4 Commercial Law

INTRODUCTION

DECISIONS AND COMMENTS

HIRE PURCHASE

(a) Surety's right to indemnity
Anglo American Corporation Ltd v *Chin Pak Soon*

(b) Consequences of breach by hirer
Dorothy Kwong Chen v *Ampang Motors Ltd & Anor*

AGENCY

(a) Right of estate agent to remuneration
Chew Teng Cheong & Anor v *Pang Choon Kong* FC

(b) Election agent
Ali Amberan v *Tunku Abdullah*

(c) Agency created by master-servant relationship
Negara Traders Ltd v *Pesuruh Jaya Ibu Kota, Kuala Lumpur*

(d) Representation by principal as to agent's authority
Cheng Keng Hong v *Government of Federation of Malaya*

GUARANTEE

(a) Variation without surety's consent
Citibank NA v *Ooi Boon Leong & Ors* FC

(b) Surety's right to indemnity
Anglo American Corporation Ltd v *Chin Pak Soon*

(c) Liability of surety upon bankruptcy of debtor
Lee Wah Bank Limited v *Joseph Eu* FC

INSURANCE

(a) Principles of interpretation of policy of insurance.
Malaysia National Insurance Sdn Bhd v *Abdul Aziz bin Mohamed Daud* FC

BILLS OF EXCHANGE

(a) Cheques given for illegal consideration
Ratna Ammal v *Tan Chow Soo*

(b) Effect of a wrongful dishonour of a cheque
The Chartered Bank v *Yong Chan* FC

MONEYLENDERS

(a) Non-compliance with section 16(3) of Moneylenders Ordinance.
Overseas Union Finance Ltd v *Lim Joo Chong.*

(b) Admissibility of evidence to show moneylending business
Chellappah v *Official Assignee*

(c) Compliance with section 21 of Moneylenders Ordinance.
Gulwant Singh v *Amar Kaur.*

EQUITABLE ASSIGNMENT AND EQUITABLE RIGHT TO LIENS

(a) Equitable assignment
Malayawata Steel Berhad v *Government of Malaysia* FC

(b) Equitable right to liens

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

BANKRUPTCY

(a) Personal liability of executor of estate for debts of his testator's business

Re Wong Tee Lian

SALE OF SHARES

Central Securities (Holdings) Bhd v *Haron bin Mohamed Zaid*

PARTNERSHIP

Keow Seng & Company v *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered*

INTRODUCTION

It is difficult to detect any firm philosophy behind His Royal Highness' decisions in cases on commercial law. This difficulty may be attributed to two primary reasons: it was not until recently that various divisions (in particular the Commercial Division) in the High Court was introduced. Thus, in the absence of such a division in the High Court, High Court Judges had to hear and determine cases on every branch of the law. As such, the opportunity and scope for specialisation was minimal, if not non-existent.

Secondly, during the tenureship of the Sultan as a High Court Judge, the number of commercial suits instituted was rather limited. It is unlike the present situation, where the number of commercial cases instituted or heard in the Commercial Division of the High Court has increased in line with the economic growth of the country.

In this Introduction, therefore the contribution of His Royal Highness in certain areas of commercial law (excluding company law[1] and contract[2]) in Malaysia will be highlighted. It should also be pointed out that in not referring to the Sultan's other judgments (especially those which are unreported) this Introduction may not reflect the true scope of His Royal Highness's contribution in the area of commercial law.

In this Introduction, the contribution of the Sultan, especially in the areas of the law relating to hire purchase, suretyship, insurance and moneylending will be commented upon .

Suretyship

It is in this branch of the law that His Royal Highness made major contributions towards the development of Malaysian law. In three cases His Royal Highness had to decide on certain aspects of the law of

---

[1] See below.

[2] See below.

suretyship in which there was no relevant precedent in Malaysia. In *Lee Wah Bank Limited* v *Joseph Eu*[3], Raja Azlan Shah CJ (Malaya) (as he then was) had to decide on the issue as to whether a surety is released upon the discharge and annulment of the receiving and adjudicating orders made against the principal debtor. In the absence of any clear provisions in the Contracts Act on this matter, the law prior to this decision remained unclear. In this case, Raja Azlan Shah CJ held:

> A release in bankruptcy does not discharge the surety. That is because the discharge is not the act of the creditor, but by operation of law, ie it is the bankruptcy law and not the creditor that discharges the bankrupt.[4]

In *Citibank NA* v *Ooi Boon Leong*[5] the question as to whether a surety is discharged of his liability under a contract of guarantee when there is a variation in the terms of the contract between the debtor and the creditor had to be decided. Raja Azlan Shah CJ (Malaya) (as he then was) found in the Federal Court that in the circumstances of the case, the surety was not discharged of his obligations. His Lordship held that section 86 of the Contracts Act which provides as follows:

> Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

was not applicable.

On appeal to the Privy Council, their Lordships, agreed with the finding of His Royal Highness.[6]

In *Anglo-American Corporation Ltd* v *Chin Pak Soon & Anor*[7], Raja Azlan Shah J (as he then was) on the interpretation of section 98 of the Contracts Act held that a surety had a right to be indemnified by the debtor for any money paid by the surety under the guarantee.

Hire-Purchase

A number of important principles of law relating to hire purchase transactions were enunciated by His Royal Highness in *Dorothy Kwong Chan* v *Ampang Motor Ltd & Anor*[8]. Raja Azlan Shah J (as he then was) held that a dealer who sold a car to a finance company to let it on hire purchase to a hirer was an agent of the finance company. Raja Azlan Shah J refused to follow the then English law[9] on this matter and said that for commercial expediency, the dealer had to be treated as an agent of the finance company. His Lordship observed that:

> This is a realistic approach and well suited to the mercantile needs of this country.

---

[3] [1981] 1 MLJ 11.

[4] At page 4.

[5] [1981] 1 MLJ 282.

[6] [1984] 1 MLJ 222. See notes below.

[7] [1966] 1 MLJ 267.

[8] [1969] 2 MLJ 68.

[9] See notes below.

On the question of implied terms in a hire purchase agreement in respect of a motor-car, His Lordship held that, subject to any express terms, the following two terms were to be implied:

(a) that the vehicle hired corresponds with the description, that is, the lender must lend that which he contracts to lend and not something which is essentially different — and this is a fundamental term which cannot be excluded by an exemption clause, so that any breach of that term automatically gives the hirer a right to terminate the contract if he so wishes and sue for damages generally, or, at his option, to affirm the contract and treat it as subsisting and sue only for damages;

(b) that the vehicle is fit for the purpose for which it is hired as reasonable care and skill can make it. The obligation is in the nature of a warranty, breach of which entitles the hirer to a claim for damages only; it is not a condition which goes to the root of the contract a breach of which gives the hirer at once and without reference to the facts and circumstances a right to repudiate the whole contract.[10]

Finally, His Lordship held, as did the House of Lords in *Bridge* v *Campbell Discount Co Ltd*[11] that the clause in the hire purchase agreement which stipulated that the hirer on breach had to pay an excessive sum as compensation was in the nature of a penalty and thus was not recoverable.

Insurance

It is a general principle of law that in the interpretation of written contracts, the words of a written document are to be construed against the party putting forward the document. This rule is applied whenever there is any ambiguity in the meaning and scope of a particular provision in a contract. This rule of interpretation is also a useful tool employed by Judges to strike at exemption clauses or in consumer transaction where there is often inequality of bargaining power on the part of the consumer. His Royal Highness invoked this principle of construction in favour of an assured in a motor insurance policy in the Federal Court decision of *Malaysia National Insurance Sdn Bhd* v *Abdul Aziz bin Mohamed Daud*[12]. Raja Azlan Shah FJ (as he then was) said:

> It also seems to me that as between the assured and the insurers, the exception clause in the proviso, on the ordinary principles of construction has, as far as possible, to be read against the insurance company, that is to say, if there is a doubt as to its extent, and the question were to arise as to the liability of the insurers, the construction most favourable to the assured must be given to him.[13]

---

[10] At page 70.

[11] [1962] 1 A11 ER 385.

[12] [1979] 1 MLJ 29.

[13] At page 32.

His Lordship, in the instant case held that the mere fact that at the time of the accident, the driver of the motor vehicle had an expired driving licence could not be relied upon by the insurance company to deny liability. His Lordship arrived at this conclusion by interpreting the relevant provision in the insurance policy in favour of the assured. Raja Azlan Shah FJ also pointed out that this interpretation was not contrary to public policy.

Agency

The underlying principle of the law of agency is that one person, the agent is given the power by another, the principal, to act on his behalf and to change the legal relations of the principal. Generally the relationship between the principal and the agent arises out of a contract between the principal and agent. It must, however be borne in mind that certain relationships resembling that of agency may not in fact be an agency. One such relationship is that of an estate agent and the owner of a property. As an example, an estate agent has no authority to enter into a legally binding contract with the purchaser on behalf of the owner: strictly speaking he is not an agent. However, in common parlance, the term 'agent' is used to describe anyone who acts on behalf of another even though he may have no legal capacity to so act.

One difficulty which often arises in the law of agency relates to the scope of authority of an agent. In certain situations, the principal may not be bound by the actions of an agent nor would he be liable to a third party for such actions of the agent. In such cases the rights of the parties have to be determined by considering whether in fact the agent had the authority to do the particular act.

His Royal Highness Sultan Azlan Shah had, in a number of cases to decide on these two main issues spelt out above relating to the law of agency. In *Dorothy Kwong Choon* v *Ampang Motors Ltd & Anor*[14], His Royal Highness decided that a dealer under a hire purchase transaction was an agent of the finance company whilst in *Ali Amberan* v *Tunku Abdullah*[15], the Sultan held a political party which had put up a candidate for an election to be the agent of the candidate. In this case, after a careful analysis of a number of Indian and English authorities on a similiar point, His Royal Highness concluded:

> Inspired and guided by English and Indian election law I take the view that the rule of extended scope of agency holds good in our election law; any other view would tend to make it impossible to preserve the purity and freedom of election.[16]

In *Negara Traders Ltd* v *Pesuruhjaya Ibu Kota, Kuala Lumpur*[17], Raja Azlan Shah J (as he then was) had to consider whether a principal was

---

[14] [1969] 2 MLJ 68.

[15] [1970] 2 MLJ 15.

[16] At page

[17] [1969] 1 MLJ 123.

liable for the criminal acts of his agent. His Lordship held that as the agent had no authority to confirm the sale orders nor was he held out to have such authority, the principal was not liable for the forgeries committed by the agent. Amongst the leading cases referred to by His Lordship was the House of Lords decision of *Lloyd* v *Grace, Smith & Co.*[18] The House of Lords in that case held that a master (the principal) is liable for any fraud committed by the servant (the agent) only if the said acts of the agent was within the scope of the agent's real or ostensible authority.

In *Cheng Keng Hong* v *Government of the Federation of Malaya* [19] Raja Azlan Shah J (as he then was) dealt with the issue of the liability of the principal to a third party when a principal had induced the third party into believing that the unauthorised acts of the agent was within the agent's authority. His Lordship in this case made a detailed study of the law of agency obtaining under English law and under the Contracts Act.[20] The decision itself demonstrates a thorough knowledge which His Royal Highness had of the provisions of the Contracts Act at a time when such provisions were rarely invoked by many judges and lawyers during the early years after the independence of Malaysia.

For the present purposes of classification, the case of *Chew Teng Cheong & Anor* v *Pang Choon Kong*[21], a case dealing with the right of an estate agent to receive his renumeration has also been included in this Chapter. In this case, Raja Azlan Shah CJ(as he then was) held that whether an estate agent was entitled to his remuneration depended on the construction of the contract. The Judicial Committee of the Privy Council agreed with the view expressed by the Sultan on the law but differed on the finding of fact.[22]

Bills of Exchange

In two cases dealing with bills of exchange, His Royal Highness not only dealt with the substantive law on the subject but also in His Highness' characteristic style spelt out with much clarity the important procedural aspects involved in this branch of law. These cases once again demonstrate the mastery of His Royal Highness of the law on practice and procedure in Malaysia. These cases further reinforce the general view that amongst the various branches of the law, practice and procedure is regarded by many as the *forte* of His Royal Highness.

In *The Chartered Bank* v *Yong Chan*[23] Raja Azlan Shah FJ (as he then was) dealt with certain 'points of intricacy and commercial importance', on the law on bills of exchange. The action in the instant case was in respect of a claim for damages for a wrongful dishonour of a

---

[18] [1912] AC 716.

[19] [1966] 2 MLJ 33.

[20] Section 190 of the Contracts Act

[21] [1981] 1 MLJ 298.

[22] See notes below.

[23] [1974] 1 MLJ 157.

cheque drawn on a partnership account with the Chartered Bank. During the course of His Lordship's judgment, Raja Azlan Shah FJ made some important observations on the law and practice of banking; on the importance of proper pleadings and on the liability of partners under the Sabah Partnership Ordinance 1961.

On the causes of action available for a wrongful dishonour of a cheque, His Lordship said:

> A wrongful dishonour of a cheque gives rise to two possible causes of action, one for breach of contract and the other in tort, and in a proper case the practice has been to combine the two claims in one action, [but] rules of pleadings determine how those claims may be so combined.[24]

His Lordship made the following observations on the importance of proper pleadings:

> If we are to mantain a high standard in our trial system, it is indubitably not to treat reliance upon forms of pleadings as pedantry or mere formalism.[25]

The judgment of His Royal Highness in *The Chartered Bank* case is yet another example of the simple and yet elucidating manner in which His Highness' judgments are written.

In *Ratna Ammal* v *Tan Chow Soo*[26] Raja Azlan Shah J (as he then was) again explained with clarity, the shifting of the burden of proof in cases when fraud or illegality is alleged against the holder in due course of a bill of exchange. His Lordship pointed out:

> Every holder of a bill [of exchange] is *prima facie* deemed to be a holder in due course. ...He will therefore have to do no more than to prove the signature of the person sued, everything else being presumed in his favour. The burden will then be on the person sued to prove that no consideration has at any time been given.[27]

His Lordship then pointed out that to this rule there was an exception:

> If in an action on the bill it is admitted or proved that ... the bill is tainted with fraud or illegality ... then the presumption no longer holds good. The burden of proof is shifted and it is now the holder of the bill who must prove affirmatively that subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.[28]

Moneylending

A number of cases were decided by His Royal Highness, the Sultan of Perak on moneylending transactions. In *Overseas Union Finance Ltd* v *Lim Joo Chong*[29], Raja Azlan Shah J (as he then was) held that as the

---

[24] At page 159.

[25] Ibid.

[26] [1966] 2 MLJ 294.

[27] At page 295.

[28] *Ibid.*

[29] [1971] 2 MLJ 124.

memorandum of agreement did not comply with section 16(1) of the Moneylenders Ordinance, the contract was unenforceable. In so holding, His Lordship cautioned moneylenders of the need to comply with the provisions of the Ordinance:

> 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.[30]

In *Gulwant Singh* v *Amar Kaur*[31], Raja Azlan Shah J (as he then was) held that the reference to the statement of account in the statement of claim, irrespective of the fact that it was not signed by the moneylender was sufficient compliance with section 21(1) of the Moneylenders Ordinance. The basis of His Lordship's finding was that as a statement of claim is a pleading, the statement of account referred to in the pleading becomes 'part and parcel of the pleading'. His Lordship distinguished the earlier case of *Palaniappa Chettiar* v *Tan Jan*[32] and agreed with the views expressed by Gill J in *Karuthan Chettiar* v *Parameswara Iyer*[33] as to the scope of section 21(1).

Raja Azlan Shah J (as he then was) established the principle of law in *Chellapah* v *Official Assignee*[34], that in determining whether a person was carrying on a moneylending business, loans made by such a person during a reasonable period immediately preceding the transaction which is being challenged and also loans made after the said transaction are relevant and admissible to establish the required regularity, continuity and system which is characteristic of carrying on a moneylending business.

