10 Land Law

INTRODUCTION

DECISIONS AND COMMENTS

DEALINGS

(a) Charges — form 16D or form 16E

Overseas Union Finance Ltd v *Lim Joo Chong*

(b) Leases — effect of non-registration

(i) *Ho Ying Chye* v *Teh Cheong Huat*

(ii) *Woo Yew Chee* v *Yong Yong Hoo* FC

(c) Lien — a right to it in equity

(i) *Zeno Ltd* v *Prefabricated Construction Co (Malaya) Ltd & Anor*

(ii) *Mercantile Bank Ltd* v *The Official Assignee of the Property of How Han Teh*

CAVEATS

(a) Renewal/Revival

Lim Kiat Moy v *Hamzah*

(b) Right under a contract of sale caveatable

Macon Engineers Sdn Bhd v *Goh Hooi Yin* FC

(c) Removal

Nanyang Development (1966) Sdn Bhd v *How Swee Poh*

INDEFEASIBILITY OF TITLE

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

LAND USE AND PLANNING

(a) Imposition of conditions on conversion

Pengarah Tanah dan Galian, Wilayah Persekutuan v *Sri Lempah Enterprise Sdn Bhd* FC

(b) Need for imposition of category of land use

Land Executive Committee of Federal Territory v *Syarikat Harper Gilfillan Bhd* FC

(c) Breach of condition

Collector of Land Revenue, Johor Bahru v *South Malaysia Industries Bhd* FC

MALAY RESERVATION LAND

(a) Revocation

Mohamed Isa & Ors v *Abdul Karim & Ors*

LAND ACQUISITION

(a) Potential development value

Bukit Rajah Rubber Co Ltd v *Collector of Land Revenue, Klang*

This Introduction and Comments to this Chapter are contributed by
Mr Teo Keang Sood LLB (Malaya) LLM (Harvard) Advocate and Solicitor
Lecturer, Faculty of Law University of Malaya

(b) Extension of time to submit claim for compensation
Highlands Malaya Plantations Ltd v *Collector of Land Revenue, Klang*

SALE OF LAND

(a) Equitable right to a legal title
(i) *Kersah La'usin* v *Sikin Menan*
(ii) *Munah* v *Fatimah*
(iii) *Chik binti Abdullah* v *Itam binti Saad* FC

(b) Squatter rights under the National Land Code
Sidek bin Haji Muhamad & 461 Ors v *The Government of the State of Perak & Ors* FC

INTRODUCTION

In the area of land law, one can readily say that the judgments of His Royal Highness, Sultan Azlan Shah have undoubtedly thrown considerable light on some of the more obscure and ambiguous aspects of land law. In *Kersah La'usin* v *Sikin Menan*[1]; *Munah* v *Fatimah*[2] and *Chik binti Abdullah* v *Itam binti Saad*[3], His Royal Highness relied on the principle in *Williams* v *Greatrex*[4] to enable the equitable estate of the purchaser in each case to be clothed with a legal title through the equitable device of specific performance. This was so despite the failure on the part of the purchasers in not proceeding at once for specific performance.

In *Bukit Rajah Rubber Co Ltd* v *Collector of Land Revenue, Klang*[5] Raja Azlan Shah J (as he then was) emphasized the importance of valuing the land to be acquired not only with reference to its condition at the time of acquisition but also with reference to its potential development value. This would, amongst others, enable one to arrive at a fair market value of the land to be acquired. However, as was held in *Khoo Peng Loong & Ors* v *Superintendent of Lands and Surveys, Third Division*[6] and *Collector of Land Revenue, Kuantan* v *Noor Chahaya binte Abdul Majid*[7], the land must not be valued by taking into consideration any advantage which would accrue by reason of the proposed use to which the acquired land would be put. Paragraph 3(e) of the First Schedule to the Land Acquisition Act, 1960 expressly prohibits any such advantage to be taken into account as the land is to be valued as though it has not already been built upon.

His Royal Highness' defence of the property rights of private individuals against the arbitrary exercise by a public authority such as

---

[1][1966] 2 MLJ 20.
[2][1968] 1 MLJ 54.
[3][1974] 1 MLJ 221.
[4][1957] 1 WLR 31.
[5][1968] 1 MLJ 176.
[6][1966] 2 MLJ 156.
[7][1979] 1 MLJ 180.

the State Authority of its powers may be seen in the case of *Pengarah Tanah dan Galian, Wilayah Persekutuan* v *Sri Lempah Enterprise Sdn Bhd.*[8] This case throws considerable light on the scope and extent of the State Authority's power to impose such conditions which it deems fit in matters pertaining to land use and planning. The decision of Raja Azlan Shah Ag CJ (as he then was) serves as a warning to the State Authority that the exercise of its discretion is not unfettered but is instead subject to scrutiny and control by the courts. Following from the decision of Raja Azlan Shah Ag CJ (as he then was), any condition which the State Authority seeks to impose under section 124(5)(c) of the National Land Code,1965 in an application for conversion of land use, must be reasonably related to the permitted development of the land in question. The imposition of a condition requiring the surrender of a title in perpetuity in return for a leasehold title is, accordingly, an unreasonable and arbitrary exercise of the State Authority's power to impose such conditions as it may think fit.

With regard to caveats, the case of *Macon Engineers Sdn Bhd* v *Goh Hooi Yin*[9] is authority for the proposition that a purchaser of land under a contract of sale acquires a contractual right in respect of the land which is capable of being protected by the entry of a private caveat in respect of the said land. The proposition that a purchaser of land under a contract of sale, which has yet to be registered, acquires a right which rests in contract may be seen in the earlier decided cases of *Loke Yew* v *Port Swettenham Rubber Co,*[10] *Haji Abdul Rahman & Ors* v *Mohamed Hassan*[11] and *Bachan Singh* v *Mahinder Kaur & Ors.*[12] Such a contractual right is caveatable under section 323(1) of the National Land Code, 1965, if, as was decided in *Inter-Continental Mining Co Sdn Bhd* v *Societe Des Etains De Bayas Tudjuh*[13], it represents a registrable interest in respect of which a right in equity founded on specific performance can be ordered. The test is, accordingly, not whether one would succeed in an action for specific performance.

The position of unregistered leases under the National Land Code, 1965 is that they have effect in contract. This is in line with a series of decided cases such as *Yong Tong Hong* v *Siew Soon Wah*[14], *Inter-Continental Mining Co Sdn Bhd* v *Societe des Etains de Bayas Tudjuh*[15] and *Woo Yew Chee* v *Yong Yong Hoo*[16] and section 206(3) of the National Land Code, 1965 itself. The case of *Ho Ying Chye* v *Teh Cheong Huat*[17], decided prior to these cases and before the coming into force of the National Land Code, 1965, is accordingly no longer good authority.

---

[8][1979] 1 MLJ 135.
[9][1976] 2 MLJ 53.
[10][1913] AC 491.
[11][1917] AC 209.
[12][1956] MLJ 37.
[13][1974] 1 MLJ 145.
[14][1973] 1 MLJ 133.
[15][1974] MLJ 145.
[16][1979] 1 MLJ 131.
[17][1965] 2 MLJ 261.

Under the National Land Code, 1965, alienated land is generally subject to one of the three recognised categories of land use, namely, agriculture, building and industry, as is provided for under section 52(1) thereof. However, in respect of lands alienated before the commencement of the said Code, there is no necessity for a category of land use to be imposed in respect of such lands. This is so if, under section 52(5) of the said Code, the State Authority is of the opinion that the use of the land in question could be more appropriately controlled by the imposition of express conditions under section 120 of the said Code. The decision in *Land Executive Committee of Federal Territory* v *Syarikat Harper Gilfillan Berhad*[18] may not, accordingly, be supported in the light of the relevant provision of the 1965 Code stated above. The reliance by Raja Azlan Shah Ag LP (as he then was) on the Federal Court case of *Collector of Land Revenue, Federal Territory* v *Garden City Development Berhad*[19] for the proposition that it is necessary for the registered proprietor to apply for the imposition of a category of land use also cannot be supported in view of the fact that this holding of the Federal Court was overruled by the Privy Council on appeal. It is interesting to note that the express condition 'fruit trees' was endorsed on the title to the land in question thus implying that the use of the land was to be regulated by the imposition of express condition under section 52(5) of the National Land Code, 1965 rather than by one of the three recognised categories of land use provided for under the National Land Code, 1965. Accordingly, the registered proprietor should instead be required to apply under section 124(1)(c) of the National Land Code, 1965 for the amendment of the existing express condition endorsed on the title to the land to one that is more appropriate.

DECISIONS AND COMMENTS

DEALINGS

(a) Charges — form 16D or form 16E

Overseas Union Finance Ltd
v
Lim Joo Chong

[1971] 2 MLJ 124 High Court, Kuala Lumpur

Cases referred to:-

(1) *Tan Hood Keng* v *Arunasalam Chetty* OS No 38 of 1909 (unreported).

(2) Rc Dyson's Trade Mark (1891) 65 LT 488.

(3) *In re Fawsitt* 30 Ch D 231.

---

[18][1981] 1 MLJ 234.

[19][1979] 1 MLJ 223.

(4) *Sherwood* v *Deeley* (1931) TLR 419.
(5) *Mary Michael* v *United Malayan Banking Corporation Bhd.* [1971] 1 MLJ 172.

RAJA AZLAN SHAH J: This is an application by way of summons-in-chambers for an order that the applicant/chargee may be at liberty to discontinue this action which they had started by way of originating summons (OS No 374/69).

The undisputed facts of the case are as follows: The respondent/chargor borrowed a sum of $15,000 at an interest of 12% per annum from the applicant/chargee, the Overseas Union Finance Ltd, a licensed moneylender. Repayment of the loan was on demand but until demand the respondent/chargor is to pay the principal sum at a monthly instalment of $346.50. To secure the repayment of the loan the respondent/chargor charged his land at No 14-C, Jalan Raja Laut, Kuala Lumpur to the applicant/chargee. The charge was duly registered under presentation No 374 Vol CXCVI, Folio 142.

A memorandum of agreement for the loan was drawn up pursuant to section 16 of the Moneylenders Ordinance, 1951 and signed by the parties on 21st January 1969. A memorandum of charge was also drawn up and signed by the parties on the same day.

On 19th August 1969 the applicant/chargee delivered a statutory notice of default under Form 16D of the National Land Code to the respondent/chargor reminding him that he has failed to pay the total sum of $1,386 being the sum for four (4) monthly instalments and that if he fails to remedy the breach within the time stipulated they (the applicant/chargee) will proceed to apply for an order for sale.

This notice was not complied with. On the 3rd December 1969 the applicant/chargee filed an application by originating summons for an order that the said land be sold by public auction under the National Land Code to satisfy the total sum due to the chargee at the date of the order with interest on the principal sum due at 12% per annum till the time of sale which is to be specified. In his affidavit dated 15th February 1970 the respondent/chargor opposed this application on three grounds: (i) That the contract was unenforceable as the memorandum of agreement did not comply with section 16 of the Moneylenders Ordinance, 1951 in that the date of the loan was not correctly stated and the terms of the loan were not correctly set out. (ii) That the charge was void because being an executor-cum-trustee he did not have power either under the will or the Trustee Ordinance, 1949 to charge the land, (iii) The notice of default was in the wrong form and therefore not an effective notice. He contends that it should be in Form 16E under section 255 and not Form 16D under section 254.

After receiving the respondent/chargor's affidavit the applicant/chargee sought to discontinue the action on the ground that even if the court were to grant an order for sale they, the applicant would find difficulty in selling the property it being a residence and in an area where the value has fallen. Again this application was opposed by the respondent/chargor on the grounds that an originating sum-

mons cannot be discontinued and that the applicant/chargee knowing that they could not get the order for sale now tries to get an illegal charge on the land by discontinuing the action.

I shall first consider the application for discontinuance. The respondent/chargor contends that an originating summons cannot be discontinued. The rules for discontinuance are contained in Order 26 of the *Rules of the Supreme Court*, 1957. Under rule 1 of the Order a plaintiff may discontinue an action by notice in writing before defence or after defence before taking any other proceeding in the action. At any later stage, leave to discontinue must be obtained. In *Mallal's Supreme Court Practice* at p 324 the learned author states that the Order does not apply to an originating summons. As authority he cites the unreported case of *Tan Hood Keng* v *Arunasalam Chetty*[1] which followed *Re Dyson's Trade Mark.*[2] With due respect to the learned author I do not think this is the correct statement of the rule. 'Action' under O 71 rule 1 sub-rule (1) means:

> a civil proceeding commenced by writ or in such other manner as is prescribed by these Rules, but does not include a criminal proceeding.

Under Order 55 rule 5A the method of proceeding prescribed for a sale etc., is by originating summons. Therefore an originating summons taken as of course under O 55 r 5A is a civil proceeding commenced 'in such... manner (other than a writ) as is prescribed by these Rules...', and consequently as falling within the definition of an action. (*Re Fawsitt*[3]). Since by definition an originating summons in this case can properly be called an action, Order 26 rule 1 can be invoked to discontinue it.

As for the statement in *Mallal's Supreme Court Practice* I think it should not be taken at face value. It is regrettable that the case of *Tan Hood Keng* v *Arunasalam Chetty* is not available for closer scrutiny. The only alternative would be to examine the case of *Re Dyson's Trade Mark.* North J said: 'I do not see how the rule (of discontinuance) applies to a case of which there cannot be a defence'. What exactly the learned judge meant when he said this is quite obscure. On this point I would also like to refer to the *Annual Practice* 1963 at page 592 where under the heading *Order not applicable* is stated 'This order does not apply to an originating notice of motion (*Re Dyson's Trade Mark*) nor it would seem to any case in which there cannot be a defence'. In my view 'defence' here should not be construed to mean a formal statement of defence as required under a writ of summons; rather it should be taken to mean any kind of defence. A further point to note is the fact that *Re Dyson's Trade Mark* is a case of originating notice of motion while the present is an originating summons. While an originating summons can be heard either in open court or in chambers, an originating notice of motion is always heard in open court. This could be a distinguishing factor justifying me in not following the case.

But clearly before the rules of discontinuance can be invoked there must be a defence (by writ or otherwise). A borrower may defend a proceeding brought by a moneylender on the ground *inter alia* that the

note or memorandum is inaccurate in a material particular. 'Material particular' means that the note or memorandum must contain all the terms of the contract and in particular state the date on which the loan is made, the principal, the interest *per centum* per annum, in accordance with the Moneylenders Ordinance 1951. (See *Atkin's Court Forms*, 2nd Ed Vol 27 pp 202-203). In the present case the respondent/chargor contends that the contract is unenforceable because the memorandum of agreement does not comply with the Moneylenders Ordinance, 1951, in that the date of the loan in the memorandum is wrong and that the memorandum does not contain full terms of the agreement.

Since an originating summons is an action coupled with the fact that the respondent has a defence, the rules of discontinuance can be invoked in this case.

However, it is at my discretion whether I should allow a discontinuance. Guidelines to the exercise of discretion can be found in the *Annual Practice* 1963 at page 593 under the heading *Before Judgment* which reads:

> Leave may be refused to a plaintiff to discontinue the action, if the plaintiff is not wholly *dominis litis* or if the defendant has by the proceedings obtained an advantage of which it does not seem just to deprive him.

If the applicant here is *dominis litis* then leave to discontinue may be granted. If he is not, then it is unlikely that I would grant him leave to discontinue. I do not think that the applicant is wholly *dominis litis.* He cannot dispose of the case as he thinks fit or allow it to be dismissed or let judgment go by default. The parties have come to a stage where the respondent/chargor has gained an upper hand by an advantage in that he could find flaws in the applicant/chargee's allegations namely the wrong dates in the memorandum etc. and the fact that the reason for wanting a discontinuance is not a very strong one. The respondent/chargor is not to be deprived of these advantages which have made him a well-matched adversary in the arena.

Having considered all these points I am of the opinion that the application to discontinue should be dismissed.

I shall now go on to the merits of the case and consider the application for an order for sale. The respondent/chargor's first ground of opposition to this application is that the contract is unenforceable because of non-compliance with the Moneylenders Ordinance, 1951. The relevant part of section 16(1) of the Ordinance reads:

> No contract for the repayment by a borrower ... of money lent to him ... and no security given by the borrower ... in respect of any such contract, shall be enforceable unless a note or memorandum in writing of the contract ... be delivered to the borrower ... before the money is lent.

And section 16(3) reads:

> The note or memorandum aforesaid shall contain all the terms of the contract and in particular shall show separately and distinctly, (a) the date of the loan, (b) the principal and (c) the rate of interest per centum

> per annum payable in respect of such loan or, where the interest is not expressed in terms of a rate *per centum* per annum, the amount of such interest.

In his affidavit the respondent/chargor said that the date of the loan in the memorandum was wrong. Clause 2 of the memorandum states:

> The said principal sum shall be advanced on the 18th day of January 1969 after the memorandum has been signed by the parties hereto and a copy thereof has been delivered to the borrower.

In this case the memorandum of agreement was signed and delivered on 21st January 1969 and not the 18th as stated in the memorandum. The respondent/chargor maintains that on the 18th there was no memorandum and so the statement that the loan took place on the 18th was wrong. On the other hand if it was said that the loan took place on some other date then the date stated in the memorandum was wrong.

Furthermore the memorandum did not really set out the terms of the loan. The memorandum states that payment of the loan was to be made on the 18th but in actual fact the payment was made in various amounts on different dates subsequent to the signing on the 21st. On the 21st $8,000 was paid by cheque, $150 was deducted for solicitor's fees in execution of the charge, stamps and registration, $1,500 was deducted for service charge for the loan. The balance, a sum of $5,350 was paid on the 23rd by cheque. This would also constitute a non-compliance of section 16(3) in that the terms are not fully set out. Therefore the memorandum does not contain all the terms of and the real date of the loan. Is this non-compliance sufficient to render the contract unenforceable? *Meston on Moneylending* 5th Edn at pp 94-95 states:

> ... failure to observe the requirements contained in [section 16(3) i.e., date, amount, interest etc] will not necessarily render the contract unenforceable for the moneylender may make some slight error or omission which constitutes a variation from the requirements of the section. If the error or omission is material then the contract will be unenforceable but not otherwise. The materiality of any such variation is it is submitted a question of law for the judge.

If the error or omission is calculated to mislead or tends to mislead them it is material and unenforceable. In *Sherwood* v *Deeley*[4] two different dates appeared in two different places as a result of an accidental slip. The contract was held not to be vitiated. The present case can be distinguished from the last mentioned case. In this case unlike the other it could not possibly have been an accidental slip for it appears repeatedly in both memoranda. It is therefore in my opinion a material error which tends to mislead. The burden is always on the person seeking to enforce the contract to show that the requirements of the section have been fulfilled. Here the applicant has not discharged this burden. They have not replied to the respondent/chargor's affidavit which alleges that they have not complied with the Ordinance. The contract is by reason of this non-compliance unenforceable.

Respondent/chargor's second contention is that the charge is void as

he had no power to charge the land. The power of an executor to deal with property which he obtained under a will is defined by will and, being also the trustee, by the Trustee Ordinance, 1949. After examining the will I am satisfied that neither the will nor the Trustee Ordinance confers power upon the respondent/chargor to charge the said land. As such the charge is void. It is regretted that the respondent/chargor having obtained a loan of a very substantial amount now need not pay up. This is indeed a lesson to be learnt by moneylenders in future to be more careful when lending money on a security and also to be sure that the Moneylenders Ordinance has been fully complied with. The Moneylenders Ordinance is calculated to protect borrowers from unscrupulous moneylenders but careless moneylenders are also caught by it.

Thirdly the respondent/chargor contends that the notice under Form 16D of the National Land Code is in the wrong form and as such the notice is defective. This point I need only deal with cursorily because the point has been dealt with fully in an earlier case of *Mary Michael* v *United Malayan Banking Corporation Bhd*[5].

Form 16D can be used for any charge, whereas Form 16E is to be used specially where the principal sum is payable on demand. So that even where the principal sum is payable on demand Form 16D can still be used. And I quote relevant passages from the Federal Court in *Mary Michael's* case.

Per Azmi LP at page 172:

> It is to be observed that a notice in Form 16D applies to any charge so that it can validly be used even in the case of a charge where the principal sum is payable on demand, even though Form 16E is specially designed for this purpose. This would be particularly true of a charge where the principal sum bears interest and the chargor is in default of payment of interest as stipulated in the charge... whereas Form 16D can be used whether or not the principal sum is payable on demand, Form 16E can be used only if the principal sum is payable on demand.

Per Ali at page 174:

> When a chargee issues a notice in Form 16D I do not think it can possibly be objected to as was done in this case. A chargee entitled to ask for an order for sale under section 255 of the National Land Code to which Form 16E is applicable is not, I believe, precluded from proceeding under section 254 of the Code if he so chooses.

These passages are self-explanatory and I need elaborate no further. The consequence of this case would be that to be on the safe side Form 16D should always be used.

For the sake of completeness I would like to consider whether this could have been properly a case under Form 16E though even if it is, a notice under Form 16D is not fatal to the case. For this purpose both the memoranda must be examined. Clause 1 of the annexure to the memorandum of charge reads in part:

> ... the repayment on demand of the sum of $15,000 (Dollars Fifteen

> Thousand only)... referred to as 'the principal sum') together with interest thereon as the rate of twelve *per centum* (12%) per annum... but... until such demand is made... the chargor shall pay the principal sum with interest thereon... by monthly instalments of dollars three hundred and forty-six and cents fifty only ($346.50)....

Clause 4 of the memorandum of agreement reads in part:

> ... and will agree to pay the said principal sum and the interest... by monthly instalments of $346.50 (dollars three hundred and forty-six and cents fifty only)....

It is clear from these two clauses that the repayment on demand is not only for the principal sum but of the interest as well. When the charges demanded payment of $1,386 it was for the principal sum plus interest for four monthly instalments. It is thus proper to use Form 16D.

