to the secretary of the company, sending the grant of probate with the new schedule of assets and requesting the registration of the applicant as the holder of those shares. There was no reply from the said company. The applicant subsequently received a copy of the minutes of a meeting of the board of directors held on April 1, 1968. She did not attend the meeting. The minutes read:

> The chairman and the other director, Mr Law Joo Kuen, decided to hand over the matter to the company's solicitors, Messrs Richard Talalla & Co, Kuala Lumpur, with instructions to attend to the matter as they feel that it is not proper to transfer the 1,400 shares to the name of Khoo Leong Kee and if they do so, they will be held solely responsible by the other shareholders of the company and the company will have no claim whatsoever against the estate of Law Joo Jin for the amount due and owing to the company by the deceased, Law Joo Jin.

At that meeting they purported to confirm and rectify the appointment of Messrs Richard Talalla & Co with effect from December 1, 1967 with two specified matters. They also resolved to give effect to the appointment in writing and under the company's seal. That was not done.

The argument addressed to me takes two shapes. The main argument is whether the application is to be regarded as a transfer, properly so-called, of shares in the respondent company or a transmission of such shares. The distinction between transfer and transmission on death is important and is well recognised in company law. Transfer in its natural meaning connotes a transfer from one person to another. There must be a transferor and a transferee. In such a case a proper instrument of transfer must be delivered to the company: see section 103(1) of Companies Act, 1965. The section does not affect any power of the company to register as a shareholder any person to whom the right to any shares in the company has been transmitted by operation of law. Transmission is the term used when shares vest in some person by operation of law, such as on the death or bankruptcy of a member. The relationship of transferor and transferee is lacking: see *Moodie* v *W & J Shepherd Ltd.*[1]

The personal representative of a deceased member does not *ipso facto* become a member of the company. He becomes so in one of two ways: (i) Unless the articles of association otherwise provide: see *Scott* v *Frank F Scott (London) Ltd*[2], he applies to have the shares registered in his name. This is not transfer, properly so-called, and therefore an instrument of transfer is not required. He is personally liable to pay all calls but can claim indemnity against the estate of the deceased member. (ii) He applies to be registered as a personal representative

under the provisions of section 163(1) of the Act. This section enables trustees, executors and administrators of the deceased shareholder's estates to become registered as such trustees, executors and administrators: see *Australian Company Law & Practice* by Wallace & Young at p 466. This course subjects him only to the same liabilities as he would have been subjected to if the shares had remained registered in the name of the deceased. His liabilities are not so onerous as in (i) above.

The answer to the question must therefore depend on the provisions of the articles of association of the respondent company. Articles 34 to 37 govern the transfer of shares, and any regulations contained therein dealing with their transfer must be strictly followed. The responsibility of accepting or rejecting a transfer of shares rests with the directors.

Putting it briefly, these provisions do not apply to the present case. This is not a case of transfer of shares to a non-member. I am of the view that this is purely a case for registration as a member in respect of the deceased's shares, and therefore, the provisions governing the transmission of shares apply. The material articles are 38 and 39 which read as follows:-

> 38. In the case of the death of a member, the survivors or survivor where the deceased was a joint holder, and the executors or administrators of the deceased where he was a sole or only surviving holder, shall be the only persons recognised by the company as having any title to or interest in his shares, but nothing herein contained shall release the estate of a deceased joint holder from any liability in respect of any share jointly held by him.
>
> 39. Subject to article 1 hereof, any person becoming entitled to a share in consequence of the death or bankruptcy of any member shall upon producing such evidence of title as having regard to section 72 of the Companies Ordinance 1940, the directors may from time to time properly require, have the right either to be registered himself as a member in respect of the share, or subject always to the provisions as to transfers herein contained, to make such transfer of the share as the deceased or bankrupt person could have made but the directors shall, in either case have the same right to decline or suspend registration as they would have had in the case of a transfer of the same by the deceased or bankrupt person before the death or bankruptcy.

Article 38 speaks for itself. The present applicant, being the sole surviving executrix, is the only person recognised by the respondent company as having a title to the deceased's shares. On production of the grant of probate with the amended schedule of assets annexed thereto, she has under the provisions of article 39 the right either to be registered herself as a member in respect of the deceased's shares or, subject to the restrictions with regard to transfer, to make such transfer as the deceased could have made in his lifetime. She chose the former. I think she is well entitled to take that course.

I now consider the other argument that the shares are to be transmitted, if at all, subject to the company's lien. The company claimed that a lien has accrued in respect of certain monies and they have brought an action *vide* Civil Suit No 21 of 1968 for the purpose of establishing and

enforcing that lien. The claim to a lien is altogether denied, and the action is being resisted. *Prima facie* I am of the view that the applicant is entitled to a "clean" certificate like that possessed by the person from whom she derives her title.

It was further said that it is essential to register the shares in the form proposed for the protection of the company. Counsel has failed to show me that that is necessary. The company claimed to have a lien and is entitled to that lien, if at all, by virtue of the articles, and the certificate is only granted in form "subject to the memorandum and articles of association". No estoppel arises against the company if it were to grant a "clean" certificate. They have power under their articles to decline to register any transfer of shares upon which the company has a lien and I think that it is not necessary to register the shares in the form proposed for the protection of the company, and that it would be detrimental to the present applicant who is now asking for registration. The certificate is evidence of the legal title; the applicant is entitled to be put on as the legal owner of these shares and it seems to me that she is entitled to a "clean" certificate.

If there were any probability or prospect of a fraudulent or wrongful dealing on the part of the applicant in the shares, so soon as she came into possession of the certificate, the true remedy of the company would be, as it seems to me, to apply for an injunction in the pending action to restrain her from dealing in any way with the certificate, but I do not think they have any right at all to register the shares subject to the lien, which might lead to serious inconvenience.

Putting it in a nutshell the position is this: where a shareholder of a company dies and the transmission clause in its articles of association is in the form of clause 39, the personal representative is entitled to be registered in respect of and to have a certificate of the shares, and the company has no right to enter in the register of members or in the certificate any statement as to the company's claim under its articles to a lien on the shares for the liabilities of the deceased to the company.

In the course of a further argument, Mr Talalla, on behalf of the company, contends that the applicant is not entitled to the order in terms of the motion as it was made in her personal capacity and not in her representative capacity, by way of an application for transmission under the provisions of section 163(1) of the Act. Counsel says that the latter course would have been more appropriate, in which case the company would have had no objection. The contention, in my view, cannot be upheld. Article 39 enables a personal representative to be registered as a member in respect of the deceased's shares. It does not stipulate that the personal representative must apply to be registered in a representative capacity.

The argument that the motion must specifically ask for transmission of shares is also baseless. As I have indicated earlier, the personal representative's rights *qua* member are two-fold. He can either pursue the rights made available under the articles of association or to invoke the provisions of section 163(1) of the Act. The section is an enabling section. It merely confers a power, and does not, of itself, do anything

more. The personal representative in the present case has applied to be registered as a member in pursuance of article 39.

A further argument adumbrated is that as the applicant is not entitled to the shares, a transfer is not possible. The short answer to this is this: this is not a transfer, properly so-called.

For the above reasons, the register ought to be rectified in terms of the motion. I will now hear argument as to costs.

[*After hearing arguments as to costs, the following judgment was delivered on May 30, 1968:*]

Raja Azlan Shah J : Mr Puthucheary on behalf of the applicant had argued that costs should be borne by the directors individually or against Mr Talalla personally. Counsel submitted that if Mr Talalla's fees are to be paid for objecting to rectification, his client would have to pay 96.4 per cent of the costs. In such event he said that his client finances both the objection and the present application, and therefore it is vital that he raised a technical point so that the estate is not made to suffer. He raised the point that Mr Talalla had acted without authority. The basis for the proposition seems to be this: at the meeting of directors held on 14th December 1967 it was resolved to appoint Mr Talalla to oppose the present motion. The minutes of that meeting were read and confirmed at a meeting of directors held on 1st April 1968. Clauses 5 and 6 of the minutes are relevant and I reproduce them:

> 5. It has been resolved to effect the said appointment in writing under the Company's Seal.
> 6. It has also been resolved that the instrument evidencing the said appointment shall have thereto affixed the Company's Seal in the presence of Messrs Law Joo Kuen and Law Joo Hone as Directors and the Secretary and such Directors and the Secretary shall sign the instrument to which the Seal is so affixed in their presence.

The applicant who is also a director did not attend these two meetings. As no such document bearing the company's seal existed the resolution could not be perfected.

Mr Talalla's main argument was directed to the doctrine of ratification. He submitted that the resolution appointing him was ratified at a meeting held on 1st April 1968. He relied on *Danish Mercantile Co & Ors* v *Beaumont & Ors,*[3] which establishes the principle that an action brought by agents in the name of a limited company without its authority and where later the company went into liquidation may be ratified and adopted by the liquidator and the defect cured.

I take the view that this is not a case of ratification but one of appointment of solicitor to institute proceedings on behalf of the company. The essence of ratification is *prima facie* the authorisation of unauthorised acts. In the present case, Mr Talalla's authority to act for the company depended on the resolution made and confirmed on 1st April 1968. The company had resolved that the instrument evidencing the appointment must be signed by and in the presence of both the directors Law Joo Kuen and Law Joo Hone and the secretary and that the

company's seal must be affixed to the instrument in their presence. That was the form the resolution was made. In my view the resolution was valid in the sense that it was made at a meeting of the directors at which a quorum was present and the authority to affix the seal was founded on the express provision of article 117. The unfortunate part of it is that the resolution could not be perfected because (i) the company's seal had not been affixed to the instrument of appointment, and (ii) even if that had been done it violated against the express provisions of section139(5) of the Companies Act which reads:

> (5) A provision requiring or authorising a thing to be done by or in relation to a director and the secretary shall not be satisfied by its being done by or in relation to the same person acting both as director and as, or in place of, the secretary.

For the above reasons the contention that the want of a seal is a pure formality must also fail.

The result seems to be that Mr Talalla had no authority to represent the company.

The other argument proffered by Mr Talalla was the question of waiver. On the strength of *Russian &c Bank* v *Comptoir de Mulhouse,*[4] he submitted that an application to question the authority of counsel to act for the company should have been made promptly to avoid the answer that it was ratified. Since the applicant had failed to do that it was said that she had waived her right and thus estopped from raising this point. The short answer to that is, as it seems to me, that there was no waiver. The application to question the lack of authority may be made at any stage in the proceedings, even at the conclusion of the trial. (See *Simmons* v *Liberal Opinion Ltd*[5]).

In the circumstances the directors must bear the costs of this application.

Order accordingly.

JJ Puthucheary & SDK Peddie for the Applicant.
R Talalla for the Respondent.