It can therefore be seen that even in these few cases on moneylending, His Royal Highness decided on certain novel points of law, especially on the interpretation of the Moneylenders Ordinance. The views expressed by His Highness have consistently been followed in subsequent cases.

Equitable Assignments and Equitable Right to Liens

The general principle of law is that for an equitable assignment no particular form of words are required. The only requirement is that the intention to assign must be made clear. Such intention however is not always made plain by the parties: Difficulties may arise as to whether a particular arrangement entered into between the parties amounts to an equitable assignment or merely a mandate or request. His Royal Highness had to deal with one such problem in the case of *Malayawata Steel Berhad* v *Government of Malaysia.*[35] After a survey of all the

---

[30] At page 126.

[31] [1968] 1 MLJ 107.

[32] [1965] 1 MLJ 182.

[33] [1966] 2 MLJ 151.

[34] [1970] 1 MLJ 220.

[35] [1977] 2 MLJ 215.

leading cases on the point, Raja Azlan Shah FJ (as he then was) held that as the arrangement between the parties was not absolute, it did not amount to a valid equitable assignment.

In *Mercantile Bank Ltd* v *Official Assignee of the Property of How Han Teh*[36], Raja Azlan Shah (as he then was) took a bold step, in recognising a right in equity to a lien which had not complied with the provisions of the National Land Code. At the time when there was much uncertainty as to the application of equitable rules under the Torrens system of registration as embodied in the National Land Code, the views expressed by His Royal Highness in this case was most welcomed in clearing this uncertainty. During the course of the judgment, His Lordship said:

> Independent of our land legislation our courts have always recognised equitable and contractual interests in land.

It should also be pointed out that the views expressed by His Royal Highness in this case is consistent with many of His Royal Highness' views expressed in other cases as to the application of equitable rules.[37] His Royal Highness, whilst on the Bench was always conscious of not only applying the law but was also always guided by good conscience and justice. In many instances, His Royal Highness readily invoked equitable principles whenever the facts of a particular case persuaded its application.

DECISIONS AND COMMENTS

HIRE PURCHASE

(a) Surety's right to indemnity

Anglo-American Corporation Ltd
v
Chin Pak Soon & Anor

[1966] 1 MLJ 267 High Court, Kuala Lumpur

Cases referred to:-
(1) *Kok Hoong* v *Leong Cheong Kweng Mines Ltd* [1964] MLJ 49, PC.
(2) *Watt* v *Mortlock* [1963] 1 All ER 388.
(3) *Bechervaise* v *Lewis* (1872), LR 7 CP 372 at p 377.

RAJA AZLAN SHAH J: This claim is one typical of a great many actions which now are being brought and which in recent times have been

[36] [1969] 2 MLJ 196.

[37] See also the case of *Zeno Ltd* v *Prefabricated Construction Co (M) Ltd & Anor* [1967] 2 MLJ 104.

brought on hire-purchase agreements. The particular hire-purchase relates to the hiring of a tractor by the plaintiffs as owners to the first defendant as hirer and the second defendant as guarantor.

The statement of claim which is specially endorsed, *inter alia,* states:

> 2. The second defendant in consideration of the plaintiffs having at his request agreed to hire to the first defendant the said tractor undertook and guaranteed the payments of the said rents and all other sums of money which may become payable by the first defendant under the terms of the said agreement and undertook to indemnify the plaintiffs against all loss, damage or expense which the plaintiffs may sustain by reason of the neglect of the first defendant to observe or perform any of the stipulations on his part contained in the said agreement.
>
> 3. It was an express term of the said agreement that if any of the instalments should be at any time in arrears and unpaid the plaintiffs should be entitled without notice on demand to terminate the hiring and retake possession of the said tractor without prejudice to any claim for arrears of hire-rent or damages for breach of this said agreement and/or the plaintiffs should be entitled to terminate the said agreement such termination not to discharge any pre-existing liability of the defendants to the plaintiffs.
>
> (4) On or about the 10th day of May 1964 there was an amount of $19,788.00 in arrears and unpaid and thereafter the plaintiffs retook possession of the said tractor and duly terminated the said agreement.
>
> *Particulars*
>
> | | |
> |---|---|
> | Total amount due as at 10.5.64. | $39,575.00 |
> | Total amount paid | 19,787.00 |
> | Amount in arrears: | $19,788.00 |

Judgment in default of appearance was entered against both defendants on 12th September 1964. On 18th February 1965, the second defendant filed a notice of motion to set aside the said judgment. In his affidavit he deposed, *inter alia,* that:

> I guaranteed payment to the plaintiff only in the event of the plaintiff being unable to recover against the first defendant and not as a principal.
>
> (a) the judgment aforesaid is oppressive in that the plaintiff having repossessed the tractor has also retained the substantial payment of $19,787.00 paid by the first defendant to the plaintiff towards the purchase of the tractor and in addition thereto has obtained judgment for a further sum of $19,788.00 being alleged claim for depreciation which in fact is in the nature of a penalty;
>
> (b) by reason of (a) above I verily believe that the plaintiff has obtained judgment for more than the amount the plaintiff actually is due or entitled to (sic).
>
> (c) ... I never guaranteed payment of the said sum or any other sum incurred by the first defendant on spares and miscellaneous account.
>
> (d) for the reason set out in paragraph 4 hereof my liability to the plaintiff is not co-extensive with that of the first defendant who is the principal debtor.

On 31st May 1965, the motion was allowed by Ong J. On 3rd August 1965, the plaintiffs filed a summons in chambers asking for interim judgment against the second defendant for the sum of $19,788.00 as

claimed in paragraph 4 of the statement of claim, interest and costs of $200.00 (being arrears of instalments). The case eventually came before me in chambers on 27th September 1965, and I gave interim judgment as prayed. It is now re-opened under Order 54 rule 22A of the rules of the Supreme Court.

In support of the summons the plaintiff filed an affidavit, paragraph 3 of which is substantially in the same terms as that contained in paragraph 2 of his statement of claim. In reply, defence counsel in his affidavit referred to the judgment in default which was set aside by Ong J. Plaintiff's counsel there had applied to the learned judge that judgment in part, that is to the extent of $19,788.00 in terms of paragraph 4 of the statement of claim relating to arrears of hire-purchase instalments should stand undisturbed, and that the order setting aside should relate to the remainder of the judgment debt included in the judgment in default. The learned judge declined to do so and made the order setting aside the whole of the judgment in default of appearance in the sum of $40,973.74. Defence counsel raised the plea of estoppel since he contended that the plaintiff's application was precisely the same as that made by plaintiff's counsel before Ong J and which was refused.

The law which seems to cover the plea of estoppel is sufficiently contained in the judgment of the Privy Council in *Kok Hoong* v *Leong Cheong Kweng Mines Ltd,*[1] where at page 53 Viscount Radcliffe said:

> In their Lordships' opinion the *New Brunswick Railway Co* case can be taken as containing an authoritative reinterpretation of the principle of *Howlett* v *Tarte* in simpler and less specialised terms. This reinterpretation amounts to saying that default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and, to use the words of Lord Maugham LC ([1939] AC at p 21), they can estop only for what must 'necessarily and with complete precision' have been thereby determined.

Applying the law to the present case, I have to decide what the judgment of 21st September 1964, can be treated as concluding between the plaintiff and the second defendant. Under that judgment the plaintiff was entitled to recover from the second defendant a sum of money by virtue of the hire-purchase agreement under which he stood as guarantor. The said judgment was afterwards set aside so that as it now stands there is no judgment alive and subsisting as against the second defendent. Is the plaintiff estopped from asserting in a fresh action the same facts as earlier pleaded? To my mind he would be estopped if the default judgment is alive and subsisting, but not otherwise. It cannot now be said that the default judgment had 'necessarily and with complete precision' decided on any issue between the plaintiff and the second defendant as the said judgment was set aside. In the circumstances I hold that there is no estoppel.

A further ground put forward by the second defendant was that he had in Civil Suit No 1282 of 1965, filed on 20th September 1965, asked for a declaration to be discharged and that he be exonerated from

liability under the guarantee and that an order that the first defendant do pay to the plaintiff all sums due under the hire-purchase agreement. He submitted that cases of a similar nature have been granted relief. He referred to the case of *Watt* v *Mortlock*[2] and the cases therein cited as authorities in favour of the proposition. To my mind, these cases strongly support the defendant's case. However, I do not think it profitable to go into the merits of this argument in view of the pending Civil Suit No 1282 beyond noting that in the light of those decided cases the second defendant is entitled to go to court to compel the principal debtor to pay what is due from him provided that the debt is ascertained. I may as well cite a passage from the judgment of Wiles J in *Bechervaise* v *Lewis*:[3]

> A surety has a right, as against the creditor, when he has paid the debt, to have for reimbursement the benefit of all securities which the creditor holds against the principal. This alone would not help the defendant here, because he has not, nor has the principal, actually paid the creditor, and in our law set-off is not regarded as an extinction of the debt between the parties.
>
> The surety, however, has another right, viz. that, as soon as his obligation to pay has become absolute, he has a right in equity to be exonerated by his principal.
>
> Thus we have a creditor who is equally liable to the principal as the principal to him, and against whom the principal has a good defence in law and equity, and a surety who is entitled in equity to call upon the principal to exonerate him.

If I am right, this principle of law is now embodied in section 145 of the Indian Contract Act, 1872, which reads:

> In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Section 98 of the Contracts (Malay States) Ordinance, 1950, is in substance the same as the Indian provision.

In the circumstances I set aside my order in chambers and substitute an order that the application for interim judgment against the second defendant be dismissed with costs.

Order accordingly.

AD Rajah for the Plaintiffs.
KA Menon for the Defendants.

Notes

(i) The rule embodied in section 98 is similar to the position under English law. The basis of the rule is upon the common law action for money paid which is based upon an implied promise by the principal debtor to indemnify the surety for any money paid under the guarantee. *In Re A Debtor* [1937] Ch 156, it was held that an implied contract arose at the time of the contract of suretyship.

As to the position under English law, see generally, Marks and Moss, *Rowlatt on Principal and Surety,* (1982) Sweet and Maxwell, London at pages 134- 145; *Chitty on Contracts, Specific Contracts,* (25th edn) para 4455-4457.

(ii) It would appear that the surety has a right to claim from the creditor any money paid by him as soon as he has paid it to the creditor.

(b) Consequences of breach by hirer

Dorothy Kwong Chan
v
Ampang Motors Ltd & Anor

[1969] 2 MLJ 68 High Court, Kuala Lumpur

Cases referred to:-
(1) *Financings Ltd* v *Stimson* [1962] 3 All ER 386.
(2) *Branwhite* v *Worcester Works Finance Ltd* [1968] 3 All ER 104.
(3) *Astley Industrial Trust Ltd* v *Grimley* [1963] 2 All ER 47.
(4) *Dunlop Pneumatic Tyre Co Ltd* v *New Garage & Motor Co Ltd* [1915] AC 79 at p 86.
(5) *Bridge* v *Campbell* [1962] 1 All ER 385.
(6) *Overstone Ltd* v *Shipway* [1962] 1 All ER 52.
(7) *Financings Ltd* v *Baldock* [1963] 1 All ER 443.
(8) *Yeoman Credit Ltd* v *Waragowski* [1961] 3 All ER 145.
(9) *Yeoman Credit Ltd* v *McLean* [1962] 1 All ER 57.
(10) *Interoffice Telephones Ltd* v *Robert Freeman Co Ltd* [1957] 3 All ER 479.

RAJA AZLAN SHAH J: This is a hire-purchase case relating to a motor-car, a Ford Consul 375 De Luxe Saloon. The appellant was the hirer; the first respondents were the dealers; the second respondents were the finance company. The finance company bought the said car from the dealers and let it on hire-purchase to the appellant. In the action, the appellant claimed for the return of the sum of $1,105 paid by her as part of the option money under the agreement and damages for breach of contract. She pleaded that it was an implied term of the contract that the said car should be reasonably fit for the purposes for which it was hired and that in breach of the term the said car was not so fit and consequently she was entitled to repudiate the agreement.

In their defence the dealers pleaded that since they were not agents of the finance company or privy to the agreement, the appellant was not competent to bring the action against them.

The finance company pleaded that since the appellant had an opportunity to examine and test and did in fact examine and test the said car before signing the agreement, the implied condition of reasonable fitness (which is denied) did not avail the appellant. They put in further alternatives, among others: (i) they admitted the defects but contended

that they were minor defects so that clause 1(iv) of the terms and conditions of the agreement exempted them from liability. Clause 1(iv) reads:-

> The owner gives no warranty whatsoever in respect of the vehicle as to description fitness roadworthiness repair or otherwise, nor shall the owner be responsible for any delay in delivery.

(ii) They were willing and able to perform the agreement under the dealers' warranty clause to bring the said car to a mechanical condition which was expected of a new car of the same make and type, but the appellant refused. The finance company counterclaimed for damages for breach of contract and for arrears of two monthly instalments.

The appellant filed a reply to the finance company's defence and counterclaim. She averred that she was neither competent nor required to discover latent defects in the said car and that she relied on the skill and judgment of the respondents as to the said car being fit for the purpose for which it was hired. She further pleaded that the finance company were not entitled to the sum claimed in the counterclaim as it was in the nature of a penalty.

After directing his mind to the broad principles enunciated in *Financings Ltd* v *Stimson,*[1] the learned president held that the dealers were agents of the finance company and therefore the action was rightly brought against them (the dealers). I agree with that conclusion. On the facts, it is impossible to think of the dealers as anything but the ostensible agents of the finance company. The dealers were a subsidiary for the finance company. They held the necessary forms; they handed them over to the hirer to sign; they received the deposit and the first instalment on behalf of the finance company. Most important of all, they handed over the car to the hirer as agent of the said company. The House of Lords case of *Branwhite* v *Worcester Works Finance Ltd*[2] has relevance. Lord Wilberforce (Lord Reid concurring, but the majority not concurring) came to the conclusion:

> That on the general question of the dealer's agency *Stimson's* case rather than *Gall's* ([1961] 2 All ER 104) should be regarded as correctly stating the principle as authoritative .... (page 123)

The learned Law Lord in an earlier passage explained:

> That of Lord Denning MR and Donovan LJ, takes as a starting point the established mercantile background of hire-purchase transactions, as known to and accepted by all three parties, takes that as establishing, in general, the basis for an agency relationship, and finally considers, against that background, any individual features of the particular case to see whether they confirm or weaken the agency inference. (page 121)

I think that is a realistic approach and well suited to the mercantile needs of this country. In any event there is no appeal against such finding.

As between the appellant and the finance company, the learned president found as a fact that the car that was contracted for was

delivered to her. He also found that the defect in the car which was present at the time when the appellant took delivery was not a defect that went to the root of the contract. He further took the view that there was no breach of the implied condition of fitness and held that the finance company was not liable for any breach thereof. He also held that the appellant had committed a breach of the agreement by her failure to pay the instalments. He accordingly dismissed the appellant's claim and allowed the counterclaim of the finance company in the sum of $414.10, made up as follows: $204.10 representing actual loss and $210 representing arrears of two months instalments.