I therefore order the following:

(i) That the application for order for sale be dismissed with costs. (ii) That the applicant/chargee deliver up the note or memorandum to the respondent/chargor for cancellation. (iii) That within 14 days from today i.e., the date of the order the applicant/chargee deliver to the respondent/chargor's solicitors the duplicate copy of the memorandum of the charge and all documents of title to the land. (iv) That within 14 days from today the applicant/chargee must execute a registrable memorandum of discharge, thereby discharging the Charge Presentation No 574 Vol CXCVI Folio 142 against the whole of the land held under certificate of title No 25701 for Lot No 286 in the Town of Kuala Lumpur in the District of Kuala Lumpur and deliver the same to the respondent/chargor or his solicitors and failing that the senior assistant registrar of the High Court Kuala Lumpur be empowered to execute the memorandum of discharge for and on behalf of the applicant/chargee.

Application dismissed.

Ronald Yeo for the Applicant.
M Segaram for the Respondent.

Notes

(i) This case, in line with the Federal Court case of *Jacob* v *Overseas Chinese Banking Corporation, Ipoh* [1974] 2 MLJ 161 correctly held that a notice of default in Form 16D can be used for any charge, whereas a notice of default in Form 16E can only be used where the principal sum is payable on demand. It is also settled law that Form 16E can be used to recover also the interest which had become due and payable.

(ii) The advantage of using Form 16E is that the chargee needs to wait only for a period of one month from the date the notice of default is served on the chargor before he can apply for an order for sale. Where Form 16D is used, there is a waiting period of two months

before the chargee can apply for an order for sale of the land in question: see sections 254 and 255 of the National Land Code, 1965 respectively.

(b) Leases — effect of non-registration

(i) Ho Ying Chye
v
Teh Cheong Huat

[1965] 2 MLJ 261 High Court, Kuala Lumpur

Cases referred to:-
(1) *Haji Abdul Rahman and others* v *Mahomed Hassan,* [1917] AC 209; FMSLR 290, PC.
(2) *Margaret Chua* v *Ho Swee Kiew & Ors* [1961] MLJ 173.
(3) *Doe d Price* v *Price* (1832), 9 Bing 356.
(4) *Fox* v *Hunter-Paterson* [1948] WN 399.

RAJA AZLAN SHAH J: In this case the plaintiff claims vacant possession from the defendant of the ground floor of premises known as No 5, Jalan Pasar Bharu, Kuala Lumpur (hereinafter referred to as the 'said premises'). It is agreed that the said premises was built in 1957 and is therefore outside the provisions of the Control of Rent Ordinance, 1956.

In his statement of defence the defendant pleaded as follows:

> (i) The defendant contends and will contend that in view of the valuable consideration given to the previous owner it was agreed that his tenancy would not be disturbed.
> (ii) The defendant further contends and will contend that as he is a tenant under an unregistered agreement, he claims the protection of section 42(v) of the Land Code.

The latter line of defence was abandoned in the course of the proceedings. However, there is an admission that the defendant is a monthly tenant of the plaintiff of the said premises at a rental of $150 per month and that the said tenancy was duly terminated by a notice to quit dated 20th December 1963 and served on the defendant the following day, which said notice expired on 31st January 1964 (paragraphs 2 and 3 of statement of defence).

It is also admitted that in 1951 the Vui Shen Benevolent Association was the registered owner of the land on which the said premises stood. In 1957 the said association purported to grant a lease of the said premises to one Sze Hock Seng for a term of ten years at a rental of $150 per month with effect from 1st September 1957. The purported lease was not registered in the manner prescribed in section 116 of the Land Code and was therefore ineffectual to pass the interest in the said premises to the defendant under section 96 of the Land Code.

> The agreement (hereinafter referred to as the 'said agreement') recited that one Chin Tham Shin was the landlord of the said premises and one Sze Hock Seng was the tenant thereof. It went on:
>
> WITNESSETH that the Landlord hereby lets to the Tenant the ground floor of No 5 Jalan Pasar Bharu, Kuala Lumpur (hereinafter referred to as 'the said ground floor' for a period of ten (10) years from the 1st day of September 1957 at a rental of $150 (dollars one hundred and fifty only) per month payable in arrears on the last day of each month, the first of such payments to be made on the last day of September 1957 and upon the following terms and conditions.

There are various clauses inserted providing for non-interference from the landlord or those claiming under or in trust for him (clause 3); an undertaking to execute or cause to be executed a lease or sub-lease in favour of the defendant or his nominee upon the same terms and conditions (clause 4); a provision in favour of the tenant to transfer, assign, or sub-let (clause 5); a provision for an option to extend the lease for another period of ten years (clause 6); a provision that the agreement shall be binding upon the parties hereto, their heirs, executors and assignees (clause 7).

The defendant came into the picture some time in July 1958. This can be seen from the agreed bundle of documents produced by the defendant when on 1st July 1958 the defendant paid a sum of $300 as deposit in respect of rent for the said premises. From here it can be inferred that the said premises was assigned to the defendant. It was not registered and again this was ineffectual to pass the interest therein to the defendant. In consequence of the registration of the association being cancelled,the ownership of the said premises passed to the official assignee in May 1963. On 16th December 1963 the plaintiff bought the said premises and this was duly registered in accordance with the provision of registration under section 110 of the Land Code. On 20th December 1963 the plaintiff issued a notice to quit upon the defendant which expired on 31st January 1964. The defendant is still in possession. The plaintiff now claims vacant possession, double rent at $300 per month from 1st February 1964 to date of recovery of vacant possession, and costs.

The said agreement was not in the form of Schedule XXII and therefore could not be and was not registered under section 116 of the Land Code. As such it was ineffectual to vest the interest in the said premises to the defendant under section 96 of the Land Code. It is therefore clear that it conferred no legal right in the said premises which remained after the transfer to the plaintiff duly registered as the unburdened property of the plaintiff. Be that as it may, in my opinion there is yet another problem to be solved, that is, whether there is a contract subsisting between the plaintiff and the defendant.

In the case of *Haji Abdul Rahman & Ors* v *Mahomed Hassan*[1] the transaction was one of conveyance in security and not of transfer with *appended pactum de retrovendendo,* and therefore was not caught within the provisions of the law requiring registration: see sections 4

and 14 of the (Selangor) Registration of Titles Regulation, 1891. It was held that the agreement was valueless as a transfer or burdening instrument, but it was a good contract. Lord Dunedin in the course of his judgment said:

> But when that is said section 4 has no further application. It does not profess to prohibit and strike at contracts in reference to land, provided that such contracts cannot be construed as attempting to transfer transmit, mortgage. charge, or otherwise deal with the land itself. In other words, it is contracts or conveyances which, but for the section, might be held to create real rights in a party to the contract or conveyance which alone are struck at.

With regard to the agreement, his Lordship had this to say:

> It is an agreement on the part of the defendant to transfer to plaintiff the land upon a certain contingency happening — in other words, an executory agreement. It is in fact an agreement to do something in the way sanctioned by the law. It is not an attempt to transfer, but a conditional promise to transfer.

There are other cases which have held that although the transfer of land or any interest therein would be ineffectual to pass the legal estate, the question arises as to whether there would be an enforceable contract. I think it would be sufficient if I would only refer to the Court of Appeal case of *Margaret Chua* v *Ho Swee Kiew & Ors*[2] where some of the English and local authorities were neatly considered by Thomas CJ (as he then was). In the course of his judgment, his Lordship, agreeing with the learned trial judge, said:

> ... that although the agreement might be a nullity as a lease it could be, and indeed was, a good enforceable agreement for a lease under which the appellant as registered proprietor had undertaken the obligation to grant a lease.

And at page 176 his Lordship said:

> There is, however, a written contract and in my view it is a binding contract.

In that case the agreement was a binding contract dealing with the loan by the respondent to the appellant (registered proprietor) and obliging the latter to grant the former a lease of the land in question for 25 years.

In the light of these authorities I must consider whether the contract under consideration is an enforceable contract. Defence counsel argued that this court has to look at the contract. He contended that in view of the valuable consideration given to the previous owner it was agreed that the defendant's tenancy would not be disturbed. For my part, I think learned counsel is putting the cart before the horse. The proper question for this court at this point would be to consider whether on the proper construction of the said agreement it was an attempt to pass the interest in the said premises to the defendant. If that was so, it would still be caught by the provisions of the Land Code requiring registration. Reading the agreement as a whole, I would not hesitate to

come to the conclusion that the said agreement was indeed an attempt to pass such interest in the said premises to the defendant and is therefore not enforceable. The present case is with a difference and can be distinguished from the Privy Council case of *Haji Abdul Rahman* v *Mahomed Hassan* and the Court of Appeal case of *Magaret Chua* v *Ho Swee Kiew & Ors.* In both of these cases the agreements were held to be enforceable on the ground that they were not construed as attempts to pass the lands or interests therein but were mere conveyances for loans on the security of the lands.

Accordingly, the agreement cannot be regarded as an agreement for a lease carrying with it an equitable interest in the said premises. That being the case, the final question to be asked is what kind of interest does the defendant possess, and how can such interest be determined? I would quote a passage from the 26th edition of *Woodfall on Landlord and Tenant* at page 308, paragraph 741, which I think bears some relevance for our present purpose. It states as follows:

> A legal estate of freehold cannot be created orally or by mere written agreement (not under seal): a person holding under such an agreement is, subject to any equitable right he may have, a tenant at will.

Following the principle of law as stated in the above passage, I now hold that the defendant has merely a tenancy at will and such tenancy can be determined by a demand for possession. As was stated by Tindal CJ in *Doe d price* v *Price*[3] which case was referred to with approval by Birkett J in *Fox* v *Hunter-Paterson*[4]:

> ... anything which amounts to a demand for possession... is sufficient to indicate the determination of the landlord's will.

I would therefore hold that the notice to quit dated 20th December 1963 is a sufficient demand for possession so as to terminate the defendant's tenancy.

Alternatively, it may be observed that the defendant has admitted that he was a monthly tenant and therefore the plaintiff's notice to quit dated 20th December 1963, terminating the tenancy on 31st January 1964, would be an adequate notice.

There will therefore be judgment for the plaintiff as prayed and costs.

Claim allowed.

Cheng Tin Pin for the Plaintiff.
M Edgar for the Defendant.

Note

This case is no longer authority for the proposition that an agreement for a purported lease, though not registered, cannot take effect as a contract. Section 206(3) of the National Land Code, 1965 clearly provides for the enforceability of the agreement as a contract. It is also to be noted that this case is not in line with the Federal Court decision in

Yong Tong Hong v *Siew Soon Wah* [1971] 2 MLJ 105 (affirmed by the Privy Council [1973]1 MLJ 133.

(ii) Woo Yew Chee v Yong Yong Hoo

[1979] 1 MLJ 131 Federal Court, Kuala Lumpur

Coram: Raja Azlan Shah Ag CJ (Malaya), Wan Suleiman and Syed Othman FJJ

Cases referred to :-

(1) *Rede* v *Farr* 105 ER 1188, 1189.
(2) *Abouloff* v *Oppenheimer* (1882) 10 QBD 295, 303.
(3) *Gallie* v *Lee* [1969] 1 All ER 1062, 1081.
(4) *Addiscombe Garden Estates Ltd* v *Crabbe* [1958] 1 QB 513.
(5) *Chin See Lian* v *Ng Wan Pit* [1973] 1 MLJ 115.
(6) *Marchant* v *Charters* [1977] 3 All ER 918, 922.
(7) *Barnes* v *Barratt* [1970] 2 QB 657,669.
(8) *Odhermal* v *Tan Cheng Lock and Estate and Trust Agencies (1927) Ltd & Anor* [1953] MLJ 43.
(9) *Somma* v *Hazelhurst* [1978] NLJ 463.
(10) *Richard Evans & Co Ltd* v *Astley* [1911] AC 674, 687.
(11) *Haji Abdul Rahman* v *Mohamed Hassan* [1917] AC 209.
(12) *Lin Nyuk Chan* v *Wong Sz Tsin* [1964] MLJ 200.
(13) *Yong Tong Hong* v *Siew Soon Wah* [1971] 2 MLJ 105.
(14) *Inter-Continental Mining Co Sdn Bhd* v *Societe des Etains de Bayas Tudjuh* [1974] 1 MLJ 145.
(15) *Parker* v *Taswell* (1858) 2 De G & J 559,571.
(16) *Steadman* v *Steadman* [1974] 2 All ER 977.
(17) *Lloyd* v *Cook* [1929] 1 KB 103, 148.

RAJA AZLAN SHAH Ag CJ (MALAYA): 27 Birch Road, Seremban is an ordinary one-storey shop-house. It was built before 1948 and therefore subject to the Control of Rent Act. Prior to 1962 the appellant's father was the tenant of the whole shop-house. He carried on the family business dealing in textile and cosmetics under the style of Kwong Fatt on the ground floor. The family lived on the first floor. In 1962 the appellant and the father jointly bought the said shop. They continued with the family business as before. On July 27, 1968 he entered into a written agreement with the respondent allowing the latter to occupy the front left one-half portion measuring 40 ft. in length and a middle portion measuring $5^1/_2$ ft by 18 ft, both on the ground floor, for a period of 10 years from September 15, 1968 at a monthly rent of $170 payable in advance. It was also agreed that the respondent should share with the appellant and his family the use of the kitchen, bathroom and toilet which were situated at the back of the ground floor.

For a while all went well. The parties were on good terms. Although the key to the front door was always kept by the appellant, he was always ready and willing to open it for the respondent and his employees whenever required to do so. The respondent alleged that he was entitled

under the terms of the agreement to a set of keys, but that was denied by the appellant. He had on several occasions asked for it but was turned down. The issue seemed not to be important then. He was allowed under the terms of the agreement to build two cubicles and doors to the middle portion for the purpose of keeping patent medicines and Chinese drugs and to fix a wash basin in one of the cubicles. Rents were paid and receipts were issued and that was so even after 1972.

Trouble started in April 1972 when the appellant installed a cupboard right across the common passage-way causing a partition of the ground floor, and thus obstructing the said passage-way. The respondent objected to the intrusion and on April 15, 1972 wrote a letter asking the appellant to remove it. Old matters were then brought up. The respondent pursued his request for a set of keys to the front door otherwise he said he would install his own lock. The appellant replied saying he put up the partition because he had been losing stocks from his shop. He accused the respondent of committing breaches of the tenancy agreement, e.g., failing to pay rent punctually, committing acts of nuisance in allowing his employees to sleep on the premises and allowing them to practise karate at night.

On June 5, 1972, the respondent demanded the return of $15,000 'tea-money' which he said he paid the appellant as a condition of the tenancy agreement. He further accused the appellant with installing more cupboards on June 4, thus partitioning the shop further, and causing further inconvenience and annoyance.

On June 15, 1972 the respondent filed the present suit claiming for the return of the said $15,000 and for an order that the appellant deliver to him a set of keys to the main door of the premises. The appellant counter-claimed for possession of the premises alleging breaches of the tenancy agreement. In an amended defence and counter-claim, he charged the respondent with installing separate electricity and water meters and a separate lock to the front door. His argument was based on three main grounds. First, it was said that the agreement was only a sharing arrangement under possessory licence of the sub-let portion, the kitchen, bathroom and toilet, plus the electricity and water meters, and as the respondent was never allowed exclusive occupation of any part of the said premises, the appellant throughout having the key to the main door, whereby he had dominion and control of the premises sub-let, the Control of Rent Act, 1966 had no application. Secondly, it was said that the said licence was void under section 222(4) of the National Land Code owing to non-registration and lack of identification. Thirdly, it was submitted that the Rent Act did not apply as the premises had become de-controlled when the appellant and his father purchased it in 1962.

The learned judge held that the respondent had proved his claim against the appellant and ordered him to return the $15,000. His reasons were as follows:

> I have come to the conclusion that the plaintiff has succeeded in proving his case against the defendant. The evidence adduced on behalf of the

plaintiff had a ring of truth and I accepted it. In support of his testimony that he had given $15,000 as tea-money to the defendant the plaintiff produced three cheques. The first was dated July 26, 1968 a day before the tenancy agreement was signed. An endorsement on the reverse of this cheque is not wholly legible but two words could be made out — Woo Yew. The defendant's name is Woo Yew Chee. I accepted the evidence of PW4 Loo Chin Loo who had introduced the plaintiff to the defendant. This witness had attended three or four meetings between the parties and the sum of tea-money was discussed and the amount fixed at $15,000. I have no reason to disbelieve any of the plaintiff's witnesses and accepted their evidence as true.

On the other hand the evidence adduced on behalf of the defendant was in my view not altogether true and I did not accept the defendant's denials that he had received the $15,000 as tea-money. In cross-examination he admitted that the plaintiff had offered a cheque for $5,000 but he said that he had not accepted the money. He said he refused to accept it because the plaintiff had told him that the money was from an unknown source and he did not know for what purpose the plaintiff had offered the $5,000 and he refused to accept the cheque. This in my view rather tends to give credence to the evidence of the plaintiff that he had given a $5,000 cheque a day before the tenancy agreement was signed and the other cheques amounting to $15,000. The reasons given by the defendant as to why he had not accepted the $5,000 cheque do not appear to be sound and I believe that in all probability he did accept this cheque as well as the remaining sums totalling $15,000.

The learned judge also held that the intention of the parties was to set up a monthly tenancy and not a sharing arrangement or occupation by possessory licence. He added:

The parties are described in the agreement as sub-tenant and chief tenant, the 'tenancy ' is for a term not exceeding 10 years and rent of the 'demised premises' is $170 per month. In his evidence in court the plaintiff made no mention of any sharing arrangements of occupation by possessory licence. "I entered into a tenancy agreement with him (plaintiff) on July 27, 1968" is what he said about his relationship with the defendant in respect of the premises.

The prayer for delivery of a set of keys was not pursued at the trial and therefore no order was made on it. The learned judge found no evidence to support the allegation that the respondent had committed breaches of some of the terms of the agreement. He therefore dismissed both the defence and the counter-claim. I agree. In the absence of solid evidence, it strains credulity to suggest that the respondent was at fault. In my opinion it was the appellant who was the author of the trouble in putting up the 'Berlin Wall'. I do not think that this court should assist him who had shown *prima facie* to have trodden roughshod over the respondent's rights. It is a universal principle of law that the court would not allow a party to take advantage of his own wrong: see *Rede* v *Farr*[1]. This principle was in the early cases applied to grants of leasehold interest where a lessee sought to take advantage of his own breach of covenant by calling into operation a clause, which rendered the lease void in such an event. This principle has been extended to

contracts generally: see *Abouloff* v *Oppenheimer;*[2] *Gallie* v *Lee*[3]. However, I must express my disappointment that the two remaining questions raised by the appellant were not considered by the learned judge, viz, whether the purported licence was void because it did not comply with the provisions of the National Land Code and whether the premises became de-controlled when the appellant and his father purchased the whole of the shop-house in 1962.

I now turn to the crux of the matter: was the transaction a licence or a tenancy? What is the test to be applied? It is now well known that the law will always look beyond the terminology of the agreement to the actual facts of the situation: see *Addiscombe Garden Estates Ltd* v *Crabbe*[4]. The reason is because of the number of sham agreements purporting to create no more than mere licences which are designed to circumvent the protective provisions of the Control of Rent Act. It is no longer a question of words, but substance. It is no longer a question whether the occupation is permanent or temporary. All these are factors which may be relevant in arriving at a decision whether a particular transaction is a licence or a tenancy but none of them is conclusive. The ultimate test is the nature and quality of the occupancy: whether it is intended that the occupier should have a stake in the premises sub-let or whether he should have only a personal privilege. Mohamed Azmi J applied this test in *Chin See Lian* v *Ng Wan Pit.*[5] That seems to me to be the correct principle, and it is entirely in accordance with the view taken by Lord Denning MR in *Marchant* v *Charters*[6]:

> It does not depend on whether he or she has exclusive possession or not. It does not depend on whether the room is furnished or not. It does not depend on whether the occupation is permanent or temporary. It does not depend on the label which the parties put on it. All these are factors which may influence the decision but none of them is conclusive. All the circumstances have to be worked out. Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room, whether under a contract or not, in which case he is a licensee?

Applying this principle, I turn first to the agreement itself. The said agreement was executed at the office of an advocate and solicitor. The appellant was described as 'the chief tenant' and the respondent as 'the subtenant', although there was no clear evidence to show that appellant was such as that described in the document. There were various restrictions on the part of the sub-tenant notably clause 3(3) which expressly permitted the chief tenant to enter on the premises to inspect its condition; clause 3(4) which permitted the sub-tenant to assign, sub-let of part with possession of the demised premises with the written consent of the chief tenant; clause 3(5) which allowed any alteration or additions with written consent; clause 3(7) which restricted the sub-tenant to carry on the business of a Chinese druggist store only: clause 3(9) which prohibited against partitioning the demised premises so that the passage-way separating it from the landlord's portion of the ground floor should remain free and accessible at all times to the parties,

members of their families and invitees; clause 3(11) which restricted the use of the middle portion for storage purposes only and, perhaps most cogent of all, there was a term for termination of the tenancy upon breach of covenant, and for continuation of the tenancy on giving six months' notice before expiry of the current tenancy. There was also a covenant for quiet and uninterrupted enjoyment.

Those provisions seem to me to point to a tenancy. Looking at the indications in the terms of the agreement as a whole I find in fact that a relationship of landlord and tenant was intended. There were in this case some of those features present which in *Addiscombe Garden Estates Ltd* v *Crabbe, ante,* led the court to hold that the intention of the parties was to create a tenancy. In that case there was a clause expressly permitting the grantors to enter on the premises to inspect the plant which would have been unnecessary had they had a right to enter on the premises apart from the agreement. There was a covenant for quiet and uninterrupted enjoyment by the grantee, a covenant appropriate to a lease but not appropriate to a licence. There was also a term for re-entry upon breach of covenant, which is a term appropriate only to a tenancy. There was, further, a term against assignment, which is an element which may be taken into account when determining whether any particular agreement is a licence or a tenancy, because a tenancy involves an interest in land, and it is normally characteristic of that interest that it is assignable: see *Barnes* v *Barratt*[7].

Next it was said that this was a sharing arrangement only and nothing else. The respondent had no exclusive occupation of the portion sub-let because the key to the main door was always with the appellant, indicating that he had control and dominion of the premises sub-let. This contention is based on a false premise. Possession of keys of the premises is neither here nor there: see *Odhermal* v *Tan Cheng Lock & Estate & Trust Agencies (1927) Ltd & Anor*[8]. I think the respondent had exclusive possession. His evidence at the trial gives an indication:

> Q. Could he (appellant) come and put his own goods in your (respondent's) side?
> A. No, that he could not.
> Q. Could he use your portion for any purpose he wanted?
> A. He — he cannot.