Notes

(i) The statement of the law in this case has been clearly and logically laid out with respect to the manner in which the personal representative of a deceased member may become a member of the company: (a) Unless the articles of association otherwise provide, he applies to have the shares registered in his name: *Scott* v *Frank F Scott (London) Ltd* [1940] 3 All ER 508; (b) The application to be registered as a personal representative is under section 163(1) of the Companies Act 1965. The overidding question however remains as to the scope and intent of the articles of association of the company concerned.

(ii) The second significant issue decided in this case concerns the question whether the company can claim a lien on the shares so

that the personal representative would not be able to obtain a "clean" share certificate. His Lordship clearly rejected this contention in this case on a construction of the memorandum and article of association in question.

(iii) Under common law it is clear that on the death of a sole shareholder, the shares vest in his personal representative: *Re Greens* [1949] Ch 333.

(iv) The company is bound in law to accept the production of the probate of the will: section 103(3) of the Companies Act 1965.

(b) Rectification of share register

(i) Re Len Chee Omnibus Co Ltd Chin Sow Lan v Lee Chee Omnibus Co Ltd & Ors

[1969] 2 MLJ 202 High Court, Kuala Lumpur

Cases referred to:-
(1) *Re Stranton Iron and Steel Co* (1873), LR 16 Eq 559.
(2) *Re Russian Iron Works Co,* (1866), 1 Ch App 574.
(3) *Re Ruby Consolidated Mining Co* (1924), 40 TLR 488.
(4) *Re Greater British Products Development Corporation* (1874), 9 Ch App 664.
(5) *Smith* v *Clay* (1767), 3 Bro CC 639n at 640n.

RAJA AZLAN SHAH J: This is an application by way of summons made under section 162 of the Companies Act, 1965 for an order that the register of members be rectified by deleting the name of Low Hon as holder of 20 shares in the respondent company and inserting therein the name of the appellant. The said company is the first respondent, the last three respondents are administrators of the estate of Low Hon, who was the applicant's mother.

The applicant in her affidavit stated that in 1953 she was the registered owner of the disputed shares in the respondent company. Some time in September 1957 she went to one Wong Ah Chiew who was a director of the respondent company and informed him that as she was leaving the country to settle down in Singapore, she intended to give her mother, Low Hon, a limited power of attorney, that is, to collect the monthly allowances and the dividends arising from her shares. The applicant's mother later obtained a share transfer form and gave that to Wong Ah Chiew for the applicant to sign. Wong Ah Chiew then requested the applicant to sign the transfer form saying that it was to effect a power of attorney to enable her mother to collect the monthly allowance and dividends. The applicant signed the transfer form thinking that it was merely to give a power of attorney to her mother. The mother was not present. It was only after the death of her mother in

August 1963 that she discovered that her shares had been transferred to and registered in the mother's name.

Wong Ah Chiew in his affidavit deposed that the applicant saw him and informed him that she intended to leave Ampang to settle down in Singapore and that she intended to make provision for her mother. She intended to give her a power of attorney to enable her to collect the monthly allowances and the dividends from the shares. Later, the applicant's mother came to him with a transfer form and requested him to get it signed by the applicant. Accordingly, he proceeded with the transfer form to the applicant and informed her that it was to effect a power of attorney. The applicant then signed the form. Subsequently, a circular resolution was issued to the directors of the registered company for approval. The resolution was signed by the other directors upon Wong Ah Chiew informing them that it was only for the purpose of approving a power of attorney in respect of the applicant's shares made in favour of her mother. Liew Pah Ngen, the managing director and Tai Hin, a director of the respondent company gave similar accounts in their respective affidavits. But neither of them had seen the transfer form. Liew Fah Ngen deposed that the shares transfer was not attached to the circular resolution. Tai Hin further deposed that he did not know whether the shares were transferred to the mother's name or only to her as an attorney.

The last three respondents disputed the power of attorney. They claimed that it was an outright transfer to the mother.

Mr Devasar on behalf of the last three respondents submitted that the dispute could not be dealt with under section 162 of the Companies Act in that in so far as the applicant alleged that she had been cheated or defrauded or misled which called for further investigation, the only way open to her was to bring a regular suit.

Section 162 of the Companies Act, 1965 provides as follows:

> Sub-section(1). If — (a) the name of any person is without sufficient cause entered in or omitted from the register ... the person aggrieved may apply to the court for rectification of the register, and the court may refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party to the application.

That section provides for a summary remedy. Its exercise is a matter of discretion which should not be unduly fettered. The decided cases, merely furnish valuable illustrations of the exercise of the discretion. Whether a case falls to be adjudged under section 162 or by a regular action must in the end depend upon the particular facts. However, one thing is clear. Where the facts are admitted and the question is simply one of law as in the case of *Re Stranton Iron and Steel Co,*[1] where the applicants, the owner of shares, transferred them to nominees and the question of law was whether the respondent company was justified in refusing registration or where the facts can easily be ascertained such as where an applicant who has applied for shares in a company on the faith of the prospectus stating its objects sought to remove his name

from the register on discovering that the prospectus was at variance with the memorandum of association: see *Re Russian Iron Works Co.*[2] Stewart's Case the court will entertain the application under the summary procedure but where the facts are complex and in dispute: see *Re Ruby Consolidated Mining Co, Askew's* Case[3] such as where an applicant was induced to take shares by fraud and that facts alleged by him are denied by the company, or where it is clear that some question in dispute calls for investigation as in *Re Greater Britain Products Development Corporation,*[4] the court will refuse to entertain the application and will leave the applicant to seek rectification in a regular action.

In the present case there are in my view further facts to be ascertained such as: why did the mother go to see Wong Ah Chiew with a transfer form? Why did Wong Ah Chiew who was a director of the respondent company ask the applicant to sign transfer form but intending it to be a power of attorney? Other matters requiring consideration are the examination of the transfer form in question and the circumstances in which the circular resolution was passed. I feel more facts leading to the ascertainment of the truth can be elicited in a witness action than it would be upon evidence on affidavits, for it involves very serious charges of fraud against a director of the respondent company.

There is another point which is against the applicant. The court, having concurrent equitable jurisdiction, is not bound to follow what a court of law would do in such a case in adjudicating under section 162 of the Companies Act but will take cognisance of well-known equitable principles. In the words of Lord Camden LC in *Smith* v *Clay*[5] a court of equity "has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing."

The applicant said that she became aware that her shares had been registered in her mother's name subsequent to her mother's death. That was in 1963. Letters of administration of her estate were granted to the last three respondents in July 1966. The present summons were taken out in December 1968. That was not done within a reasonable time after she became aware of the facts entitling her to relief. I am of the opinion that she is guilty of laches.

I would therefore dismiss the application with costs with liberty to file a regular action within one month of this order.

Application dismissed.

Karpal Singh for the Applicant.
AA Thomas for the 1st Respondent.
KL Devasar for the 2nd, 3rd & 4th Respondents.

Notes

(i) The emphasis in this decision that the Court's decision under section 162 of the Companies Act, 1965 is discretionary in nature

is well-made. This discretion is exercisable in two instances: (a) If the name of any person is, without sufficient cause, entered in or omitted from the register; (b) If default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member.

(ii) The application to the court may be made by the aggrieved party, or any member of the company or the company itself.
Section 162 does not exhaustively provide for the court's power to order rectification: see *Burns* v *Siemens Brothers Dynamo Works Ltd* [1919] 1 Ch 225. Furthermore the court's order to rectify the register may not necessarily result in the complete deletion of a shareholder's name. For example, when an existing shareholder is registered as the holder of an additional number of shares issued in breach of certain Exchange Control Regulations the court may order the deletion in reference to those shares only: *Re Transatlantic Life Assurance Co Ltd* [1979] 3 All ER 357.

(iii) In the present case His Lordship was clearly right in rejecting the application for the exercise of the court's discretion under section 162 as there were a number of crucial facts which were in dispute. The further ground that the applicant is guilty of laches for the delay in taking such action is again a timely warning by His Lordship to those who might be indolent in such matters.

(b) Rectification of share register

(ii) Central Securities (Holdings) Bhd v Haron Bin Mohamed Zaid

[1979] 2 MLJ 244 Federal Court

Coram: Suffian LP, Raja Azlan Shah CJ (Malaya) and Wan Suleiman FJ

Cases referred to:-

(1) *Waterford Turkish Baths Co* v *Barter* 17 Ir LTR 61.
(2) *Greville* v *Hayes* [1894] 2 Ir R 20.
(3) *Baxter* v *France* [1895] 1 QB 455.
(4) *Gloucestershire Banking Co* v *Phillips* (1884) 12 QB 533.
(5) *Re Paradise Motor Co Ltd* [1968] 2 All ER 625.
(6) *Fitch* v *Lovell* [1962] 2 All ER 685.
(7) *Hawkes* v *McArthur* [1951] 1 All ER 22.
(8) *St John Shipping Corporation* v *Joseph Rank Ltd.* [1957] 1 QB 267; [1957] 3 All ER 683.
(9) *Hunt* v *Silk* (1805) 5 East 449.
(10) *Taylor* v *Hare* (1805) 1 B & PNR.
(11) *Lawes* v *Purser* (1856) 6 E & B 930.
(12) *Clarke* v Dickson (1858) EB & E 148.
(13) *Lindsay Petroleum* v *Hurd* (1874) LR 5 PC 221, 239.
(14) *Erlanger* v *New Sombrero Phosphate Company* (1878) 3 App Cas 1218, 1278.

(15) *Rowland* v *Divall* [1923] 2 KB 500.
(16) *Biggerstaff* v *Rowatt's Wharf Ltd* [1896] 2 Ch 93.
(17) *Platt* v*Rowe* [1909] 26 TLR 49.
(18) *Kwei Tek Chao* v *British Traders and Shippers* [1954] 2 WLR 365, 372.
(19) *Ward* v *South Eastern Railway (1860) 119 RR 968.*
(20) *Re Derham and Allen Ltd* [1946] Ch 31, 36.
(21) *In re Len Chee Omnibus Co* [1969] 2 MLJ 202.
(22) *Reese River Silver Mining Co* v *Smith* (1869) LR 4 HL 64.
(23) *Ansett* v *Butler Air Transport Ltd* (1958) 75 WN 299.
(24) *In re Poole Firebrick and Blue Clay Co Ltd* (1874) LR 18 Eq 542.
(25) *First National Reinsurance Co* v *Greenfield* [1921] 2 KB 260, 279.
(26) *In re Scottish Petroleum Co* (1882) 23 Ch D 413.
(27) *Payne* v *British Time Recorder* [1921] 2 KB 16.
(28) *Horwood* v *British Statesman Publishing Co Ltd* [1929] WN 38.
(29) *Daws* v *Daily Sketch* [1960] 1 WLR 126; [1960] 1 All ER 397.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): The facts in this case are fully stated in the judgment of Harun J, in which (i) he dismissed the application of Central Securities (Holdings) Berhad, "the third party" to set aside the third party notice, and (ii) he allowed Haron bin Mohd. Zaid "the defendant" to enter final judgment against the third party.