The facts as found by the learned president are as follows: on 17th July 1963 the appellant saw a Ford Consul 375 De Luxe Saloon on the premises of the dealers. It was a new car but not of current model; it had been in stock for a considerable time. She looked inside the car and walked round it. She then drove it for about ten minutes. She was satisfied. The agreed price was $5,800 which was $1,000 less than the current model. She then signed a hire-purchase proposal form and a hire-purchase agreement prepared by the finance company and produced by the dealers. She then paid $1,000 as part of the option money under clause 1(ii) of the hire-purchase agreement and $105 as the first instalment. The hiring was for 24 months. She took the car home and showed it to her husband who, after having driven it, drew her attention to some 'noises coming from it'. A few days later she took the vehicle back to the premises of the dealers and complained of some defects and items missing. The dealers attended to the vehicle, after which she took it home. A couple of days later she brought the vehicle back to the dealers with further complaints and again it was attended to. Subsequently she again sent the car back with complaints and the dealers' engineer decided to change the rear axle from which seemed to come the humming noise in the vehicle about which she complained. As no spare axle was then available the dealers, with her consent, removed an axle from another vehicle of the same model in the garage and fitted it to the appellant's car and the humming noise lessened. However, the appellant discovered subsequently that the power of the car had been reduced. She then sent the dealers a letter demanding that she be supplied with a brand new car or a refund of the money which she had paid. The dealers offered to send the car to Ford Motors in Singapore in order to bring it up to the standard satisfactory to the appellant at the dealers' expense. She turned down this offer and on 18th October 1963, that is, three months after the date of the agreement, she returned the car to the premises of the dealers who received it on behalf of the finance company. It is significant to note that on 27th August 1963 the car had done 2,091 miles. The finance company terminated the contract and repossessed the car. She then brought the present action. The finance company counterclaimed.

It is clear from the decided cases that in a hire-purchase agreement in respect of an ordinary motor car for normal use on the road there are, subject to any express terms as to state of repair, condition, and so forth, two stipulations to be implied: (i) that the vehicle hired corresponds

with the description, that is, the lender must lend that which he contracts to lend and not something which is essentially different — and this is a fundamental term which cannot be excluded by an exception clause, so that any breach of that term automatically gives the hirer a right to terminate the contract if he so wishes and sue for damages generally, or, at his option, to affirm the contract and treat it as subsisting and sue only for damages; (ii) that the vehicle is as fit for the purpose for which it is hired as reasonable care and skill can make it. The obligation is in the nature of a warranty, breach of which entitles the hirer to a claim for damages only; it is not a condition which goes to the root of the contract a breach of which gives the hirer at once and without reference to the facts and circumstances a right to repudiate the whole contract. However, in certain circumstances the hirer is entitled to treat the contract as at an end. See the example illustrated by Upjohn LJ in *Astley Industrial Trust Ltd* v *Grimley*.[3] In the final analysis the existence and extent of this second stipulation must inevitably depend on the facts and circumstances of the individual case. There is no unqualified implied obligation of fitness. Liability for breach of this obligation may be negatived by an exception clause.

I turn then to apply these propositions of law to the facts of this case. The vehicle was delivered to the appellant with a defective axle, but the learned president has fully analysed the facts and has shown how on these facts it is impossible to treat the finance company as being in breach of the fundamental term which I have mentioned above. The appellant accepted the vehicle which was contracted for and used it for about three months, running it for about 2,091 miles. On those facts I agree with the court below, and that matter therefore passes from consideration.

On the second implied stipulation (of fitness) it can be said that the appellant might originally have had some claim for damages against the finance company for the defective condition in which she found the vehicle but for the fact that in clause 1(iv) of the agreement the finance company excluded liability so, in my opinion, they lawfully could. The defect, as found by the learned president (with whose finding I agree) was not so serious as to constitute a breach of a fundamental term, so that the exception clause applied in favour of the finance company. Even on the facts of the case, there is no breach of the implied stipulation (of fitness).

The finance company counterclaimed for $2,259.55 being the amount due under clause 6 of the Hire-purchase Agreement (P1). Clause 6 reads:

> If the owner retakes possession under clause 3 hereof, the hirer shall pay to the owner by way of compensation for depreciation the amount, if any, by which one-half of the hire purchase price exceeds the total of the sums paid and the sums due in respect of the hire purchase price immediately before retaking possession, together with any other sums due and payable hereunder at the date of the termination aforesaid.

And the relevant portion of clause 3 reads:

> If the hirer shall make default in payment of any monthly sum payable for seven days after the same shall become due (whether payment thereof shall have been demanded or not) or shall fail to observe or perform any of the other terms and conditions of this agreement ... it shall be lawful for the owner subject to any statutory restrictions to the contrary:
> (a) without notice to terminate the hiring and resume possession of the vehicle ....

The appellant on the other hand contended that the said sum of $2,259.55 is in the nature of a penalty as opposed to a genuine pre-estimate of damage. It now remains to determine whether the amount as stipulated in clause 6 of the agreement is a penalty or a genuine pre-estimate of liquidated damages. There is ample authority on this subject and appropriate tests have been worked out in a number of leading authorities of which I only need refer to *Dunlop Pneumatic Tyre Co Ltd* v *New Garage & Motor Co Ltd*[4] where Lord Dunedin remarked:

> The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

(See also the House of Lords case of *Bridge* v *Campbell Discount Co Ltd*[5]). I find it difficult to regard this sum stipulated in clause 6 as a genuine pre-estimate of loss which would be suffered by the finance company under circumstances as specified in clause 3. In this case the car was returned to the dealers who had accepted it on behalf of the finance company after a period of 3 months which is only one-eighth of the 24 months which the hire purchase agreement was to run. No definite time was mentioned but the car was subsequently sold for $4,800 and I imagine that it would be in the interests of the finance company to sell it at the earliest opportunity. It would appear the amount as stipulated in clause 6 is to secure that the appellant will not determine the agreement — irrespective of when — until at least one-half of the purchase price has been paid. If it is decided that the amount in clause 6 is a pre-estimate of liquidated damages, then coupled with the amount ($4,800) of the resale of the car, one finds that the finance company have made a profit very much greater than they first set out to make at the expense of the other party. In the circumstances of the case, I am of the view that the terms in clause 6 embrace every characteristic of a penalty and I accordingly hold that the claim founded on clause 6 must fail.

I now turn to the question of damages. There are two aspects involved, first, the finance company can only recover damages for breach of the whole contract if the hirer has in fact committed such a breach of the contract as shows that it is reasonable for the former to terminate the contract. For instance, where the hirer pays no instalments and clearly does not intend to go on with the hiring, the only reasonable solution for the impasse is for the finance company to retake the hired article: see *Overstone Ltd* v *Shipway*[6]. But where the hirer has merely made default in the payment of two instalments and there is no repudiation of the contract by the hirer accepted as such by

the finance company, it would not be reasonable for the latter to terminate the contract: see *Financings Ltd* v *Baldock*[7]. The appellant in the present case has evinced an intention not to go on with the hiring. She returned the motor car and it was accepted by the dealers on behalf of the finance company. The reasonable solution of the situation is for the finance company to terminate the contract and resume possession of the motor car.

The second aspect is the assessment of damages. The principle is this: it is the court's duty to endeavour to determine the amount of loss suffered by the injured party and, so far as money can do it, to put him in the same position as if the contract had been performed. A necessary consideration in that direction is that an allowance or discount by way of rebate should be made in respect of accelerated payments to the owners (finance company) , and the proper figure is not a matter of mathematical calculation. This is well illustrated by three cases. In *Yeoman Credit Ltd* v *Waragowski*[8] a hirer paid the initial deposit in respect of a motor car, but made no further payment. Six months after the date of the agreement the owners repossessed the car and sold it for what was found to be the best price obtainable in the circumstances. The owners terminated the agreement and they were clearly entitled to recover the arrears of instalments which had accrued up to the date of termination. In addition the Court of Appeal unanimously held that the owners were entitled to damages for the hirer's breach of contract. Such damages were based upon the total hire-purchase price less the aggregate of (i) sums previously paid towards the hire-purchase price; (ii) the amount of arrears already recovered; (iii) the sale proceeds of the repossessed motor car; and (iv) the amount of the option fee. It should be observed that no deduction was made in respect of the acceleration of payments to the owners.

In *Yeoman Credit Ltd* v *McLean*[9] the hirer had defaulted in the payment of four monthly instalments. The plaintiff finance company claimed damages on the basis laid down in *Waragowski's* case, but Master Jacob deducted a sum of £65 by way of an allowance or discount for the accelerated receipt by the plaintiffs, within six months of the agreement, of nearly half of their capital outlay. The point was that both capital and profit were repayable over a period of three years. 'These two factors,' said Master Jacob, 'the capital outlay and the hire charges, are directly inter-connected and related to each other — the one being a percentage of the other, and the two together making the aggregate of the hire-purchase price payable by instalments over the currency of the agreement.' In assessing damages the learned master therefore deducted a sum which represented a reasonable percentage on the amount of the capital received in respect of the period between the date of its receipt and the date when the hire-purchase agreement was due to expire. In making this deduction Master Jacob relied on the principle explained in *Interoffice Telephones Ltd* v *Robert Freeman Co Ltd.*[10] and he stated that the accelerated receipt of the proceeds of sale represented moneys in the hands of the plaintiffs which they would, in the ordinary course of their business as a finance company, put to use

again to earn a further profit or interest.

In *Overstone Ltd* v *Shipway, supra,* the hirer paid the initial deposit but none of the instalments. After four months the owners retook possession of the vehicle and subsequently sued for damages for breach of contract. The Court of Appeal made a deduction in respect of the accelerated receipt by the plaintiffs of part of their capital outlay. Holroyd Pearce LJ (as he then was) expressly approved the basis of calculation used by Master Jacob in *Yeoman Credit Ltd* v *Mc Lean* as a convenient guide to the assessment of damages, though he said it was not the function of a court to effect an exact calculation. Davies LJ, who had delivered judgment in the *Waragowski* case, expressly agreed with the sort of approach to the problem that was adopted by Master Jacob, though it did not arise in the *Waragowski* case.

I assess the amount of loss suffered by the finance company in the sum of $824.10. To that figure must be added the sum of $210 which represents two months' arrears of instalments, thereby making a total of $1,034.10. I cannot follow how the learned president had arrived at the sum of $414.10 as representing actual loss. The sum of $1,034.10 is made up as follows:

Cash price of the car		$5,800.00
Extras		409.10
Hire Purchase Charge		520.00
		$6,729.10
Less the following items:-		
Option money paid	$1,000	
One instalment paid	105	
Resale of car	4,800	5,905.00
		824.10
Add two instalments due (at $105 p.m.)		210.00
Actual loss		$1,034.10

I have considered the question of allowance or discount for the accelerated receipt by the finance company of $4,800 on the resale of the car. The hire-purchase charges or interests of $520 are for a period of two years. Three months had lapsed before they retook possession of the vehicle. The hire-purchase charges on the remainder of the hire period would be twenty-one months and that would amount to $455 ($\frac{\$520}{4}$ x 21). It is only fair that the appellant be allowed a deduction of this amount. In the circumstances, I would dismiss the appeal with costs, set aside the sum of $414.10 as awarded by the learned president and substitute a sum of $579.10 ($1,034.10 minus $455) as damages to the finance company.

Appeal dismissed.

V Oojitham for the Appellant.
Ronald Khoo for the Respondent.

Notes

(i) The House of Lords in *Branwhite* v *Worcester Works Finance Ltd* [1969] 1 AC 552 by a majority (with Lords Reid and Wilberforce dissenting) held that the dealer was not the agent of the finance company. A similar view was also expressed in *Northgram Finance Ltd* v *Ashley* [1963] 1 QB 476. Raja Azlan Shah J (as he then was) in *Dorothy Kwong Chan's* case took a courageous view in following the minority view as expressed by Lords Wilberforce and Reid by holding that in Malaysia, the dealer is an agent of the finance company.

(ii) The position under English law is that in transactions covered by the Consumer Credit Act 1974, the dealer is treated as an agent. The Act, therefore overules the decisions in *Northgram Finance Ltd* v *Ashley, supra* and *Branwhite, supra.* See generally 22 *Halsbury's Laws of England* (4th edn) para 65, note 9; *Chitty on Contracts,* Specific Contracts (25th edn) para 2213 and Goode, *The Consumer Credit Act,* Butterworths 1979, para 599.

(iii) *Dorothy Kwong* was decided before the Hire Purchase Act 1967 (Act 212) was introduced. A provision like Clause 6 of the hire purchase agreement in the case will now be regulated by section 18(2) of the Act. The Act also make provisions for the terms which have to be incorporated in a hire purchase agreement.

(iv) In determining whether the compensation to be paid by the hirer to the owner taking possession of the car under clause 6 of the hire purchase agreement, counsel for the hirer does not appear to have drawn the attention to the Court of section 75 of the Contracts Act which does away with the distinction between liquidated damages and penalties. The said section further provides that if a sum is named in a contract, even if it is a penalty, the party is entitled to recover for his actual loss for a sum not exceeding the sum so named. See generally *Wearne Brothers (M) Ltd* v *Jackson* [1966] 2 MLJ 155 HC, a case also dealing with a hire purchase transaction.

AGENCY

(a) Right of estate agent to remuneration

Chew Teng Cheong & Anor
v
Pang Choon Kong

[1981] 1 MLJ 298 Federal Court, Johore Bahru

Coram: Raja Azlan Shah CJ (Malaya), Abdul Hamid FJ and Yusoff Mohamed J

Cases referred to:-
(1) *Sushames* v *Cumming* [1962] NZLR 920,925.
(2) *Tribe* v *Taylor* (1876) 1 CPD 505,510.
(3) *Millar* v *Radford* [1903] 19 TLR 575.
(4) *Burchell* v *Gowrie and Blockhouse Collieries Limited* [1910] AC 614.
(5) *Symons* v *Callil* [1923] VLR 49.
(6) *Hansen Real Estate* v *Jones and Jones* [1980] NZLR 284.
(7) *Green* v *Bartlett* (1863) 14 CB (NS) 681.
(8) *Tong Lee Hua* v *Yong Kah Chin* [1979] 1 MLJ 233.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): The subject matter of this appeal is an area of some 18,000 acres of timber-land in Pahang. The profits to be made were enormous — they were said to be $18,000.000. So when it was noised about that one Au Ah Wah had the rights to this area, his acquaintance was eagerly sought. Those who did not know him personally sought therefore introductions from those who knew and were prepared to pay considerable sums for the introduction.

The appellants and one Lin Wyen Pang who was one of the plaintiffs in the action but chose not to appeal from the dismissal of their claims introduced the respondent to Au Ah Wah. Arising from that introduction, an agreement was drawn up between the respondent and Au Ah Wah on March 20, 1973 (the March 20 agreement) for the transfer of all his rights in the timber-land to the respondent. We shall refer more fully to the terms of this agreement later. The obligation of the respondent to the introducers was incorporated in another agreement between them on March 31,1973 (the March 31 agreement). On this agreement, the appellants and Lin Wyen Pang sued for the $900,000 promised to them therein. The High Court dismissed their claim and they now appeal to this court.

The law to be applied is therefore the law of estate agents. Where the agency contract provides that the agent earns his remuneration upon bringing about a certain transaction, he will be entitled to such remuneration if he is the effective, not necessarily the immediate cause of the transaction being brought about. Whether there is a sufficient connection between his act and the ultimate transaction must be ascertained from the facts of the case. 'The effectiveness of the agent's work is a matter of inference from the evidence' *per* McGregor J in *Sushames* v *Cumming*.[1] Where the agent can show that some act of his was the *causa causans* of the transaction: *Tribe* v *Taylor*[2] or was an efficient cause of the sale: *Millar* v *Radford*[3], he is entitled to his agreed remuneration. Both of these cases were approved in the Privy Council in *Burchell* v *Gowrie and Blockhouse Collieries Limited*,[4] which itself is a case where the broker was held entitled to recover because he had brought the company into relation with the actual purchaser, although the company had sold behind his back: see also *Symons* v *Callil*[5] (Full Court of Victoria). So where the property was eventually bought not by the lady introduced by the agent but by her husband as part of a property settlement then being negotiated and on the intimation by the wife that she desired that property, it was held that the

husband's action in obtaining the property for his wife had the same effect as a direct approach by the lady to the owners would have had: *Hansen Real Estate* v *Jones & Jones.*[6] We need to refer to only two more cases. In *Green* v *Bartlett,*[7] a potential buyer had asked the auctioneer, after the auction sale had not reached the reserved price, for the name of the owner and with the knowledge had purchased the property directly from him. The auctioneer was held entitled to his commission. In *Tong Lee Hua* v *Yong Kah Chin,*[8] this court considered the case as one of strict construction of the contract between the parties.