That was not challenged. In any event exclusive possession is no longer a decisive test. That is an old law which is now gone. The nature and quality of the occupancy must be looked at with a view to determine its true character. In *Somma* v *Hazelhurst*[9] the court considered the terms of the agreement before it and concluded that whether or not an arrangement constitutes tenancy or licence is no longer a matter of exclusive possession, or even any of the traditional indicators of tenancy, but simply that of the intention of the parties.

I think it is plain that in this case there was nothing in the evidence to negate and much which supported the view that there was a tenancy under the Control of Rent Act, 1966.

It was then cogently submitted and contended that the learned judge

erred in ordering the refund of the $15,000. Apart from vague and unreliable pieces of evidence, it was urged that the respondent had not proved that the appellant had cashed any of the alleged cheques given to him and further that the alleged signature of 'Woo Yew' on cheque Exhibit PIA was that of the appellant. In my opinion, the time-honoured question that I have to determine, and it is a question of law, is whether it was reasonably open to the learned judge on the evidence to find that the $15,000 tea-money was paid by the respondent to the appellant as a condition of the tenancy agreement. There can be least be no doubt that it was open to the learned judge to arrive at that finding, but the real difficulty is whether there was sufficient evidence to justify that finding.

In a civil case one needs only circumstances raising a more probable inference in favour of what is alleged. An inference from an actual fact that is proved is just as much part of the evidence as the fact itself. Where direct proof is not available it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture: see *Richard Evans & Co Ltd* v *Astley*[10]. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood. It is to be noted that once the right principle has been applied the appellate court has said over and over again that this type of case becomes a matter of fact for the learned trial judge.

I should think that applying these principles to the case before us, inferences sufficiently appeared from the circumstances to which the learned judge had referred that made it at least more probable than not that $15,000 tea-money was demanded and received by the appellant.

Next it was said in somewhat general terms that the agreement was void for lack of registration and identification. Section 222(4) of the National Land Code was cited in support of the latter proposition. The sub-section reads as follows:

> (4) Every such sub-lease shall be granted by an instrument in Form 15B; and in any case where the sub-lease relates to a part only of the land comprised in the grantor's lease or sub-lease, there shall be attached to the instrument a plan and description sufficient to enable the part to be accurately; identified.

What the argument boils down to is that just because the sub-lease did not comply with the provisions of section 222(4) of the National Land Code the said lease was void. I think that argument is without merit. We have heard that line of argument before. It was raised and answered in the following cases; in *Haji Abdul Rahman* v *Mohamed Hassan*[11] the Judicial Committee of the Privy Council held that an agreement, not in registrable form, to transfer back certain land upon a certain contingency happening, while useless as a transfer or burdening instrument, was good as a contract; in *Lin Nyuk Chan* v *Wang Sz Tsin*[12] this court held that failure to comply with the registration provisions of section 88

of the Sabah Land Ordinance did not render the agreement for a lease invalid and unenforceable; in *Yong Tong Hong* v *Siew Soon Wah*[13] this court held that a non-registration 30 year lease was treated as a specifically enforceable agreement for a lease; in *Inter-Continental Mining Co Sdn Bhd* v *Societe des Estains de Bayas Tudjuh.*[14] this court again held that a purported sub-lease not in statutory form was good as an agreement for a sub-lease and specifically enforced it. In all these cases equity intervened and treated an imperfect lease as an agreement for a lease provided it is otherwise valid and enforceable. In the present case, by the doctrine of equitable intervention the purported sub-lease would be treated as an agreement for a sub-lease and since it had been partly executed by possession having been taken under it, the equitable remedy of specific performance would be peculiarly appropriate. The facts of the present case make it more analogous to such cases as *Parker* v *Taswell*[15] where the uncertainty of a contract was urged but where performance had been partly carried out. Lord Chelmsford had this to say when decreeing specific performance:

> It must be borne in mind that this agreement has been partly executed by possession having been taken under it; and there are many authorities to shew that in such a case the court will strain its power to enforce a complete performance.... The agreement, moreover, is admitted to be sufficiently certain as to all substantial parts of it, and the only portions of it to which uncertainty is attributted are subordinate matters. No authority has been cited to shew that in such a case specific performance may not be decreed.

Steadman v *Steadman*[16] is a modern authority for the proposition that a grant of specific performance based on an act of part performance must be referrable to an existing contract between the parties. Viscount Dilhorne and Lord Simon at pages 992, 999 accepted the statement in *Fry on Specific Performance,* 6th ed (1921) page 278:

> The true principle however of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract and are consistent with the contract alleged.

It remains to deal with the argument as to the effect of the purchase of the premises in 1962 when there was no provision of decontrol under the Control of Rent Ordinance, 1956 but became law as from January 1, 1967 when the Control of Rent Act, 1966 came into force. It was contended that the appellant and his father, the latter having been the tenant of their predecessor in title, ceased to be a tenant and became the owner by merger or surrender by operation of law. As such, the premises became decontrolled. It was then argued that as there was no tenancy of a controlled premises, the Control of Rent Act, 1966 did not apply. *Lloyd* v *Cook*[17]and a series of related cases were cited in support of the argument. I have come to the conclusion that these cases, however, turned on the interpretation of a statute basically different from our own and particularly on the effect to be given to the decontrol

provision for which there is no counterpart in the Control of Rent Ordinance, 1956. In my view, the general principle for Rent Act protection has always been that the subject-matter of protection must be 'premises' let or sub-let as a separate human dwelling or partly for human dwelling and partly for business. Once this is accepted as the true principle, then when the premises was purchased in 1962, it did not cease to be controlled premises, and that character did not change with the coming into force of the Control of Rent Act, 1966, for the simple reason that the right of property cannot be taken away by a repealing statute, unless there is an express or implied intention to do so. What section 23 of the Control of Rent Act, 1966 envisages is that on the happening of a certain event, the landlord may apply to the Rent Tribunal for a certificate and upon service of a copy of such certificate, the premises concerned shall cease forthwith to be controlled premises. That requirement was not fulfilled in the present case and that is only possible after January 1,1977 because the said Act has no retrospective effect.

For the above reasons I would dismiss the appeal with costs.

Wan Suleiman and **Syed Othman FJJ** concurred.

Appeal dismissed.

Atma Singh Gill for the Appellant.
James Ponniah for the Respondent.

Note

The decision in this case on the point of the enforceaility of the unregistered sub-lease as a contract is consistent with section 206(3) of the National Land Code, 1965. This decision also finds support in earlier authorities such as *Margaret Chua* v *Ho Swee Kiew & Ors* [1961] MLJ 173 and the Privy Council case of *Yong Tong Hong* v *Siew Soon Wah* [1973] 1 MLJ 133. In support of the decision that equity will intervene to treat an imperfect lease as an agreement for a lease, his Lordship relied, *inter alia,* on the English authorities of *Parker* v *Taswell* (1858) 2 De G & J 559 and *Steadman* v *Steadman* [1974] 2 All ER 977 and had this to say at pp 134-135 of the instant case:

> In all these cases equity intervened and treated an imperfect lease as an agreement for a lease provided it is otherwise valid and enforceable. In the present case, by the doctrine of equitable intervention the purported sub-lease would be treated as an agreement for sub-lease and since it had been partly executed by possession having been taken under it, the equitable remedy of specific performance would be peculiarly appropriate.

(c) Lien — a right to it in equity

(i) Zeno Ltd
v
Prefabricated Construction Co (Malaya) Ltd & Anor

[1967] 2 MLJ 104 High Court, Kuala Lumpur

See under Company Law at page 350 above.

Notes

(i) The decision was upheld on appeal to the Federal Court. See *Paramoo* v *Zeno Ltd* [1968] 2 MLJ 230.
(ii) One of the prerequisites for the creation of a statutory lien is that there must be an intention to create a lien. This is usually evidenced by the deposit of the document of title with the lender. This point was emphasized in the instant case. The failure to enter a lien-holder's caveat under the 1965 Code does not prevent the existence of a right to a lien in equity.
(iii) Where the right to a lien in equity arises first in point of time as compared to that of unsecured creditors such as a judgment creditor, the former has priority over the claim of the latter. (See *Paramoo* v *Zeno Ltd* [1968] 2 MLJ 230).

(ii) Mercantile Bank Ltd
v
The Official Assignee of The Property of How Han Teh

[1969] 2 MLJ 196 High Court, Kuala Lumpur

See under Commercial Law at page 302 above.

Notes

Apart from the requirement that for a statutory lien to arise under the National Land Code, 1965 there must be an intention to create a lien: see *Zeno Ltd* v *Prefabricated Construction Co (Malaya) Ltd, supra,* there are also the further formal requirements provided for under section 281 of the National Land Code, 1965 that the borrower must deposit the issue document of title with the lender as security for a loan and that a lien-holder's caveat must be entered in respect of the land in

question under the relevant provisions of the said Code. The instant case illustrates the principle that provided there is an intention to so create a statutory lien under the National Land Code, 1965 which is evidenced by the deposit of the issue document of title to the land with the lender, the failure to so apply for the entry of a lien-holder's caveat in respect of the land will not prejudice the claim of the lender to a right to a lien in equity. The rationale underlying the Court's decision in this respect is that section 206(3) of the National Land Code, 1965, which recognises both equitable and contractual interests in land, entitles the court to do justice between the parties by giving effect to equitable rights by way of contract.

Such a right in equity will, all other things being equal, prevail over any subsequent competing equities in the absence of any conduct on the part of the claimant of the prior equity which would justify the postponement of his prior equity to that of a claimant later in point of time: see the Australian High Court case of *Butler* v *Fairclough*[1] and the Australian case of *Abigail* v *Lapin*[2] which went on appeal to the Privy Council. For a local case in this respect: see *Vallipuram Sivaguru* v *Palaniappa Chetty*[3] Such a priority would be preserved as where, in the instant case, the lender did not part with possession of the documents of title to the land in question.

CAVEATS
(a) Renewal/Revival

Lim Kiat Moy
v
Hamzah

[1966] 2 MLJ 175. High Court, Kuala Lumpur

Cases referred to:-
(1) *Chow E Wha* v *Registrar of Title & Ors* [1948-49] MLJ Supp 119.
(2) *Direct United States Cable Co* v *Anglo-American Telegraph Co* (1876-77), LR 2 App Cas 412.

RAJA AZLAN SHAH J: This is an application to extend the life of a private caveat registered with the Collector of Land Revenue, Ulu Langat, in the State of Selangor, on 30th December, 1965, until such time as the applicant's claim in Kuala Lumpur High Court Civil Suit No 203 of 1966 is heard and finally disposed of.

---

[1](1917) 23 CLR 78 [2][1934] AC 491
[3][1937] MLJ 59

The facts are in a small compass. The respondent is the registered proprietor of land held under M.C. 713 for lot No 82 in the Mukim of Cheras in the District of Ulu Langat, hereinafter referred to as the said land. By an agreement dated 13th December,1963, entered into between the respondent and the applicant the said land was sub-leased to the said applicant and a memorandum of transfer was duly registered in the Land Office. On 30th December, 1965, the applicant lodged a caveat against the said land. On 21st March, 1966, the Collector served upon the applicant a notice of intended removal of the said caveat under the provisions of section 326 of the National Land Code. On 6th April, 1966, the said notice was served on the applicant. On 8th April, 1966, the applicant made the present application. On 20th April, 1966, the collector wrote to the applicant's solicitor acknowledging their letter dated 15th April, 1966, and in paragraph 2 thereof he stated as follows:

> "In reply I wish to inform you that your claim which you have presented to the High Court on behalf of Lim Kit Moy (f) concerning the above matter has been noted, and this office will not cancel this caveat until a decision has been received from the High Court".

On 29th April, 1966, the collector entered a memorial on the register removing the said caveat. The present application came before me in chambers this morning the 2nd May, 1966. In other words, a court order not to remove the said caveat has not been granted and served on the collector on the 21st April, 1966, or even to the present day.

This case brings into review the provisions of section 326 of the National Land Code. That section enacts that any person whose land is bound by a private caveat may apply to the Registrar (in the present case the collector) for its removal and the collector shall serve upon the caveator a notice of intended removal in Form 19C and subject to sub-section (2) remove the caveat at the expiry of the period of one month specified in that notice. In the instant case the caveat lapses at the expiry of one month specified in the notice, i.e., 21st April 1966. However, the section is what I may say controlled by sub-section (2), that is the court may on the application of the caveatee from time to time extend the said period of one month and the collector on being duly served with a court order shall not remove the caveat until the expiry of the said period as thereby-extended. That section is not analogous to section 171 of the repealed Land Code (Cap 138) for the latter section expressly states that the proper registering authority shall remove a caveat at the expiry of the 21 days after notice on the caveator unless he shall have been previously served with a court order extending the time as provided for by section 172. That means the court order extending the time must be served upon the proper registering authority during the life of the caveat. The case of *Chow E Wha* v *Registrar of Titles & Ors*[1] is authority for the proposition. There is therefore a manifest distinction between the two sections and that case cannot accordingly be invoked into a consideration of the instant case on the ground that sub-section (2) of section 326 of the National Land Code is wide and does not specify the time limit for service of the court order on the collector. The question

therefore arises whether sub-section(2) enacts that the court order must be served on the collector before the caveat becomes spent.

In interpreting the section the duty of the court is to construe it according to the intention expressed in the section itself. Lord Blackburn pointed this out long ago in the case of *Direct United States Cable Company* v *Anglo-American Telegraph Company:*[2]

> The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand those words it is material to inquire what is the subject-matter with respect to which they are used, and the object in view.

The object of sub-section (2) is to extend the duration of the caveat and the sub-section must therefore be construed so as to give effect to that general purpose. To my mind the word 'extend' is used in the common intercourse of mankind and the popular meaning attributed to it is that it enlarges or gives further duration to any existing right rather than revest an expired right. To construe it otherwise seems to me not only to place a strained contsruction on the words of the sub-section but also to introduce a term which is unreasonable in two respects: firstly, it would not be an 'extension' but a 're-creation', and predicating the purpose of the section to be to benefit a caveator by the extension of his rights, is adopting a very different idea from recreating an expired right; secondly, it would be inconsistent with the general tenor of the phrase 'the Registrar on being duly served with any order of the court under this sub-section shall not remove the caveat until the expiry of the said period as thereby extended' for that would imply that only when there exists a caveat can the Registrar be said 'not to remove' the same. The word 'extend' is too strong for me to grapple with; and if the court were to get rid of its operation, a great public injury would be effected by calling back a right that by lapse of time had become extinct. In my view the language of the section is wholly prospective. I would therefore dismiss the application with costs.

Under Order 54 rule 22A of the Rules of the Supreme court I certify that I require no further argument on the matter.

Application dismissed.

AK Sen for the Applicant.
FC Arulanandom for the Respondent.
Hamzah Dato' Haji Abu Samah (Legal Advicer, Selangor) for the collector of Land Revenue.

Notes

(i) Subsequent to this decision, the notice of intended removal of a private caveat in Form 19C in the First Schedule to the National Land Code, 1965 was amended by PU(A) 184 of 1984 to provide for the said period of one month under section 326(1)(b) of the 1965 Code to commence from the date of service of the aforesaid notice on the caveator. To this extent, the case is no longer good authority.

(ii) His Lordship correctly pointed out that a caveat once extinguished or removed by the Collector under section 326(1)(b) of the 1965 Code cannot be extended by the Court under section 326(2) of the said Code.

(iii) Subsequent cases which relied on *Lim Kiat Moy* v *Hamzah, supra,* in this respect are *Tan Teo Muah & Ors* v *Alkhared & Khoo Holdings Sdn Bhd* [1981] 2 MLJ 284 and *Hong Keow Tee & Anor* v *Alkhared & Khoo Holdings Sdn Bhd* [1982] 2 MLJ 42.

(b) Right under a contract of sale caveatable

Macon Engineers Sdn Bhd
v
Goh Hooi Yin

[1976] 2 MLJ 53 Federal Court, Penang
Coram: Gill CJ (Malaya), Ali and Raja Azlan Shah FJJ

Cases referred to:-
(1) *Chin Cheng Hong* v *Hameed & Ors* [1954] MLJ 169.
(2) *Temenggong Securities Limited & Anor* v *Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45.
(3) *Butler* v *Fairclough* (1917) 23 CLR 78, 79
(4) *Abigail* v *Lapin* [1934] AC 491.
(5) *In re Registration of Caveat* (1908) Innes 114.
(6) *Tee Chin Yong* v *Ernest Jeff* [1963] MLJ 118.
(7) *Sellamah d/o Marimuthu* v *Registrar of Titles, Perak,* Perak Civil Appeal No 16 of 1959 (unreported).
(8) *Official Assignee* v *Madam Chan Kam Lin,* Selangor Originating Summons No 140 of 1954 (unreported).
(9) *Bachan Singh* v *Mahinder Kaur* [1956] MLJ 97.
(10) *Lysaght* v *Edwards* [1876] 2 Ch D 499.
(11) *Haji Abdul Rahman & Anor* v *Mahomed Hassan* [1917] AC 209; 1 FMSLR 290, PC.
(12) *Nanyang Development (1966) Sdn Bhd* v *How Swee Poh* [1970] 1 MLJ 145.
(13) *Jit Kaur* v *Parl Singh* [1974] 2 MLJ 199 at p 201.

RAJA AZLAN SHAH FJ: As I see it, the central question in this appeal is whether the private caveat should be removed. That presupposes a caveatable interest in favour of the respondent. In my view, the respondent had a contractual right under a contract of dealing in land which is a right of action against the vendor personally. That is a caveatable interest. There is statutory support for this view *vide* section 323(1)(a) of the National Land Code which appears wide enough to include any person claiming any right to title or interest in land. This section is enacted in wider terms as compared with the corresponding provisions of previous legislation: see section 166 of the Land Code, 1926.

How can the respondent's caveatable interest be removed and what

are the principles governing it? It is no longer in doubt that the entry of a caveat casts a dark shadow on the property. It paralyses the dealings in it. No one can buy the property under such a cloud. That is the reason for the appellants' application to remove the said caveat. If the caveat is entered when it ought not to be, the court can order its removal. The party aggrieved is entitled to compensation for wrongful entry of a private caveat (section 329). In some cases it would not be right to remove a caveat. For instance, if the caveator had a substantial point in his favour and it would not be right and proper to remove it. In that case it would not be appropriate to grant a relief under the summary provisions which are envisaged under section 327 of the National Land Code.

In my opinion what the court at the present stage has to see is not that the caveator must ultimately succeed, but that he has a *prima facie* case, and that his claim is not baseless or frivolous. In such circumstances the court will not summarily remove the caveat but will extend it until the hearing of the action. The burden of proof rests on the caveator as the person asserting the claim. In *Nanyang Development (1966) Sdn Bhd* v *How Swee Poh*[12] (a non-unanimous decision) this court had occasion to say that it is for the caveator in an application under section 327 to satisfy the court that it is just for the caveat to remain. I think that decision is in accordance with principle and authority.

In the present case the respondent claims that he has an interest in the said land. He has filed a claim against the registered proprietors for specific performance, damages and lien over the said property. Whether he has good grounds for his alleged claim is surely worthy of argument and consideration. I cannot say that his claim is so baseless or frivolous that he should be deprived of his chance to have that tried in an action. And it would be a denial of that chance if the caveat were summarily removed, for once the appellants registered the transfer, the caveator's right, if he has any, is destroyed. I further take the view that a caveat based on a document which *prima facie* is valid will not be removed on a summary application where the facts are involved and seriously disputed. Similar premonitory hint is detectable in *SK Das on the Torrens System in Malaya* (pages 347-348) which was adopted in *Jit Kaur* v *Parl Singh*[13]:

> In dealing with applications for the extension of the operation of or for the removal of caveats against dealings with land it has always been the desire of the court to allow the parties the fullest opportunity to litigate any matter that may be in dispute between them. The court is loth to prevent parties litigating any right that they think they may possess: *In re Caveat of Lewis* (1903) 23 NZLR SC 581. Where there is a conflict of testimony the caveat will not be discharged.

For the above reasons I will dismiss the appeal with costs.

Appeal dismissed.

Raja Abdul Aziz for the Appellants.
Lee Kok Liang for the Respondents.

Notes

(i) This case, in line with earlier decided cases such as *Chin Cheng Hong* v *Hameed & Ors* [1954] MLJ 169, is authority for the proposition that a person who has entered into an agreement to purchase land has a right to a registrable interest therein, which right can be protected by the entry of a private caveat. Under section 323(1)(a) of the National Land Code, 1965, a private caveat may be entered at the instance of any person or body claiming *inter alia* any right to a title to or any registrable interest in any alienated land.

(ii) As can be seen from the cases of *Inter-Continental Mining Co Sdn Bhd* v *Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145 and *United Malayan Banking Corporation Bhd* v *Development and Commercial Bank Ltd* [1983] 1 MLJ 165, one of the criterion for determining whether there is a caveatable interest under section 323(1) of the 1965 Code is whether there is a right in equity founded on specific performance of a registrable interest in the land and not whether one would succeed in an action for specific performance.

(iii) On the question whether the caveat ought to remain, the Court correctly held that it should remain.As was observed by the Privy Council in the subsequent case of *Eng Mee Yong & Ors* v *V Letchumanan* [1979] 2 MLJ 212 the caveator is entitled to have his caveat remain on the land if he can satisfy the court on the evidence presented to it that his claim to an interest in the land does raise a serious question to be tried and that on a balance of convenience it would be better to maintain the *status quo* until the trial of the action so as to prevent the caveatee from disposing the land to a third party .

(c) Removal

Nanyang Development (1966) Sdn Bhd
v
How Swee Poh

[1969] 1 MLJ 232 High Court, Kuala Lumpur

Cases referred to :-
(1) *Lim Kiat Moy* v *Hamzah* [1966] 2 MLJ 175.
(2) *In re Meister, Lucius and Bruning* [1914] WN 390.