On March 12, 1975 the defendant agreed to sell to Syarikat Seri Padu Sdn Bhd "the plaintiffs" 560,000 fully paid-up ordinary shares of $1 each of United Holdings Bhd at $8 per share. The plaintiffs paid the total sum of $4,480,000 for the said shares and the defendant agreed to deliver to the plaintiffs the share certificates and the instruments of transfer within one week. The defendant delivered effectively only 36,722 shares. The plaintiffs' claim was for the refund of the purchase price of $4,186,224 paid in respect of the undelivered 523,278 shares, damages, interest and costs.

The writ was filed on May 21, 1977. The defendant entered appearance on June 13, 1977 and on June 21, 1977 took out a summons for leave to issue and serve a third party notice on the third party. The said leave was granted on July 18, 1977. The defendant claimed that the shares he sold to the plaintiffs were part of the 1,400,000 fully paid ordinary shares of $1 each of United Holdings Bhd at $8 per share he had acquired from the third party under a written agreement dated December 7, 1974. On January 22, 1975 the defendant paid the third party the total purchase price of $11,200,000 for the said shares whereupon the latter delivered to the defendant share certificates of this amount and the necessary instruments of transfer. One of the share certificates is numbered 0227 for 523,278 shares together with the relevant instrument of transfer "Exhibit H1". Pursuant to the agreemet of March 12, 1975 with the plaintiffs, the defendant then delivered to them *inter alia* the said share certificate numbered 0227 and the instrument of transfer. On December 13, 1976, some 20 months afterwards, the plaintiffs discovered, so they alleged, that the instrument of transfer in respect of share certificate numbered 0227 was executed by the registered owner Dr Chong Kim Choy in favour of International Holdings (Pte) Ltd. In the meantime, the shares were

registered in the name of Seri Padu. On being registered the defendant made repeated requests to the third party for a registrable instrument of transfer but the latter refused and failed to deliver the transfer form or other shares of this amount whereby the defendant claims from them that he is entitled to substantially the same relief and/or remedies as claimed by the plaintiffs against the defendant.

The third party entered a conditional appearance to the third party notice on September 8, 1977 and on September 30, 1977 applied to set aside the said notice. On October 3, 1977 the defendant applied to set aside applied for leave to enter final judgment against the third party, alternatively, for third party directions as follows: (i) that the defendant deliver a statement of claim to the third party within 14 days from the date of this order who shall plead thereto within 14 days; (ii) that the defendant and the third party file an affidavit of documents within 60 days from the close of pleadings and there be an ispection of documents within 30 days thereafter; (iii) that the question of the liability of the third party to indemnify the defendant be tried together with the trial of the action between the plaintiffs and the defendant, and (iv) that the costs of the application be costs in the cause. On October 28, 1977 the plaintiffs applied for leave to enter final judgment against the defendant. These applications were, by consent, adjourned into open court and heard together.

The defendant submitted to judgment and the learned judge accordingly gave leave to plaintiffs to enter final judgment by consent. The application of the third party to set aside the third party notice was made on the following grounds:

(a) There is a question proper to be tried between the defendant and the third party in that the agreement was performed;
(b) The issue between the defendant and the third party forms the subject of a separate action *vide* High Court Kuala Lumpur Civil Suit No 2323 of 1976 and is bad for duplicity;
(c) The service of the third party notice on the third party on 5th day of September, 1977 was bad.

Ground (c) was abandoned.

With regard to (a) the learned judge held that the third party had not performed their part of the agreement with the defendant. The basis of his decision is that without a proper instrument of transfer the defendant could not effectively deal with share certificate numbered 0227, in this instance to transfer it to the plaintiffs. He further held that section 162 of the Companies Act, 1965 and the arguments regarding laches, acquiescence and estoppel were irrelevant.

With regard to (b) the learned judge in the exercise of his discretion refused to allow consolidation of the present case with Civil Suit No 2323/76. He said that there is a basic difference between the two causes of action; in the former, it is on the ground of failure of consideration, *viz.*, non-delivery of share certificates which have been paid for; in the latter, an action for rescission and damages based on fraud. Further, the evidence required to prove the allegations in respect of the two causes of action are not the same although the relief claim sought is the same.

In the circumstances, the learned judge dismissed the third party's application to set aside the third party notice.

It is common ground that in July 1974 Dr Chong Kim Choy held 524,278 shares: see *Annual Return of United Holdings* for year ending July 29, 1974; in June 1975 he held 1,000 shares, the defendant held 50,000 shares, and the plaintiffs held 985,510 shares: see *Annual Return of United Holdings* for year ending June 30, 1975; and in December 1977, he held 524,278 shares, the defendant held 50,000 shares, and the plaintiffs held 462,232 shares: see *Annual Return of United Holdings* for year ending June 30, 1975; and in December 1977, he held 524,278 shares, the defendant held 50,000 shares, and the plaintiffs held 462,232 shares: see *Annual Return of United Holdings* for year ending December 15, 1977.

From these Annual Returns it is apparent that Dr Chong Kim Choy held the disputed 523,278 shares in 1974; did not hold them in 1975 but held them again in 1977. During the period he did not hold them, the plaintiffs' shares increased by an equal number of shares but were similarly reduced in 1977. This came about by act of registering share certificate numbered 0227 in the name of the plaintiffs followed by deregistration and re-registration in the name of Dr Chong Kim Choy.

The learned judge held as a fact that the first act of registration was erroneous. In doing so, he upheld the basic and entire case for the defendant against the third party.

With regard to the defendant's application of October 3, 1977 for summary judgment against the third party, alternatively, for third party directions, the learned judge held that there was no issue to go to trial and he gave leave to the defendant to enter final judgment in the sum of $4,186,224 as representing the refund of the purchase price of the undelivered shares comprised in share certificate numbered 0227 with interest. It would be sufficient if we echo his reasoning:

> The fact remains that share certificate numbered 0227 is still registered in the name of Dr Chong Kim Choy and neither the plaintiffs nor the defendant could deal with it. They have no right of sale and therefore there has been no effective sale by the third party to the defendant.

The third party appealed against the whole of the decision.

In this court counsel for the third party submitted a massive written argument in which he urged a complete reversal of the decision. We cannot possibly discuss in detail all his arguments but we will take each of his main submissions in turn.

We also have been referred to a great number of authorities by both counsel but we think for present purposes we shall be absolved from any disrespect for their arguments if we only refer to a few, because on certain points excerpts from the material authorities are assembled in them.

The question is therefore simply whether, at the hearing of the application for third party directions, the court is satisfied that there is a question proper to be tried between the defendant and the third party: see *Waterford Turkish Baths Co* v *Barter:*[1] *Greville* v *Hayes.*[2] It is on

such application that the validity of the third party notice and the objection of the third party will be gone into: see *Baxter* v *France.*[3] If the court is so satisfied, and the facts are complex and disputed, the directions will be for trial. If not so satisfied the court may order judgment on the application of the defendant.

The liability of the third party may be established by an affidavit of the defendant or other persons analogous to an affidavit in support of a summons under Order 14 of the *Rules of the Supreme Court* to which no sufficient answer is made by the third party: see *Gloucestershire Banking Co* v *Phillipps.*[4] Therefore the third party who are burdened with the duty of satisfying the court that there is a question proper to be tried are not likely to succeed unless they can produce evidence to support their contention.

It is the contention of counsel for the third party that the directions should be for trial as there are many issues to be explored and it is therefore wrong for the learned judge to have accepted them as proven facts. The main triable issues relied on can be briefly stated.

It is argued on behalf of the third party that it is wrong for the learned judge to hold that since the instrument of transfer Exhibit "H1" was not in proper form the defendant could not effectively transfer the share certificate numbered 0227 to the plaintiffs. In the course of the argument the following cases were cited, *Re Paradise Motor Co Ltd,*[5] *Fitch* v *Lovell*[6] and *Hawkes* v *McArthur,*[7] for the proposition that section 103 of the Companies Act is only a revenue section and that a transfer contravening the said section is not void but only an irregularity and a beneficial owner can deal with the shares pending registration. Section 103 is couched in the following words:

> Notwithstanding anything in its article a company shall not register a transfer of shares or debentures unless a proper instrument of transfer has been delivered to the company....

In our opinion, the weight of the authorities which were cited supports the view that the third party can deal with the shares pending registration. We bear in mind the much quoted and commonsense warning by Devlin J in *St John Shipping Corporation* v *Joseph Rank Ltd*[8] against a too-ready assumption of illegality or invalidity of contracts when dealing with statutes regulating commercial transactions.

The third party contend that the defendant's claim upon which he has obtained judgment is a claim for the return with interest of part only of the entire purchase price of $11,200,000 which he paid under what they allege was a single and indivisible contract for the purchase at that price of 1.4 million shares. As they had delivered to the defendant 976,722 of the 1.4 million shares, thus representing 63% of the whole contract, there had been part performance, and as the defendant had derived some of the benefit which he had bargained for, he cannot claim restitution to recover the purchase-money: see *Hunt* v *Silk.*[9] This is based on the theory that the consideration is whole and indivisible, and that the courts will not apportion it unless the parties have done so. Another reason is that the parties cannot be restored to the situation in

which they stood immediately before the time when the contract was made. Thus in *Taylor* v *Hare*[10], it was held that where a vendor sold a patent right, and the purchaser paid the purchase-money and used the patent right and enjoyed a benefit therefrom, but it afterwards appeared that the patent was invalid, the purchaser could not claim restitution of the purchase-money. See also *Lawes* v *Purser*[11].

Even if this contract was divisible as in the case of a sale of goods to be delivered by instalments (see section 38, Sale of Goods (Malay States) Ordinance No 1 of 1957) and that there had been a failure of consideration in respect of a properly severable part of it, it is argued that the defendant cannot succeed in his claim for rescission and a return of part of his money unless he can make restitution. But restitution cannot be made if something transferred under the contract has altered its character. Thus in *Clarke* v *Dickson*[12] rescission was refused where a partnership, in which the representee had been induced to take shares, had been converted into a limited liability company, for the existing shares were wholly different from those which he originally received.

As a variant or possibly as an extension of the above argument it is suggested that the Sales of Goods (Malay States) Ordinance No 1 of 1957, which includes stocks and shares is also relevant. However, it is of significance to bear in mind that a little note of caution is necessary in applying the provisions of the said Ordinance as to the passing of possession and property in the goods; they present a certain difficulty in reconciling with the company law with regard to shares other than bearer shares since the legal ownership of the registered shares is determined by reference to the company's share register and transfer can be made only in written form and in conformity with the requirements of the articles of association. The section most relied on is section 13(2) which enacts:

> Where a contract of sale is not severable and the buyer has accepted the goods or part thereof or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract express or implied to that effect.