It is clear that the claim of the appellants depends on the proper construction to be given to this March 31 agreement. It recited that they were responsible for the March 20 agreement and then said that they were relinquishing their rights to the timber-land upon certain terms. By all accounts it was a rather curiously drawn up document. But the consideration was stated in the following terms:

> 1. In consideration of the Second, Third and Fourth Parties relinquishing the rights to the 18,000 acres of forest land the subject matter of the said contract between the First Party and Au Ah Wah dated 20th day of March, 1973 the First Party hereby covenants with the Second, Third and Fourth Parties as follows:
> (a) to pay the sum of Dollars Fifty ($50) per acre on the said forest land of 18,000 acres that is : Dollars Nine Hundred Thousand ($900,000) to the Second, Third and Fourth Parties in equal shares upon the performance of the said contract between Au Ah Wah and Pang Choon Kong that is to say upon the payment of the entire consideration of $1.2 million to Au Ah Wah subject to the following terms;
> (b) to pay the Second, Third and Fourth Parties the sum of Dollars Five hundred and Fourty thousand ($540,000) as aforesaid within two (2) weeks on the performance of the said contract with Au Ah Wah; provided that the licence to fell timber for the first thousand acres be issued by the relevant authorities;
> (c) to pay the Second, Third and Fourth Parties the sum of Dollars Three hundred and sixty thousand ($360,000) within six (6) months after the first payment of the Dollars Five hundred and Fourty thousand ($540,000) as aforesaid and provided always that the licence to fell timber on the first thousand acres shall be granted pursuant to the said contract between the First Party and Au Ah Wah and the First Party shall issue a post-dated cheque within six (6) months upon the first payment of the $540,000 to Second, Third and Fourth Parties, in equal shares.

As we read the agreement, the payment was for $900,000 only which though a large sum is but 5% of the profits to be derived from the venture. It was to be paid in two stages and dependent on the transfer of Au Ah Wah's rights and the issue of a licence, the licence being absolutely necessary to give validity to the transfer as the original licence is personal to the holder and it is forbidden by law and by the licence itself to transfer assign or otherwise part with it to third parties. We will observe that the agreement is silent as to any other events absolving the respondent from his obligation to pay the agreed sum for the introduction to Au Ah Wah.

Nevertheless the respondent in his defence now said that Au Ah Wah had no rights to the timber-land, they belonged to 30 licensees; it was a term of the March 20 agreement that it was conditional upon the consent of the 30 licensees and the approval of the Government and these Au Ah Wah had failed to obtain. He said there was a failure of consideration. Further and in the alternative the March 31 agreement was bad in law.

It is now necessary to turn to the events leading up to the two agreements. On October 1, 1966 an agreement was entered into between the Government of Pahang and thirty persons (the licensees) whereby the latter were given a licence to extract forest produce over an area of 24,000 acres subject to the terms and conditions therein set out. Amongst them was one forbidding the transfer by any means of the rights in the licence: clause 16. At the relevant time, 6,000 acres had been exploited leaving an area of 18,000 with any commercial value. Au Ah Wah claimed to have obtained all the rights to the remaining area. He did not say by what means he did so nor did he produce any document signed by the licensees. In view of clause 16 the nature of those rights might well be questioned. Nevertheless he claimed to have acquired the rights over this area of land and he agreed in the March 20 agreement to transfer all these rights to the respondent, to whom he was introduced by the appellants. What those rights were did not appear to have been defined anywhere in the agreement, though the parties thereto did not appear to have been in any doubt about them. But the agreement was clearly for the transfer of the licensees' interests rights and title to the land and it was represented that Au Ah Wah had the means of effecting this transfer, if not of enforcing it. Clause 6 therefore provides that the respondent should make available to Au Ah Wah a sum of $1,200,000 for 'paying off' the licensees whose names were set out in an enclosure by way of a schedule annexed to the agreement. It was also agreed that the rights of these licensees were to be transferred to a company to be formed for the respondent by Au Ah Wah who was also then an advocate and solicitor. But for such a transfer to be lawful and effective, it must be with the approval of the Government. Au Ah Wah consequently had to undertake to obtain the approval of as well as the transfer of the rights of the 30 licences. The time agreed to was 3 months from the date of the contract. The fruits to be harvested by Au Ah Wah on the successful outcome of the venture were fairly substantial.They were fully set out in the agreement but are of no concern in this appeal.

In the event no company was formed to which all the 30 licensees transferred these rights. This was because of dissensions amongst them. In the words of Au Ah Wah, 12 ran out on him. And on September 7, 1973, Au Ah Wah and the respondent executed a short agreement rescinding the March 20 agreement. If the matter had stopped here, there clearly could be no claim by the appellants against the respondent. But the matter did not stop at this point.

On November 10, 1973, the Government entered into a new agreement with the 30 licensees for the termination, so-called, of the first agreement of August 1, 1966 to enable the Government to enter into

separate agreements with three companies, Syarikat Hayati Sdn Bhd, Syarikat Bertapak Sdn Bhd and Syarikat Sastiva Bharu Sdn Bhd (Hayati, Bertapak and Sastiva respectively) for the purpose of felling and logging the remaining 18,000 acres. To enable this to be done, this area was sub-divided into 3 as clearly shown on a plan annexed to the agreement. Hayati was to get 6,000 acres, Bertapak 4,800 and Sastiva 7,200 acres. There can be no doubt of the purpose of this agreement from the part played by Au Ah Wah in effeting it. He was the witness for all the thirty licensees. The agreement also provided for the allocation of these licensees to the three companies.Hayati was allotted 10, Bertapak 8 and Sastiva the remaining 12, who deductively must be the 12 who ran out on Au Ah Wah.

Following this agreement, the Government on May 27, 1974 entered into separate agreements with the three companies for the extraction of forest produce from these areas. Once again Au Ah Wah signed as attesting witness to the execution of the agreements by the directors of the three companies.

A search in the Registry of Companies revealed the following: Of those original licensees, only 2 of the 10 allotted to Hayati remained as shareholders. Bertapak also had 2 of the 8 allotted to it. One of the other 6 had died however and it is not known what had happened to his allocation. The full complement of twelve remained with Sastiva, the two who had died being substituted by their personal representatives.

It is not however suggested that there is any significance in this as the rights of the licensees had passed to the companies and the question whether the respondent had acquired any rights over the timber area must be determined by an examination of the composition of the three companies. It will be sufficient to observe shortly that in Bertapak and Hayati, the shareholders and the directors include several persons with the same surname as the respondent. Quite a few of them reside at his address. The same is perhaps not true with Sastiva but the curious feature is that the directors reside at Pahang, but the registered office is in Kuala Lumpur and it had a Chinese secretary.

The only conclusion to be reached on this documentary evidence must be that the respondent had obtained the rights pertain to the 10,800 acres given to Hayati and Bertapak. As for the 7,200 acres allotted to Sastiva, the respondent admitted that he knew that one Tan Seng Eng had obtained the licences issued to Sastiva and the documentary evidence in the three agreements made, two on September 7, and the third on September 12, 1973, is to the effect that whatever benefits were obtained in the matter by Au Ah Wah and Tan Seng Eng, they were all passed over to the respondent and another, through the instrumentality of Au Ah Wah.

On all this evidence, we can only form one conclusion that Au Ah Wah had performed his contract with the respondent and as provided for in the March 31 agreement(which is the relevant one for construction in the determination of the rights and obligations between the parties) the rights of the appellant had accrued 'on the performance of the said contract with Au Ah Wah'. The other requirement in the

contract was the issue of a first licence to fell 1,000 acres. The evidence of Harun bin Ismail, the Deputy Director of Forestry (PW3) was that at the date of hearing, 10,000 of the 18,000 acres had been worked. The obligation of the respondent to pay the appellants had therefore crystallised. It is true that the negotiations with the original licensees had to negotiate a further channel, but that did not alter the fact that the respondent came into the picture through the introduction of the appellants, nor the other fact just as clear, that throughout the weaving of the fabric, the hand of Au Ah Wah was seen.

For these reasons, the appeal is allowed with costs here and in the court below. Judgment will be entered for the plaintiffs as prayed.

Appeal allowed.

V Masacorale for the Appellants.
GS Nijar for the Defendant.

Notes

(i) As rightly pointed out by His Lordship, an estate agent's right to renumeration would depend on the terms of the agency contract. It is then a question of construction as to the circumstances under which the agent is entitled to his fees.

As a general rule, subject to any provisions to the contrary in the agency contract, the agent is entitled to his remuneration if he is the effective cause of the transaction. The agent, need not be the immediate cause of the transaction. So long as there is a sufficient link between his act and the ultimate contract between the employer and the third party, he will be entitled to his renumeration. See the cases referred to by His Lordship in his judgment. See generally *Chitty on Contracts, Specific Contracts,* (25th edn) para 2305-2322.

(ii) In the instant case, the Federal Court held that on the construction of the agency contract, the agent was entitled to his commission as a contract had been successfully concluded between the respondent and a third party (Au Ah Wah) through the introduction of the agent even though there was a need for further negotiations between the contracting parties.

On appeal to the Privy Council, by the respondent, the Privy Council allowed the appeal, see [1984] 1 MLJ 145. The Privy Council disagreed with the interpretation of the contract by the Federal Court and said that under the contract the agent was only entitled to his commission not only when the appellant entered into a particular contract with Au Ah Wah but also only when the contract was performed by the parties. Lord Keith of Kinkel in delivering the judgment of the Board said:

> In the result, the March 31 agreement is not capable of being construed as a general employment of the plaintiffs as agents for the

> purpose of any transaction into which Pang might enter with Au upon any terms and conditions whatsoever which might be agreed by them both. It is too tightly drawn for that. It provides particularly for commission to be payable upon, and only upon, the substantial implementation of one specific contract, namely that of March 20.
> (At page 149)

In the instant case, as the first contract entered into between the appellant and Au was rescinded and therefore never substantially implemented and as it was replaced by another containing materially different terms and conditions, the respondent was not, in the circumstances entitled to any payment from the appellant under the contract.

(iii) The right of the agent to his renumeration was also discussed by the Privy Council in the case of *Tong Lee Hua* v *Yong Kah Chin* [1981] 1 MLJ 1, on appeal from the Federal Court of Malaysia. The main issue, however, before the Board was whether the appellant (defendant in the action) could establish a triable issue by way of defence to a claim of the respondent (the plaintiff in the action).

(b) Election agent

Ali Amberan
v
Tunku Abdullah

[1970] 2 MLJ 15 High Court, Kuala Lumpur

Cases referred to:-
(1) *James* v *Smee* [1954] 3 All ER 273,277.
(2) *Sefton* v *Tophams Ltd* [1967] AC 50,67,68.
(3) *McLeod (or Houston)* v *Buchanan* [1940] 2 All ER 187.
(4) *Kelly's Directories Ltd v Gavin & Lloyds* [1902] 1 Ch 631,634.
(5) *Wakefield case* (1874) 2 O'Mal & H 102.
(6) *Taunton case* (1869) 1 O'Mal & H 181, 182.
(7) *Nani Gopal Swami* v *Abdul Hamid Chaudhary* 19 ELR 175
(8) *Triloki Singh* v *Shivrajwati Nehru* (1958) 16 ELR 234.
(9) *Amritsar South (Sikh) Constituency* (1937) *Doabia* (I) 92.
(10) *Southern Towns (Mohammadan)* 1949 Doabia (I) 310.
(11) *Sudhir Laxman* v *SA Dange* (1958) 17 ELR 373.
(12) *Westminster case* (1869) 1 O'Mal & H 89.
(13) *Stepney case* (1892) O'Mal & H 35.
(14) *N Pethu Reddiar* v *V A Muthiah & Anor* AIR (1963) Mad 390.
(15) *Tribeni Ram* v *Satya Deo Singh* AIR (1966) All 20.

RAJA AZLAN SHAH J: This is an election petition against the respondent who was the successful candidate at the recent general election for the Parliamentary Constituency of Rawang. The petitioner is not the unsuccessful candidate but a voter and active member of the Gerakan Rakyat

party.

It is sought to avoid the election on 3 grounds:

(i) That corrupt practice was committed in connection with the said election by the respondent or with his knowledge or consent or by any agent of the respondent by printing, publishing, distributing, posting up or causing to be so printed, published, distributed or posted up before and during the said election handbills and/or advertisements which referred to the said election and did not bear upon its face the names and addresses of its printers and publishers contrary to section 11(1)(c) of the Election Offences Act, 1954 (Revised 1969).

(ii) That illegal practice was committed in connection with the said election by the respondent or with his knowledge or consent or by any agent of the respondent by printing, publishing, distributing, posting up or causing to be so printed, published, distributed or posted up before and during the said election handbills and/or advertisements which contained reproduction of what purports to be a ballot paper to be used or likely to be used at such election with the symbol of the respondent's Alliance party and the purported symbol of the Gerakan Rakyat party contrary to section 3(m) of the said Act.

(iii) That the recount of votes made under regulation 25(8) of the Elections (Conduct of Elections) Regulations 1959 was not conducted in accordance with the principles laid down in the said Regulations and was thus void, invalid and/or a nullity and that such non-compliance affected the result of the election.

The petitioner now prays:

(a) That GT Rajan, the unsuccessful candidate ought to have had or had a majority of lawful votes, and that a scrutiny and/or a recount be ordered.

(b) A declaration that the said GT Rajan was duly elected and ought to have been returned.

(c) A declaration that Tunku Abdullah, the respondent was not duly elected or ought not to have been returned, and/or

(d) A declaration that the election is void.

I will now consider the various allegations in their chronological order.

(i) The allegation of corrupt practice under section 11(1)(c) of the Election Offences Act.

It is not disputed that on the evidence 7 cards were found to be in circulation. They did not bear on their surface the names and addresses of the printer and the publisher as required by section 11(1)(c) of the Act.

The respondent's story is this. On 17th or 18th April 1969, he visited the Alliance office at Rawang. To his annoyance he discovered that the Alliance secretary of the Rawang Branch, Enche Kamaruddin bin Buyong, had caused to be printed 2,500 copies of the impugned cards and had distributed 1,500 to the various sub-branches. That gentleman is not the respondent's electoral agent. I accept the respondent's words

that he had given specific instructions that any advertisement, handbills, stickers and any other documents issued by the party must bear the printers' and publishers' name. The uncontroverted fact that all publications, e.g., booklets, circulars and rubber-stamped documents bearing names and addresses of the printers and publishers is consistent with and lends support to the respondent's evidence. I further accept that the impugned cards were printed without his knowledge and consent and that he was indisposed prior to that date. Any subsequent knowledge of the publications cannot be relevant for the purpose of determining the consent of the candidate prior to the publication. He personally directed the destruction of the remaining copies which were in the office. He then directed the secretary to print a set of similar cards with the name and address of both the printer and publisher. He thought these copies did not violate the provisions of the Act.

It may be noticed at once that these cards bear upon their surface the symbol of two political parties namely, that of the Alliance and below it that of the Gerakan party. That is a reproduction of a ballot paper and thus offends the provisions of section 3(m) of the Act. These cards were subsequently distributed to the sub-branches on or about 24/25th of April 1969. Later the respondent found that these cards offended the election law and he therefore gave instructions for their destruction. That was done although a few were not recovered.

It is of significance to note that the primary purpose of the diverse provisions of the election law which may at first-hand appear to be technical is to safeguard the purity of the election process and the courts will not in ordinary circumstances minimise their operation. It is the concern of the courts to purge elections of all kinds of corrupt or illegal practices so as to protect the political rights of the citizens and the constituency.