RAJA AZLAN SHAH J: The applicant is the registered proprietor of 19

pieces of land (hereinafter referred to as the 'said lands'). On or about the 10th January 1969 the respondent presented a Caveat, Presentation No 287, Vol XLI Folio 113 (hereinafter referred to as 'the Caveat') against the said lands. The applicant applies by way of originating motion to remove the said caveat pursuant to section 327(1) of the National Land Code, 1965.

Mr Eugene Lye for the respondent raised a preliminary objection. First, he says that the originating motion is irregular and misconceived. He contends that the provisions of the National Land Code are silent as to the procedure to be adopted in removing a caveat. He says that in such a case the procedure specified in the FMS Land Code (Cap 138) must be followed, that is, by way of originating summons. He cites sections 441 and 447(1) of the National Land Code and the case of *Lim Kiat Moy* v *Hamzah*[1].

The second limb of this argument is centred on the sections provisions of sections 326 and 327 of the Code. He says that the present application under section 327(1) of the National Land Code is premature. It is his contention that the preliminary step stipulated by section 326 should first be taken before embarking on the present application under section 327(1).

Mr Wong Soon Foh, on behalf of the applicants contends that it is not irregular to initiate proceedings by way of originating motion. He relies on a passage in 1963 *Annual Practice* on page 1268:

> Where a statute provides for an application to the court without specifying the form in which it is to be made, and the rules do not expressly provide for any special procedure, such application may usually be made by originating motion.

He answers Mr Eugene Lye's second limb by saying that any person in the position of the applicants has an option to initiate proceedings either in pursuance of section 326 or 327 of the National Land Code.

I agree with the proposition that in such a case as the present where an Act of Parliament does not expressly specify in what form an application may be made to the court, as a matter of procedure it may be made in any form in which the court can be moved. There is no question that the court can be moved by originating motion. The passage relied on by Mr Wong Soon Foh is taken from the judgment of Warrington J in *In re Meister, Lucius and Bruning,*[2] in which the learned judge held that in Chancery cases the procedure usually adopted, where an Act of Parliament is silent as to the form an application might be made to the court, is by originating motion: In *Lim Kiat Moy* v *Hamzah, supra,* I did not make a ruling that an application to remove a caveat must be by originating motion. No doubt that case was proceeded by originating summons but the validity of the procedure was never considered. It cannot therefore be said that that case creates a precedent on procedure.

It is not in doubt that the FMS Land Code (Cap 138) made no provision whatever for the necessary procedure to present a caveat. Part 19 of the National Land Code has remedied these omissions. Besides

providing in detail for the incidents and effects of four distinct types of caveat — the Registrar's, the private, the lien-holder's and the trust caveat, it makes detailed provisions for the procedure to remove a caveat. In respect of a private caveat, the National Land Code provides three different avenues to different sets of people to remove a caveat. Section 325 declares that a private caveat may be withdrawn on the application of the person or body at whose instance it was entered. It further specifies the administrative steps to be taken by the Registrar to cancel a caveat. Section 326 enables the caveatee to remove a caveat on application to the Registrar who is obliged to take certain administrative steps to effect its removal. Any person aggrieved by the Registrar's decision has a right of appeal to this court (section 418). Section 327 gives power to the court to order the removal of a caveat on the application of the party aggrieved by the existence of such caveat and it also enumerates certain administrative steps to be taken by the Registrar to effect its removal. From such decisions there is a right of appeal to the Federal Court.

It is therefore manifest that the three sections confer collateral rights to the different classes of persons for whose benefit they are designed. In my view it is fallacious to say that the right declared in section 326 is preliminary to that conferred by section 327.

For the above reasons, I overrule the preliminary objection.

Objection over-ruled.

Wong Soon Foh for the Applicants.
Eugene Lye for the Respondents.

Note

As was correctly pointed out by his Lordship, the provisions relating to the removal of a private caveat are independent of each other and may be resorted to by the specified categories of persons. Accordingly, sections 325 and 327 of the National Land Code, 1965 are available to the caveator, caveatee and any aggrieved persons respectively. In the case of sections 325 and 326 of the said Code, the removal is effected by the Registrar of Titles whilst removal under section 327 is effected by the Court. As between sections 326 and 327 of the Code, removal can be effected immediately by the Court in the case of the latter whereas there is a waiting period of one month under the former. However, to come under section 327 of the Code, one must qualify as an "aggrieved person".

INDEFEASIBILITY OF TITLE

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

Cases referred to:-

(1) *Freeman* v *Pope* (1870) 5 Ch App 538.
(2) *Cadogan* v *Kennett* 98 ER 1171.
(3) *Reese River Silver Mining Co* v *Atwell* (1869) LR 7 Eq 347.
(4) *Green* v *Nixon* (1857) 23 Beav 530 & 535; 53 ER 208.
(5) *Waimiha Sawmilling Co Ltd* v *Waione Timber Co Ltd* [1926] AC 101, 106.
(6) *Regal (Hastings) Ltd* v *Gulliver* [1967] 2 AC 134,139.
(7) *The Great Luxembourg Railway Co* v *Sir William Magnay* (1858) 25 Beav 586; 53 ER 761.
(8) *In re Forest of Lean Coal Mining Co* (1878) 10 Ch D 450.
(9) *Ex parte James* (1803) 8 Ves 337, 345; 32 ER 385.
(10) *Keech* v *Sandford Sel Cas T King* 61; 25 ER 223.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): On June 6, 1974 the respondent obtained judgment against the first appellant in the sum of $95,611.34. It lay unsatisfied. Only $1,906 was recovered by garnishment. Execution proceedings by way of judgment debtor summons were taken but proved abortive. On June 1, 1973 the first appellant had entered into a sale agreement for the purchase of a piece of land in Petaling Jaya measuring 1,540 sq ft. ('the said land') for $15,000 and had paid a deposit of $5,000. The sale agreement stipulated a transfer to the first appellant or its nominee or nominees, the usual conveyancing phrase. On March 3, 1975 the court approved the sale. On October 13, 1975 the said land was registered in the names of the second and third appellants, the directors of the first appellant, in equal half shares.

On April 12, 1976, the respondent brought an action against all three appellants and another director claiming, *inter alia,* a declaration that the said land is the property of the first appellant against which the judgment might be executed.

The first appellant entered a defence denying ownership of the said land. It admitted entering into a sale agreement but averred that it did not complete the purchase because of lack of funds, and that the second and third appellants bought it with their own money. Quite predictably the second and third appellants raised the same line of defence. The third director did not appear or deliver any defence.

The learned judge rejected the defence as incredible. He found as a fact that the substitution of the second and third appellants for the first appellant was alleged to be backed by a resolution of the directors, incidentally the second and third appellants, the existence of which was at one time denied, but was subsequently produced in circumstances

which would not vouch for its authenticity. He found that it lacked the certification by the company's secretary or secretaries. What the learned judge meant, so we understand, was that the transfer was voluntary and in fraud of the judgment creditors. He therefore gave judgment for the respondent.

The learned judge's findings were challenged. It was said that the weight of the evidence showed that the transfer was not voluntary, but for consideration, and that there was no evidence of fraudulent intent. We are of the view that the appellants' position as on October 13, 1975 when the transfer was made is relevant. The judgment had been entered on June 6, 1974, some sixteen months earlier; it was unsatisfied. They had done nothing to satisfy their liability under the judgment; the transfer was made in circumstances which gave rise to suspicion over its *bona fides;* it did not specify the consideration. It was, of course, open to the appellants to show what consideration was paid for it, but they chose not to do so beyond producing a sham resolution. They evidently hoped to convince the learned judge that the respondent had not proved its case. The hope was misconceived. He was not convinced.

In our opinion the inevitable result of the transfer of the said land on October 13, 1975 when taken together with all the surrounding circumstances was to defeat any attempt to execute the judgment. The present case falls squarely within the line of authorities exemplified by *Freeman* v *Pope*[1] where Lord Hatherley LC said (at page 541): "But it is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute." The statute referred to is 13 Elizabeth 1 c.5, the predecessor of the (U K) Law of Property Act, 1925 which has been said to be merely declaratory of the common law, i.e. to prevent debtors disposing of their property to the prejudice of their creditors: see *Cadogan* v *Kennett*[2] "The principle on which the statute of 13 Elizabeth 1 c.5 proceeds," said Lord Hartherley in *Freeman* v *Pope, supra,* page 540, "is this, that persons must be just before they are generous, and that debts must be paid before gifts can be made." That case is illustrative of the principle that the onus is discharged by inference from the known facts. Therefore, where the surrounding circumstances are capable of establishing a *prima facie* case of intent to defraud, the onus shifts on the appellants to disprove this if it can; and the fact that the transfer was voluntary makes the task of upholding it all the more difficult. The challenge to the learned judge's finding that the transfer was voluntary and in fraud of the judgment creditors therefore fails.

It does not follow, however, that the transfer of the said land was ineffective. The transfer was completed, of course, before any attempt was made by the judgment creditors to impeach the transfer; and the

transfer is not then void, but voidable, that is to say, unless and until it intervenes by levying execution or taking legal proceedings. Thus Lord Romilly MR in *Reese River Silver Mining Co* v *Atwell*[3] said (at page 352): "But as soon as the court finds that a deed has been executed for the purpose of delaying, hindering, or defrauding creditors, and that it comes within the statute, it sets the deed aside, but it goes no further; and the plaintiffs must take some independent proceedings if they wish to have execution against the property in this deed."

As it stands the registered title of the said land in the hands of the second and third appellants is indefeasible. The concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it. Therefore the registration of the transfer of the said land under the National Land Code defeats all prior unregistered interests in that land unless the party who acquires the registered title has been guilty of fraud: see section 340(2)(a) of the National Land Code. In that event the person who was has been deprived of his unregistered interest will be entitled, as against the fraudulent party, to have the transfer set aside. The suggestion that the provisions of section 20 of the Companies Act, 1948 is applicable cannot be accepted here as that section only deals with acts of the company in excess of the powers conferred by the articles and memorandum of the company and not the commission of illegal acts. The ability of the company to transfer its assets is undoubted and under this section 20, the transfer once effected cannot be declared invalid merely because the company as transferor acted without capacity or power. But the section has, in our view, absolutely no relevance where the transfer or conveyance is sought to be set aside as being in fraud of its creditors. In such an application, the question before the trial court is one of fact, where the transfer is or is not in fraud of creditors.

Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean 'actual fraud, i.e. dishonesty of some sort' for which the registered proprietor is a party or privy. "Fraud is the same in all courts, but such expressions as 'constructive fraud' are ... inaccurate:" but "'fraud' ... implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled": *per* Romilly MR in *Green* v *Nixon*[4]. Thus in *Waimiha Sawmilling Co Ltd* v *Waione Timber Co Ltd*[5] it was said that "if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent ..."

Upon a true perspective of the facts, we are satisfied that 'fraud had been brought home to the person whose registered title is impeached.' The first appellant was substantially indebted to the judgment creditor as on June 6, 1974. It was as at that date in a position of tight liquidity. It did not have its own funds sufficient money to cover its financial commitments. In the meanwhile court proceedings were brought to enforce the judgment but to no avail. Later the said land in which it had an interest was transferred to its two directors in circumstances which gave rise to suspicion over the *bona fides* of the transaction. It is our

opinion that the transfer was a mere cloak to deprive the judgment creditor of recourse to the property which would otherwise be applicable for its benefit. If this was not a case of deliberate fraud on the judgment creditor, we do not know what is. In concluding this part of our reasons for judgment it is useful to refer to a passage from the judgment of Lord Mansfield in *Cadogan* v *Kennett, supra,* page 1172:

> One case was, where there had been a decree in the Court of Chancery and a sequestration. A person with knowledge of the decree, bought the house and goods belonging to the defendant, and gave a full price for them. The court said, the purchase being with a manifest view to defeat the creditor, was fraudulent, and therefore, notwithstanding a valuable consideration, void. — So, if a man knows of a judgment and execution, and, with a view to defeat it, purchases the debtor's goods, it is void: because, the purpose is iniquitous. It is assisting one man to cheat another, which the law will never allow.

In the result, the respondent succeeds in setting aside the transfer.

The crucial question now is the ownership of the said land. If it is the property of the first appellant, which is the case of the respondent, then it is available to the respondent for execution. Our view is that the second and third appellants were trustees and they held the said land in trust for the first appellant. We say it for this reason. At all material times the second and third appellants were directors and in a fiduciary relationship to the company, the first appellant: see *Regal (Hastings) Ltd* v *Gulliver*[6]. And by virtue of the Specific Relief Act, 1950 (Revised-1974) they were trustees. A 'trustee' is defined in that Act as including every person holding expressly, by implication or constructively, a fiduciary character. As such they had attached to them, for the benefit of the shareholders, all the liability and duties which attached to a trustee and agent: see *The Great Luxembourg Railway Co* v *Sir William Magnay*[7]. "Again directors are called trustees. They are no doubt trustees of assets which have come to their hands, or which are under their control": *per* Sir George Jessel MR in *In re Forest of Dean Coal Mining Co*[8]. As trustees they could not purchase the said land. The inflexible rule of equity forbade them to do that. "This doctrine as to purchase by trustees, assignees, and persons having a confidential character, stands much more upon general principles than upon the circumstances of any individual case. It rests upon this: that the purchase is not permitted in any case however honest the circumstances: the general interests of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases": *per* Lord Eldon LC in *Ex parte James*[9].They no doubt could purchase only with full knowledge and consent of their *cestui que* trust. In the absence of such knowledge and consent they were accountable: see *Keech* v *Sandford*[10] and *Regal (Hastings) Ltd* v *Gulliver, supra.* The allegation that the company lacked the funds to purchase and that the second and third appellants bought the said land with their own money as members of the public is a travesty of the facts. The same argument was raised and

rejected in *Regal (Hastings) Ltd* v *Gulliver, supra.* Lord Russell of Killowen said (at page 149): "It was contended that it was impossible for Regal to get the shares owing to lack of funds and that the directors in taking the shares were really acting as members of the public. We cannot accept this argument. It was impossible for the *cestui que* trust in *Keech* v *Sandford, supra,* to obtain the lease, nevertheless the trustee was accountable. The suggestion that the directors were applying simply as members of the public is a travesty of the facts. They could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain."

We would dismiss the appeal with costs.

Appeal dismissed.

CV Das for the Appellants.
K Anantham for the Respondents.

Notes

(i) It is trite law that registration under the National Land Code 1965, being central to the Torrens System, passes the legal title to the land in favour of the person who is registered as proprietor thereof. However, the question of whether the title is indefeasible or not will depend on whether registration is procured by one of the means prescribed in section 340(2) of the National Land Code 1965. In other words, registration by itself does not determine whether a title is indefeasible or not.

(ii) One of the statutory exceptions to indefeasibility of title provided for under section 340(2) of the National Land Code 1965 is where the title in question is procured by way of fraud. In such a case, the registered title of the person who acquires it by fraud is opened to 'attack' by the rightful owner of the land who may, accordingly, take proceedings to recover the land back from the former.

(iii) Whether fraud exists is a question of fact to be determined from the circumstances of each particular case. 'Fraud', as established by the Privy Council case of *Assets Co* v *Mere Roihi,* [1905] AC 176 mean actual fraud in respect of which the registered proprietor is a party or privy. There must be dishonesty of some sort which is brought home to the knowledge of the registered proprietor or his agents. However, mere knowledge of the existence of an adverse claim in respect of the land would not amount to fraud on the part of the person in whose name the title to the land is registered: *Waimiha Sawmilling Co* v *Waione Timber Co* [1926] AC 101 and *Ong Tin* v *The Seremban Motor Garage* (1917) 1 FMSLR 308

LAND USE AND PLANNING

(a) Imposition of conditions on conversion

(i) Pengarah Tanah dan Galian, Wilayah Persekutuan
v
Sri Lempah Enterpise Sdn Bhd

[1979] 1 MLJ 135 Federal Court, Kuala Lumpur
Coram: Suffian LP, Raja Azlan Shah Ag CJ (Malaya) and Chang Min Tat FJ

See under Administration Law at page 125 above.

Notes

(i) The principle enunciated in this case is that, in an application for conversion of user of the land under section 124(1) of the National Land Code, 1965, the State Authority has no power under section 124(5) of the 1965 Code to impose conditions which are unreasonable and not related to the permitted development in question. Although the State Authority is vested with the discretion to impose such conditions as it may think fit under section 124(5)(c) of the 1965 Code, the exercise of such a discretion is not unfettered. The discretion should be exercised for a proper purpose and should not be exercised unreasonably. For the observation of Lord Denning on such matters, see *Fawcett Properties* v *Buckingham County Council* [1960] 3 All ER 503 at p 518.

Accordingly, it was held that the State Authority has no power to require the surrender of a title in perpetuity in exchange for a leasehold title as a condition for approving the conversion of land use.

(ii) The principle enunciated in *Pengarah Tanah dan Galian* v *Sri Lempah, supra,* referred to above, was applied in *Ipoh Garden Bhd* v *Pengarah Tanah dan Galian, Perak, Ipoh* [1979] 1 MLJ 271.

(b) Need for imposition of category of land use

Land Executive Committee of Federal Territory
v
Syarikat Harper Gilfillan Berhad

[1981] 1 MLJ 234 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah Ag LP, Syed Othman and Salleh Abas FJJ

See under Administrative Law at page 208 above.

Note

It is to be noted that under the National Land Code, 1965 there is no necessity to impose a category of land use in respect of every land alienated before the commencement of the 1965 Code. This would be the case, as is provided for in section 52(5) of the 1965 Code, if the State Authority is of the opinion that the use of the land could be more appropriately controlled by the imposition of express conditions under section 120 of the said Code. On the facts of the case, this appears to be exactly what the State Authority had done, namely, by endorsing the express condition 'fruit trees' on the document of title to the land. Thus, there is no requirement that one of the three recognised categories of land use must be endorsed on the document of title thereto.

(c) Breach of condition

Collector of Land Revenue, Johor Bahru
v
South Malaysia Industries Bhd

[1978] 1 MLJ 130 Federal Court, Johore Bharu
Coram: Gill CJ (Malaya), Ong Hock Sim and Raja Azlan Shah FJJ

Cases referred to:-
(1) *Hyman* v *Rose* [1912] AC 623, 631.
(2) *Kemp* v *Bird* (1877) 5 Ch D 974.
(3) *Bashir* v *Commissioner of Lands* [1960] 1 All ER 117.
(4) *Brigg* v *Thornton* [1904] 1 Ch D 386.
(5) *Esdaile & Ors* v *Lewis* [1956] 2 All ER 357.
(6) *Lam Kee Ying Sdn Bhd* v *Lam Shes Tong & Anor* [1974] 2 MLJ 83.
(7) *Winter Garden Theatre (London) Ltd* v *Millenivon Productions Ltd* [1947] 2 All ER 331, 343.

RAJA AZLAN SHAH FJ (delivering the judgment of the Court): This case concerns alienation of a piece of State Land dated May 13, 1971, and made by the State Authority whereby an industrial lot in Jalan Skudai, Johor Bharu, measuring about 3 acres was granted by the State Authority to the respondent company for a term of 60 years, subject to the provisions and conditions contained in the National Land Code and to a number of specified conditions referred to in the Qualified Title as, and therein set out under the heading of 'Special Conditions' (section 109). The said conditions comprised six numbered paragraphs of which the first three are in these terms:

i. The land hereby leased shall be used solely for the erection of a factory.
ii. Within 24 months from the date of the Registration of QT, the lessee shall build upon the land hereby leased only a factory according to plan approved by the Town Council and the Collector of Land Revenue, Johor Bharu.
iii. The land hereby leased shall not be transferred, charged,sub-leased or otherwise disposed of until the building of the factory required by the condition first above written has been completed as evidenced by endorsement thereon under the hand of the Commissioner of Lands and Mines.

Two other express conditions are referred to in the Qualified Title. One is with regard to the payments of premium and deposit and the other is restriction as to user, i.e., 'supaya plot2 dikawasan Jalan Skudai, Johor Bharu, dijadikan kawasan perusahan rengan' and that the jenis per-usahaan 'membuat kilang zink, wire-netting, screw dan nuts'. These are expressed by references to State Executive Council, Johor Paper PTG 267/59-11 and a letter (of the appellant to the respondent company dated) March 1, 1970, vide AAJB 3/v/243/69.

The factory was built within the stipulated time and on May 13, 1975 the Commissioner of Lands & Mines lifted special condition (iii) (above) and endorsed it at the back of the Qualified Title. On June 11,1976, the respondent company sub-leased a portion of the factory built thereon to Perbadanan Urea dan Baja Malaysia Sdn Bhd ('the urea company') to use it as their store for storing its industrial chemicals and fertilisers and also as their office for their store-keeper for 3 years at the rent of $1,400 per month. Thereupon, on January 22, 1976, the appellant issued a notice in Form 7A under section 128 requiring the respondent company to remedy the breach within a period of one month. It is common ground that the notice was not complied with. On March 8, 1976, the appellant issued a notice in Form 7B under section 129 requiring the respondent company to appear before him in an inquiry to show cause why he should not make an order declaring the land forfeited. At the inquiry which was held on March 29, 1976 the respondent company admitted the breach and asked for time to evict the urea company. They were ordered to remedy the breach on or before June 30, 1976. Instead of complying with the said order, they however, on April 19, 1976, filed a Notice of Motion to declare that the proceedings against them under the provisions of sections 128 and 129 of the National Land Code were misconceived and illegal and as such null and void. The court delivered judgment in their favour on June 15, 1976. The appellant appealed. We allowed the appeal.

It is common ground that the respondent company has not remedied the breach.

The learned judge adopted the reasoning of *Hyman* v *Rose*[1] that if it was comtemplated in a lease to prohibit a different user, that must be expressed as a condition. He thus said:

> The principle underlying this authority as far as I can see, is that in a lease if it is comtemplated to prohibit a different user or alteration of premises

> for different user, then there must be an express condition. In the present case it is common ground that the lease shall be used solely for the erection of a factory. The questions to be determined are whether the use carries with it the use as a store of a portion of a factory that has been erected, and, if so, whether the store can be used to hold not only goods of the factory, but also other goods. In the context of the principle stated in *Kemp* v *Bird*[2] the question is does the use of a portion of a factory as a store create wider obligation than intended by the words 'solely for the erection of a factory'.