It is accordingly argued on the strength of that section that as the contract was not severable the only remedy of the defendant who had accepted a substantial part of the shares contracted for but claimed defect in title as to a small part is to maintain an action for damages for breach of warranty, and not for recovery of the purchase price.

In any event if the contract was severable, it is further suggested that another issue fell to be determined which was wholly overlooked by the learned judge, namely, whether there was some conduct, by way of estoppel, on the part of the defendant amounting to acceptance in performance of the contract.

It is therefore suggested there is a flaw in the judgment and that if the learned judge had considered the defendant's claim in the context of

the law of restitution he would have to consider the equitable doctrine of laches which he held not to be relevant. It is a well established principle that equity, in accordance with the maxim *vigilantibus et non dormientibus lex succurrit,* refuses to grant relief to stale claims. In the present case the claim was not made until over $2^1/_2$ years after the contract had been completed in December 1974 and the defendant has been throughout and remains in enjoyment of the management and control of United Holdings, and very substantial changes have been made in the company's financial affairs in the interim — see 1975 Annual Report. In the circumstances it is argued that as the defendant has been dilatory in the prosecution of his claim and has acquiesced in the wrong done to him, is guilty of laches and is debarred from relief: see *Lindsay Petroleum Co* v *Hurd*[13] quoted with approval by Lord Blackburn in *Erlanger* v *New Sombrero Phosphate Company.*[14]

The defendant naturally fortifies his case on the authority of such cases as *Rowland* v *Divall,*[15] *Biggerstaff* v *Rowatt's Wharf, Ltd*[16] and *Platt* v *Rowe*[17] for the proposition that the defendant can nevertheless rescind the contract and recover back the price paid as there has been a total failure of consideration. It is said here that he did not get what he had paid for, namely, the shares comprised in share certificate numbered 0227 because the transferee named therein was International Holdings.

In considering this proposition it becomes necessary to examine these cases in order to determine what is the accepted principle. The present case, it is urged, is no different from that of *Biggerstaff* v *Rowatt's Wharf, Ltd, supra.* In that case Harvey, Brand & Co. bought from a limited company and paid for 7000 barrels. There was a short delivery of 400 barrels. It was held that it was a severable contract and Harvey, Brand & Co could sue for money had and received for the short delivery on the ground of total failure of consideration as regards the barrels not delivered.

In *Platt* v *Rowe, supra,* it was held that there was a total failure of consideration where the shares were not registered in the name of the transferor, and the purchaser could recover the purchase price from him.

The authority most relied on is *Rowland* v *Divall, supra.* The defendant sold a car to the plaintiff which, unknown to either of them, had been stolen. The defendant was in breach of the implied condition that he had a right to sell the car but the plaintiff did various acts, namely, he repainted the car and resold it to a customer. It was not discovered that the car was a stolen car until the police seized it. The plaintiff and his purchaser between them had possession of it for about four months. It was held that the plaintiff could recover the purchase price as there had been a total failure to consideration: he had not "received any portion of what he agreed to buy .... the person who sold it to him had no right to sell it and therefore he did not get what he paid for — namely, a car to which he would have title;and under those circumstances the user of the car by the purchaser seems quite immaterial for the purpose of considering whether the condition had been converted into a war-

ranty", *per* Bankes LJ at page 504.

It is important to bear in mind that the claim was for breach of an implied condition on the part of the seller that he had the right to sell the car. Bankes LJ said at page 503:

> The plaintiff now brings his action to recover back the price that he paid to the defendant upon the ground of total failure of consideration. As I have said, it cannot now be disputed that there was an implied condition on the part of the defendant that he had a right to sell the car, and unless something happened to change that condition into a warranty the plaintiff is entitled to rescind the contract and recover back the money. The Sale of Goods Act itself indicates in section 53 (section 59 of our Ordinance No 1 of 1957) the circumstances in which a condition may be changed into a warranty: 'Where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty' the buyer is not entitled to reject the goods, but his remedy is in damages. Mr Doughty contends that this is a case in which the buyer is compelled to treat the condition as a warrantly within the meaning of that section, because, having had the use of the car for four months, he cannot put the seller in *status quo* and therefore cannot now rescind, and he has referred to several authorities in support of that contention. But when those authorities are looked at, (referring to *Taylor* v *Hare, supra, Hunt* v *Silk, supra, Lawes* v *Purser, supra*) I think it will be found that in all of them the buyer got some part of what he contracted for.

The decision in *Rowland* v *Divall, supra,* has been the subject of comment by text-book writers as a decision which "rests basically on a fallacy": see *Atiyah* on *Sale of Goods,* 5th ed at page 502; *Treitel,* 30 MLR at pages 146-149. In our view, that case can be explained on the basis that the contract was voidable and not void and that gave an election to the plaintiff to reject it within a reasonable time. The answer that the plaintiff gave was: "As soon as I knew that I had not got the property I took my action, and the fact that I had had the use of the car does not make any difference". Devlin J commented on that statement as follows:

> Clearly, the answer would not have been the same if the buyer, with knowledge of the true facts, had continued to use the car for another twelve months or so, and had then found that the market had fallen and that he would like to hand it back again; nor, or course, would it be open to the seller in such circumstances to appear one morning and take the car back again, and when the buyer protested, to say: 'The car was never yours, because I never had any property in it ; I have never bought the property from the person who really owned it and it has improved considerably in value, and now I want it back, and here is the price that you paid for it'; but that would necessarily be the result if the contract were void, and not merely viodable: see *Kwei Tek Chao* v *British Traders and Shippers Ltd.*[18]

The present case is based on the representation that the third party was the beneficial owner of 1.4 million United Holdings shares and where, as it is alleged there was misrepresentation, the contract was not void, but voidable at the option of the defendant. He must take action

with reasonable promptness to rescind it on becoming aware of it. Otherwise the right to rescind may be lost. And it may be lost if he takes any benefit under the contract, or does something amounting to an acceptance of it after becoming aware of the misrepresentation. Further, he runs the risk of losing that right if, with knowledge of his right to rescind, he requests the other party to remedy the default. Another material consideration is restitution; if it is impossible, through altered circumstances, to restore the parties to their original positions, e.g., if the shares received by the defendant have, either because of his action or as a result of his acquiescence, undergone a substantial alteration, especially in a detrimental sense, he may lose his right to rescind.

Everything depends upon the facts of the case and the nature of the contract and these must be gone into upon a full investigation upon a witness action and not upon affidavit evidence.

At this stage of the proceedings we will not undertake a preliminary trial of the action beyond noting the several circumstances which lead us to the conclusion that the decision to give leave to the defendant to sign final judgment against the third party without trial was to say the least, wrong and unsupportable.

As has been noted, the whole contention, with which the judge agreed, of the defendant was that the registration of the shares was an error. All error implies an honest mistake as to a fact, without there being any deliberation about it and especially without there being any purposeful gain derived from it. Whether the first act of registration is an error must therefore necessarily be tested by evidence, which the third party must be given the opportunity to cross-examine and should not be accepted at this stage on a mere suggestion or a bare assertion in an affidavit. This is particularly so, having regard to the several circumstances in the case. First, the plaintiffs are effectively Dato Koh Kim Chai and the defendant and the registration of the 523,278 shares in the plaintiffs meant that they now had 985,510 shares which with the 100,000 shares in the name of Dato Koh Kim Chai and the 50,000 shares in the name of the defendant gave them a holding of 1,135,510 shares out of the 2,000,000 shares issued, in other words, an absolute majority. And this majority they held from June 30, 1975, to December 15, 1977. It effectively enabled them to put Dato Koh Kim Chai and the defendant on the Board of Directors, displacing, among others, Dr Chong Kim Choy. And, with their voting strength, they were enabled to do what they liked to do with the company and its assets. In the claim of the defendant against the third party it is necessary, in our view, that this be gone into.

Accordingly, the significance of the correspondence between the secretary of the company and Dr Chong Kim Choy. On March 17, 1975 the secretary of United Holdings wrote to Dr Chong Kim Choy as follows:

> Dear Dr Chong,
>
> *SHARE CERTIFICATE NO 0227*
>
> I refer to the transfer form signed by you to cover certificate No 0227 for 523,278 shares of United Holdings Bhd and return herewith the said form

for your cancellation.
As you are aware these shares were sold to Central Securities and subsequently to Mr Koh Kim Chai, The transfer form executed by you is invalid as the transferee, International Holdings Pte Ltd has been inserted in the transfer form. As such I enclose herewith a new transfer form for your execution. Kindly sign on both sides of the transfer form marked by a pencil cross. On completion I shall be glad if you will return this to me immediately.

On April 22, 1975 he again wrote to Dr Chong enclosing a copy of the transfer form for his signature. Then came the reply from Dr Chong which was dated April 25, 1975:

Dear Sir,

Share Certificate No 0227 for 523,278

I acknowledge with thanks your registered letter dated 22nd instant. This share certificate was held by me in trust for International Holdings (Pte) Ltd, and I had already transferred the same shares back to them without any monetary consideration. I am therefore returning the original transfer form signed by me (transferee being IHPL) to you. It is only proper that you transfer the shares to IHPL and get them to transfer the shares to whoever are the present legal owners. I regret that I cannot in good faith declare that I have received a sum of $11,486,109.52 from Syarikat Seri Padu Sdn when this is not true, as it will give rise to further problems for me.

Yours faithfully,
(Dr Chong Kim Choy)

Now what are the reasonable and proper inferences to be drawn from these letters? In our view, the irresistible inferences are: the defendant had held the share certificate in question from the time he had received it from the third party to the time he delivered it to the plaintiffs without having it registered in his name. This was some 5 days after he had entered into the agreement of sale with the plaintiffs. When the plaintiffs sought to register it in their name, the secretary knew immediately that it could not be done. The secretary must have advised the plaintiffs because instead of rejecting the application to register the transfer outright, he endeavoured to obtain a registrable transfer from Dr Chong Kim Choy, but despite the transferor's refusal and, it is to be stressed, despite his clear knowledge that it was wrong to do so, he did register the transfer in the name of the plaintiffs. Whether he did so of his own motion or at the direction of another or others will have to be seen. This fact will have to be adduced in evidence. If he did so because he was directed to do so, the identity and the motives of those under whose orders he ignored the provisions of law must be determined for a proper and final adjudication of the claim. What the secretary should have done, of course, was to refuse to register the transfer as being against the rules and return it to the party seeking the transfer. What he did, however, was otherwise than in accordance with his strict duties. He or someone else (there being another secretary) carried out the registration and then, later, much later, again in direct contravention of section 162 Companies Act, that is without any power to do so,

and without an order of court, he deregistered the plaintiffs and, strangely, registered the same shares in the name not of International Holdings (Pte) Ltd despite the latter letter, but in the name of Dr Chong Kim Choy.