Now an allegation of corrupt practice is of a quasi-criminal nature in as much as a finding of corrupt practice entails penal consequences. The onus is on the petitioner to prove it beyond reasonable doubt by evidence which is clear and unambiguous.

On the evidence Messrs Jenson Press printed the offending cards; the respondent could only have 'printed' them if they were being printed by Messrs Jenson Press as his servants or agents, in the course of his business: see *James* v *Smee.*[1] No such connection between the respondent and Messrs Jenson Press has been proved.

The petitioner had, therefore, to fall back upon the words 'cause to be printed'. To cause a thing to be done is the same thing as to be the *causa causans. Causa causans* is the real effective cause as contrasted with the *sine qua non* which is merely an incident which precedes in the history or narrative of event: see *Sefton* v *Tophams Ltd*[2]. Putting it in a simplified form, to 'cause to be printed' involves some express or positive mandate from the person 'causing' to the other person, or some authority from the former to the latter, arising in the circumstances of the case: see *McLeod (or Houston)* v *Buchanan*[3].

It is not disputed that the order to print the offending cards was given by Enche Kamaruddin. In that sense Enche Kamaruddin caused those

cards to be printed by Messrs Jenson Press. Messrs Jenson Press were his 'agents'. If it could be shown that the respondent and Enche Kamaruddin had a common interest or "partners or joint-adventurers" in 'causing' the cards to be printed, the fact that Messrs Jenson Press were the 'agents' of Enche Kamaruddin would render them also the 'agents' of the respondent as would make the latter liable for 'causing' those cards to be printed: see *Kelly's Directories Ltd* v *Gavin & Lloyds*[4].

What is a common interest must in the last analysis depend upon the circumstances of each case. A case of common interest is where an agent pursues an act for the benefit of his principal. In that context it is said that both the principal and the agent have a common interest in the subject matter of the act. This point revolves itself into a nice question as to the meaning of 'agency' in election law.

English parliamentary election law has been the source from which our election law is modelled and therefore it will not be incorrect for this court to receive from it the inspiration and guidance in interpreting our law, in particular the rules and tests laid down in English cases with regard to 'agency'. In English election law the definition of 'agency' has been given a very wide scope and two quotations from English judges would suffice to show clearly the relationship:

> By election law the doctrine of agency is carried further than in other cases. By the ordinary law of agency a person is not responsible for the acts of those whom he has not authorised, or even for acts done beyond the scope of the agent's authority ....But if that construction of agency were put upon acts done at elections, it would be impossible to prevent corruption. Accordingly a wide scope has been given to the term: see *Wakefield case*[5].

In *Taunton*'s case[6] Blackburn J remarked:

> The rule of law has long been established that in parliamentary matters we are not to consider the strict rule of common law agency ... it has long been established that where a person has employed an agent for the purpose of procuring his election, he, the candidate, is responsible for the act of that agent in committing corruption, though he himself not only did not intend it or authorise it but even *bona fide* did his best to hinder it.

It will thus appear that the law of agency in English election matters goes so far that a candidate may be made responsible even for acts done by the agent in defiance of his instructions.

In India too whenever the question of agency has arisen, reference to English election law has been made with approval and the rule of extended scope of agency has been followed. Thus an 'agent' includes not only a person who has been specifically engaged by the candidate or his election agent to work for him at the election but also a person who does in fact work and whose services have been accepted by the candidate: see *Nani Gopal Swami* v *Abdul Hamid Chaudhary*[7]. In the case where a candidate has been set up by a party, that party and members and officials thereof have been held to be the candidate's agents because by agreeing to stand as a candidate of that party, he must be deemed to have agreed to the party and its prominent members

working to promote his election: see *Triloki Singh* v *Shivrajwati Nehru*[8]. In that case it was further held that if a Minister who is a prominent member of the Congress, works actively for the success of a party candidate, with the knowledge and approval of the candidate, he can be treated as agent of the candidate. In *Amritsar South (Sikh) Constituency, 1937*[9] it was held that the publication of posters by a prominent member of a party who sets up the respondent as a candidate was an agent of that candidate. In *Southern Towns (Mohammadan), 1949*[10] the respondent had contested on the Muslim League ticket. The League and its secretary were held to be agents of the respondent in arranging meetings and processions. In *Sudhir Laxman* v *SA Dange*[11] it was held that election committee members of a party forming an election committee for propaganda purposes must be deemed to be the agents of the candidate.

Inspired and guided by English and Indian election law I take the view that the rule of extended scope of agency holds good in our election law; any other view would tend to make it impossible to preserve the purity and freedom of elections. Accordingly a candidate at an election is responsible for the acts of agents who are not and would not necessarily be agents under the common law of agency. Therefore a political party and its prominent members who set up the candidate and with his consent, either expressly or by necessary implication, sponsor his cause and work actively to promote his election, may aptly be regarded the 'agents' of the candidate for election purposes.

Reverting to the present case it is on record that Enche Kamaruddin was not the electoral agent of the respondent. He was since 1967, the secretary of the Alliance Rawang Branch. In that capacity he had actively worked for the success of the respondent and party and in that direction he caused the offending cards to be printed in order to promote the respondent's election. It can also be inferred that the respondent had employed or authorised him to do the election work for the party and the candidates in the Rawang Constituency at Federal and State levels and the fact that Enche Kamaruddin had acted beyond the scope of his authority is not a valid defence and it was this aspect of it on account of which this law of agency in election was described in the Westminster case,[12] as:

> a stringent law, a harsh law; it makes a man responsible who has directly forbidden a thing to be done by a subordinate agent.

On these facts and under the circumstances of the case I am satisfied that the respondent is guilty of corrupt practices under section 11(1)(c) of the Act.

(ii) The allegation of illegal practice under section 3(m) of the Election offences Act.

Section 3(m) enacts:

> Any person who prints any advertisement, hand-bill, placard or poster, which refers to an election and contains a reproduction of a ballot paper, or of what purports to be a ballot paper, to be used or likely to be used at such election shall be liable to imprisonment.....

It seems to me that the words 'Any person who prints' give the key to the true construction of the sub-section. That sub-section imposes a penal liability to any person who violates its provisions. Therefore, in accordance with the canon of statutory interpretation it must be strictly construed, that is, the language therein cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purpose for which the Act as a whole was enacted.Applying this test it is plain that this particular sub-section was designed to enforce, obedience to the mandates of the law by punishing the printers who disregard its provisions. It is specifically directed against the person who 'prints' but not against those who 'cause to be printed'. The manifest distinction between the language used in this section and that used in section 11 cannot also be overlooked.

On the evidence I am satisfied that the respondent did not print those offending cards. In my view, this ground is misconceived.

(iii) Recount and/or scrutiny.

I have already dealt with this issue on interlocutory application and have dismissed it on the facts. I have now been asked to reopen the issue on additional facts, which for unexplained reasons were not advanced at the earlier hearing although they were not unavailable then. I see no compelling reason why I should not reconsider this issue on new facts.

It is on record that on the first count the respondent polled a majority of 275 votes and since the difference was less than 2% of the total number of votes cast a recount was granted at the request of the unsuccessful candidate: see regulation 25(8)(b) Elections (Conduct of Elections) Regulations, 1959. On the recount a total of 25 votes were retrieved thus reducing the respondent's majority to 250 votes. The respondent was declared elected.

The petitioner now says that had there been a proper recount, the unsuccessful candidate would be the person to secure a majority of lawful votes. To substantiate this point, he listed various irregularities and illegalities in the conduct of the recount.

Before I proceed to state the precise grounds on which the irregularities and the illegalities are rested, certain matters have to be mentioned.

Simultaneously with the Parliamentary Election, the State Assembly Election was also held. There was one returning officer. At the time of the counting of votes the Alliance candidate had 15 counting agents and the Gerakan Rakyat 14. Besides, the election agent of each candidate as well as the candidates themselves were present. In all, including invited guests, there were about 30-40 people in the counting hall.

The counting of votes for the Parliamentary seat commenced at about 9.00 pm on 10th May 1969. The ballot papers of each candidate were mixed and then sorted out and tied up in bundles of tens and tens into bundles of hundreds. The counting was completed at about 2.00 am on 11th May 1969. No complaint was made in respect of the counting. A recount was ordered and that was completed at about 5.00am. On the recount each candidate's votes were placed in five separate baskets and these baskets were in turn placed on two separate tables.

Before I consider the petitioner's case I would like to put on record the

following. The returning officer and the counting clerks were drawn from various Government departments and although some suggestion was made before this court that they had rigged the election process, that charge has not been made out or persisted in. There can be no presumption that these officers commit irregularities. I am quite satisfied that all these officials were doing the best possible thing in difficult circumstances and in my judgment no blame of any kind rests on them.

The petitioner's case is based on two limbs. First, it is said that on the recount the votes were counted from the bundles of tens, the bundles were never untied and re-mixed, there was no resorting and therefore the method adopted violates the procedure prescribed in the *Pegawai Pengurus*. That is the illegality alleged by the petitioner.

His case rests solely on the evidence of the unsuccessful candidate and his counting agents Mohamed Yunus bin Abdul Rani. The respondent admitted that there was no re-mixing and resorting but said that an agreement was reached between him and the unsuccessful candidate with the consent of the returning officer that the ballot papers could be re-counted from the bundles of tens. The returning officer was subpoenaed by the petitioner and in fact he was in court throughout the whole proceedings but he was never called to the witness-box.

The vital question to be answered is whether omission to re-sort the ballot papers violates the provisions of the election law thus rendering. the election void and a nullity. It is manifest that the conduct or method to be adopted on a recount must be regarded as having been exhaustively dealt with by the Elections (Conduct of Elections) Regulations, 1959 (LN69/1959). Regulation 25(8) gives power to the returning officer to order a recount on the application of either candidate or election agent. In any event he has a discretion to order a recount or recounts to satisfy himself as to the correct result of the poll. However, the regulation is silent as to the method to be adopted on a recount. In such an event must the returning officer start the whole process again, i.e., must he order the bundles of tens to be untied, mixed again and sorted? Paragraph 80 (page 74) of the *Pegawai Pengurus* expressly states that on a recount the whole process must start again from stage 'C' — the sorting of ballot papers for each candidate and decisions on doubtful ballot papers. The petitioner no doubt strongly relies on this paragraph of the *Pegawai Pengurus*. For my part, I have no qualms in expressing my view that the *Pegawai Pengurus* is nothing but an administrative guidance to assist election officers in their work. It has not the force of law.

In my view since regulation 25(8) gives to the returning officer a discretion to order more than one recount in order to satisfy himself as to the correct result of the poll and since it is silent on the method to be adopted, it is quite plain that the legislature intended to give to the returning officer a discretion in such matters. That being my considered view, has it been shown that he had exercised his discretion wrongly? I do not think so.

On the assumption that the returning officer erred in not following

the procedure enumerated in the *Pegawai Pengurus* has it been shown that non-compliance materially affected the result of the election? This is not a case for scrutiny, for scrutiny consists in ascertaining afresh whether some or all the ballot papers are valid or not. This is a case for a recount and for it to succeed it must be substantiated by specific instances and reliable *prima facie* evidence.This is clear from the well-known *Stepney Case.*[13] Where there is no proof, not even suspicion, of any irregularity in the counting of votes, there can be no justification for directing a recount. In *N Pethu Reddiar* v *V A Muthiah & Anor,*[14] it was held that an election petitioner cannot claim for a recount only because in his petition he has prayed that on a proper counting of votes he would be the person to secure a majority of lawful votes. In *Tribeni Ram* v *Satya Deo Singh*[15] it was held that directing a recount which could not have been for readjusting votes as a result of improper reception or rejection of votes but only for ensuring the correctness of the counting or of sorting, is in the discretion of the court. The whole basis of the present petitioner's case for a recount is that had there been a proper recount the unsuccessful candidate would be the person to win by a majority. These cases show that there is no justification for a recount solely on that ground.

Secondly, it is complained that the method of recount was done in a manner as a cashier does in a bank and that there was no opportunity given to the counting agent to scrutinize the votes except for the first two baskets that were involved in the hour of scrutiny. It is contended that there was an agreement between the unsuccessful candidate and the respondent that one counting agent should supervise one counting clerk. On one side of the table there were five counting clerks and on the opposite side were the counting agents. In pursuance of this agreement it is therefore said that only two counting clerks did the counting under the supervision of the candidates' respective agents while the other three counting clerks did not begin until the aforesaid two counting clerks had completed their counting. It was at that stage that eight votes in favour of the unsuccessful candidate were recovered from the respondent's bundle and from the unsuccessful candidate's own bundle nine votes in his favour were recovered in excess from the bundles of ten and from that the petitioner surmised that had there been a proper recounting he would have obtained a majority of lawful votes. He further said that while the recounting was going on upon the terms agreed to between the two candidates the returning officer returned to the scene and directed that the other three counting clerks should carry on counting simultaneously with the other two clerks otherwise the counting for the State seats would be held up.

As I have said earlier in my judgment, the petitioner's case rests solely on the evidence of the unsuccessful candidate and his counting agent. The respondent quite naturally said that the counting was proper; there was no underhand dealing.

The onus is always on the person who asserts a proposition or fact which is not self-evident. If the court finds the evidence pro and con so evenly balanced that it can come to no conclusion, then the person on

whom the onus lies has failed to prove his case. The returning officer and the counting clerks were not called to give evidence. Had this course been adopted, perhaps my view would be different from the one I am about to express.

On the evidence as it stands I find the case evenly balanced that I am unable to arrive at any conclusion at all and in the circumstances I hold that the petitioner's case based on the second limb has not been discharged.

The claim for a recount, instead substantiated by specific instances and reliable *prima facie* evidence, rests on nebulous allegations. This is but an attempt to fish out evidence to support the petitioner's case. There is no jusification for directing a recount. If the law were otherwise it will indeed lead to incovenience. A defeated candidate in an unexceptionable election might harass the successful candidate by filing a frivolous petition and asking for a recount, involving thereby a repetition of the process of counting with no manifest advantage to anybody but himself.

Order accordingly.

OL Phipps for the Petitioner.
Dato' Athi Nahappan for the Respondent.

APPENDIX A

Report for Excuse of Corrupt or Illegal Practice under section 28 of the Election Offences Act, 1954 (Revised in 1969)

RAJA AZLAN SHAH J (January 13, 1970): On the principle of extended scope of agency in election law I am satisfied that the respondent was by his agent Enche Kamaruddin bin Buyong guilty of corrupt practice under section 11(1) (c) of the Act in that the said agent caused the election handbills to be printed without having on their surface the names and addresses of its printers and publishers. I am also satisfied that the said Enche Kamaruddin bin Buyong was not the respondent's election agent.

Section 28 of the said Act gives power to the appropriate authority not to declare the said election void provided:

The Attorney-General was given an opportunity to be heard, by that I mean whether appropriate criminal proceedings would be instituted against the said respondent or any other person connected with the said election and that the candidate has proved to the satisfaction of the court:

(a) that no corrupt or illegal practice was committed at such election by the candidate or his election agent and the offences mentioned in the said report were committed contrary to the orders and without the sanction or connivance of such candidate or his election agent;
(b) that such candidate and his election agent took all reasonable means for preventing the commission of corrupt or illegal practice at such election;
(c) that the offences mentioned in the said report were of trivial, unimportant and limited character; and
(d) that in all other respects the election was free from any corrupt or illegal practice on the part of such candidate and of his agents.

In those circumstances the election of such candidate shall not, by reason of the offences mentioned in such report, be void, nor shall the candidate be subject to any incapacity under this Act.

The Attorney-General's representative was heard and he was of the opinion that the offence of corrupt practice as committed in the present case was trivial and unimportant in the sense that he would have instituted proceedings against the person or persons concerned if it was otherwise. I associate myself with this view.

I further take the view that such offence has a limited character in that the offending cards were traced from the possession of the party workers and not from the voters. There is no evidence to indicate that such offending cards were distributed to the voters but only to assist the party workers in their work.