The learned judge regarded the State Executive Council Paper and the appellant's letter of March 1, 1970, as a general description of the subject-matter. If the intention is to exclude any of the activities referred to in section 117(1), he said that it must be shown that there is inconsistency with any express condition. He was of the view that putting up a store is not inconsistent with the use of the land as a factory. He considered a store is a necessary appurtenance or natural incident to a factory, and putting up a store does not create a wider obligation than that intended by the conditions in the title. In the present case, if it is intended that the factory shall have no store, then it must be so expressed. Similarly, if it is intended that the factory shall not use its store for storage of goods other than the factory's own goods or products, then it must also be so expressed. He concluded that the provisions of section 117(1)(a)(iv) permits the respondent company to use its store not only for its own goods but also for other commodities.

Another ground which found favour with the learned judge is the question of renting a portion of the factory premises. He said that the respondent company has fulfilled the positive condition of erecting a factory. With the lifting of condition (iii) the respondent company is permitted to transfer or sub-lease the whole land, and if that is so, he saw no objection to transfer or sub-lease a portion of it, provided that the use of the said portion is still within the industrial context. He aslo seemed to think that if it is intended to restrict the respondent company from sub-leasing or allowing any other person occupying part of the premises, there must be an express prohibition. He said that there can only be a breach if there is a special condition such as: 'No portion of the factory shall be rented out to any urea company'. He concluded by saying that there is no such prohibition, express or implied, in either the Executive Council Paper or the appellant's correspondence of March 1, 1970, or the Special Conditions.

Briefly then, the learned judge gave three grounds for his decision. First, on the authority of *Hyman* v *Rose, supra,* there must be an express condition if it is contemplated to prohibit a different user (to use part of factory premises as a store and office); secondly, to use part of factory premises as a store for its own goods and other commodities is not inconsistent with section 117(1)(a)(iv); and thirdly, there must be a prohibition, either express or implied, against sub-leasing.

I shall deal with grounds one and three together as they involve the determination of one issue, i.e., there must be express condition restricting user of the land and factory thereon. That in its turn involves

the determination of two questions: (i) Is there express condition restricting user, (ii) If there is, has the respondent company committed a breach.

Putting it briefly, counsel for the appellant's argument is directed to the case of *Hyman* v *Rose, supra* which he said the learned judge had failed to distinguish on the facts. With regard to the second question to be resolved, it is said on the analogy of *Bashir* v *Commissioner of Lands,*[3] that the special conditions endorsed on the document of title, expressed as they are in the passive, as is usual in the case of restrictions as to user, imposed an imperative obligation on the respondent company to perform and observe them, that is, the land shall be used solely for the erection of a factory for the purpose of a light industry for the manufacture of the permitted limited items. That being the case, there is a clear breach of the express conditions referred to in the document of title.

The respondent company's case was argued in the following way. It is said that this is a case of a restrictive covenant as to 'letting' only and not 'use' and accordingly following the principle enunciated in *Brigg* v *Thornton,*[4] which in turn applied the principle in *Kemp* v *Bird, supra,* there must be an express condition as regards restriction as to user. Omission to stipulate such a condition in the document of title operates in the company's favour. And therefore as long as it uses the factory in compliance with the express condition referred to in the document of title or implied condition as to 'industrial use', its conduct cannot be impeached. The land, it is argued, is subject to the broad category of industry. It was also put in argument that the condition that is binding on the company is the condition specifically endorsed on the document of title and not the other two conditions that are referred to in the Executive Council Paper and the letter of March 1, 1970.

In order to appreciate the case of both parties, it is necessary to examine the authorities referred to in argument.

In *Brigg* v *Thornton, supra,* the lease contained, *inter alia,* a covenant on the part of the landlords 'not to let any other portion of the said arcade for trade or business to be carried on by the tenant'. It was held following the somewhat similar case of *Kemp* v *Bird, supra,* that the covenant was as to 'letting' only and not 'using' so that the landlords were free to deal with their property generally, i.e., they could carry on in the arcade business of any kind they chose or they could even sell the arcade to a purchaser who would not thereby be restricted to carry on a similar business.

In *Kemp* v *Bird, supra,* the lease contained a covenant on the part of the landlord only not to let any house in the same street for the purpose of carrying on the business of an eating-house and the usual words extending the covenant to his heirs, executors, administrators, and assigns were expressly left out. It was held that the covenant bound only the landlord as regards 'letting' and that he was not restricted from assigning an adjoining house in the same street to another person who was free to carry on the trade of an eating-house on the premises. If it was intended that there should have been a positive restriction as to

user, a well-known form would have been used and which would have been binding on the landlord and on his representatives, and his assignees. But it was clear from the covenant that that was not the case. The obligation stopped at the lessor, and was not to extend to his assignee.

In *Hyman* v *Rose, supra,* the ground and chapel then being erected thereon was leased for a term of years and contained covenants by the lessees to complete the chapel by a given date and to repair, maintain, and keep it in good and substantial repair. The chapel was completed and used as a place of worship. The lease was then sold and the premises were adapted for a cinematograph theatre. For that purpose certain internal alterations were effected. It was held that the covenants did not restrict its user as a chapel. Certain trades were forbidden but there was nothing to prevent its user for any other trade. Nor was there anything to prohibit internal alterations suitable for such trade.

In *Bashir* v *Commissioner of Lands, supra,* there were 12 special conditions and one of them, condition 4, read:

> The land and buildings shall be used for hotel purposes only except that shops may be constructed on the ground floor.

The conditions which must be construed as a whole related to a number of different matters of varying importance, all of which, as is usual in conveyancing practice, would be made the subject of covenants relating to forfeiture.

The principle gleaned from these cases is that we must construe the special conditions endorsed on the document of title as they stand and as a whole to see what is the intention of the parties; then it seems to me that the problem is solved without the smallest difficulty. We must be vigilant not to interpret the document and give it an extended meaning which is not therein expressed. James LJ in *Kemp* v *Bird, supra,* puts it in this way (page 976):

> Persons who are men of business, as they were here, are able to get protection and advice, and they must make their covenants express, so as to state what they really mean, and they cannot get a Court of Law or of Equity to supply something which they have not stipulated for in order to get a benefit which is supposed to have been intended.

Romer LJ in *Brigg* v *Thornton, supra,* before referring to the above passage said 'that in cases like this the court ought not to extend a covenant such as this beyond what on the face of it is the purpose of it': page 395.

The point at issue therefore turns on the construction of the document of title which must be construed in the light of the provisions of the National Land Code. In the present case there are three express conditions referred to in the document of title and they must be construed as a whole. I summarily reject the submission of counsel for the respondent company that the two express conditions referred to in the Executive Council Paper and the letter of March 1, 1970 and endorsed on the document of title are not binding upon his client. That argument is

devoid of any merit. It is really too plain for argument that the erection of the factory on the land in question is for the purpose of setting up a light industry for the manufacture of the permitted items listed in the Executive Council Paper referred to in the document of title. Is the respondent bound to use the factory exclusively for the manufacture of the permitted items? It is here the parties are at issue. In my opinion, the appellant's case is much stronger. The State Authority is empowered to impose the express conditions on the said land (section 120). They thus run with the land and they bind the proprietor (section 104). By virtue of section 122(d) the State Authority has power to impose 'such conditions as it may think fit with respect to', *inter alia,* 'the use to which any building is to be put'.

In other words, the State Authority has and did exercise its power to impose restrictions as to user of the factory premises erected on the land in question, i.e., for the purpose of a light industry for the manufacture of zinc, wire-netting, screws and nuts. It will be remembered that the document of title is expressed subject to the provisions and conditions contained in the National Land Code. These words appear to import into the document of title itself references to section 104 and section 122. My conclusion on this is that, on accepting the lease and going into possession under it, the respondent company contracted to observe and perform the conditions which amounted to express conditions for the purposes of section 104 and section 122. In my judgment the learned judge was wrong when he said that there can only be a breach if there is a special condition, express or implied, such as 'No portion of the factory shall be rented out to any urea company'. I can only say, with unfeigned respect for the opinion of the learned judge, that he seems to me to be putting in a new condition on the document of title and not interpreting it as it should be. I think he is not justified in taking such a liberty of interpretation. That certainly would be a strange mode of interpreting the special conditions, that because you cannot find anything expressed about using the said factory for the storage of industrial chemicals and fertilisers and as an office, you can invent provisions and insert conditions which the document of title has not provided for.

Has the respondent company committed a breach of the express condition restricting user? It is the respondent company's case that with the lifting of condition (iii) relating to transfer, charge and sub-leasing, it can sub-lease the whole land and a *fortiori* part of it to the urea company, provided the latter uses that part within the industrial context. It is therefore said that using that part for storing of industrial chemicals and fertilisers and as an office comes within 'using' in the industrial context. In my opinion, this line of argument is a little far-fetched. We are not here concerned with the case of landlord and tenant but one under the National Land Code. The National Land Code is our own creation and is intended to be a complete code regulating the respective rights of the State and the occupier. In the former case it is in order to apply the well-established principle of landlord and tenant that a covenant not to sub-let premises is not broken by sub-letting part of it:

see *Esdaile & Ors* v *Lewis*[5]. In the present case different considerations apply. Here, the restrictive covenants are in respect of both 'letting' and 'use'. However, the covenant in respect of 'letting' was lifted but not that with regard to 'user'. It still runs with the land and binds the respondent company. In my view, these are circumstances which distinguish the present case materially from those of *Brigg* v *Thornton, supra,* and *Kemp* v *Bird, supra. Bashir* v *Commissioner of Lands, supra,* too affords no assistance to the argument on behalf of the appellant because that case depended on the interpretation of section 83 of the Kenya Crown Lands Ordinance, 1915 relating to relief against forfeiture.

I cannot assent to the argument that a lessee with an express condition restricting user can under the circumstances of the present case change the nature of the *jenis perusahaan'* endorsed on the document of title. Regard must be had to the user of the factory premises which is permissible under the lease, that is, that the express conditions imposed are imperative obligation on the respondent company to use the factory premises for a light industry for the manufacture of the permitted limited articles. That being the inherent limitation as to user, storing of industrial chemicals and fertilisers is therefore not a legitimate purpose of 'user' permitted under the lease. In my view, the alteration as to user in the present case is not permissible and is clearly in breach of the express condition restricting user. It is a continuing breach (section 103) and the order of March 8, 1976 does not operate as a waiver by the appellant as the respondent company has not complied strictly with the requirements of the said order: section 129(4)(b) and (5).

I now turn to ground two — to use part of the factory premises as a store for its own goods and other commodities is not inconsistent with section 117(1)(a)(iv). It must be noted that the land alienated is classified under category 'industry' (section 52) which means its use is limited (implied) to industrial purposes which are elaborated in section 117(1)(a), and as far as the present case is concerned for the purpose of erecting the said factory and to use it for or in connection with, *inter alia,* 'manufacture'... and 'the storage, transport or distribution of goods or other commodities'. These implied conditions only operate to the extent that they are not inconsistent with any express conditions to which the land is subject (section 117(2)). In other words, the implied conditions spelt out in section 117(1) shall not be inconsistent with the express conditions referred to in the document of title, i.e., in our case, for the purpose of a light industry for the manufacture of kilang zink, wire-netting, screw and nuts. The question arises as to whether storing of industrial chemicals and fertilisers is inconsistent with the express condition with regard to the manufacture of the above permitted limited articles. I think the answer must be in the affirmative. Suffice it to say that to use part of the factory premises for an alien and totally unconnected industrial project is inconsistent with the express conditions in the said lease. I would fully endorse the appellant's argument that such use is indeed an unnecessary appurtenance, an unnecessary

adjunct, an illegitimate incident to the factory for the simple reason that it was used for purposes which are alien and totally unconnected with industrial project of the factory. The learned judge, in my opinion, had failed to see the difference between the use of a store in a factory by the factory itself and the use of a store in a factory by an alien person for the alien and totally unconnected industrial project as aforesaid.

The result is that the appellant's claim to forfeiture must succeed unless the respondent company can and should be released in equity against the appellant's legal rights.

In the course of the argument, counsel for the respondent company applied for the first time to us for relief against forfeiture by invoking the provisions of section 237 of the National Land Code. That section is reproduced and reads:

> 237.(1) Any lessee, sub-lessee or tenant against whom any person or body is proceeding to enforce a forfeiture may apply to the court for relief against the forfeiture: and the court —
> (a) May grant or refuse relief as it thinks fit, having regard to all the circumstances of the case (including, if the case is one to which the provisions of section 235 applied, the proceedings and conduct of the parties under that section); and (b) if it grants relief, may do so on such terms as it thinks fit.
> (2) The provisions of sub-section (1) shall have effect notwithstanding any provision to the contrary in the lease, sub-lease or tenancy in question.

That section which was obviously modelled on the provisions of section 14 of the (UK) Conveyancing and Law of Property Act, 1881 (see also section 146 of the (UK) Law of Property Act, 1925), has been judicially considered in the Privy Council case of *Lam Kee Ying Sdn Bhd* v *Lam Shes Tong & Anor*[6] and it certainly supports the proposition that the respondent company is not debarred from making the application for relief for the first time in this court. The point is whether this court ought to relieve the respondent company in the circumstances. It has been said that the court's discretion to grant relief against forfeiture is very wide, and the House of Lords in *Hyman* v *Rose, supra,* has refused to lay down any rigid rules to fetter it. Although there has been a fluctuation of authority on the subject, I think it is safe to state that as a general rule a court will consider the conduct of the parties, the nature and gravity of the breach and all the circumstances in deciding whether relief should be granted and , if so, on what terms. Evidence has been established that this is a case of clear and wilful breach of an express condition of the lease coupled with a lack of evidence as to the respondent company's ability speedily and adequately to make good the consequences of its default, although the respondent company was given reasonable time on two occasions to remedy it. As a matter of fact, the appellant has done everything possible under the Code to request the respondent company to remedy it. It cannot now be said that he has acted unreasonably in the circumstances. In my opinion, this is also a case of continuous disregard by the respondent company of the appellant's rights over a period of time. Equity expects men of business

to carry out their obligations and the settled practice of courts of equity is to do what they can to preserve the sanctity of the bargain. We would indeed be acting flatly contrary to the salutary observation of Lord Uthwatt in *Winter Garden Theatre (London), Ltd* v *Millennium Productions, Ltd*[7] that 'in a court of equity, wrongful acts are no passport to favour'. I do not think that this court should assist the respondent company who has shown *prima facie* to have trodden roughshod over the appellant's rights.

In the circumstances we allowed the appeal and dismissed the application for relief against forfeiture.

The following supplementary judgment was delivered on January 5, 1978:

Raja Azlan Shah FJ: I have again considered the matter with regard to the application for relief from forfeiture under section 237 of the National Land Code made by the respondent company and I feel that it is misconceived.

Section 237 is referable to Part 15 which deals with leases and tenancies and section 221 refers to leases granted by the proprietor of alienated land. Lease is defined in section 5 to mean a registered lease. This is not the case here as in these proceedings we are dealing with alienation of State Land by the State Authority for a term of 60 years under section 76.

In my view, action to enforce forfeiture in respect of State alienation for a term of years comes under section 129 and *not* under section 234 *et seq* which is within Chapter 3 of Part 15. In the present case the forfeiture provisions under Part 8 would accordingly be applicable, and there is no provision for relief from forfeiture by the court. Section 133 provides for the aggrieved person to apply to the State Authority for annulment of the forfeiture and section 134 prescribes for appeals against forfeiture.

In the circumstances I do not think that this court has jurisdiction to entertain the application made by the respondent company under section 237. It is important to set this matter right as I do not wish that similar applications should be made in the future.

Gill CJ (Malaya) and **Ong Hock Sim FJ** concurred.

Appeal allowed.

Suleiman Hashim (Senior Federal Counsel) for the Appellant.
Chua Jui Leng for the Respondent.

Notes

(i) As was correctly pointed out by their Lordships, a restriction on land use can also take the form of an implied condition under the National Land Code, 1965. In relation to land subject to the category 'industry', these implied conditions are provided for in section 117 of the 1965 Code. To the extent that they are not inconsistent with any express conditions imposed under section 120 of the 1965 Code, they operate to regulate the use to which the

land may be subject to (see section 117(2)). Accordingly, there is no necessity, in every case, to impose an express condition if it is contemplated to prohibit the land from being used for a purpose other than one to which the land is for the time being subject to.

(ii) Their Lordships also correctly pointed out that the restrictions relating to 'letting' and 'user' to which the land was subject to were independent of each other. Accordingly, the lifting of the restriction relating to 'letting' by way of a transfer, charge or sub-lease of the said land did not also apply to the restriction relating to 'user' which still runs with the land and binds the respondent company. Thus, to use the land for storing industrial chemicals and fertilisers in the face of the express condition requiring the land to be used only as a factory premises for a light-industry, for the manufacture of zinc, wire-netting, screws and nuts was clearly a breach of the restriction on 'user' in that the storing of such chemicals and fertilisers was totally unconnected with the manufacture of the above said articles.

(iii) It was also pointed out by their Lordships that an application for relief from forfeiture effected by the State Authority must be distinguished from one effected by a private individual lessor. The former is governed by Part 8 of the National Land Code, 1965 which does not provide for relief from forfeiture by the court (see also *United Malayan Banking Corporation Bhd & Anor* v *Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87). Instead, sections 133 and 134 of Part 8 provide for the aggrieved person to apply to the State Authority for annulment of the forfeiture and for appeals against forfeiture within a specified time period respectively. In the case of forfeiture effected by a private individual lessor, relief from forfeiture may be made to the court under section 237 of the 1965 Code.

MALAY RESERVATION LAND

(a) Revocation

Mohamed Isa & Ors

v

Abdul Karim & Ors

[1970] 2 MLJ 165 High Court, Ipoh

Cases referred to :-

(1) *Chew Khan* v *Lam Weng Yoon & Anor* [1965] 2 MLJ 136.
(2) *Nathu* v *Gomti* LR 67 IA 318.
(3) *Ho Giak Chay* v *Nik Aishah* [1961] MLJ 49.
(4) *Idris bin Haji Mohamed* v *Ng Ah Siew* [1935] MLJ 257, 259.

(5) *Melliss* v *Shirley Local Board* (1885-6) 16 QBD 446.
(6) *Cope* v *Rowlands* 2 M & W at p 157; 150 ER 707.
(7) *Manks* v *Whiteley* [1912] 1 CH 735.
(8) *Edwards* v *Marcus* [1894] 1 QB 587.
(9) *Whiteley* v *Delaney* [1914] AC 132.
(10) *Waimiha Sawmilling Co Ltd* v *Waione Timber Co Ltd* [1926] AC 101.
(11) *Loke Yew* v *Port Swettenham Rubber Co Ltd* [1913] AC 491.

RAJA AZLAN SHAH J (stated the facts and arguments set out in the headnote above, and continued): The plaintiffs' claim in CS 464/69 being based on the sub-lease executed in favour of the first and second plaintiffs and in CS 514/69 being based on the sub-sublease executed in favour of the three plaintiffs, it must first be determined whether these leases are valid in order that the plaintiffs are entitled to challenge the rights of the defendants over the same piece of land. This point can be shortly disposed of on the analogy that a person cannot grant a valid tenancy to himself or to himself and another: see *Chew Khan* v *Lam Weng Yoon & Anor*[1]. Accordingly, the sub-sublease in CS 514/69 executed by the first two plaintiffs in favour of themselves and the third plaintiff is invalid and since CS 514/69 cannot stand for this reason, there remains only CS 464/69, the sublease of which is not affected by the invalid sub-sublease in CS 514/69. The sublease in CS 464/69 being registered on 7th February 1969, is effective to transfer the rights of the first, second and third defendants to the first and second plaintiffs.

However, the fourth and fifth defendants claim that all such rights of the first, second and third defendants have already been transferred to them previous to this sublease *vide* the first and second permits to mine and the sublease, all of which were executed on 22nd August 1968. Since the legality of these three documents and a subsequent agreement employing the sixth defendants to operate the mine, is called into question by the plaintiffs it becomes necessary to determine whether the first and second permits to mine and the sublease all executed on 22nd August 1968 and the subsequent agreement are rendered invalid either by (1) the non-correspondence of the third defendant's name in the three documents and in the mining certificate, the deletions of the first and second plaintiffs' names from the three documents and other alterations therein; or (2) the contravention of the provision of the Malay Reservations Enactment; or (3) the contravention of the provision of the mining certificate; or (4) the intention, in drawing up two similar permits to mine, to circumvent the provisions of the Mining Enactment.

I do not think that the non-correspondence of the third defendant's name in the three documents and in the mining certificate is material enough to affect the validity of the three documents, after considering the similarity between the name appearing in the three documents and that appearing in the mining certificate.

With regard to the alterations of the three documents, the only relevant section in the Evidence Ordinance is section 106 which reads: 'When any fact is especially within the knowledge of any person, the

burden of proving that fact is upon him'. This seems to throw the onus of proving the alterations validly made upon the fourth and fifth defendants. For a clearer elucidation on the law regarding alterations of documents, reference can be made to *Halsbury's Laws of England.* There it is stated that the onus lies on the party who is claiming under the documents to explain the alterations and show when they were made. Alterations made before execution of the documents do not affect the validity of the documents. Any alteration appearing upon the face of the document is presumed, in the absence of evidence to the contrary, to have been made before the execution. If alterations are made in a material part of a document after its execution, by or with the consent of the parties thereto or persons entitled thereunder, but without the consent of the parties liable thereunder, the document is thereby made void: see 11 *Halsbury's Law of England* 3rd Ed pages 379 and 367 respectively, see also *Nathu* v *Gomti*[(2)].