Thirdly, the suspension of trading of the company's shares on the Kuala Lumpur Stock Exchange: this was sought by Dato Koh Kim Chai and his Board of Directors on December 23, 1974 and was for the purpose of re-organising and restructuring, impliedly for the good of the company and the benefit of the shareholders. An application for re-listing was made on March 20, 1975, but alas for the pious hopes and the good intentions of the directors, approval to date has not been forthcoming. Clearly there is more to the case than meets the eye.

There appears therefore some justification for the conclusion that the defendant 'had got some part of what he contracted for', and that is material consideration 'that he had done something to convert the condition into a warranty' entitling him to seek his remedy, if any, in damages only. We agree with the third party's contention that the issues regarding laches, acquiescence and estoppel are in the circumstances not irrelevant as the learned judge held them to be. He had misdirected himself in law on those points quite apart from the further consideration of restitution which also was overlooked by him.

A point deserving consideration is this: it is argued on behalf of the third party that when the disputed shares were transferred to the plaintiffs in 1975, their name was placed by United Holdings on their register of members until it was unilaterally removed by them in 1977 without a court order under section 162 of the Companies Act. The section reads as follows:

> 162 (1) If —
> (a) the name of any person is without sufficient cause entered in or omitted from the register; or
> (b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member:
> the person aggrieved or any member or the company may apply to the court for rectification of the register, and the court may refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party to the application.
> (2) On any application under sub-section (1) of this section the court may decide:
> (a) any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand; and
> (b) generally, any question necessary or expedient to be decided for the rectification of the register.
> (3) The court when making an order for rectification of the register shall by its order direct a notice of the rectification to be so lodged.
> (4) No application for the rectification of a register in respect of an entry which was made in the register more than thirty years before the date of the application shall be entertained by the court.

The question, they contend, is whether United Holdings, having once registered the plaintiffs as shareholders, are entitled *propio motu* to strike them off the register? They argued on the strength of what was said in *Ward* v *South Eastern Railway,*[19] United Holdings, having chosen to put upon the register persons having a perfectly good equitable title to be there, cannot afterwards of their own. will and pleasure take them off on the simple ground that there is a flaw in their legal title. Since the register of members is *prima facie* evidence of matters inserted therein as required or authorised by section 158(4) of the Companies Act, it is further argued on the authority of *Re Derham and Allen Ltd*[20] that only the court can rectify it on proper application under section 162; accordingly it is wrong on the part of United Holdings unilaterally to strike the plaintiffs' name off the share register. Since the plaintiffs are to be recognised as the registered owner it lay within their power to initiate rectification of the register. Section 162 is relevant in the present case and the learned judge was in error when he held that it was not.

The defendant's case is based on the proposition that what is shown in the register of members is not conclusive and that the company may rectify the register on the ground of mistake without going to court. Since the registrar of United Holdings had the power and had made the rectification, to go to court is irrelevant. A further argument is that what he had asked for was title to the disputed shares; it is patent from the instrument of transfer Exhibit "H1" that title was not transferred to him. In the circumstances it is suggested that the learned judge was not in error when he held that section 162 was not relevant.

The point has been considered many times in many cases. We do not propose to refer to all of them, but it is worth referring to a few which put the matter in its proper perspective. The power to rectify the register under the section is a summary remedy. The court on an application under the section may decide any question of title of any party to have his name entered or omitted from the register, whether such question arises between members and alleged members or between such persons and the company. It may also decide any incidental questions arising with the above, if expedient or necessary. Sometimes the summary procedure under the section is not an appropriate remedy. Thus where complicated questions of law and fact arise it is, we think, only proper to refer the parties to a suit, because rectification can also be had by a suit: see *In re Len Chee Omnibus Co Ltd.*[21] In *Reese River Silver Mining Co* v *Smith,*[22] the application for rectification of the register on the ground of fraud and misrepresentations was by way of a suit against the company. And delay in applying for rectification will destroy the remedy: see *In re Len Chee Omnibus Co Ltd, supra,* where it was held that two years delay was fatal: *Ansett* v *Butler Air Transport Ltd,*[23] where a suit for rectification of the share register was delayed in almost a year, it was held that the plaintiffs were not entitled to relief.

In the present case United Holdings had taken upon itself to rectify the register without any application to court for the purpose, and in justification of this procedure we were referred to the judgment of Jessel

MR in *In re Poole Firebrick and Blue Clay Co Ltd*[24] (a case of common mistake and both parties were willing to rectify), to *In re Reese River Silver Mining Co, supra,* (directors should not wait for the filing of the bills to rectify the register if they knew that the contract had been entered into upon fraudulent representations) and to *Re Derham and Allen Ltd, supra,* (issues of shares at a discount require the sanction of the court). In this connexion the observation of Cohen J in that case is apposite (page 36):

> I wish to say nothing to encourage directors to carry out rectification of a company's register without an order of the court being obtained in proceedings in which the right to rectification is duly established. The protection of the court's order is in the ordinary case essential to any rectification of the register by the removal of the name of a registered holder of shares.

In the present case United Holdings dispute the propriety of the plaintiffs to be on their register and in this regard we would refer to the observation of McCardie J in *First National Reinsurance Co* v *Greenfield:*[25]

> I should add this with regard to the rectification of the register that an application to the court is only essential when the company disputes the right to rectification.

To that we need only add that expulsion of a member from the register is a serious matter and the company cannot take upon itself to alter it.

Be that as it may, it seems to us to be somewhat futile exercise to deal with this point because the real issue here is not whether section 162 of the Companies Act is or is not relevant, but whether rectification under the section is an appropriate remedy, or whether the remedy should be by way of a suit. We take the view that an application for rectification cannot be granted where there are serious disputes regarding title and the issues cannot be properly decided in the summary proceedings under the section. Delay is a material consideration. In the present case, the delay is almost 2 years. The *dicta* of Kay J in *In re Scottish Petroleum Co*[26] point emphatically to the case here represented by the third party: "The law of the court is that a man must take proceedings to have his name removed with due diligence if he has any complaint to make". The observations of Baggallay, Lindley and Fry LJJ in that case support the view the third party are taking. If a man is too late to secure rectification it must follow that he is too late to avoid the contract. In that case the delay of a fortnight in repudiating the shares made it doubtful whether the repudiation in the case of a going concern would have been in time (page 434).

Having regard to all the circumstances of the case, we are of the view that the learned judge was wrong in giving summary judgment to the defendant. There is a question proper to be tried between the parties. that being so, it remains to consider the question of consolidation of the third party proceeding with Civil Suit No 2323 of 1976.

The main purpose of consolidation is to save costs and time, and

therefore it will not usually be ordered unless there is "some common question of law or fact bearing sufficient importance in proportion to the rest" of the subject-matter of the actions "to render it desirable that the whole should be disposed of at the same time": *Payne* v *British Time Recorder Co,*[27] *Horwood* v *British Statesman Publishing Co, Ltd,*[28] *Daws* v *Daily Sketch*[29]. Where this is the case, actions may be consolidated where the plaintiffs are the same and the defendants are the same.

Now, the causes of action in this third party proceeding and Civil Suit No 2323 of 1976, where the plaintiffs and the defendants are the same, arise out of the same series of transactions, i.e., purchase of United Holdings shares and short delivery of such shares, and in our view there are questions of fact or law common to them, e.g., where rescission is a common element of relief, it is only necessary to prove that there is misrepresentation, innocent or fraudulent.

We may add that in such circumstances, one of the tests in deciding whether consolidation should be ordered is to determine whether two inconsistent judgments will come into existence if it is not ordered.

We therefore allow the appeal with costs here and below and issue the third party directions in terms of the application of October 3, 1977 except prayer (iii), unconditional leave to defend, and consolidation of the third party proceeding with Civil Suit No 2323 of 1976.

Appeal allowed.

Lim Kean Chye for the Appellants.
VC George for the Respondent.

Notes

(i) In *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244, the preliminary legal issue before the Federal Courts concerned points of procedure, that is, whether the decision of the High Court in dismissing the application to set aside a third party notice and in granting summary judgment against the third party was correct.

(ii) Raja Azlan Shah CJ (Malaya) (as he then was) in delivering the judgment of the Federal Court made a careful analysis of the facts and the law. In so doing His Lordship made a number of significant observations in meeting the respondent's arguments which is of importance to the company lawyer.

(iii) One of the issues was whether the third party company can deal with the shares pending registration, albeit the instrument of share transfer is alleged to be defective. On this point His Lordship adopted the warning of Devlin J in *St John Shipping Corporation* v *Joseph Bank Ltd* [1957] 1 QB 267 that the court must not have too-ready an assumption of illegality or invalidity of commercial contracts.

(iv) His Lordship also held that in a contract for sale of shares, the

restitutionary remedy for the unpaid balance is not usually available as the contract is indivisible and there is evidence of acceptance of part performance. His Lordship examined a number of common law decisions in this area and came to the conclusion that there were important triable issues of fact and law so that it was not possible to make a decision purely on affidavit evidence.

(v) His Lordship also stressed that the equitable doctrine of laches applies so that on the facts of this case the delay of two years was held against the respondent.

(vi) On the issue whether the Sale of Goods Ordinance 1957 applies to a sale of shares or stock, His Lordship observed that this has to be approached with caution since the legal ownership of the registered shares was determined by reference to the company's share register and the transfer of such shares could only be made in accordance to the prescribed written form and with the requirements of the articles of association.

(vii) His Lordship further held that if rescission of contract for sale of shares was sought on the grounds of misrepresentation, the recognised defences to such an action was applicable, for example, lack of promptness to take action for rescission, conduct amounting to acceptance of the contract or receipt of benefits of the contract after becoming aware of the misrepresentation.

(viii) Finally His Lordship concluded, that the company's power to rectify the share register under section 162 of the Companies Act 1965 cannot be done unilaterally if there were facts which were in serious dispute.

(c) Whether directors are trustees of the company

PJTV Denson (M) Sdn Bhd & Ors
v
Roxy (Malaysia) Sdn Bhd

[1980] 2 MLJ 136 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah CJ(Malaya), Syed Othman FJ and Abdul Hamid J

See under Land Law at page 662, below.