I am satisfied that the corrupt practice was not committed by the respondent or his election agent and that the said offence was committed contrary to his orders and without the sanction or connivance of such candidate. I have already indicated that finding on page 3 of my judgment (pp 16 and 17, *supra*):

I accept the respondent's words that he had given specific instructions that any advertisement, handbills, stickers and any other documents issued by the party must bear the printers' and publishers'name. The uncontroverted fact that all the party's publications, e.g., booklets, circulars and rubber-stamped documents bearing names and addresses of the printers and publishers is consistent with and lends support to the respondent's evidence. I further accept that the impugned cards were printed without his knowledge and consent and that he was indisposed prior to that date. Any subsequent knowledge of the publications cannot be relevant for the purpose of determining the consent of the candidate prior to the publication. He personally directed the destruction of the remaining copies which were in the office.

I am satisfied that the respondent and his election agent took all reasonable steps for preventing the commission of the corrupt practice. That is also indicated on page 3 of my judgment, which has been reproduced in the previous paragraph. I find that the electoral offence under section3(m) of the said Act was not committed by the respondent or his election agent. That is indicated on pages 8 and 9 of my judgment (p 18, *supra*):

Section 3(m) enacts: "Any person who prints any advertisement, handbill, placard or poster, which refers to an election and contains a reproduction of a ballot paper, or of what purports to be a ballot paper, to be used or likely to be used at such election shall be liable to imprisonment ...."

It seems to me that the words 'Any person who prints' give the key to the true construction of the sub-section. That sub-section imposes a penal liability to any person who violates its provisions. Therefore, in accordance with the canon of statutory interpretation it must be strictly construed, that is, the language therein cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purpose for which the Act as a whole was enacted. Applying this test it is plain that this particular sub-section was designed to enforce obedience to the mandates of the law by punishing the printers who disregard its provisions. It is specifically directed against the person who 'prints' but not against those who 'cause to be printed'. The manifest distinction between the language used in this section and that used in section 11 cannot also be overlooked.

On the evidence I am satisfied that the respondent did not print those offending cards. In my view, this ground is misconceived.

Finally I am satisfied that in all other respects the said election was free from any corrupt or illegal practice on the part of the respondent or his agents.

In the light of my findings I am satisfied that the mandatory provisions of section 28 of the Act have been proved to my satisfaction and 1 therefore declare that the election is valid and that Tunku Abdullah was duly returned.

APPENDIX B

Certificate under section 36 of the Election Offences Act, 1954 (Revised in 1969)
RAJA AZLAN SHAH J (January 13, 1970): The petition was filed by a Gerakan voter against the successful candidate Tunku Abdullah. It was based on three specific grounds-

(i) that corrupt practice was committed by the respondent or his agents by causing the election handbills to be printed without bearing upon their surface the name and address of its printers and publishers, contrary to section 11(1)(c) of the Act;

(ii) that illegal practice was committed by the respondent or his agents by printing the said election handbills and/or advertisements which contained reproduction of what purports to be a ballot paper with the symbol of two political parties, contrary to section 3(m) of the said Act; and

(iii) that a recount be ordered.

I found the grounds (ii) and (iii) not proved by the petitioner. However, I found that an offence of corrupt practice by the respondent's agent Enche Kamaruddin bin Buyong was committed contrary to section 11(1)(c) of the Act.

In the circumstances and on the facts of the case and by invoking the provisions of section 28 of the said Act, I hereby certify that the respondent was duly returned.

(c) Agency created by master-servant relationship

Negara Traders Ltd
v
Pesurohjaya Ibu Kota, Kuala Lumpur

[1969] 1 MLJ 123 High Court, Kuala Lumpur

Cases referred to:-
(1) *Lloyd* v *Grace Smith & Co* [1912] AC 716.
(2) *Deatons Proprietary Ltd* v *Flew* (1949), 79 CLR 370, 381.
(3) *George Whitechurch* v *Cavanagh* [1902] AC 117.
(4) *Uxbridge Permanent Benefit Building Society* v *Pickard* [1939] 2 All ER 344.
(5) *Sheriffa Shaikhah* v *Ban Hoe Seng Co Ltd* [1963] MLJ 241.
(6) *Ruben* v *Great Fingall Consolidated* [1906] AC 439.
(7) *Kreditbank Cassel* v *Schenkers Ltd* [1927] 1 KB 826.
(8) *South London Greyhound Race-courses Ltd* v *Wake* [1931] 1 Ch 496.
(9) *Greenwood* v *Martin's Bank Ltd* [1933] AC 51.

RAJA AZLAN SHAH J: This is a claim for goods sold and delivered to the defendants (the Commissioner of the Federal Capital, Kuala Lumpur). The plaintiffs are a firm dealing in hardware. They allege that on eight separate occasions the defendants through their authorised agent or employee ordered and took delivery of changkols and scythe blades to a total value of $4,217.

The circumstances giving rise to the present claim are quite clear and undisputed. On 17th November 1964, the manager of the plaintiff firm

received a telephone call purportedly to be from the Municipal Health Department, Kuala Lumpur, asking for quotations for changkols and scythe blades. After being told of the prices, the caller, who spoke in Tamil, informed the manager that he would issue a local order and send it through a messenger. He further requested the manager to deliver the goods to the messenger. About one hour later Rajamanickam, the office messenger of the defendants' health department, arrived wearing the authorised uniform of the defendants and presented a local order to the plaintiffs' manager. The local order was, in point of form, genuine inasmuch as it was the local order form used by the defendants and was correctly entered and appeared to be signed by the head of the health department, Dr LS Sodhy, with the official rubber stamp affixed to it. On the strength of it the manager prepared the delivery note, obtained Rajamanickam's signature, and handed him the goods. On the following day he sent the invoice to the health department. Seven similar orders were purportedly issued by the defendants. The same Rajamanickam presented those local orders to the plaintiffs' manager; he then took delivery of the goods after acknowledging receipt of them on the delivery advice notes. It is of interest to note that there were no dealings between the parties before 17th November 1964.

It transpired that these orders were forgeries. The financial clerk whose principal duty was to prepare local orders denies preparing them. Dr LS Sodhy denies ordering the goods or signing the local orders. I believe them. Their evidence was neither contradicted nor challenged. The invoices and the goods never reached the defendants. Nor were they aware of the transactions until 19th December 1964, when the plaintiffs confronted them with a request for payment. They immediately refuted liability and refused to pay. Departmental investigation revealed the forgeries. On 21st December 1964, they lodged a report with the police. On the same day Rajamanickam gave 24 hours' written notice to resign and left without informing anyone. That letter was just left on a table. Until now he cannot be traced and there is a warrant of arrest awaiting him. The goods were never recovered.

The plaintiffs seem to found their claim on the principle of ostensible authority. They say that the various orders tendered were the official forms of the defendants with the official rubber stamp affixed thereon, and were duly signed by the head of the department; they were presented by an employee of the defendants wearing their official uniform; the goods on delivery were taken by the same person; and lastly, several bills for each order were submitted to the defendants for settlement. They further say that the issue of forgery is totally irrelevant.

The defendants contend that the goods were never ordered by or delivered to them or their agent or employee. Alternatively, if the goods were ordered by their agent or employee, such agent or employee was not authorised and had no power to enter into any such contracts. A further alternative is that the order, if any, were forgeries and therefore they are not liable.

It was proved that in practice the defendants order such goods from their Cheras Road Municipal Store; orders from local firms are strictly

prohibited. Local orders, when authorised, are prepared by the financial clerk and then signed by the Municipal Health Officer, and in his absence by his deputy. They are then despatched.

On the higher balance of probability there is ample evidence to establish that those local orders, if not actually forged by Rajamanickam, were known by him to be forged.

This case therefore raises the important question of how far a master is liable to third parties for the dishonesty and fraud committed by one of his servants when the master is not himself at fault. The classic exposition of the law governing such liability is to be found in the speeches of their Lordships in *Lloyd* v *Grace Smith & Co*[1] which can be summarised as follows: that the master is liable only if the dishonesty and fraud fell within the scope of the servant's real or ostensible authority, no matter whether it was done for the benefit of the master or for the benefit of the servant. In order to attract the vicarious liability, the servant's dishonesty and fraud must consist of 'acts to which the ostensible performance of his master's work gives occasion or which are committed under cover of the authority the servant is held out as possessing or of the position in which he is placed as a representative of his master'; *per* Dixon J in *Deatons Proprietary Ltd* v *Flew.*[2] Thus a company is not liable for the fraudulent issue or forgery of shares certificates by its secretary on the ground that the officer lacked, and was not held out as having, authority to perform any but purely ministerial acts in relation to the certification of transfers such as the issue of cerficates signed by directors and in relation to shares which have been duly lodged: *George Whitechurch* v *Cavanagh.*[3] In *Lloyd* v *Grace Smith & Co, supra,* a solicitor's managing clerk was held out as a person fit to be trusted and endowed with authority to exercise his discretion in legal business with clients and therefore his principals were held liable for misappropriation of mortgage moneys by the clerk, who had induced one of their clients to transfer the mortgage to him by fraudulently misrepresenting the nature of the transaction. The essence of that case was that the clerk was acting within the scope of his ostensible authority in receiving the deeds and thus his principals had them in their charge. The principle in *Lloyd's* case now includes forgery of title deeds by a solicitor's managing clerk within the scope of his ostensible authority: *Uxbridge Permanent Benefit Building Society* v *Pickard.*[4] In that case the clerk by false representation and the production of forged title deeds which, if not actually forged by him, were known by him to be forged, induced the plaintiffs to advance money to a person alleged by the clerk to be a client of the firm on a mortgage of land. The law has been extended to apply to a case of principal and agent: see *Sheriffa Shaikhah* v *Ban Hoe Seng Co Ltd.*[5]

Counsel for the defendants contended that the observations in *Ruben* v *Great Fingall Consolidated*[6] have application to the facts of this case. In that case an attempt was made to saddle a limited liability company with responsibility for the fraud of its secretary who obtained money from the plaintiff by issuing forged share certificates to which the seal of the company was affixed, and the signatures of two directors forged

by the secretary. The plaintiff contended that the certificates were delivered by the secretary in the course of his employment and that the delivery imputed a representation or warranty that they were genuine. It was admitted that the secretary was a proper person to deliver certificates on behalf of the company. The House of Lords rejected this contention by saying:

> He had not, nor was he held out as having, authority to make any such representation or to give any such warranty. And certainly no such authority arises from the simple fact that he held the office of secretary and was a proper person to deliver certificates. Nor am I able to see how the defendant company is estopped from disputing the genuineness of this certificate. That, indeed, is only another way of stating the same contention. From beginning to end the company itself and its officers, with the exception of the secretary, had nothing to do either with the preparation or issue of the document.

(*Per* Lord Loreburn at page 443). Lord Macnaghten made a similar observation (page 444):

> The fact that this fraudulent certificate was concocted in the company's office and was uttered and sent forth by its author from the place of its origin cannot give it an efficacy which it does not intrinsically possess. The secretary of the company, who is a mere servant, may be the proper hand to deliver out certificates which the company issues in due course, but he can have no authority to guarantee the genuineness or validity of a document which is not the deed of the company. I could have understood a claim on the part of the appellants if it were incumbent on the company to lock up their seal and guard it as a dangerous beast and if it were culpable carelessness on the part of the directors to commit the care of the seal to their secretary or any other official. That is a view which once commended itself to a jury, but it has been disposed of for good and all by the case of *Bank of Ireland* v *Trustees of Evans' Charities* in this House: see 5 HLC 389.

Another ground put forward by the company was that the certificates were forgeries. Lord Loreburn made the following observation when the issue of forgery was raised (page 443):

> I cannot see upon what principle your Lordships can hold that the defendants are liable in this action. The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery.

Lord Macnaghten had this to say (page 444):

> The thing put forward as the foundation of their claim is a piece of paper which purports to be a certificate of shares in the company. This paper is false and fraudulent from beginning to end. The representation of the company's seal which appears upon it, though made by the impression of the real seal of the company, is counterfeit, and no better than a forgery. The signatures of the two directors which purport to authenticate the

> sealing are forgeries pure and simple. Every statement in the document is a lie. The only thing real about it is the signature of the secretary of the company, who was the sole author and perpetrator of the fraud. No one would suggest that this fraudulent certificate could of itself give rise to any right or bind or affect the company in any way. It is not the company's deed, and there is nothing to prevent the company from saying so.

This principle has been applied to bills of exchange forged by a branch manager: see *Kreditbank Cassel* v *Schenkers Ltd*,[7] and to share certificates forged by the director and secretary of a company: *South London Greyhound Race-courses Ltd* v *Wake*.[8]

Although it is correct to hold that the present plaintiffs have a right to assume that all matters of internal management in the defendants' department had been duly complied with and that they would not be affected by irregularities of which they had no notice that rule applies only to irregularities that might otherwise affect a genuine transaction. It cannot apply to a forgery. In my opinion this point is fatal to the plaintiffs' case and therefore they can make no claim against the defendants except upon one of two grounds, either that the defendants are estopped from setting up the forgeries: see *Greenwood* v *Martin's Bank Ltd*[9] or that the office messenger had such ostensible authority as to render his employers, the defendants, liable for his act in presenting the orders and taking delivery of the goods.

In my judgment the defendants are not estopped from setting up the forgeries. There were no previous conduct or dealings of the defendants to establish agency by estoppel. The defendants had never conducted themselves in any manner or done anything to represent or lead the plaintiffs to the belief that those transactions were their deeds. Without such representation there can be no estoppel. There was no evidence in this case upon which an estoppel could be founded. The plaintiffs are then driven to rely, if they can, upon the ordinary rule applicable in the case of principal and agent. If they can show that the preparation and authentication of those orders were within the ostensible authority of the person occupying the position which this office messenger occupied, there might have been a claim founded upon this ground.There was no such evidence. Indeed it was proved that it was not part of the office messenger's duties to issue local orders. Counsel for the plaintiffs then sought to persuade me to consider the case from another angle. He says that the issue of forgery is totally irrelevant. The only point which I have to consider, he says, is that those orders which in all respects were in proper form, i.e., duly signed and stamped, were presented by the agent of the defendants wearing their authorised uniform. In my opinion the fact that those orders were forgeries cannot give them the efficacy which they do not intrinsically possess. The office messenger, who is a mere servant, may be the proper person to present (personally) those orders which the defendants might in due course issue, but he can have no authority to guarantee the genuineness or validity of the documents which are not the deeds of the defendants. If those orders were forgeries, then they were mere waste paper.

The plaintiffs' case is dismissed with costs.

Claim dismissed.

AR Rajasingam for the Plaintiffs.
VC George for the Defendants.

Notes

(i) The general rule is that the principal is liable even for the fraudulent acts of the agent so long as the agent acts within his actual or apparent authority: *Hambro* v *Burnard* [1904] 2 KB 10.

(ii) The House of Lords in *Lloyd* v *Grace, Smith & Co* held that if an agent commits a fraud while acting or purporting to act in the course of the business which he is authorised, or held out as authorised, to transact on account of his principal, the principal, although innocent of the fraud, is liable for the fraud of the agent whether the fraud results in a benefit to the principal or not. See also *Uxbridge Permanent Benefit Building Society* v *Pickard* [1939] 2 KB 248 where a solicitor was held liable for the forgery committed by his clerk. It was held in this case that the solicitor's clerk had been held out as having the necessary authority for the act done by the clerk.

(iii) In *Negara Traders, supra,* as rightly pointed out by Raja Azlan Shah J (as he then was), the principal was not liable for the forgery committed by his agent as the principal could establish that the agent had no such authority nor was he held out to have such authority.