The onus therefore lies upon the fourth and fifth defendants to show that the alterations were made before the execution of the three documents in order that they can uphold the validity of these documents on this ground. In his evidence, the fifth defendant testified that the first, second and third defendants were the ones who gave instructions to delete the names of the first and second plaintiffs when the latter did not turn up at Mr Lal Harcharan Singh's office in Ipoh, the place where it was alleged the execution of the documents by first, second, third, fourth and fifth defendants took place. The first defendant, however, maintained that the signing of the three documents by the first three defendants took place at his house and his sister's house in his kampong. He was supported by one Haji Ahmad Shabki who asserted that the execution of the documents was not effected on 22nd August 1968 but on one Sunday when he accompanied certain people namely Mr Au Ah Wah, Mr Lai Kai Chee and Mr Ho Fang Chew to the first and third defendants' house and after that to the second defendant's house. His presence during the execution of the documents was admitted by the first defendant, Haji Shabki maintained that the documents could not have been executed by the first three defendants in Mr Lal Harcharan Singh's Ipoh office on the evening of 22nd August 1968, because on that day, he was working in Ulu Langat until 6.30 pm. He produced an entry made in the attendance book. His superior officer substantiated his testimony of having worked on the 22nd August 1968 but admitted he could not state from his own personal knowledge at what particular time the entry of return was made by Haji Shabki; he agreed there was a possibility of the return entry having been made on the following morning when Haji Shabki came to work. However, in the absence of concrete evidence to the contrary, I accept as a fact that Haji Shabki was in Ulu Langat on 22nd August 1968. On the other hand Mr Lal Harcharan Singh and the five defendants maintained that the execution of the documents by defendants one to five was effected in the former's office. However, Mr Lal Harcharan Singh, in his affidavit in CS 235/69, affirmed that one Haji Mohamed Razali was also present in his office at that time. The fifth defendant in his evidence, denied the presence of this

person, who according to him was sick at the time and he alleged that Mr Lal Harcharan Singh had to travel to Kuala Kangsar to get his signature in connection with similar documents for the adjoining piece of land. This story being contradicted by Mr Lal Harcharan Singh throws a doubt on the fourth and fifth defendants' evidence that the documents were executed in Mr LH Singh's office. In view of these circumstances, it is more probable than not that the documents were executed by the first three defendants, not in Mr LH Singh's office but in their respective houses.

With regard to whether the alterations were made before or after execution, the evidence clearly shows that the deletions of the first and second plaintiffs' names and certain other words therein were already on the documents when all the parties affixed their signatures. The first defendant affirmed both in his affidavit in CS 235/69 and in his evidence that the cancellations of the names were already there when he signed. The fifth defendant testified that the authentication of the deletions was done by Mr L H Singh. In reply to a question, he said he did not know why he did not authenticate the deletion. This shows that when he affixed his signature, the deletions were already known to him. However, it is the case of the first three defendants that they did not intend to exclude the first and second plaintiffs from the documents and that they signed the documents under the belief that the permits to mine were renewals of the previous permit to mine dated 28th June 1967 in favour of the first and second plaintiffs and fourth and fifth defendants and accordingly that the documents they signed were also in favour of the first and second plaintiffs. The first defendant in his affidavit in CS 235/69 and in his evidence, stated that Haji Ahmad Shabki explained to him and to the second and third defendants that the permits were for first and second plaintiffs and fourth and fifth defendants as in the previous permit. Nobody, however, explained the deletions on the various pages of the three documents to him and he said that he was asked to sign on the various pages containing the deletions by Mr Lai Kai Chee who did not give him any reasons. He further maintained that if he had been consulted about the deletions of the first and second plaintiff's names, he would never have agreed and that the deletions were done without his consent. In the light of this fact, I cannot come to any other conclusion but that the documents are invalidated by the alterations made without the consent of the first three defendants.

In the alternative, even if it can be said that the validity of the documents cannot be affected by alterations made before the execution of them, the three documents are void on the ground of mistake, the first three defendants having signed the documents under the mistaken belief that they were to be executed in favour of the first and second plaintiffs as well as the fourth and fifth defendants. The first three defendants did not intend to contract merely with the fourth and fifth defendants, but they intended to contract and were under a mistaken impression that they were also contracting with the first and second plaintiffs in addition to the fourth and fifth defendants. I therefore hold the three documents null and void.

It is disputed by fourth, fifth and sixth defendants that the said land still remains in the Malay Reservation. They argued that on surrender to the State and subsequently on the issue of the mining title by the State to the first three defendants, the said land became State land and thereby lost its character as Malay Reservations land, and as such it is no longer covered by the Malay Reservations Enactment. The issue before this court therefore is whether the said land is still in the Malay Reservation so as to render the agreement between the fourth and fifth defendants and the sixth defendants void being in contravention of the provisions of the said Enactment.

I think the defendants' novel argument is rather far-fetched. Section 2 of the Enactment defines Malay Reservation as one duly declared and gazetted under the provisions of the Enactment or of the Malay Reservations Enactment, 1913. It is not disputed that the said that was so gazetted in the *Gazette* notification of 8th September 1921 made under the provisions of the Malay Reservations Enactment, 1913. Where such land has been so declared to be in Malay Reservation it will lose its character only when it is duly revoked under the provisions of section 4(i)(b) which states:

> The Mentri Besar may at any time, with the approval of the Ruler of the State in Council by declaration published in the *Gazette* revoke any declaration whereby any land has been declared to be Malay Reservation, either as to the whole or any part of the area therein referred to.

I think section 4(i)(b) clearly contemplates that there need to be an express and not implied revocation, and such revocation has to be gazetted so as to be effective. There is no such *Gazette* notification declaring that it has been so revoked. To hold that an agricultural land in Malay Reservation when converted into mining land loses its character as a Malay Reservation land would, I think, be contrary to the intention of the Enactment which aims at preserving and protecting Malay interests. The preamble in the Enactment states that it is:

> An Enactment to amend and consolidate the law relating to Malay Reservation and to provide for securing to Malays their interests in land.

The Enactment provides only one way by which a Malay Reservation land may lose its character — *i.e.,* by revocation under the provisions of section 4(i)(b). To hold otherwise than is contemplated by the Enactment would certianly defeat the whole purpose of the Enactment. Furthermore, under section 5 of the Enactment, any State land may be included in a Malay Reservation. Though the provisions of section 6(ii) had not been observed when the mining lease was issued, it would not, I think, take the said land out of Malay Reservation because there is nowhere in the Enactment which states that the non-observance of the provisions of section 6(ii) would have the effect of losing its character as Malay Reservation land. The section merely requires the collector of the district in which such land is situated to present to the proper registering authority a requisition in the proper form requiring him to note in his register of title the fact of the inclusion of such land in such Malay

Reservation. This, I think, is merely an executive act and has no legal effect on the character of the land. In the circumstances. I think it would certainly be within the spirit and intendment of the Enactment that the said land unless so revoked under the provisions of section 4(i)(b) still retains its character as Malay Reservation land.

Being a Malay Reservation land, any dealings contrary to the provisions of the Enactment would render the said dealing void and of no legal effect (section 19). Section 7 of the Enactment provides that:

> No state land included within a Malay Reservation shall be sold, leased or otherwise disposed of to any person not being a Malay.

The Enactment clearly prohibits dealings in respect of the said land with non-Malays, and as such the agreement between the fourth and fifth defendants and sixth defendants employing the sixth defendants to mine the land for tin ore is clearly one of those dealings prohibited by the Enactment. In *Ho Giak Chay* v *Nik Aishah*[3] where the charges were executed over Kelantan Malay Reservation land to non-Malays, the court held that they were null and void as being contrary to the provisions of the Malay Reservations Enactment 1930, even though they were registered under the Kelantan Land Enactment. Hepworth J in holding that the said charges were null and void said that a charge to a non-Malay vests in him a right or interest in Malay land and such right or interest is prohibited as it contravenes the provisions of the Enactment. Though in the present case it is a contract, by virtue of the said contract or agreement it vests in the sixth defendants, the right to enter upon the land, to install the necessary equipments and plants and to extract the ore from the land, and this I think clearly contravenes the provisions of the Malay Reservations Enactment. As Huggard CJ (SS) in *Idris bin Haji Mohamed* v *Ng Ah Siew*[4] at page 259 said:

> From these provisions (i.e., sections 7, 8, 9, 10, 13), it is clear that the intention of the Enactment was to preclude Malays from parting with any right or interest in Reservation lands, except to the very limited extent permitted by the Enactment, to persons of any other race.

I therefore hold that the said agreement employing the sixth defendants to mine the land is null and void.

It is also to be observed that it is one of the conditions of the mining lease/certificate that the lessees shall not enter into any mining contracts with non-Malays except for the purpose of constructional works only. The sub-leases and permits to mine granted by the first three defendants to the first and second plaintiffs and fourth and fifth defendants are governed by the conditions in the mining certificate and as such they are bound by the said conditions (section 18 of the Mining Enactment). Any contravention of the said conditions would render the said agreement/contracts void. Even assuming that the permits to mine and sub-lease granted to the fourth and fifth defendants on 22nd August 1968 are valid, their agreement with the sixth defendants is clearly in contravention of the conditions in the mining certificate and as such is void. Furthermore, section 120 of the Mining Enactment

provides for a penalty in the form of a fine for any infringement of the conditions stipulated in the mining lease. It is settled law that where a contract is prohibited by statute such a contract is void though the statute inflicts a penalty only: see *Melliss* v *Shirley Local Board*[5]. A penalty often implies a prohibition: see *Cope* v *Rowlands*[6]. But when the prohibition of an act is inferred from the infliction of a pecuniary penalty or a fine as in this case, it is necessary to determine whether the fine is imposed for the purpose of preventing the act from being done at all or only for the purpose of making the person who does it pay a certain sum of money. To determine this it is necessary to refer to the objects of granting mining leases to land under Malay Reservation. Clearly the object would be to secure such lands only to the Malays and to restrict or prevent them from dealing with the lands contrary to such objects. Such being the object, and reading section 120 in the light of such circumstances. I think that the purpose of that section is to prohibit such contracts from being entered into with a penalty imposed together with the prohibition. In the circumstances, the contract is void.

The next issue is whether the two permits to mine and the sub-lease purportedly executed on the 22nd August 1968 were done with the intention of circumventing the provisions of the Mining Enactment. It is not disputed that all the three documents were executed at the same time and were substantially in identical terms. Both the permits to mine were for a period of one year each, but the second permit to mine was only to take effect from the time the first permit to mine expired. The sub-lease was for the period of the mining lease/certificate and the extensions or renewals thereof. The plaintiffs contend that the two permits to mine should be read together, thus constituting a single permit to mine for two years, and, by this act, they contend, that the defendants are trying to circumvent section 37 of the Mining Enactment thereby rendering the said permits to mine void. The said sub-lease would also be void under that section.

It is a settled rule of construction that where several documents forming part of one transaction are executed contemporaneously, all the documents must be read together as if they are one: see *Manks* v *Whiteley*[7]. This principle was followed in *Idris bin Haji Mohamed* v *Ng Ah Siew, supra,* where Terrell J at page 261 said:

> It is a well known rule of construction that where the arrangement between parties is contained in several documents all executed simultaneously, all the documents must be read together to ascertain the intention of the parties, and it is a corollary from this that the intention must be gathered from the documents as a whole. It has been held, for example, that when a bill of sale and a mortgage of a reversionary interest were executed simultaneously and related to the same debt, the bill of sale could be defeated by a condition contained only in the mortgage, *Edwards* v *Marcus*[8]: see also the dissenting judgment of Fletcher Moulton LJ in *Manks* v *Whiteley,* which was approved on appeal to the House of Lords, *sub-nominee Whiteley* v *Delaney*[9]

In the present case, the two said permits to mine referred to the same subject matter and were substantially in identical terms except that the

second permit was to take effect only a year later, that is, after the first permit had expired. In the circumstances the two permits to mine should be read together as forming one permit to mine for a period of two years. The question now is this; whether it is invalid under section 37 of the Mining Enactment. Section 37 provides that any sub-lease granted for a term not exceeding one year shall be valid without registration, and I think, that it is a natural corollary from reading this section that a sub-lease for more than one year shall not be valid if it is not registered. As far as the sub-lease is concerned it is clearly invalid since it is for the period of the mining certificate/lease (which is for 10 years) and was not registered. But could it be said that section 37 also covers permits to mine or in other words could the permits to mine in law be equivalent to sub-leases? I have anxiously examined the two said documents and I have come to the conclusion that though the two documents were entitled as 'Permit to Mine' they were in substance sub-leases. To the question whether by executing these two permits to mine and the sub-lease the defendants were trying to circumvent the provisions of the Mining Enactment, it can be answered simply by saying that such an intention can be gathered from the documents as a whole. There was no reasonable explanation as to the necessity of executing the Second Permit to Mine, which was to take effet only a year later and furthermore it would seem strange and rather suspicious why another sub-lease was needed when there were already two permits to mine. Moreover, the first Permit to Mine dated 28th June 1969 already contained a clause whereby the same was subject to yearly renewal and as such there is no necessity of executing a further permit to mine. In the circumstances, I am satisfied that the intention of the defendants could not have been anything else but to flout the law, and this court takes a serious view of those persons who flout the law for their own ends. Since the two permits to mine were in substance sub-leases and were not registered, they are therefore void under section 37 of the Mining Enactment, reading the two documents together as a whole. In the circumstances, the permits to mine are void.

The first and second plaintiffs also contend that under the permit to mine dated 28th June 1967, they are entitled to renewal of the said permit in their favour and since they have not relinquished or renounced their rights thereunder, the fourth and fifth defendants in collusion with the sixth, have acted in fraud of the rights vested in the plaintiffs by entering into the two permits to mine and the sub-lease. The fourth, fifth and sixth defendants counterclaim that it was the first and second plaintiffs with first, second and third defendants who had acted in fraud of their rights by virtue of the sub-lease granted by first, second and third defendants to first and second plaintiffs.

As far as the defendants' counterclaim is concerned I think it is without merit. It is settled law that fraud means actual fraud and not constructive or equitable fraud. To constitute fraud there must be a dishonest intention to cheat a man of his known existing right: see *Waimiha Sawmilling Co Ltd* v *Waione Timber Co Ltd*[10]. Knowledge of an unregistered right does not of itself constitute fraud: see *Loke Yew* v

Port Swettenham Rubber Co Ltd[11]. In sub-leasing the said land to the first and second plaintiffs, the first, second and third defendants as well as the first and second plaintiffs could not be said to be acting with a dishonest intention to cheat the fourth or fifth defendants of their rights under the said permits to mine and the sub-lease of 22nd August 1968, when they had in the first place no such right under the said documents, or at least at that time they were already disputing the validity of the fourth, fifth and sixth defendants' rights under such documents. On the other hand, I think it is the fourth and the fifth defendants in collusion with the sixth defendants who had acted in fraud of the rights of the first and second plaintiffs. From the evidence of the first, second and third defendants it is clear that the three documents were intended to be executed as a renewal of the previous permit to mine i.e., that of 28th June 1967 and the first and second plaintiffs had not in any way relinquished or renounced their rights thereunder. It is clear that the first, second and third defendants had not consented to the execution of the two permits to mine and the sub-lease in favour of the fourth and fifth defendants only. They testified that they were not explained what the alterations in the documents were for except for being told that the documents were to be a renewal of the previous sub-lease and therefore in favour of the first and second plaintiffs as well. Looking at all the documents as a whole and noting the various deletions thereunder and the evidence above I think the dishonest intention on the part of the fourth and fifth defendants to deprive the first and second plaintiffs rights to such renewals of the mining lease and permit to mine, and to transfer such rights only to themselves on the higher balance of probabilities is sufficiently established. The sixth defendants had all the time been actively participating in this fraud, and were 'rewarded' by the fourth and fifth defendants when they entered into an agreement employing them to mine the land, and which agreement was clearly in contravention of the provisions of the Malay Reservations Enactment and the Mining Enactment and the conditions in the mining certificate. In the circumstances I think fraud on the part of the fourth, fifth and sixth defendants on the higher balance of probabilities is sufficiently established.

Since the said permits to mine as well as the sub-lease are void, the fourth and fifth defendants could not thereby have any right or title in the land as against first and second plaintiffs, the registered sub-lessees; and the fourth and fifth defendants could not as such enter into any valid agreement with the sixth defendants. Even if they could, the agreement is void for the reasons stated earlier viz., infringement of the provisions of the Malay Reservations Enactment, the conditions in the mining certificate and the provisions of the Mining Enactment.

Accordingly CS 514/69 is dismissed with costs. CS 464/69 as prayed with costs (one counsel). The third party costs is to be borne by the fourth, fifth and sixth defendants. Such costs to be taxed.

Order accordingly.

P Mooney for the Plaintiffs.
M Sivalingam for 1st, 2nd & 3rd Defendants.
PP Dharmananda for 4th, 5th & 6th Defendants.

Note

In the light of this case, it is now settled law that a Malay Reservation land, duly declared and gazetted as such, can only lose its character in the manner provided for in the FMS Malay Reservations Enactment (Cap 142), namely, upon revocation by the Ruler in Council under section 4 of the said Enactment. A surrender and re-alienation of the land, as in this case, would not cause it to lose its character as a Malay Reservation land.

LAND ACQUISITION
(a) Potential development value

Bukit Rajah Rubber Co Ltd
v
Collector of Land Revenue, Klang

[1968] 1 MLJ 176 High Court, Kuala Lumpur

RAJA AZLAN SHAH J: This is a reference under section 38 of the Land Acquisition Act, 1960 in respect of the compulsory acquisition by the Central Government of 50 acres of land belonging to Bukit Rajah Estate, comprising part of Lot 26, Mukim of Kapar, Klang (approximately 495 acres in area) for a site for Radio Malaysia transmitting station.

The area was gazetted under section 8 of the Act on 5th November 1964 *vide* Selangor GN 751, and it is therefore required to determine its 'market value' as on that date.

The land acquired is situated approximately three miles north of Klang town on the Klang-Meru Road and about 700 yards off this road to its left. It has therefore no road frontage, but access to it is *via* a laterite estate road. The main services, electricity, water and telephone are on the road, but they cater for that rubber estate and not for any housing development project. It is about half-a-mile outside Klang Town Council boundary. The land in question is firm, level, and dry, with a slight fall towards the southern boundary. At the time of acquisition it was under rubber belonging to clone (PB 86) and about 25 years old. It was first tapped in 1948. It is bounded on the south by a canal and Kampong Batu Belah which is a very small village comprised of temporary houses and buildings and covered with rubber and fruit trees, and in the immediate vicinity are small-holdings covered with rubber. It is not situated adjacent to or in the vicinity of any developed area. Running parallel to this boundary is a laterite road which is separated from it by a 15ft. main drain. There was then no bridge across it. The land is subject to an expressed condition, that is, agricultural purpose.

The Collector of Land Revenue, Klang, held an enquiry on 21st January 1965 at which Mr. JM Carter the valuer for the estate appeared on their behalf. They claimed compensation at the rate of $8,400 per acre. The collector's award was made on 30th June 1965 at the rate of $2,400 per acre, based on the land's proximity to Klang-Meru Road, Klang town, the Town Council boundary, its expressed condition, and finally to development areas in the immediate neighbourhood (see para 8, Form 0). It is now said that the collector has based his award purely on its agricultural value and paid no regard to the value of the land as a potential building or industrial site.

At the hearing before us, Mr Carter, who is no stranger to our courts in land acquisition cases, gave as his considered view the market value of the land acquired, based on the land development potential for urban purposes — probably housing, possibly industry. Mr Lim Mau Chin, the Government Valuer, gave the market value of the land acquired in terms of its agricultural value, and with that value as a basis he took into consideration the land's remote building potentiality and other special factors. Since both experts held divergent views with regard to the market value, it is therefore incumbent on this court to analyse carefully the value of all the evidence upon which each is based.

Mr Carter fortified his view by comparing with the urban development along Meru Road which he says has reached the $1^1/_2$ milestone and the urban development along Kapar Road which he says stretches as far as the $2^1/_2$ milestone after which the small holdings are encountered. These are of the semi-permanent and temporary nature which he classified as sub-urban. He says that land along Meru Road is more competitive in price than along other roads leading out of Klang town. In arriving at his conclusion he also relies on the general pattern of development north of Klang river. He is of the opinion that development on the north side of Klang river is more probable than on the south side because the general pattern of development in Klang and Port Swettenham in the last six years indicates a definite attention to the north which he says stems from the Klang Straits wharves. These wharves are constructed north of the Klang river. All traffic to those wharves must cross Klang river at Klang, run to Port Swettenham, and re-run to Klang. The present development indicates that there will have to be a by-pass running north of the Klang river, thus avoiding Port Swettenham and Klang and connecting the Klang wharves with the main arterial road to Kuala Lumpur. That, he says, will be the most logical outcome of the Klang-Port Swettenham and its economic outcome.

It is obvious that the urban development in Klang-Meru Road consists of developed lands, that is, shop-houses, and the latest development in this locality is Meru Gardens, that is, a small-holding consisting of terraced houses situated at the $1^1/_4$ milestone. After the second milestone there is no development whatsoever. The area onwards is a green belt — mainly rubber cultivation. That is still the position at the present day. At the third milestone are lands belonging to the rubber estate. At the time of acquisition and even today there is no indication of any permanent building development in the immediate vicinity. It is there-

fore fallacious to say that there was development in Kampong Batu Belah and the adjoining smallholdings and that the price along Meru Road is more competitive than along other roads leading out of Klang. Development in Klang is centered at Jalan Teluk Gadong and the Eng Ann Housing Estate. These developments are sufficient to meet local demands for housing in the next few years. There are still lands between the land acquired and the town centre remaining undeveloped. It is unlikely that there will be an immediate demand for this land for building purposes. It is also fallacious to say that there is no more land to the north of Klang town that can be developed except the land in question. The belief that a hypothetical by-pass running north of Klang river, by-passing Klang and Port Swettenham, as a guide to the market value of the land acquired appears to be open to no objection if the hypothesis is based on inferences from ascertained facts. No evidence has been led that far beyond a bare assertion from the Antolic plan, and it is difficult to consider this as anything but within the realm of speculation in the remote future, especially as the proposed by-pass has to cut through hundreds of private properties thus entailing vast Government expenditure.