CREATION OF CHARGE

Zeno Ltd
v
Prefabricated Construction Co (Malaya)

[1967] 2 MLJ 104 High Court, Kuala Lumpur

Cases referred to:-

(1) *Johore Para Rubber Co Ltd* v *Registrar of Companies, Malayan Union* [1948] MLJ 135 at 136.
(2) *Selibin Tin Syndicate Ltd* v *Registrar of Companies* (1921) 2 FMSLR 262.
(3) *Raman Chettiar* v *Muthiah Chetty* (1923), 3 FMSLR 177.
(4) *Palmer* v *Wiley* (1906), 23 MN (NSW) 90, 91.
(5) *Ngan Khong* v *Bamah* [1935] MLJ 167.
(6) *Arunasalam Chetty & Ors* v *Peah Ah Poh & Ors* [1937] MLJ 17.
(7) *Crosbie-Hill* v *Sayer* [1908] 1 Ch 866, 875.
(8) *Barry* v *Heider* (1914), 19 CLR 197.
(9) *Great Western Permanent Loans* v *Friesen* [1925] AC 208.
(10) *Abigail* v *Lapin* [1934] AC 491.
(11) *Bulter* v *Fairclough* (1917), 23 CLR 78.
(12) *National Bank of Australasia* v *United Hand-in-Hand Co* (1897), 4 App Cas 391.
(13) *Woon Poon Hoh* v *Muthiah Chetty* [1934] MLJ 121.
(14) *Murugappa Chetty* v *Seenivasagam* [1936] MLJ 217.
(15) *Gan Khor* v *Soon bin Pelita* [1935] MLJ 158 at p 159.
(16) *Noble* v *Noble & Ellis (No 2)* [1964] 2 WLR 349, 354 355.
(18) *Government Stock & Ors Investment Co* v *Manila Railway H L* (1897), 66 L J Ch 102, 105.
(19) *Biggerstaff* v *Rowatt's Wharf Ltd* [1896] 2 Ch 93.
(20) *Wallace* v *Avershade* [1899] 1 Ch 891.

RAJA AZLAN SHAH J: In the event that has happened, the first issue to be decided in the present case is whether the charge executed by the first defendants on 16th February 1962 in favour of the plaintiffs is valid.

The facts are as follows. The first defendants, a limited company subject to the provisions of the Companies Ordinance, took a loan of $75,000 from the plaintiffs and executed a mortgage and general charge, and as security they deposited the title deed for land held under EMR 4031, Lot 703, in the Mukim of Bukit Raja, Klang, in the State of Selangor, of which the first defendants are the registered proprietors. The charge was never registered in the Land Office although it was registered with the Registrar of Companies on 9th March 1962. The plaintiffs lodged a caveat in respect of the said land with the Collector of Land Revenue, Klang, and it was duly recorded in the Register of Document of Title on 23rd April 1962. On 31st October 1963 the second defendant obtained judgment in the sum of $20,514.87 against the first defendants in Civil Suit No 261 of 1962, and on 14th November 1963 he obtained a prohibitory order against the said land and presented the same to the Collector of Land Revenue for registration under the provisions of the Land Code. The prohibitory order provided that it was subject to caveats and prohibitory orders. By an order of the court dated 6th February 1964 in Civil Suit No 261 of 1962 the second

defendant obtained an order for the sale of the said land by public auction at a reserve price of $25,000. In April 1964 the plaintiffs issued their writ against both defendants.

The first defendants are said to have no other assets. They have not repaid the principal sum of $75,000 nor any interest thereon to the plaintiffs despite a demand for payment made to them on 10th February 1964. Furthermore, the plaintiffs state that they gave notice to the second defendant of their prior lien on the said land but nevertheless the second defendant proceeded to by-pass their rights and interests in the matter.

The plaintiffs now pray for judgment in the sum of $82,500 including interest against the first defendants, a declaration that the plaintiffs' lien on the said land has priority of right, claim and interest over that of the second defendant's prohibitory order, an order to set aside the order of sale dated 6th February 1964, alternatively that the said land be auctioned with a reserve price of $90,000.

The first defendants did not enter appearance and judgment by default was accordingly entered against them.

Mr Devaser on behalf of the second defendant argued that the charge was not "created" within the meaning of section 80 of the Companies Ordinance 1940 and is therefore void. Counsel submitted that for the charge to be "created" under the Ordinance it must be created in conformity with the provisions of the Land Code. Counsel concluded by arguing that if the charge is void it is void for all purposes and the plaintiffs are not entitled to rely on any part of it.

Section 80(1) of the Ordinance provides that every charge created after the fixed date, namely, 10th Februrry 1915, by a company registered in the Federation shall be void against any creditor unless the prescribed particulars of the charge together with the instrument, if any, by which the charge is created or evidenced are delivered to or recieved by the registrar for registration within 21 days after the date of its creation. Section 80(10)(c) provides that a charge on land situated in any Malay State shall be deemed to be created at a time when the charge is created pursuant to section 90 of the Land Code (Cap 138).

Therefore, in considering the date of creation of a charge on land it is necessary to look into the relevent provisions of the Land Code: see *Johore Para Rubber Co Ltd* v *Registrar of Companies, Malayan Union*[1]. Section 55 of the Code, *inter alia,* provides that land comprised in any entry of the Mukim Register shall be subject to the provisions of the Enactment and shall not be capable of being charged or dealt with except in accordance with the provisions of the Enactment. Section 90 provides the manner of registering an instrument. Section 96 provides that no land shall be charged until the transaction is registered in accordance with the provisions of the Enactment. These sections make it perfectly plain that for the purpose of that Enactment any attempt to create a charge on land otherwise than by registration is void though doubtless for other purposes the execution of such a document would serve to create certain rights and liabilities: see *Johore Para Rubber Co Ltd's* case, *supra.* In the Johore case the company took a loan from a

finance board and on 15th August 1947 executed in their favour a memorandum of charge on land situated in Johore. The charge was duly registered at the Registry of Titles at Johore Bahru on 9th September 1947 and on the same day the company despatched by post a copy of the charge to the Registrar of Companies for registration under section 81 of the Companies Ordinance, 1940. The registrar refused to register the charge, claiming that he was precluded from doing so by section 80(1) of the Ordinance. It was there held that by virtue of section 63 and section 65 of the Johore Land Enactment, which are in *pari materia* with section 55 and section 96 of the Land Code, the charge was created on the day it was registered in the Registry in Johore Bahru on 9th September 1947 and as a copy of the charge was addressed to the Registrar of Companies by post the same day and was received by him within the period of 21 days the registrar should register the charge.

In my view the *Johore* case is not dissimilar to the instant case and there is no reason why I should not adopt the reasoning therein stated. However, a point which, at first hand, has caused me some anxiety is the case of *Selibin Tin Syndicate Ltd* v *Registrar of Companies*[2] which held exactly the opposite view. In that case, which was briefly reported, the company executed a charge over sundry of the company's mining leases and sub-leases on 21st July 1921 to secure repayment of the sum of $29,500 and interest. The charge was duly registered in the Land Office on 3rd August 1921. On the return of the said charge a duplicate thereof together with the particulars required by section 93 of the Companies Enactment (FMS) No 20 of 1917 was sent to the Registrar of Companies and reached him on 18th August 1921. The registrar refused to register the particulars on the ground that the period of 21 days required by section 93 had elapsed since the date of signing the said charge. It was held that a charge is created when executed and that the time allowed by section 93 of the Companies Enactment begins to run from that date and not from the date of registration in the Land Office.

There seems to be an apparent conflict between those two cases. However, it is of interest to note that the *Selibin* case was not considered in the later case of *Johore Para Rubber Co Ltd.* A close examination of the Companies Enactment, 1917, discloses that there are no provisions corresponding to section 80(10)(c) of the Companies Ordinance, 1940. In my view, section 93 of the Companies Enactment, 1917, was taken from section 93 of the United Kingdom Companies (Consolidation) Act, 1908, which is silent on the definition of the word 'create'. The omission is deliberate for the simple reason that in the United Kingdom there are no provisions for a system of registration of titles to land similar to the Torrens System of registration. The two cases can therefore be said to have been decided under different laws and it is to that extent that they can be distinguished. In any event I would prefer to adopt the reasoning in the *Johore* case in view of the express statutory provisions of section 80(10)(c) of the Companies Ordinance 1940.

In the circumstances of this case it is quite obvious that the charge is void for all purposes with the consequence that the money secured

thereby becomes immediately payable: see section 80(1) of the Companies Ordinance, 1940.

Mr Chooi Mun Sou, on behalf of the plaintiffs, argued that he was not claiming as chargee under the Land Code but as a lien holder. The case of *Raman Chettiar* v *Muthiah Chetty*[3] was cited as being on all fours with the present case. Mr Devaser on the other hand submitted that if that was the case then the lien by virtue of section 134 of the Land Code was created after registration of the caveat and not by execution of deposit of title. Counsel therefore argued that the plaintiffs must state, as is required under the section, that they intended to create a lien.What in effect the plaintiffs were saying was that since the first defendant had deposited with the plaintiffs the issue document of title there was the intention to create a lien over the mortgage and general charge, and that, it was submitted by Mr Devaser, was not enough. Another argument propounded by Mr Devaser was that the plaintiffs had violated the provisions of section 167 of the Land Code in that they had failed to state the nature of the interest in the land and the ground upon which their claim was founded. The ground which the plaintiffs claimed was that they had got a lien over the mortgage and general charge and that, counsel submitted, was in general terms and therefore insufficient.

The law regarding the creation of a lien under the Land Code is well settled. Under section 134 of the Code a lien over any land can only be created by the deposit of the relevant issue of document title by the proprietor followed by a caveat by the holder of the lien which requires delivery of the issue document of title with the caveat for a memorial thereto to be made: see Das *Torrens System in Malaya,* p 348. In my view, since intention is always a matter of inference from all the relevant circumstances, once the issue document of title is deposited with the depositee that is evidence of intention to create a statutory lien for purposes of the section. In the present case the first defendant company executed an unregistered mortgage and general charge as security of the loan and clause 2(6) thereof states:

> The mortgagor further hereby deposits the Title for Land held under EMR 4031 for Lot 703 in the Mukim of Bukit Raja District of Klang with the lender as security for principal and interest and the lender may lodge a caveat with the Collector for Land Revenue to create a lien.

From this document and the fact that the document of title was deposited with the plaintiffs, it is abundantly clear that there was the intention to create a lien over the land in accordance with section 134 of the Code.

Objection was taken by Mr Devaser that the caveat was defective in that it did not specify the nature of the interest in the land and the grounds on which the claim was made. Counsel referred me to a valuable treatise on 'The Drafting of Caveats' by John Baalman in the *Australian Law Journal,* Vol 31, p 17, and to Vol 9 of the same journal at p 328, 'Caveat against Dealings — Quantum of Estate or Interest'. Those articles, to my mind, go no further than re-stating that the statutory

requirements of filing a caveat which corresponds to section 167 of our Code must be strictly complied with. Section 167 reads:

> A caveat shall state the nature of the interest in the land and the ground upon which the claim is founded, shall be verified by the affirmation of the caveator or his agent, shall contain an address within the Federated Malay States at which notices may be served, and may be in the Form in Schedule XXXV.