(iv) In *Kooragang Ltd* v *Richardson & Wrench Ltd* [1981] 3 All ER 65, the Privy Council considered the liability of a master for acts done by an agent who had been ordered not to do the particular act. Their Lordships held that in determining whether an act done by a servant or agent was done in the course or within the scope of the servant/agent's employment in cases where there was no dealing by the third party with the servant or agent and where the issue is one of actual authority or total absence of authority in order to render the master liable, it was necessary for the injured third party to prove that the master had authorised the act. Such authority could not be inferred from the fact that the act done was within a class which the servant or agent was authorised to do on the master's behalf. *Uxbridge's* case was distinguished by the Privy Council in the instant case.

(v) Lord Wilberforce pointed out that as the nature of a master-servant relationship has changed in recent times, it was necessary to take into account the present realities when considering the liability of masters for the acts done by the servants.

(vi) In considering the liability of a principal for frauds committed by

agents in Malaysia, section 191 of the Contracts Act which provides as follows is relevant:

> Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

(vii) As to the authority of a clerk in the employ of a housing developer to enter into a contract on behalf of the housing developer, see the recent Federal Court decision in *Chew Hock San & Ors* v *Connaught Housing Development Sdn Bhd* [1985] 1 CLJ 533.

(d) Representation by principal as to agent's authority

Cheng Keng Hong
v
Government of Malaysia

[1966] 2 MLJ 33 High Court, Selangor

See under Law of Contract at page 410 below.

Notes

See under Law of Contract at page 418 below.

GUARANTEE

(a) Variation without surety's consent

Citibank Na
v
Ooi Boon Leong & Ors

[1981] 1 MLJ 282 Federal Court, Kuala Lumpur

Coram: Raja Azlan Shah CJ (Malaya), Chang Min Tat and Salleh Abas FJJ

Cases referred to:-
(1) *Prenn* v *Simmonds* [1971] 3 All ER 237,241.
(2) *Holme* v *Brunskill* (1878) 3 QBD 495, 505.
(3) *National Bank of Nigeria Ltd* v *Awolesi* [1964] 1 WLR 1311,1316.

(4) *Rees* v *Berrington* (1795) 30 ER 765, 767.
(5) *Polak* v *Everett* (1876) 1 QBD 669, 677.
(6) *Dobbs* v *National Bank of Australasia Ltd* (1935) 53 CLR 643.
(7) *Bache & Co* v *Banque Vernes* [1973] 2 LLLR 437.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): The appellant bank ('the bank') in this case sued the respondents for the sum of $331,731.32 inclusive of interest upon a contract of guarantee up to a limit of $600,000 for banking accommodation given to Leisure Industries Sdn Bhd. The respondents are directors of the company. Whether they are the only directors has not been made clear. They jointly and severally guaranteed in written form the repayment of such advances made to the company and interest thereon at an agreed rate.

The writ was issued on December 13, 1977. On January 21, 1978 the bank took out an RSC Order 14 application, supported by a proper affidavit, for summary judgment. The Assistant Registrar made an order in terms but his order was reversed in the High Court. The appellant now appeals to this court to restore the order of the Assistant Registrar.

The clauses relevant to the consideration by the court in hearing RSC Order 14 application are the following:

> Clause 8. The liability of any of us hereunder shall not be affected by any failure by the Bank to take any security or by any invalidity of any security taken or by any existing or future agreement by the Bank as to the application of any advances made or to be made to the customer.
> Clause 16. No one of us shall be discharged or released from this guarantee by any arrangement made after this guarantee or any dealing between the customer and the Bank without our knowledge or consent or by any variation or alteration without our knowledge or consent in the agreement between the customer and the Bank for the making of advances or otherwise giving credit of affording banking facilities to the customer by the Bank.
> In other words to give full effect to the provisions of this guarantee each of us hereby waives all rights inconsistent with such provisions and which we might otherwise as sureties be entitled to claim and enforce and we declare that the Bank shall be at liberty to act as though we or each of us were principal debtors or principal debtor to the Bank for all payments guaranteed by us aforesaid to the Bank.

These clauses expressly maintain the liability of the respondents in the event of the bank doing or omitting to do certain acts therein recited.

The respondents contend that their liabilities under the guarantee were conditional on the bank securing certain acts on the part of the company, the directors and the shareholders. Such acts are not contained in the guarantee but are present in a long letter bearing the same date as the guarantee and containing the terms and conditions under which the bank was prepared to grant the loan facilities to the company. The acceptance by the respondents of the offer was expressly made conditional upon a formal document of guarantee 'incorporating substantially' the said terms.

It has nowhere been contended that there are other documents and inferentially the guarantee sued on was the legal document containing the terms between the parties and it was executed by the respondents after acceptance by them. It must therefore be a matter for argument whether the said letter is admissible in evidence to determine the existence and the application of the terms of the guarantee having regard to the provisions of sections 91 and 92 of the Evidence Act 1950. We are of the view that the said letter does not fall within the category of negotiations as to be caught by the prohibitory provisions of the Evidence Act but gives factual background which is certainly admissible. As Lord Wilberforce said in *Prenn* v *Simmonds:*[1]

> In my opinion, then evidence of negotiations... ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction.

Relying entirely on the contents of this letter, the respondents raised two objections to the application. They argued that the failure of the bank to obtain (i) a valid debenture on the company's assets in that it did not contain any provision to enable the receivers to be appointed in the event of default to sell the properties of the company charged under it, and (ii) A letter of undertaking from the shareholders who held about 40% of the issued share capital not to divest their respective shareholdings without the bank's prior written consent and to inject additional capital into the company in the event of a cash shortfall as long as the term loan was outstanding constituted variations of their contractual liability and were sufficient to absolve them from their obligations. The Assistant Registrar thought such arguments irrelevant. The High Court considered that they raised issues which entitled the respondents to unconditional leave to defend.

It is necessary to consider the statutory provisions of section 86 of the Contracts Act 1950 which was relied on by the respondents. The section is as follows:

> Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

The section provides express provision for the respondents to consent to any variation. They are the sole judges whether or not they will consent to remain liable notwithstanding such variation, and that if they have not so consented they will be discharged. This provision is in accordance with what is stated to be the law by Cotton LJ in *Holme* v *Brunskill*[2] which was followed in the Privy Council in *National Bank of Nigeria Limited* v *Awolesi*[3]:

> The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet that if it is not self-evident that the

> alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court, will not, in an action against the surety, go into an inquiry as to the effect of the alteration .... but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration,and that if he has not so consented he will be discharged.

This passage follows the classic statement of Lord Loughborough LC in *Rees* v *Berrington*[4]: 'It is the clearest and most evident equity not to carry on any transaction without the knowledge of (the surety), who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him.'

We think the matter is tersely summed up by Quain J in the case of *Polak* v *Everett*[5]:

> I think the convenience and policy of the matter .... is that the contract of the surety should not be altered without his consent .

In the light of what was said in *Holme's* case, *supra,* 'where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety' we are of the opinion that the variation, if any, was so fleeting and patently non-prejudicial to the respondents as to fall within the *de minimis non curat lex* rule — the law does not concern itself with trifles. Whatever the validity of the first objection i.e., that the debenture was said to be defective in that it did not contain any provision to enable the receivers to be appointed in the event of default to sell the properties of the companies charged under it, the bank in an *inter partes* application had obtained an order from the High Court to sell the assets of the company under the debenture. The offer was made on March 21, 1978 and until it is set aside on appeal, it is an effective order for the sale and could not, by any stretch of the imagination or by any sensible argument, be said to result to the detriment of the respondents, it not being contended that there were other assets which had escaped the net of the debenture. But the respondents have put forward the suggestion that the company may appeal against the decision authorising the sale. The short answer to that is of course that the appeal must be lodged in accordance with well-defined rules of court within a specified time. This court is not advised that such an appeal has been brought.

With regard to the second objection that the bank had failed to obtain an undertaking from the other shareholders holding about 40 per cent of the issued share capital of the company not to divest their share-holdings without the bank's prior written consent, there has not been a shred of evidence or even of allegation that such shareholders had in fact transferred their shares. In any event, this contention completely ignores the ordinary provision in the articles of association of a private limited company such as this one is that the transfer of any shares by any shareholder could only be effected with the approval of the board of directors — a provision necessary for the smooth operation of a private limited company as a small body of men — and the fact therefore that

the first line of defence to make the shareholders retain their shares and thus to preserve, as if it could, the financial security of the respondents, was the respondents themselves. Neither is it anywhere alleged that the shares were other than fully paid up shares to show that there is any possibility of a call-up on the unpaid portion of the shares.

In any event, the contract of guarantee contains express provisions giving the bank the right to do or omit to do certain things without thereby prejudicing its right against the respondents. Clause 8 provides that the bank may recover from the respondents notwithstanding any failure on its part to take any security or that any security given to the bank is invalid. Clause 16 enables the bank at its absolute discretion and without notice to or consent of the respondents to vary or alter the contract between the bank and the company and that any right of the respondents which is inconsistent with the terms of the contract has been waived by them. In other words there was a voluntary waiver of the rights of the respondents to be subrogated on payment of the loan. Accordingly where the respondents have promised to waive any variation or alteration and the bank has proceeded with the performance of the contract on that basis it would be in our opinion inequitable to allow them to resile from the contract.

That brings us to the important question whether the Assistant Registrar was entitled to deal with the case under the RSC Order 14 procedure. We have often said in this court many a time that where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the Assistant Registrar or the judge in chambers, or, for that matter this court shall not deal with the whole matter under the RSC Order 14 procedure. In the present case the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. Clause 19 provides thus 'A certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives'. It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate: see *Dobbs* v *National Bank of Australasia Ltd*;[6] *Bache & Co* v *Banque Vernes*.[7]

In the circumstances the respondents are bound under clause 19 to accept the certificate of indebtedness duly executed by the Assistant Vice-President of the Branch as conclusive evidence of the debt due to the bank. On this footing the bank would be entitled to judgment as prayed for.

This appeal is allowed with costs here and in the High Court below.

Appeal allowed.

C Abraham for the Appellants.
VC George for the Respondents.

Notes

(i) The rule embodied in section 86 of the Contracts Act, as pointed out by his Lordship is generally similar to the position under the common law. Though, section 86 appears to be widely worded in that it seems to imply that 'any variance, made without the surety's consent' will discharge the surety's liability, the Courts in India and Malaysia have followed the English law in restricting the scope of the section. Under English law, only a variance of a contract which is made without the surety's consent which is or has the likelihood of being prejudicial against the surety would discharge the surety from his liability. The dictum *Holme* v *Brunskill* (1877) 3 QBD 495 which was relied upon by Raja Azlan Shah CJ (Malaya) was also applied by the Federal Court in the earlier case of *Heng Cheng Swee* v *Bangkok Bank Ltd* [1976] 1 MLJ 267.

(ii) The other important Malaysian case on section 86 of the Contracts Act is the Federal Court decision in *Heng Cheng Swee* v *Bangkok Bank Ltd, supra.* This case was not referred to in *Ooi Boon Leong's* case.

(iii) The decision of Raja Azlan Shah CJ was affirmed by the Privy Council on appeal by the sureties: *Ooi Boon Leong & Ors* v *Citibank NA* [1984] 1 MLJ 222. One of the arguments raised by the sureties before the Board was that the clause whereby they had agreed not to be discharged from their liability by reason of any variation in the guarantee contract was void by virtue of certain provisions of the Contracts Act. The main thrust of the argument was that parties to a contract could not 'contract out' of the Contracts Act and as such the said clause in the guarantee agreement was an attempt to contract out of a express provision of the Contracts Act, namely section 86. Their Lordship of the Privy Council rejected this argument by holding that there was nothing in the Contracts Act which provides that contracting parties are unable by agreement to vary the legal consequences spelt out by the Act. Lord Brightman observed:

> If freedom to contract is to be curtailed in relation to a particular subject matter, their Lordships would expect the prohibition to be expressed in the statute, and not left by the legislature to be picked up by the reader as an implication based upon sections dealing with different subject matters.
>
> [At page 226]

His Lordship concluded:

> A consideration of the terms of the Act, and of the bizarre consequences of the appellants' interpretation, leads inevitably to the conclusion that that interpretation is incorrect.
>
> *[Supra]*

(iv) On the question as to whether, assuming that the clauses of the Guarantee relied upon by the Bank were void, the sureties would be discharged from their liability under the Guarantee on the ground that there was variation of the Guarantee, Lord Brightman observed:

> Their Lordships do, however, feel considerable doubt whether it can properly be said that the omission from the debenture of a power to sell out of court was a "variance" of the agreement by the company to grant a fixed and floating charge within the meaning of section 86, which was the section upon which the appellants principally relied; and whether, in the terms of the Act, the appellants would have been discharged by the omission of the Bank to obtain the undertakings called for by the Letter of Agreement.
>
> [At page 226]

(v) As to the scope of section 86 (section 133 of the Indian Contract Act, see also the Privy Council decision in *Seth Pratap Singh* v *Moholalbhai* v *Keshavlal Harilal Setalwand* AIR (1935) PC 21, on appeal from India.

(vi) In reading section 86 of the Contracts Act as to the liability of the surety, section 63 and 64 should also be taken into consideration. If the agreement between the creditor and debtor is substituted by a new agreement or if the parties rescind or alter the original contract, it would appear that the surety will be discharged of his liability under section 86. But see the case of *Government of Malaysia* v *Adnan bin Awang* [1980] 2 MLJ 291 (HC) and Sinnadurai, 'Novations, Rescissions and Alternations of Contracts', (1980) 7 JMCL 139.

(b) Surety's right to indemnity

Anglo-American Corporation Ltd
v
Chin Pak Soon & Anor

[1966] 1 MLJ 267 High Court, Kuala Lumpur

See page 235 above.

(c) Liability of surety upon bankruptcy of debtor

Lee Wah Bank Limited
v
Joseph Eu

[1981] 1 MLJ 11 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah CJ (Malaya), Chang Min Tat and Salleh Abas FJJ

Cases referred to:-
(1) *In re Fitzgeorge Ex parte Robson* [1905] 1 KB 462.
(2) *Subramanian* v *Batcha Rowther* AIR (1942) Mad 145.
(3) *Bank of India* v *Cowasjee* AIR (1955) Bom 419,421.
(4) *McDonald* v *Dennys Lascelles Ltd* (1933) 48 CLR 457.
(5) *Citibank NA* v *Ooi Boon Leong & Ors* [1981] 1 MLJ 282.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): The short point in this appeal is whether the surety is released upon the discharge and annulment of the receiving and adjudicating orders against the principal debtor.

Both the Assistant Registrar and the learned judge thought so. Counsel on behalf of the appellant bank ('the bank') contended to the contrary. Relying on Commonwealth cases i.e., *In re Fitzgeorge;*[1] *Subramanian* v *Batcha Rowther;*[2] *Bank of India* v *Cowasjee*[3] and *McDonald* v *Dennys Lascelles Ltd,*[4] he argued that discharge of the bankrupt debtor in no way affects the liability of the surety who has guaranteed the debt of the bankrupt.

The provisions of section 35(4) of the Bankruptcy Act, 1967 which is *in pari materia* with section 28(4) of the United Kingdom Bankruptcy Act, 1914 was also cited to us in support of the proposition. The sub-section is as follows:

> An order of discharge shall not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt, or was jointly bound, or had made any joint contract with him or any person who was surety or in the nature of a surety for him.

The contention that found favour both with the Assistant Registrar and the learned judge is this: In essence a surety's obligation is to satisfy the obligation of the principal debtor; and therefore once that obligation is gone, in other words once the principal debt is gone, the liability under the guarantee also disappears. It is the application of the general rule of contract which is embodied in statutory form in sections 81 and 87 of the Contracts Act, 1950:

> 81. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.
> 87. The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

It may be observed that in such cases it is the act or omission of the creditor that discharges the liability of the surety, e.g., when the creditor enters into a contract with the principal debtor without the consent of the surety. To that general rule there is, however, an exception. A release in bankruptcy does not discharge the surety. That is because the discharge is not the act of the creditor, but by operation of law, i.e. it is the bankruptcy law and not the creditor that discharges the bankrupt. *Generalia specialibus non derogant.* In *Subramanian* v *Batcha Rowther, supra,* it was held:

> that a discharge of the principal debtor by operation of law does not discharge the surety,

and the remedy of the creditor against the guarantor should not be restricted to the amount that the debtor may by operation of law be compellable to pay. The rule applicable to cases of this nature was very clearly enunciated in *In re Fitzgeorge; Ex parte Robson, supra,* where Bigham J says: (page 464).