Mr Carter's second consideration is the evidence of sales of comparable land for urban purposes prior to the date of acquisition. He quoted these two parallels to give some indication how the market fluctuated by the date of actual acquisition. The prices at these sales, it is suggested, were obtained when the market was generally low. One was a sale of Lot No 2740 held under CT 18262 in the Mukim of Bukit Rajah comprising an area of 56.219 acres at $8,000 per acre by Eng Ann Realty (Klang) Ltd to the Central Electricity Board in May 1962, and another of a sale of Lot No 2901 in the same Mukim by the same company to Chew Loy Construction Co of 84,683 acres at $10,000 per acre in November 1962. It must be observed that both these lands are within the Town Board area and were planted with old rubber trees. (See Serial Nos 1 and 2, Annexure A in Exh P1). The first sale, it is observed, is situated very close to existing development in Klang i.e., shop-houses. There are many housing estates in that locality already in existence and this piece of land is zoned for housing development. It has direct frontage on Meru Road. The second sale is very close to the first sale. It lies near a developed area, in fact behind the shop-houses along Meru Road at a distance of about a quarter-mile. It is accessible through the existing housing estate (towards the south). There are two main roads leading into this land. It is about 300 yards to the Federal highway. It is obvious that these sales are not sales of similar lands in the neighbourhood of the land acquired though they may be relevant as an indication of the general run of compensation awarded.

Mr Carter also instanced six other sales to indicate the general run of compensation awarded in those cases to serve as a guide in the present case. In the latter part of 1963 and the early part of 1964, Highlands & Lowlands Para Rubber Co Ltd sold three pieces of land approximately 28, 50 and 32 acres respectively at $10,000 per acre. These three sales, more or less bounded by Teluk Gadong Road and Langat Road, are

situated very close to well developed areas. The lands fronting Teluk Gadong Road are very intensively developed and in fact more developed than the land along Meru Road. There is also development just before the three sales, ie., Langat Road. These three sales are situated outside the Town Board boundary and are about half-a-mile to the south of Klang town. They are situated in the housing development zone. There is evidence to indicate that the Klang-Port Swettenham complex has a very bright future. In my view the land acquired paled in comparison. It is miles away and is in fact in a different locality. It cannot therefore be said that these three sales afford a valuable indication of the market value of the land acquired. These are not sales of similar lands in the same locality.

The other three sales were effected by Bukit Rajah Rubber Co Ltd also in the latter part of 1963 and the early part of 1964. They are all agricultural land planted with old rubber and have road frontage on Federal highway a main arterial highway between Kuala Lumpur and Port Swettenham. These areas definitely command better values and they can hardly be described as land precisely similar in all circumstances and conditions to the land acquired. One lot of approximately 90 acres, partly within and partly without the Town Board boundary, was sold at $12,000 per acre. It has two road frontages, one on Federal highway and the other on Batu Tiga Road. The other sale comprising approximately 72 acres was sold at $17,500 per acre. This land is just outside the Town Board boundary and adjoins the Eng Ann Housing Estate a developed area. It is in close proximity to Klang town and is about 400 ft. from Federal highway. The last piece of land of approximately 37 acres is partly within and partly without the Town Board boundary and adjacent to Eng Ann Housing Estate and in close proximity to Klang town. It has frontage to the Federal highways on either side. This lot was sold at $9,000 per acre because the land is occupied by squatter tenants holding under leases for 30 years from 1962 at nominal rents.

Another factor which commends itself to Mr Carter's opinion is the value of the land acquired. He says that the acquisition introduces an artificial situation which would not be created voluntarily by a prudent land-owner. He says that if the land acquired was placed in the open market in blocks of 50 acres the usual method is to start at the road frontage and work inwards. Under this method he says that the land acquired should find a ready market within three years at a price of not less than $10,000 per acre. He worked out a comparable price as follows (see p 3 of his report, Exh P 1).

Selling price in 3 years	$10,000	per acre
Present value of $1 in 3 years @ 6%	8,396	per acre
Present value of land	$ 8,396	per acre
(Say)	$ 8,400	per acre

He gave a compound interest at 6% per year which he says is the interest rate adopted by Government and which is generally considered to be

acceptable. In evidence he said that it is almost an equal choice whether one would continue development backwards or further along the road, but the inclination is to develop backwards because of the roads that have to be constructed to the rear boundary of the land. He gives the period of deferment at three years based on experience and reasonableness.

Mr Lim's assessment of the market value is $2,400 per acre. He works on this basis. He first assessed the agricultural value of the land at $1,400 per acre. He then took into account the remote building potentiality of the land and other features which he assessed at $1,000 per acre.

In order to arrive at the agricultural value he used the investment method of valuation. He first estimated the yield of rubber over the remaining economic life of the trees which he estimated to be 10 years and arrived at the average yield of 1,000 lbs, per acre per year after having taken into account the production figures provided by the estate (see Exh B 13A). He says that the life expectancy of a rubber tree is 25 years and they are past their peak period which is from 12 to 20 years (see graph, Exh B13B). Next, he estimated the net profit per lb. which is price minus cost. In order to arrive at the net profit he had to estimate the price of rubber and cost of production. He therefore calculated the average price of rubber 12 months prior to the material date (see Exh D13D) and arrived at the figured of 65.1 cents per lb. For purposes of calculation he took the round figure 65. Regarding cost, he analysed the cost of ten big companies in the country (see Exh D13E). These companies produced about 1,000 lbs of rubber and their costs varied from 34 to 47 cents per lb. However, Mr Lim had considered that the estates had submitted figures on costs on details or rubber as given by Malayan Estates Ltd. Their costs varied from 39 cents in 1962, 38 cents in 1963, and 37 cents in 1964. He considered the cost of 38 cents to be reasonable, so he subtracted 38 from 65 (representing the price of rubber per Ib) and arrived at the figure of 27 cents which represents the net profit. This figure of 27 cents he multiplied by the yield of 1,000lbs., giving a net income of $270. In terms of valuation percentage he capitalised at 10 years purchase at 12% remunerative rate and 3% sinking fund which is adjusted for tax at 4% and arrived at a figure of $1,018. To this figure he added the reversion of the site which was estimated at $700 per acre which again must be deferred for 10 years at $6^1/_2$%. He arrived at a figure of $371. The agricultural value of the land is therefore $1,018 + $371 = $1,389, say $1,400 per acre (see Appendix A, Exh D 11).

Mr Carter, on the other hand, is of the view that the life expectancy of a rubber tree is 31 years and therefore the remaining tapping life is 15 years. With regard to the yield of rubber over the remaining years he puts it at 1,170 lbs. per acre per year. Unfortunately no data is given to support this figure. He took the average rubber price on the basis of Mr Lim's calculation, i.e., 65.1 cents, and from that figure he subtracted the actual cost of production of Bukit Rajah Estate,i.e., 37.38 cents. This figure he multiplied by the yield of 1,170 Ibs, giving a net profit of

$324. Capitalising at 15 years purchase at 12% remuneration rate and 3% sinking fund, he arrived at a figure of $1,863. To this figure he added the reversion development value of $10,000 per acre, and taking the present value of $1 for 15 years at 6% he arrived at a figure of $6,000 per acre (see Exh. P16B).

Mr Lim took the following factors into consideration in determining the remote building potential value:-

(a) The land is under the cultivation of rubber and not immediately ripe for development.
(b) It is zoned for agricultural use. Before the land can be developed it is necessary to convert its agricultural title into a building one and obtain planning permission. Whether this is forthcoming is a risk a prudent purchaser would take into account.
(c) At time of acquisition and even today there is no indication of any permanent building development in the immediate vicinity.
(d) The land has no metalled road frontage and access is *via* estate road. The use of the estate road which is a private road will entail additional cost. The acquiring authority intends to build a bridge across the ditch to provide access.
(e) The land is sited outside the Klang Town Board boundary.
(f) Water and electricity can be provided.
(g) The land acquired comprises an area of 50 acres. A prospective purchaser buying a piece of land of this size would invariably expect a reduction in value as an inducement and provision for sufficient margin of profit for the risk undertaken.

Mr Lim also cites evidence of sales of four smallholdings situated very close to the land acquired as providing good indication of value in the immediate neighbourhood. The only difference, he says, between these sales and the land acquired is in their size and their similarity is in their use, situation, quality, and potentiality. A share of 81/361 of Lot 223 comprising 4.512 acres which is directly opposite the land acquired — to the south of it — being separated from it by the main drain and a laterite road frontage, was conveyed to a relative in April 1964 at $1,976 per acre. The land is level and is under rubber, coffee and fruit trees. It has a temporary house. A share of $^1/_4$ of Lot 233 comprising 4.825 acres was conveyed to a relative in January 1963 at $1,244 per acre. The land is immediately to the south of Lot 233. It is level and has frontage on to a laterite road. It is covered with fruit trees and some rubber. Lot 838 comprising 4.819 acres was sold in the open market in January 1964 for $1,600 per acre.Lot 845 comprising 3.881 acres was also sold in the open market in November 1963 at $773 per acre. Both these lands are situated to the south west of the land acquired. They are level and have no road, frontage but are accessible by footpaths. They are covered with old rubber.

The first two sales cannot be said to represent the value of the lands which a willing seller might be expected to realise in the open market. Although these sales might be relevant, their probative value would obviously depend upon several main circumstances *viz,* whether the price obtained represented the proper market value of that property and

how far the property is comparable with the land acquired. The other two sales, though in the open market, are dissimilar in all essential characteristics.

Another instance of sale is the acquisition in July 1964 of an area of 1.5 acres of Lots 752 and 753 about two miles from the land acquired. The compensation was the owner's claim of $3,500 per acre. This is a back-lying piece of land with no road frontage and on the southern side of the ditch. It is said to have a better site by virtue of its proximity to Kapar Road which is a built-up area with light industrial works. In my view, the circumstances are very different from the land acquired. There is no parallel whatsoever.

In my opinion, no hard and fast rule can be laid down regarding the method to be adopted for assessing the proper market value of the land acquired. In the last analysis each case must be considered in the light of its special features. I have considered 'evidence of sales of the same land' as the safest guide in arriving at a fair market value. Of this, there is none. I have also considered 'evidence of sales of similar land in the neighbourhood' and I have arrived at the conclusion that after making due allowance for all peculiar circumstances these sales can only afford assistance in arriving at the proper market value. It is plain that evidence of previous sales of neighbouring lands can seldom be obtained which shall be precisely parallel in all those circumstances to the sale of the land acquired. Differences, though of varying degrees, must always exist. What precise allowances should be laid down for these differences is not a matter which can be reduced to any rigidity. With regard to expert opinions that were adduced, I would like to lay emphasis on the judgment of earlier decided cases that generally they have very little probative value unless supported by, or coincide with, other evidence. In my view, the market value must be based on a rational enquiry of the value of the property to the owner which is an objective assessment of all the surrounding circumstances. Ordinarily, the objective assessment would be the price that an owner willing and not obliged to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for the sale of the land. The property must be valued not only with reference to its condition at the time of acquisition but also its potential development value.

In the light of these observations, I take the view that the proper method to arrive at a fair market value of the land acquired, taking all relevant considerations, is to assess its existing value with its inseparably essential element i.e., its potential development value. I have considered the written opinions of both assessors, and I think they are more realistic insofar as they regarded the land as agricultural land and its inseparable counterpart — the potential development value. After discussion, I agree that the figure of $4,022 per acre would be a fair market value of the land acquired. This amount is arrived at on the following basis: of the figures rendered by the government valuer, Mr Carter, and the agents of Bukit Rajah Estate concerning the unexpired period of life expectancy, we accept the figure of 13 years given by the estate's agents as the most acceptable of the three as they should have

accurate and personal knowledge of the economic tapping life of the trees than the other two witnesses. With regard to the average annual yield per acre, we are of the opinion that as all the figures given by the government valuer, Mr Carter and the agents (the agents in their statement quote the yield for 1964 at the estimated figure of 965 lbs. which they explained in their letter dated 6th November 1964 is the overall figure for the whole estate and not for the particular area acquired) are estimates, in the absence of any positive proof we are inclined to accept the figure of 1,000 Ibs. as a reasonable one. As the income is an immediate and assured income, we have given the capitalisation rate at $7^1/_2$% (remunerative rate). From our calculation (stated below) we have arrived at a figure of $1,992 per acre which represents the existing value of the land acquired.

Existing Use Value.

Estimated production, 1,000 lbs.			
Estimated net profit, 27.72 cts. per lb.			
	= $277.20	(Say)	$ 277.00
Years purchase for 13 years @ $7^1/_2$% and 3%			x 7.193
		(Say)	$1,992.00

We are of the opinion that the potential development value of the land acquired at which any calculation may reasonably be based is $7,000 per acre, after having taken the following factors into consideration:-

(a) The comparative figures of sales produced as evidence by both sides cannot be accepted as fully comparable to the land acquired and therefore can only be accepted as a guide to market conditions prevailing at the time of acquisition.

(b) Evidence has shown that the nearest rural development along Meru Road is about $1^1/_2$ miles from the acquired area.

(c) The acquired land is situated about 700 yards from the main Meru Road and the only access at the time of acquisition was an estate laterite road which is a private road and which may be used on certain conditions and payment of charges for maintenance.

Our calculation is reproduced below. We are of the view that reversion to development use is uncertain, thereby involving a certain amount of risks. Therefore we consider that the reversion should be capitalised at a higher rate of 10%. Further, the period of deferment is, in our opinion, what a prudent purchaser would expect. We have based it at 13 years.

Reversionary Value.

Reversion to development value per acre,	$7,000.00
Present value of $1 0.29 for 13 years @ 10%,	$2,030.00

There will therefore be judgment for the applicant and costs. The respondent shall pay interest on the excess sum at the rate of 6% per annum under section 48 of the Act.

Mr Ong Yeow Kay and Mr TR Marks, Assessors, concur.

Further, I direct that each assessor shall receive a fee of $100 per day for the three days of this hearing.

Judgment for the applicant.

DG Rawson for the Applicant.
Azmi Kamaruddin (Legal Adviser) for the Respondent.

Notes

(i) In assessing the amount of compensation to be made for a piece of land acquired, the potential development value of the land must also be taken into account. Thus, the Collector cannot make his award purely with reference to its existing condition at the time of acquisition. This point was, accordingly, emphasised by his Lordship in this case. For similar cases on this point, see also *Khoo Peng Loong & Ors* v *Superintendent of Lands and Surverys, Third Division* [1966] 2 MLJ 156 and *Collector of Land Revenue, Kuantan* v *Noor Chahaya binti Abdul Majid* [1979] 1 MLJ 180.

(ii) However, the land must not be valued as though it had already been built upon. In other words, any advantage due to the carrying out of any scheme by the Government for which the land is compulsorily acquired should be disregarded. In this connection, see Paragraph 3(e) of the First Schedule to the Land Acquisition Act, 1960. See also *Khoo Peng Loong & Ors* v *Superintendent of Lands and Surveys, Third Division, supra,* and *Collector of Land Revenue, Kuantan* v *Noor Chahaya binti Abdul Majid, supra.*

(b) Extension of time to submit claim for compensation

Highlands Malaya Plantations Ltd
v
Collector of Land Revenue, Klang

[1970] 2 MLJ 95 High Court, Kuala Lumpur

RAJA AZLAN SHAH J: Of the three alternatives put forward by the applicants in support of his motion, it is sufficient for me to state that only the last one merits consideration. It reads:

> That the applicant be granted extension of time in which to submit a claim for compensation up to the day following the date on which the Collector of Land Revenue received the applicant's valuer's letter dated 18th June 1964.

It is clear that the collector adjourned the proceeding on 25th June

1963. The award was made on 11th May 1964 on the basis that the applicant had omitted to make a claim for compensation.

Briefly, the applicants' explanation for the omission is this: confusion had arisen due to the fact that the land gazetted for acquisition in connection with the Damansara water supply scheme had also been gazetted for acquisition for the purpose of a new town, and as such it was not possible to formulate a claim for compensation at that stage because it was not possible to ascertain whether the claim should be submitted in connection with the water supply scheme or in connection with the new town. That proposition was contained in a letter dated 14th April 1964 written by the applicants' valuer to the collector.

That may afford sufficient reason for such omission but, in my opinion, that is matter for the land acquisition judge to decide. That is clear from the wording of clause 4(b) of the First Schedule which prescribes the amount of compensation which the court can award when deciding a reference made to it under section 36. If the court should then decide that the omission to submit the claim is founded on sufficient reason, it has power to enhance the amount of compensation: see 5th edn *Sanjiva Row on Land Acquisition and Compensation,* at p 638 .

In the circumstances I do not feel disposed to entertain the motion. It is accordingly dismissed. There will be no order as to costs.

Motion dismissed.

SDK Peddie for the Applicants.
Haji Mohd Azmi Dato' Hj Kamaruddin (Legal Adviser, Selangor) for the Respondent.

Note

It follows from this case that an application for an extension of time in which to submit a claim for compensation in land acquisition cases must be made by way of a reference under section 36 of the Land Acquisition Act, 1960. The rationale is that if the omission to submit the claim for compensation is founded on sufficient reason, the land acquisition judge has the power to enhance the amount of the compensation awarded by the Collector in the absence of such a claim. Accordingly, such an application should not be made otherwise than by way of a reference under section 36 of the Land Acquisition Act, 1960.

SALE OF LAND
(a) Equitable right to a legal title

(i) Kersah La'usin
v
Sikin Menan

[1966] 2 MLJ 20 High Court, Kuala Lumpur

Cases referred to:-
(1) *Brickles* v *Snell* [1916] 2 AC 599.
(2) *Loke Yew* v *Port Swettenham Rubber Co* [1913] AC 491
(3) *Haji Abdul Rahman & Others* v *Mohamed Hassan* [1917] AC 209.
(4) *Haji Osman bin Abu Bakar* v *Saiyed Noor* [1952] MLJ 37 at p 38.
(5) *Bachan Singh* v *Mahinder Kaur and others* [1956] MLJ 97 at p 98.
(6) *Tan Ah Boon* v *State of Johore* [1934] MLJ 142 at p 151.
(7) *Williams* v *Greatrex* [1957] 1 WLR 31.
(8) *Crofton* v *Ornsby* (1806), 2 Sah and Lef 583.

RAJA AZLAN SHAH J: This case is of some significance as it involves important principles of law. The plaintiff is asking for a declaration that he is the beneficial owner of the land comprised in Extract from the Mukim Register No 307, Lot 237 Mukim of Sungei Panjang in the District of Sabak Bernam in the State of Selangor (hereinafter referred to as the said land) and other consequential relief. His case is based on the following premises. His mother owned the said land. She died in 1938. He is the sole beneficiary of his mother's estate which comprised the said land only. In September 1940 he entered into an agreement with the defendant's father (since deceased) to sell the said land for a consideration of $400. Both duly executed a memorandum of transfer in the required from before the Assistant Collector of Land Revenue who attested it. The plaintiff now claims that as the EMR 307 was still in his mother's name he could not perfect the purchaser's title. He therefore testified that as a result the collector returned to him the document of title and to the purchaser the purchase price. He took no steps to register his name in the EMR until December 1961 when he applied for distribution under the Probate and Administration Enactment. From the time of his mother's death till the time of the said application he had left the said land which he claimed was looked after during that period by his sister and later by his nephew. The hearing eventually was fixed in February 1963 on which day he was absent. The defendant was granted letters of administration of the estate. In August 1963 the plaintiff entered a caveat and in February 1964 he issued this writ against the defendant as administrator of his mother's estate.

The defendant claimed that the said land was sold to his late father in September 1940. The memorandum of transfer was duly executed and was attested by the Assistant Collector of Land Revenue. The registration of the memorandum of transfer could not be effected as the document of title was with the plaintiff and he had failed to bring it with him. His father died in May 1941. In his defence the defendant avers:

Para 1. The defendant then never knew the plaintiff's whereabouts and his occupation until the defendant received a letter from the plaintiff's solicitors. Messrs Rajendra & Teik Ee, some time in November 1963.

Para 2. The defendant objects as the plaintiff had sold the land under EMR 307 Lot No 237 in the Mukim of Sungei Panjang, in the District of Sabak Bernam, to defendant's late father, Menan bin Yet then of Sungei Panjang, Sabak Bernam, for $400 cash when the said land was under belukar and uncultivated. The plaintiff executed a memorandum of transfer of the said land in favour of the defendant's father, Menan bin Yet (for the whole share) who was then alive before the Collector of Land Revenue, Sabak Bernam, on the 26th day of September 1940, and the same was duly stamped on the 30th day of September 1940, at the Stamp Office,Sabak Bernam. The registration of memorandum of transfer could not be accepted by the Land Office, Sabak Bernam, then as the title deed of the said land was not left in the Land Office, Sabak Bernam, and was in the hands of the plaintiff. The defendant's late father then sought for the title deed from the plaintiff, but the plaintiff was found to have shifted to some other place outside Sabak Bernam unknown to the defendant's late father and the defendant's family. The plaintiff left Sabak Bernam with all his family.

Para 4. Since then the defendant's father and family cultivated the said land and planted it with coconuts and enjoyed the income derived from the said land without any hindrance, objection or claims by the plaintiff or anyone. The defendant had been paying the quit rent annually except for the year 1962, 1963 and 1964 in which the quit rent was paid in the early part of the year by someone unknown to the defendant.

Para 6. The defendant prays that all the claims of the plaintiff be rejected and that the plaintiff be ordered to deliver the Title Deed of the said land to the defendant.

The defendant was not represented and he seems to be an illiterate kampong dweller. He testified to the same effect as that pleaded. He said that the family lived on the said land, developed it with coconut trees and derived benefits from it since 1940. He paid quit rents up to 1960. The defendant was able to produce three receipts in respect of payment of quit rents i.e., for 1955, 1957 and 1958. The rest, he said, could not be traced, He appeared to be a straight-forward and honest witness and I accept his evidence on the point. The defendant brought the Assistant Collector of Land Revenue, before whom the plaintiff and his father and executed the memorandum of transfer and which was attested by that collector, as a witness. The collector deposed that both the plaintiff and the defendant's (deceased) father came before him and executed the memorandum of transfer in his presence and he attested the same. He further said that the deceased gave $400 in cash to the plaintiff in his presence, and later both left his office. After seeing him in the witness box I feel there is no reason to disbelieve him. In cross-examination he said:

> There was a petition for letters of administration in respect of the estate of Temah by Kersah before the execution of the memorandum of transfer. I was shown by Kersah the order of the Collector of Land Revenue giving him the land. That register was destroyed by fire the occupation by the anti-Japanese forces.

In the absence of further proof to that effect and in the light of the fact the defendant was granted administration of the estate I have no alternative but to assume that no letters of administration were granted to the plaintiff in respect of his mother's estate.