Thus, if a defective caveat is lodged it can be treated as waste paper; *per* Pring J in *Palmer* v *Wiley*.[4] Thus a caveat couched in vague terms such as "claiming an equitable interest" or claiming "estate or interest, documentary title" without particularising it, was held to be bad and the caveat removed: see Das *Torrens System in Malaya*, p 344.

It is now necessary to look into the caveat in the present case to see whether it complies with the provisions of section 167 of the Code. The plaintiffs here claimed a lien, and I quote:

> A lien on the ground that PCC Prefabricated Construction Company (Malaya) Limited the proprietors did deposit with us the issue document of title deed held under Entry in the Mukim Register No 4031 Lot No 703 in the Mukim of Bukit Raja in the District of Klang with intent to create a lien over mortgage and general charge dated the 16th day of February 1962, under Item 6. A copy of the said mortgage and general charge is attached hereto and marked 'A'.

What does the caveat mean? To me it cannot mean anything else than exactly what it says, that is, a lien on the ground that the first defendants had deposited with the plaintiffs the issue document of title and that is substantial evidence of an intention to create a lien. Therefore, the nature of the plaintiffs' interest in the land is a lien, which has been held in *Ngan Khong* v *Bamah*[5] as "analogous to an equitable mortgage". It is an equitable interest in land capable of being caveated: see also *Arunasalam Chetty & Ors* v *Peah Ah Poh & Ors*[6]. The grounds on which the claim is based is also evident from the caveat. It is in effect in the nature of a collateral security for the loan. Although the caveat fails to say expressly that it affords collateral security, I think that is implicit. It says that the issue document of title is deposited with intention to create a lien under clause 6 of the mortgage and general charge which is attached to the caveat. To my mind it states the substance of the claim. The grounds of the claim are satisfied if the caveat states the substance of the claim. It is a matter of substance and not of form. No technical or precise language need be used.

In my view the caveat establishes priority and the onus is therefore on the holder of a subsequent equity to show facts which render it inequitable for the holder of a prior equity to insist as against him on that priority. Although priority in time is the ordinary test, in the final analysis where evidence discloses some act or omission on the part of the holder of a prior equity the rule that "who has the better equity" applies; *per* Parker J in *Crosbie-Hill* v *Sayer*.[7]

An act which postpones a prior equity arises where a proprietor by his conduct had given a duly executed registerable instrument to the

transferee who subsequently mortgaged the land to a *bona fide* mortgagee: see *Barry* v *Heider;*[8] *Great Western Permanent Loan Co* v *Friesen.*[9] In *Abigail* v *Lapin*[10] the Privy Council held that where the proprietors of land in New South Wales had transferred them to the nominee of the creditor together with the certificates of title but had lodged no caveat, their equity should be postponed to that of the mortgagee because the proprietors had armed their transferee with power to deal with the lands as owner.

The only omission treated in the decided cases is the omission to lodge a caveat. It was observed in *Butler* v Fairclough[11] that the failure to file a caveat constitutes negligence so as to defeat the prior equity for it enables the registered proprietor,"holding his certificate of title in his pocket to hawk the certificate around the town" and obtaining advances of money on the face of the clean certificate. In *Abigail* v *Lapin, supra,* their Lordships of the Privy Council found themselves in agreement with the minority judgment of the High Court that, apart from priority in time, the test for ascertaining which encumbrancer had the better equity must be whether either had been guilty of some act or default which prejudiced his claim, and in the case under review the holders of the prior equity "reinforced the apparently absolute ownership of the registered proprietor by neglecting the well-known method of protecting their rights and interests by means of a ceveat": see 8 ALJ 198, 200.

However, Mr Devaser does not rely on similar decided cases to found his claim that his client had a better equity. His contention is that the plaintiffs had entered possession of the first defendants' premises through their watchman and as such were to be regarded as a mortgage in possession with its attendant responsibilities and liabilities; in particular, counsel submitted, the plaintiffs were strictly accountable for any acts of waste. Counsel strongly relied on the provisions of section 137 of the Land Code and the case of *National Bank of Australasia* v *United Hand-in-Hand Co.*[12] In my view, that section and that case cited and the local cases of *Woon Foon Hoh* v *Muthiah Chetty*[13] and *Murugappa Chetty* v *Seenivasagam*[14] are not applicable in the instant case as it is quite clear that no default was made in the maintenance and cultivation of the land and that no application for a certificate to the collector was made that there was such default. In any event that section does not authorise a chargee to enter into possession of country land comprised in an EMR or of town land or village land.

With regard to the contention that the plaintiffs are analogous to a mortgagee in possession, it is sufficient if I cite a passage of Thomas C J in *Gan Khor* v *Soan bin Pelita*[15]:

> It must be remembered that a charge is a very different transaction to a mortgage. There is no such thing as a mortgage of land known to the law of the Federated Malay States. Charges alone are recognised. The rights arising from a charge are contained in the Land Code. It is not possible to seek to introduce the elements of an English mortgage into a charge as provided by the law of the Federated Malay States, and therefore, apart from any express powers it is not correct to say that a chargee has the

right to enter into occupation.

Mr Devaser then argued that there was fraud in the sense that there was collusion between the plaintiffs and first defendants to defraud the latter's creditors. Among other things, counsel seemed to found his contention on the premise that Loebis, who is the director of both companies, took no step to enter appearance or contest the claim when the plaintiffs served notice of demand on the secretary on behalf of the first defendants and that no action was taken to enforce the charge until after the second defendant had taken execution proceedings against the first defendants. Such was the contention of counsel, but I am unable to accede to it. It seems to ignore the nature and character of the act of which the second defendant complained and to disregard the principles on which courts of equity proceed when dealing with fraud. It will not be out of place to cite a passage from the judgment of Scarman J in *Noble* v *Noble & Ellis (No 2)*[16] whose statement of law was approved in the Court of Appeal.[17] The court was there dealing with collusion in respect of a matrimonial proceeding. But in pointing out the distinction between a case of collusion and a case of non-collusion the learned judge uses very plain language and his remarks may be useful in clearing the ground in the present case:

> In my opinion the answer to the problem of distinguishing between a collusive and a non-collusive bargain in any given case depends upon a careful and accurate analysis of the bargain made. There must, of course, be a bargain. It must be construed like any other contract, that is to say, full weight must be given to its implied as well as to its express terms.

In another passage he said:

> A collusive bargain is one with a corrupt intention. It is an agreement under which a party to the suit for valuable consideration has agreed either to institute it or to conduct it in a certain way: for example, the reluctant petitioner induced by the offer of some benefit to take proceedings against an eager respondent, or — closer to this case — a co-respondent induced by a promise of some benefit not to defend a charge of adultery, or stronger still, to provide evidence or to bear witness at the trial against the respondent. If, upon a fair consideration of the circumstances, the parties intend by their agreement to match institution of suit or any aspect of its conduct with the provision of some benefit to the party instituting or in that aspect conducting the suit, here is, in my opinion, collusion. Unless there is this matching of forensic proceeding against valuable consideration there is no collusion. The 'dishonest purpose' of which Bucknill J spoke in *Scott* v *Scott* [1913] P 52, 54; the 'element tending to pervert the course of justice' which Willmer J recognised as necessary in *Lowndes* v *Lowndes* [1950] P 223; 231; each is to be found in the parties' intention that for valuable consideration one of them will either take or refrain from taking a forensic step otherwise open to him in the suit. That is the corrupt intention, that the element in the bargain tending to pervert the course of justice. I would add that to refrain from raising a defence or to drop a charge while continuing with others, though negative acts, are of course as much part of the conduct of a suit as positive steps taken to institute or prosecute it, and if done or agreed to be

done for valuable consideration would be collusive.

Applying the above principles and treating the onus as upon the second defendant to establish fraud which is on the higher balance of probabilities, it cannot rationally be said that the circumstances prevailing in the present case constitute fraud in the sense propounded by counsel. In my opinion the existence of a collusive bargain is lacking. There is not a shred of evidence of an agreement to procure the initiation or to provide for the conduct of the suit. There is already evidence that the plaintiffs have passed a resolution to approve the sum of $75,000 loaned to the first defendants: see resolution by circular letter dated 16th February 1962.

Mr Devaser finally admitted that the memorandum of charge resembles a floating charge on the moveable assets of the first defendant and argued that those assets technically in their possession had either been lost or fritted away by the first defendants with the connivance, abetment, negligence or wilful default of the plaintiffs and therefore the plaintiffs are liable to reduce their claim by a corresponding amount of such loss.

It is an accepted principle of law that a floating charge is an equitable charge on the assets for the time being of a going concern. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement, but if there is no agreement for suspension he may exercise his right whenever he pleases after default: *per* Lord Macnaghten in *Government Stock &c Investment Co* v *Manila Railway, H L.*[18] Until such intervention the company carries on as if the charge were non-existent: see *Biggerstaff* v *Rowatt's Wharf Ltd*[19]; *Wallace* v *Avershade.*[20] In the present case the memorandum of charge gives a floating security over all the undertaking and goodwill of the first defendants and all its property, assets, and rights whatsoever and wheresoever both present and future (excluding the premises charged by way of legal mortgage or specifically mortgaged or charged or specifically assigned). There is evidence that the first defendants' business ceased in the latter part of 1962 when their managing director, Mr Lucas, disappeared. The plaintiffs thereupon placed a watchman at the defendant's site at Batu Tiga. In that event I agree with counsel's submission that the plaintiffs had intervened with the consequence that the floating security had crystallised and became a fixed charge. Now, what is the position of the plaintiffs in relation to the fixed charge? It was suggested by Mr Devaser that they are analogous to a trustee. No authorities were advanced to substantiate that proposition. I feel that I cannot bind myself to such proposition. In my view, the plaintiffs are in a position of a receiver. In fact, the instrument creating the charge enables the plaintiffs to appoint a receiver "at any time after the principal monies have become payable". The duties of a receiver are in my view subject to but not in derogation of the powers conferred by the instrument creating him. The dominant power is that of taking

possession of the property covered by the charge and collecting the income derived therefrom, if any. Subject to that instrument, the general powers of the receiver are that he must exercise the same care of the property as an ordinary prudent businessman would in regard to his own property and refrain from speculating; he is responsible for any loss caused by his negligence or by his wilful default, but will not be liable for loss or mistake after he has acted honestly and without negligence; he is also a trustee for any money due from himself as receiver.