On the balance of probabilities I have come to the inescapable conclusion that there was an agreement between the two parties to sell the said land for a consideration of $400 and that the purchase price had been paid to the vendor. It was an agreement for a sale of land simpliciter and time was not of its essence. The fact that the defendant's family went into possession of the said land, developed it, and had derived benefits from it for the last 20 years without interference from the plaintiff or his caretakers (that is, his sister and nephew) and the payments of quit rent up to 1960 are acts as were necessary and relevant to show that they were in possession of it. These circumstances do indicate that they went into possession as a result of the agreement and their possession was referable to that agreement.

The first consideration is whether the plaintiff could enter into a contract with the defendant's (deceased) father involving a subject matter which was then not subsisting in the sense that the said land was still in his mother's name. It is not disputed that he was the sole beneficiary and that he was in such a position that when the time came he could perfect the title of the purchaser. The fact that at the date of contract the vendor had neither title nor power to call for title is not of itself an answer to a suit of specific performance by the purchaser: *Brickles* v *Snell.*[1] Actual possession of both the legal estate and any equitable rights are not prerequisites so long as the vendor is in such a position that when the time for completion comes he will be in a position to pass on the title to the purchaser. In those circumstances the contract is good but only in equity.

The next question is: what significance does such a contract possess under a system of law requiring registration of title? In both the Privy Council decisions it was held that an unregistered transfer of land gives the purchaser a right which rests in contract: *Loke Yew* v *Port Swettenham Rubber Co,*[2] *Haji Abdul Rahman & Ors* v *Mohamed Hassan.*[3] In 1952 Pretheroe Ag CJ, in delivering a judgment of the Court of Appeal in *Haji Osman bin Abu Bakar* v *Saiyed Noor*[4] applied the principle enunciated in *Loke Yew's* case. In 1956, Thomson J (as he then was) in his usual way, stated the matter emphatically and concisely in *Bachan Singh* v *Mahinder Kaur & Ors:*[5]

> Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *ad rem* which is also a right *in personam.* In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code which has the same effect in our law as appearance before the Praetor in the law of Rome, delivery of seisin in the old English feudal law and infeftment by registration in the Register of Sasines in the modern Scots law,

or according to Thorne J in *Tan Ah Boon* v *State of Johore*[6]:

> analogous to that of the Roman *Fidei Commisum,* so that the purchaser who has paid the whole of his purchase price has no estate, properly so called, in the land agreed to the purchased, but has rights which rest it contract, and which may or may not, according to the circumstances of the particular case, entitled him to sue and to invoke the equitable principle of specific performance.

The only remaining question is: what happens to the contract *in fieri* when the purchaser dies seven months after the date of contract? Does that right under the contract devolve on his personal representative? In *Haji Osman's case, supra,* Pretheroe Ag CJ remarked at page 38:

> As death does not avoid a contract of this nature it seems clear that the same principles apply where a proprietor dies and his representative becomes the registered proprietor. As such he can, in my opinion, be compelled to take all steps necessary to give effect to the contract executed by the deceased proprietor.

Thomson J (as he then was) said at page 39:

> If a purchaser agrees to buy a piece of land and pays the purchase price then subject to the terms of the contract and in the absence of fraud, misrepresentation or mistake he is entitled to a good title to the land and to possession, and the death of the vendor does not abate his rights by one iota.

In that case, the vendor sold a piece of land to a purchaser for $2,250. The purchase price was paid, the transfer was executed by both parties before the collector of land revenue and the transfer together with the document of title was handed by the vendor to the purchaser. The transfer was not presented for registration until some six months after the vendor's death. It was held that the death of the vendor did not avoid the contract; the legal personal representative of such deceased person was trustee for the purchaser who, subject to the terms of the contract and in the absence of fraud, misrepresentation or mistake, was entitled to the land and to possession. It may be that in *Haji Osman's* case it was with reference to the vendor's death that registration was not effected, but in my judgment a contract of this nature is also not abrogated by the death of the purchaser. In this connection I wish to adopt a passage in *Das's The Torrens System in Malaya* at page 359:

> A contract of sale is not abrogated by death, bankruptcy or other disability of the vendor (or purchaser) after the signing of the contract but before completion. The rights and liabilities thereunder vest in the legal representative, official assignee or committee appointed by the court, who are bound no less than the vendor (or purchaser) was bound to perform the contract and by all equities which affected the deceased, the bankrupt or other person before disability.

The editor of *Anson's Principles of the English Law of Contract* (22nd ed) holds a similar view at page 411:

> The general rule is that rights and liabilities under a contract pass, on the

> death of a party to the contract, to his personal representatives.

I therefore hold that any right which the purchaser had vests in his would-be personal representative.

That is not the end of the matter. The defendant in paragraph 6 of his statement of defence did pray that:

> the plaintiff be ordered to deliver the title deed of the said land to the defendant.

That, to my mind, is in the nature of a counterclaim,though the pleadings do not seem to indicate in express terms. I think I have to consider this aspect of the claim in order to do justice in the instant case. After anxious consideration of the matter I order the plaintiff to deliver the document of title to the defendant as administrator of the estate so that he may take such steps as may be necessary to perfect the (deceased) purchaser's title in his legal personal representative. The plaintiff's claim is therefore dismissed with costs.

It may be argued, perhaps, in due course, that laches or delay may be a bar to the personal representative's claim. In answer I would rely on the case of *Williams* v *Greatrex.*[7] I need not go into the details of that case beyond saying that it was an action for specific performance of a contract for the sale of land simpliciter made 10 years previously. On behalf of the vendor it was argued that when he repudiated the contract the purchaser ought to have brought an action for specific performance then and there to compel him to perform the contract. Denning LJ (as he then was) said at page 36:

> A very long time elapsed without his taking the vendor to court. But I think the answer to it is this: once the purchaser went into possession of the land having the contractual right to be there, he not only had an equity to be there, but also the benefit of a contract to sell him these two plots. That was not only an equity: it was an equitable interest in the land. He was in a sense the equitable owner of the land. So long as he was in possession of the land, he does not lose his rights simply by not proceeding at once for specific performance.

And in a later paragraph of the same page:

> There is an interesting passage which Mr Pennant read us from a case in 1806. *Crofton* v *Ormsby,*[8] in which Lord Redesdale, Lord Chancellor in Ireland, said: "The whole laches here consists in the not clothing an equitable estate with a legal title, and that by a party in possession. Now I do not conceive that this is that species of laches, which will prevail against the equitable title; if I should hold it so,it would tend to overset a great deal of property in this country, where parties often continue to hold under an equitable contract for 40 or 50 years, without clothing it with the legal title. I conceive, therefore, that possession, having gone with the contract, there is no room for the objection". And then he added: "But, in the present case, there is nothing but a resting on the equitable estate by a person in possession, without clothing it with a legal title, which I think never was held to be that sort of laches that would prevent relief". Likewise we have here possession which is taken under a contract of purchase with an equitable right to be there. All that needs to

be done is for the legal title to be perfected. In such a case, laches or delay is not a bar.

At page 40, Hodson LJ (as he then was) said:

> What is the position if the plaintiff was in possession? In Fry LJ's book on *Specific Performance* (6th ed 1921) which was not, of course, edited by him — at p 517 it is stated: "1110. Where the contract is substantially executed, and the plaintiff is in possession of the property, and has got the equitable estate, so that the object of his action is only to clothe himself with the legal estate, time either will not run at all as laches to debar the plaintiff from his right, or it will be looked at less narrowly by the court" and authority for that proposition is stated to be that of Lord Redesdale in *Crofton* v *Ormsby, supra.*

Claim dismissed.

ST Gamany for the Plaintiff.
In Person for the Defendant.

Notes

(i) The principle enunciated in this case is that where a purchaser under a contract of sale had paid the full purchase price and had entered into possession of the land under an expectancy of title, he would be regarded as the equitable owner of the land whose rights as against the vendor to have the full title to the land formally transferred to him could not be lost by reason of mere delay or laches. On the point whether laches or delay may constitute a bar to an action for specific performance under such circumstances His Lordship relied on the case of *Williams* v *Greatrex* [1957] 1 WLR 31 where Denning LJ (as he then was) said at p 36:

> A very long time elapsed without his taking the vendor to court. But I think the answer to it is this: once the purchaser went into possession of the land, having the contractual right to be there, he not only had an equity to be there, but also the benefit of a contract to sell him these two plots. That was not only an equity: it was a equitable interest in the land. He was in a sense the equitable owner of the land. So long as he was in possession of the land, he does not lose his rights simply by not proceeding at once for specific performance.

(ii) In the event of the death of the purchaser, any such right which he had would be vested in the purchaser's personal representative.

For a similar case, see *Munah* v *Fatimah, infra.*

(ii) Munah v Fatimah

[1968] 1 MLJ 54 High Court, Kota Bharu

Cases referred to:-
(1) *Kersah La'usin* v *Sikin Menan* [1966] 2 MLJ 22.
(2) *Williams* v *Greatrex* [1957] 1 WLR 31.

RAJA AZLAN SHAH J: The plaintiff claims that a piece of padi land held under Serial No 44, Lot No 140, Mukim Melor, Daerah Peringat, District of Kota Bharu, Kelantan,up till now registered in the name of Hamat bin Lembek (deceased), be transmitted and registered in her name, alternatively, for the return of the purchase price of $500, costs of this suit and any further or other relief as this court deems fit. The defendant is sued as administratrix of her father's estate, Hamat bin Lembek (deceased). The defendant failed to appear in court, though she was served with the notice of today's hearing. She has entered appearance and she has filed her statement of defence in which she denies the sale of the said land and claims that the plaintiff is a trespasser on the said land for a period of some 15 years; she also pleads limitation. The case comes within the provisions of Order 36 r 31.

Briefly the plaintiff states that after the death of Hamat bin Lembek, his 2 beneficiaries, Said bin Hamat and Fatimah binte Hamat entered into an agreement with her to sell the said land for $500. That was in 1946. She duly paid the purchase price and went into occupation and planted padi on it and had since enjoyed possession and profit without objection from the beneficiaries. She had also paid the annual quit rents for the said land. She had repeatedly asked the beneficiaries to take out letters of administration in respect of the deceased's estate so that they could transfer the said land to her. The beneficiaries did nothing. One of the beneficiaries, Said bin Lembek had since died and it was only on 30th January 1954, the defendant applied and was granted letter of administration of her father's estate. After unsuccessful attempts by the plaintiff to get the said land transferred to her, she filed the writ in September, 1965.

I am satisfied that the plaintiff had entered into an agreement with the beneficiaries to purchase the said land for a consideration of $500, that she had entered possession and cultivated it with padi and had since reaped the economic crops and enjoyed possession and profit without hindrance from the beneficiaries for a period of 19 years. The plaintiff had also paid the quit rents.

The legal position is that there is an ordinary contract for the sale of the land which is not subject to the consideration inherent in commercial contracts. Relying on the contract the plaintiff went into occupation and did such acts as were necessary and relevant to show that she was in possession. She never got off the land. As from that time,

it seems to me, that she was the equitable owner of the said land. What is required now is to clothe the equitable estate with a legal title. She therefore seeks the aid of this court. In my opinion she is well entitled to the relief she claims. The law with regard to an agreement to sell land under an expectancy of title is discussed in my judgement in *Kersah La'usin* v *Sikin Menan*[1] and I do not think I can profitably add to what I have there said.

I now order the defendant as administratrix of her father's estate to take all relevant steps to perfect the plaintiff's title. That is why the action is brought against the defendant in her representative capacity. In my view the case is properly brought against the defendant in her representative capacity.

There is the other point raised by counsel on behalf of the absent defendant, that is, that the action is time barred. Without going into unnecessary detail it is sufficient for me to say that the case of *Williams* v *Greatrex,*[2] to which reference was made in *Kersah's* case, is against the defendant. It was there said that where a plaintiff is in possession of an equitable estate under a contract substantially executed, so that the object of his action is to clothe himself with the legal estate, time will not run at all as this is not that species of laches which will prevail against the equitable title.

There will therefore be judgment by default against the defendant with costs.

Judgment for the plaintiff.

Dato' Wan Mustapha for the Plaintiff.
C Jegathesan for the Defendant.

Note

Reference was made to the principle enunciated in the case of *Kersah La'usin* v *Sikin Menan, supra,* and applied to the substantially similar facts of this case. The case of *Williams* v *Greatrex, supra,* was again relied on as authority. As Raja Azlan Shah J (as he then was) said at p 55:

> Without going into unnecessary detail it is sufficient for me to say that the case of *Williams* v *Greatrex,* to which reference was made in *Kersah's* case, is against the defendant. It was there said that where a plaintiff is in possession of an equitable estate under a contract substantially executed so that the object of his action is to clothe himself with the legal estate, time will not run at all as this is not that species of laches which will prevail against the equitable title.

(iii) Chik binti Abdullah v Itam binti Saad

[1974] 1 MLJ 221 Federal Court, Alor Star
Coram: Suffian CJ, Ali and Raja Azlan Shah FJJ

Cases referred to:-
(1) *Noordin bin Mat Dom* v *Yahaya bin Mohamad Jalit* [1952] MLJ 16.
(2) *Munah* v *Fatimah* [1968] 1 MLJ 54.

RAJA AZLAN SHAH FJ: I agree that the appeal be dismissed for the following reasons.

As indicated by the learned Chief Justice, we are not here concerned with competing priorities between the plaintiff and Salim's estate. The latter could have sued Abdullah bin Mohamad's estate for specific performance of the agreement (Exhibit P3), but they have elected not to do so.

We are here asked to give specific performance of the agreement (Exhibit P2) entered into between the plaintiff in her personal capacity and Mek binti Jusoh as a representative of Abdullah bin Mohamed's estate. Since 1948 the plaintiff had been in possession of the said land without interruption. From the time she went into occupation she was the equitable owner of the said land. What is required now is to clothe the equitable estate with a legal title. She is entitled to invoke the equitable relief of specific performance. In my opinion the case of *Munah* v *Fatimah*(2) is a useful analogy. She is also entitled to rely upon her possession of the title deed as a reasonably sufficient protection.

Appeal dismissed.

Karpal Singh for the Appellants.
A Jayadeva for the Respondent.

Notes

(i) The case of *Munah* v *Fatimah, supra,* was relied upon in holding that the respondent who had, since then, been in occupation of the land was now the equitable owner of the said land. As was the case in *Munah* v *Fatimah, supra,* and *Kersah La'usin* v *Sikin Menan, supra,* the court held that the respondent was entitled to the equitable relief of specific performance as '... what is required now is to clothe the equitable estate with a legal title' (at p 233).

(ii) It is trite law that a transfer of land, which has yet to be registered, gives the purchaser a right which rests in contract. (See *Loke Yew* v *Port Swettenham Rubber Co* [1913] AC 491 and *Haji Abdul Rahman & Ors* v *Mohamed Hassan* [1917] AC 209). As Thompson J (as he then was) said in *Bachan Singh* v *Mahinder Kaur & Ors* [1956] MLJ 37 at p 38:

Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *ad rem* which is also a right in *personam*. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code...

(b) Squatter rights under the National Land Code

Sidek bin Haji Muhamad & 461 Ors
v
The Government of The State of Perak & Ors

[1982] 1 MLJ 313 Federal Court, Ipoh
Coram: Raja Azlan Shah CJ (Malaya), Salleh Abas FJ and Abdoolcader J

Cases referred to:-
(1) *McPhail* v *Persons Unknown* [1973] 1 Ch 447, 456.
(2) *Grafton* v *Griffin* 39 ER 130.
(3) *Hemmings* v *Stoke Poges Golf Club* [1920] 1 KB 720.
(4) *Aglionby* v *Cohen* [1955] 1 QB 558.
(5) *Doe d Rochester (Bp)* v *Bridges* 109 ER 1001, 1006.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): In 1950 the appellants, numbering 377, came to Teluk Anson (now Teluk Intan) from Kedah, North Perak and Selangor and opened up a large part of a jungle area in the Mukim of Bandar, Teluk Anson. They were squatters. They now occupy an area of what is known as Kawasan Block D in a scheme known as Rancangan Seberang Perak Padi Cultivation Scheme, Kampong Gajah, in the District of Perak Tengah. Between 1950 and 1970 more and more settlers came and settled in the area. The matter became intolerable. So the State Government put up a plan to organise the settlement of these squatters. It divided the area into four blocks. Blocks A and B were allotted to the local settlers — settlers from the State itself. Block C is given to FELCRA (Federal Land Consolidation and Rehabilitation Authority). Only ex-servicemen and youths were eligible. There were already 360 settlers who had occupied the land in Block C. They were re-settled in another area — part of Block D where the appellants were already in occupation. Naturally the appellants were not happy with the new situation.

It is alleged that as a result of a meeting held in January 1977 between the pioneer settlers in Blocks C and D (including the appellants) and government officials including the District Officer, Perak Tengah, to find a solution to the problem arising from the resettling of the 360 Block C settlers in Block D, the District Officer promised that each settler family would be given three acres of padi land subject to

successful interviews to be held by the District Land Committee. The settlers did not agree to 3 acres; they wanted 5 acres. They complained to their Member of Parliament who,it would appear, could not do much for them. To make matters worse, Bernama was quoted as the source of an article in the *Utusan Melayu* issue of January 15, 1977, that the State Government proposed to open up about 10,000 acres of land at Seberang Perak to be developed by more than 1,000 persons who illegally pioneered the land in that area, and that the State Director of Lands and Mines, Haji Yang Rashidi b. Maasom, had said that each pioneer settler family would be given 5 acres of padi land. *Utusan Zaman* in an article dated January 23, 1977 also carried the same story.

It is further alleged that interviews were held subsequently; some settlers were successful and were given 3 acre lots in Block D; some others, including the appellants, were not successful. The appellants were given notice to stop work and to vacate the area.

They then filed a writ,asking for a declaration, *inter alia,* that they are entitled in law and in equity to be in possession of their respective lots in Block D, originally pioneered, opened up and occupied by them.

The respondents say that the appellants are not entitled in law and in equity to compel the State Government to give State land to them as they were and are in illegal occupation of State land. They admit that there was a meeting between the District Officer and the settlers in January 1977 but it was purely to explain to the settlers of the State Government's intention to allocate to each family an area of 3 acres subject to successful interviews. They deny that the articles in the newspapers were published by or under their authority or their servants or authorised agents.

The respondents applied under Order 18, rule 19, to strike out the appellants' action on the grounds that they are squatters, and that it is within the sole discretion of the State Government to alienate State land.

The learned judge upheld the application. He said this:

> From the facts as disclosed in the statement of claim, the defence and the affidavits, it is clear to me that the plaintiffs have no rights against the State Government. Being mere tresspassers they cannot claim title as against the State Government. Even though they have occupied the land for a number of years but they cannot acquire any title by adverse possession. Under section 48 of the National Land Code, it is clearly provided that no title to State land shall be acquired by possession, unlawful occupation or occupation under any licence for any period whatsoever.

In our opinion there is one issue which lies at the heart of this case. It is whether the appellants have a cause of action against the respondents. The answer is obvious. It is clear beyond doubt that they cannot succeed because they are squatters. Squatters have no right either in law or in equity: see *McPhail* v *Persons Unknown CA*[1].It does not lie in their mouths to assert that they used and occupied the land as squatters.

Their position under the National Land Code is not dissimilar. Section 48 of the Code is against them. It says that 'No title to State land shall be

acquired by possession, unlawful occupation or occupation under any licence for any period whatsoever'. Section 78 of the Code is also relevant. It says that alienation of State land shall only be effected in accordance with the provisions of Chapter 3, of Part Five and Chapter 2 of Part Eleven, and notwithstanding that its alienation has been approved by the State Authority, the land remains State land until registration under the Code. Section 341 of the Code empowers the State Authority to dispossess any squatters at any time. So the limitation period does operate against the State. What equitable right or interest can be conjured up for the squatters who have illegally occupied State land? Squatters go into possession by, or as a result of, illegal occupation of State land. Illegal occupation of State land is an offence under section 425 of the National Land Code. It is well established that a court of equity will never assist squatters to resist an order of possession illegally acquired; it will never intervene in aid of wrong-doers: see *Grafton* v *Griffin*[2]. We would like to say this at once about squatters. The owner is not obliged to go to the courts to obtain an order of possession. He is entitled, if he so wishes, to take the remedy into his own hands. He can go in himself and turn them out without the aid of the courts of law. He can even use force, so long as he uses no more force than is reasonably necessary. He will not then be liable either criminally or civilly. This however is not to be encouraged because of the disturbance which might follow but the legality of it is beyond question. The decision of the English Court of Appeal in *Hemmings* v *Stoke Poges Golf Club*[3] manifests this principle and we would also refer to the judgment of Harman J, in *Aglionby* v *Cohen*[4] in this respect regarding common law rights.

The appellants sought to justify or excuse their conduct by arguing before us, as they did before the learned judge, that the State government had promised them land and therefore the government should not renegue on the promise given to them. They relied on the article attributed to Bernama in the *Utusan Melayu.* They say Bernama is a government agency and therefore what it says via the newspaper binds the government. We have looked at the Pertubohan Berita Nasional Malaysia Act, 1967, and we cannot find anything in its provisions which state in categorical terms that what it says binds the government. (See particularly section 4).

Assuming what the State Director of Lands and Mines said in the *Utusan Melayu* is true, can he bind the State Government? The short answer is that he had no authority to bind the government to alienate State land to the settlers. For this a formal resolution of the State Authority is necessary. The want of authority was clearly pleaded, and is a formidable obstacle to any contention that the appellants' claim lay in estoppel.

The only way to obtain State land is by way of the National Land Code. The case falls within the broad principle that 'where an Act creates an obligation, and empowers the obligation in a specified manner, we take it as a general rule that performance cannot be enforced in any other manner': see *Doe d Rochester (Bp)* v *Bridges*[5]. Likewise here in the

case of landless. It cannot have been intended by Parliament in enacting the National Land Code that every person who was in need of land should be able to sue the government for it or to take the law into his own hands for the purpose. So the courts must, for the sake of law and order, take a firm stand. We can sympathise with the plight in which the appellants find themselves. But we can go no further. They must make their appeal for help elsewhere, not to us.

The appeal is dismissed with costs.

Appeal dismissed.

Raja Mohd Redzuan for the Appellants.
Haider Mohd Noor (State Legal Adviser, Perak) for the Respondents.