It was suggested by Mr Devaser that the tools were looted because of the negligence of the plaintiffs and that no credit notes were taken in respect of the electric calculator, air-conditioner, and the lorry; further, the plaintiffs must account for the refrigerator given to Lucas and the proceeds of sale of the motor-car which was disposed of by Lucas, and therefore a corresponding amount of depreciation of the assets must be taken into account for purposes of the present claim. I would be glad to accede to such proposition if and when the moveable assets are to be considered in ascertaining priorities. In the present case we are only concerned with a lien on the land in question and therefore when the time arises counsel's submission will be considered.

In the circumstances there will be judgment for the plaintiffs in the sum of $82,500 including interest against the first defendants, a declaration that the plaintiffs' lien on the said land has priority of right, claim and interest over that of the second defendant's prohibitory order, and an order for the sale of the said land under the provisions of section 257 of the National Land Code by way of public auction within thirty days hereof. The registrar is required to fix the reserve price for the purpose of the sale. Costs to the plaintiffs.

Judgment for the plaintiffs.

Chooi Mun Sou for the Plaintiffs.
KL Devaser (2nd Defendant) for the Defendant.

Note

In *Zeno Ltd* v *Prefabricated Construction Co (Malaya) Ltd & Anor, supra,* Raja Azlan Shah J (as he then was) held the view that a charge is only "created" within the meaning of section 80 of the Companies Ordinance 1940 if the charge complies with the provisions of the Land Code. On this point His Lordship followed the decision in *Johore Para Rubber Co Ltd* v *Registrar of Companies* [1948] MLJ 135 and rejected the decision of *Selibin Tin Syndicate Ltd* v *Registrar of Companies* (1921) 2 FMSLR 262. Although *Zeno Ltd* went up on appeal to the Federal Court: see *Paramoo* v *Zeno Ltd* [1968] 2 MLJ 230. This point was not dealt with in the judgment of the Federal Court.

WINDING UP

In Re Fair Insurance Co Ltd

[1969] 2 MLJ 114 High Court, Kuala Lumpur

RAJA AZLAN SHAH J: This is an application by Yap Phan Kooi and Saw Yew Bee who are the only contributories and directors of Fair Insurance Co Ltd which is hereinafter referred to as "the company".

The company was incorporated in 1961 under the Companies Ordinance, 1940-1946. On the coming into force of the Life Assurance Act, 1961 the directors decided to wind up voluntarily. Accordingly, the company went into voluntary winding up on 22nd February 1962. Yap Hong Thin and V Kandiah were appointed liquidators.

On 7th May 1962 Arthur Clarence Gracy, the competent authority under section 8 of the Life Assurance Companies (Compulsory Liquidation) Act, 1962 petitioned that (i) the company be wound up by the court under the provisions of the Companies Ordinance, 1940-1946, and the Life Assurance Companies (Compulsory Liquidation) Act, 1962; (ii) Anthony Niblock, Philip Gerald Grundy, Francis Neale Mugliston, Norman Davies Wood and John Arnold Howard of Evatt & Co, Kuala Lumpur be jointly and severally appointed liquidators of the company. On 28th May 1962, Suffian J (as he then was) ordered that the voluntary winding up of the company be continued but subject to the supervision of the court. It was further ordered that Anthony Niblock, Philip Gerald Grundy, Francis Neale Mugliston, Norman Davies Wood and John Arnold Howard be jointly and severally appointed liquidators in place of Yap Hong Thin and V Kandiah. John Arnold was later discharged.

On 19th June 1964, Yap Phan Kooi and Saw Yew Bee applied by way of summons in chambers for the determination of the following questions: (i) whether the liquidators should wind up the affairs of the company as in an ordinary voluntary winding up and/or whether the provisions of the Life Assurance Companies (Compulsory Liquidation) Act, 1962 apply to the winding up; (ii) whether policy holders of the company whose policies had lapsed before the coming into operation of the Life Assurance Act, 1961 should still be regarded as creditors of the company; (iii) on what basis should those persons whose policies did not lapse on 15th October, 1961 be paid; (iv) how should the validity of the claims received by the liquidators be ascertained and whether some representative of the contributories or the creditors or some other independent person should be associated in the inspection and determination of the validity of such claims. On 15th December 1964, Gill J (as he then was) ordered that: (i) the provisions of the Life Assurance Companies (Compulsory Liquidation) Act, 1962 applied to the winding up of the company; (ii) policy-holders of the company whose policies had lapsed before the coming into operation of the Life Assurance Companies (Compulsory Liquidation) Act, 1962 were not creditors of

the company; (iii) those persons whose policies did not lapse on 15th October 1961 were to be paid an amount equal to the aggregate of the premiums paid and claimed by them under the policies; (iv) the validity of the claims received by the liquidators was to be ascertained by the liquidators alone. The applicants then appealed against the answer to question (iv). On 6th September 1965 the Federal Court upheld the answer of Gill J to question (iv).

Coming now to the present application, the applicants, Yap Phan Kooi and Saw Yew Bee, on 21st September, 1965 applied for an order that: (i) Anthony Niblock, Philip Gerald Grundy, Francis Neale Mugliston and Norman Davies Wood be removed and Lim Seng Guan of Ipoh or such competent person be appointed as liquidator as the court considers fit; (ii) alternatively, Lim Seng Guan be appointed as liquidator in addition to Anthony Niblock; (iii) a committee of inspection be appointed as provided in the Companies Ordinance, 1940-1946. Prayer (iii) was later abandoned by the applicants.

It is the gist of the appellants' complaints that the liquidators appointed by the court had failed: (i) to observe certain statutory provisions of the Companies Ordinance, 1940-1946; (ii) to apply themselves with the diligence and care expected of them; (iii) to maintain the impartial balance between the interests of the claimants and that of the contributories.

As for the removal of the liquidators, counsel for the applicants relied on section 183(1), section 242(2) and section 251(3) of the Companies Ordinance, 1940-1946. Section 183(1) provided that: "(1) A liquidator appointed by the court may resign or, on cause shown, be removed by the court." Section 242(2) provided that: "(2) The court, may on cause shown, remove a liquidator and appoint another liquidator". Section 251(3) provided that: "(3) The court may remove any liquidator so appointed by the court or any liquidator continued under the supervision order and fill any vacancy occasioned by the removal, or by death or resignation."

Counsel for the respondents contended that none of the sections which counsel for the applicants relied on for the removal of the respondents was applicable in the circumstances of the case. After deliberation, I arrived at the same conclusion.

Counsel for the applicants first relied on section 183(1) of the Companies Ordinance. That section was inapplicable by reason of section 252 of the same Ordinance which provided:

> (2) A winding up subject to the supervision of the court is not a winding up by the court for the purpose of the provisions of this Ordinance which are set out in the Ninth Schedule to this Ordinance but, subject as aforesaid, an order for a winding up subject to supervision shall for all purposes be deemed to be an order for winding up by the court.

The Ninth Schedule bore the heading. "Provisions which do not apply in the case of a winding up subject to supervision of the court." Section 183 other than sub-section (5) was included in the list of provisions in the Ninth Schedule which were inapplicable to a winding up subject to the

supervision of the court. By the order of the court dated 28th May 1962 the winding up of the company was to continue but subject to the supervision of the court. Hence, section 183(1) which counsel sought to rely on was in fact inapplicable to the liquidation of the company since it was subject to the supervision of the court.

Counsel for the applicants next relied on section 242(2) of the Companies Ordinance. This section was one of the sections mentioned in section 239 of the same Ordinance. Section 239 provided that "The provisions contained in the eight sections of this Ordinance next following shall apply to every voluntary winding up whether a members' or a contributors' winding up." Since the winding up of the company was one subject to the supervision of the court, by section 252(2) of the Companies Ordinance it was deemed a winding up by the court. As section 242 was only applicable to a voluntary winding up and not to a winding up by the court, it must necessarily be inapplicable to the present winding up.

The last section which counsel for the applicants relied on was section 251(3) of the Companies Ordinance. Section 251(1) provided that when an order was made for a winding up subject to supervision, the court might by that or any subsequent order appoint an additional liquidator. Section 251(3) read: "The court may remove any liquidator so appointed by the court or any liquidator continued under the supervision order and fill any vacancy occasioned by the removal or by death or registration." The phrase "any liquidator so appointed by the court" must refer to the appointment of an additional liquidator under section 251(1). The present liquidators were not additional liquidators appointed under section 251(1). The only other liquidator covered by section 251(3) was one whose appointment was continued under the supervision order. The previous liquidators of the company were Yap Hong Thin and V Kandiah who were substituted by the present liquidators by the order of the court dated 28th May 1962. So the present liquidators were appointed at the time when the court ordered that the voluntary winding up of the company was to be continued but subject to the supervision of the court and they were not liquidators whose services were continued by that order. Therefore, section 251(3) had no application to the present liquidation.

The present liquidators cannot be removed by an order of the court under any provision of the Companies Ordinance, 1940-1946.

The only other prayer which remains is for the appointment of an additional liquidator. Section 251(1) of the Companies Ordinance provided that 'Where an order is made for a winding up subject to supervision, the court may by that or any subsequent order appoint an additional liquidator.' That section conferred a discretionary power on the court, the exercise of which must depend on the merits of each case. In the present application, the liquidation had been completed to all intents and purposes. All the claims had been dealt with by the present liquidators and the verified claimants had been paid. The first and final dividend was in fact declared in August 1964, more than a year before the applicants took out the present application. In the circumstances, no

useful purpose can be served by the appointment of an additional liquidator.

As to the question of costs, the company now has no assets. No order as to costs.

Application refused.

N Sharma for the Applicants.
DG Rawson for the Respondents.

Notes

(i) The grounds upon which this decision was based, that is section 252 and the Ninth Schedule of the Companies Ordinance 1940-46 are no longer applicable. The Companies Act, 1965 which repealed (see section 3 and the First Schedule) the Companies Ordinance 1940-46 do not have the equivalent of section 252 and the Ninth Schedule of the Ordinance.

(ii) Section 183 of the Companies Ordinance 1940-46 is however in *pari materia* with section 232 of the Companies Act 1965 which reads:

> A liquidator appointed by the Court may resign or on cause shown be removed by the Court.

(iii) The Court's power to remove a liquidator is also found under section 266 of the Companies Act 1965. The English equivalent is section 242 of the 1948 Act. Common law decisions on the removal of a liquidator show that this power is exercisable not only on grounds of misconduct or unfitness but include situations where there is conflict between the liquidator's duties and his personal interest: see *In re John Moore Gold Mining Co (1879) 12 Ch D. 235; Re Charterland Goldfields, Ltd* (1909) 26 TLR 132; and *Re Adam Eyton Ltd* (1887) 36 Ch D 299.

(iv) The present statutory provisions in respect of voluntary winding-up is found in Division 3, sections 254-276 whilst in respect of the General Power of the court in winding-up it is found in sections 243-253 of the Companies Act, 1965.