> I think in this case that the creditor is entitled to prove for the value of the guarantee that the debtor has given. It is said that, because the principal debt is gone, therefore, the liability under the guarantee to pay the interest on the debenture is also gone. I do not agree with that view. The principal debt is gone no doubt, but not by any act of the creditor. It is gone by operation of law. The principal debt will never be repaid, but in my opinion, the obligation of the debtor to pay interest under his guarantee remains.

The remaining question therefore that arises here for our determination is whether the bank is entitled to an Order 14 judgment. The principle applicable in this sort of cases has been stated very often in this court in recent years, the last case being in *Citibank NA* v *Ooi Boon Leong & 2 Ors:*[5]

> Where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the Assistant Registrar or the judge in chambers, or, for that matter this court, shall not deal with the whole matter under the RSC Order 14 procedure.

In the result the appeal is allowed and there will be an Order 14 judgment in favour of the bank for $40,832.92 with costs here and below.

Appeal allowed.

P Royan for the Appellants.
Ronald Khoo for the Respondent.

Note

Though an order of discharge shall not release a surety of his liability under the guarantee, a surety for payment of interest on a loan is not liable for any interest accured after the debtor had become bankrupt and had been discharged: *Re Moss* [1905] 2 KB 307.

INSURANCE

(a) Principles of interpretation of policy of insurance

Malaysia National Insurance Sdn Bhd

v

Abdul Aziz Bin Mohamed Daud

[1979] 2 MLJ 29 Federal Court, Kuala Lumpur

Coram: Raja Azlan Shah, Wan Suleiman and Syed Othman FJJ

Cases referred to:-

(1) *Edwards* v *Griffiths* [1953] 1 WLR 1199.
(2) *Mumford* v *Hardy & Anor* [1956] 1 WLR 163.
(3) *Tan Kwang Chin* v *Public Prosecutor* [1959] MLJ 252.
(4) *Public Prosecutor* v *Albert See* [1971] 1 MLJ 47.
(5) *Public Prosecutor* v *Lim Ching Chuan* [1972] 1 MLJ 27.
(6) *Public Prosecutor* v *Nasir* [1972] 2 MLJ 39.
(7) *Josephine Yii Chui Leng* v *Public Prosecutor* [1973] 2 MLJ 47.
(8) *Cheong Bee* v *China Insurance Co Ltd* [1974] 1 MLJ 203.
(9) *Smith* v *Accident Assurance Co* (1870) LR 5 Exch 302,307.
(10) *In the Estate of Crippen* [1911-13] All ER Rep 207.
(11) *Beresford* v *Royal Insurance Co Ltd* [1938] 2 All ER 602.
(12) *Hardy* v *Motor Insurers' Bureau* [1964] 2 All ER 742.
(13) *Tinline* v *White Cross Insurance Association Ltd* [1921] 3 KB 327.
(14) *James* v *British General Insurance Co Ltd* [1927] 2 KB 311.

RAJA AZLAN SHAH FJ: The facts which give rise to the present appeal may be briefly stated. On August 3, 1974 the respondent was driving his father's car BAK 6130 when it was involved in a collision with another car AQ 2634. Both vehicles were badly damaged. The driver of the latter car and his passenger suffered personal injuries. Car BAK 6130 was insured with the appellants under the provisions of Part IV of the Road Traffic Ordinance, 1958 from December 16, 1973 to December 15, 1974. The policy of insurance stated that 'the company shall not be liable in respect of any accident loss damage or liability caused sustained or incurred whilst the motor vehicle is being driven by any person other than an authorised driver.' The respondent and his father were named as the 'authorised driver', subject to the following:

> Provided that the person driving is permitted in accordance with the licensing or other laws or regulations to drive the motor vehicle or has been so permitted and is not disqualified by order of a Court of Law or by reason of any enactment or regulation in that behalf from driving the motor vehicle.

At the time of the accident the respondent had an expired driving licence. He first applied for a driving licence in 1972 when he was 18 years old. He was issued with a learner's licence and passed his driving competency test in March 1973. He was then issued with a driving licence for the period March 5, 1973 to March 4,1974. His driving licence had since been renewed annually on August 8, 1974 and August 30, 1975. Prior to August 3,1974 he had never been charged in any

court in connection with a driving offence nor had he prior to that date been disqualified by any court for holding or obtaining a driving licence.

In the circumstances the question arose whether the insurance policy was in force on the date of the accident and the test is not whether the insurers considered themselves on risk, but whether they were in law liable to indemnify the respondent. The appellants denied liability and relied on the exemption clause. The respondent argued that he was covered by the second limb of the proviso. He issued a writ in order to obtain a declaratory order, instead of taking the convenient course of issuing an originating summons. The case came before Harun J who came to the conclusion that the indemnity applied to him in the particular circumstances of the case. He said: 'I am satisfied that the second limb of the proviso does not refer to a current valid driving licence; if it did the proviso would not be in the disjunctive. The situation envisaged by the second limb is precisely that which plaintiff (respondent) finds himself in — a technical lapse to renew his driving licence. This is the only ground on which the defendant company is repudiating liability.' It is from that decision that the appellants now appeal.

It is of course established law that in this case the motor insurance policy which is a contractual document, is subject to the same general rules of interpretation as any other written document: see *Smith* v *Accident Insurance Co.*[9] One of those rules is that in any written document the words are *prima facie* to be construed 'in their plain, ordinary, popular meaning, rather than their strictly precise, etymological, philosophic, or scientific meaning': see 22 *Halsbury's Laws of England* 3rd Ed page 212 para 402. Only if there is a clause in the policy which is open to two constructions, the court will construe it *contra proferentem,* that is, against the insurers. The question of interpretation, here, is centred on the second limb of the proviso. It is common ground that the respondent was not covered by the first limb of the proviso as his driving licence had expired some four months before the date of the accident. Naturally a great deal of argument turned on the meaning to be attached to the phrase in the second limb 'has been so permitted'. It is also common ground that the words 'not disqualified by order of a Court of Law, or by reason of any enactment or regulation in that behalf from driving the motor vehicle' is to be given a restricted meaning as not disqualified from holding or obtaining a driving licence by reason of an order of the court or by reason of disease or physical disability (section 29) or age or otherwise (section 33).

'Has been so permitted' has been construed by the appellants to mean has been so permitted in accordance with the licensing laws etc, as referred to in the first limb. It is said to be an extension of the first limb, thus conveying the meaning that the driver must be in possession of a current driving licence. In considering this contention, it becomes necessary to examine the authorities in order to determine what is the accepted meaning. The trend in judicial opinion that is discernible in the decided cases which are said to support the appellants' view i.e., *PP* v

Albert See,[4] *PP* v *Nasir*[6] and *Cheong Bee* v *China Insurance Co Ltd,*[8] is that the courts are more ready to hold that the insurance company will not consider itself on risk when a person has broken a term of the insurance policy and he drives a motor vehicle with an expired provisional driving licence. Reliance was also placed on an observation of the learned judge in *Josephine Yii Chui Leng* v *PP*[7] to the effect that driving a motor vehicle with an expired driving licence bears the same legal consequences as driving with an expired provisional driving licence. Such observation in turn rested its authority on *Albert See's* case, *supra,* which specifically related to a case of a learner driver driving without 'L' plates and driving with an expired provisional driving licence. In my judgment, *Josephine Yii's* case, *supra,* is limited to its particular facts. In that case the insurance company considered itself on risk on the date of the alleged offence and that must have been one of the material factors which the learned judge took into account in arriving at his conclusion. If an insurance company had told the court that it considered itself on risk, the mischief at which the Road Traffic Ordinance is aimed did not arise, for, if an accident had taken place, it would have indemnified the assured so that the injured person would recover the money. It would not be necessary or appropriate to disagree with the factual basis on which the decision rests, but I must confess that I cannot follow it in so far it decides on the analogy of 'driving with an expired provisonal driving licence'. The reliance on *Albert See's* case, *supra,* is misplaced for there are important differences between the two cases. I do not find it necessary to pursue or elaborate the discussion of that topic here. No doubt it obviously calls for closer examination in an appropriate case. It is seldom that a court involved in a matter such as the present is not referred to some of the authorities. However I would once again emphasise what has so often been said before, that precedents are not to be slavishly followed; a case may be followed only for its strict *ratio decidendi.*

In my view the two limbs of the proviso are in the disjunctive, they must obviously refer to two different sets of circumstances excluding liability. The first limb is quite plain. It envisages the case of a person who is the holder of a driving licence authorising him to drive a motor vehicle of that class or description (section 25). What is the meaning of the phrase in the second limb 'has been so permitted'? According to the evidence before the learned judge, the appellants read the proviso, in particular the phrase under consideration, as not putting them on risk when the motor vehicle was being driven by the respondent with an expired driving licence. If that was the construction of the meaning of the phrase which was possible on the wording of the proviso, one would be able to say that the learned judge had erred in arriving at his decision,but it appears to me that the meaning is not open to doubt. The words 'and is not disqualified by order of a Court of Law or by reason of any enactment or regulation in that behalf from driving the motor vehicle' following immediately after the words 'has been so permitted' appears to me to indicate clearly, and I see no sufficient reason in any of the arguments for departing from the unequivocal meaning, that the

appellants were contemplating the case of a person who has been permitted to drive but has been disqualified for holding or obtaining a driving licence by reason of a court order or by reason of age or physical or mental disability. It also seems to me that as between the assured and the insurers, the exception clause in the proviso, on the ordinary principles of construction has, as far as possible, to be read against the insurance company, that is to say, if there is a doubt as to its extent, and the question were to arise as to the liability of the insurers, the construction most favourable to the assured must be given to him, but I have come to the conclusion that the learned judge was right in the interpretation he put on it.

It remains then to consider the question of public policy. It was submitted on behalf of the appellants that it would be contrary to public policy if it is to be construed that they were required to cover the respondent who was unlawfully on the road by reason of driving a motor vehicle with an expired driving licence. This rule of public policy which is in fact a branch of the rules of ethics is no easier to define than the meaning of the phrase 'has been so permitted'. Broadly speaking, the principle in the context of insurance law is that no man is allowed to profit at another person's expense from his own conscious and deliberate crime. Thus the murderer in *In the Estate of Crippen*[10] and the felonious suicide in *Beresford* v *Royal Insurance Co Ltd*[11] have had their claims defeated on the grounds that it would be contrary to public policy to assist a personal representative to recover what were in fact the fruits of the crime committed by the assured. In *Hardy* v *Motor Insurers' Bureau*[12] Lord Denning MR in the course of his judgment said:

> If Phillips (that was the driver in the case) had taken out a policy of insurance in those terms, and had afterwards been gulity of murder by deliberately running down a police officer or, as here, had been guilty of maliciously causing grievous bodily harm with intent, what would the legal position be? Assume that he had been convicted of the felony and had been afterwards made to pay damages to the widow or to the person injured, could he have claimed indemnity under the policy? Clearly not, for the good and sufficient reason that no person can claim reparation or indemnity for the consequences of a criminal offence where his own wicked and deliberate intent is an essential ingredient in it....

and he cited *Beresford* v *Royal Insurance Co Ltd, supra,* and went on:

> This rule is not rested on an implied exception in the policy of insurance. It is based on the broad rule of public policy that no person can claim indemnity or reparation for his own wilful and culpable crime. He is under a disability precluding him from imposing a claim.

On the other hand the motor manslaughter cases are not within these classes of cases and public policy does not prevent the enforcement of an indemnity: see *Tinline* v *White Cross Insurance Association Ltd*[13] and *James* v *British General Insurance Co Ltd.*[14] The reason behind it seems to be that the act to be indemnified is one intended by law that people should insure against. The logical test is whether the person seeking indemnity is guilty of a deliberate, intended and unlawful violence or

threats of violence. Road traffic cases e.g., manslaughter on the road by gross negligence, negligent driving and the like are not wilful and culpable crimes which make them contrary to public policy to allow a person to be indemnified. In the circumstances, having carefully reviewed the question of public policy, I do not think it applies in this case.

I would dismiss the appeal with costs.

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

Appeal dismissed.

Khoon Eng Chin for the Plaintiff.
Zainor Zakairah for the Defendants.

Notes

(i) *Beresford* v *Royal Insurance Co Ltd* [1938] AC 586 is often cited for the proposition of law that no person can benefit from a contract when such benefit results from the performance by him of an illegal act. In *Beredford's* case itself, the House of Lords held that it would be contrary to public policy to allow the personal representatives of the deceased to obtain the benefit under the insurance policy as the death was caused by suicide. It should be noted that the decision of the House of Lords may no longer be good law as suicide is no longer a crime in England.

(ii) The rule of public policy that a person may not claim indemnity as a result of his own deliberate or tortious act is not strictly applied in motor insurance policies. The non-application of this rule of public policy can be seen in the cases like *Tinline* v *White Cross Insurance Association Co Ltd* [1921] 3 KB 327 and *Hardy* v *Motor Insurers' Bureau* [1964] 2 All ER 742. The rationale for not strictly adhering to the general rule of public policy in cases of motor insurance is probably based on the ground that 'the social harm which would be caused by not enforcing such insurance rights outweighs the gravity of the anti-social act committed', or on the ground that public policy requires that the injured party be compensated, otherwise the whole scheme of compulsory motor insurance would break down.

BILLS OF EXCHANGE

(a) Cheques given for illegal consideration

Ratna Ammal
v
Tan Chow Soo

[1966] 2 MLJ 294 High Court, Kuala Lumpur

Cases referred to:-
(1) *Tatam* v *Haslar* (1889), 23 QBD 354.
(2) *The Board of Trade* v *Owen* [1957] 2 WLR p 351 at p '359.
(3) *Cope* v *Rowlands* (1836) 2 M&W 149; 2 Gale 231; 6 LJ Ex 63; 150 ER 707.

RAJA AZLAN SHAH J : The plaintiff claims against the defendant as drawer of cheque No 459527 for the sum of $50,000 dated 24th January 1961 and drawn by the defendent upon the Nederlandsche Handel-Maatschappy, Penang, (hereinafter referred to as the bank) payable to bearer. She claimed to be the holder of the said cheque on 24th January 1961 and duly presented it for payment on 5th July 1963 but the said cheque was dishonoured, payment thereof having been countermanded by the defendant. The plantiff gave notice of the dishonour to the defendant by letter dated 6th July 1963. The defendant admits that he was the drawer of the said cheque but pleaded that it was given by him to one Mahalingam Ratnavale for an illegal consideration contrary to public policy or forbidden by statute. He alleged that the plaintiff who is the mother of the said Ratnavale became the holder of the said cheque knowing fully well that it was given for an illegal consideration. In the alternative the defendant pleaded that the plaintiff paid no consideration to any party whatsoever to become the bearer of the said cheque.

The law applicable to the present case is the English Bills of Exchange Act, 1882, hereinafter referred to as the Act. By virtue of sub-section (2) of section 30 of the Act, every holder of a bill is *prima facie* deemed to be a holder in due course. That is, he is presumed to have given value for it in good faith, without notice of any defect in title of the person who negotiated it. He will therefore have to do no more than to prove the signature of the person sued, everything else being presumed in his favour. The burden will then be on the person sued to prove that no consideration has at any time been given. But to this rule there is an exception. If in an action on the bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is tainted with fraud or illegality of some kind, if in fact the consideration is, or is deemed to be, illegal, then this presumption no longer holds good. The burden of proof is shifted and it is now the holder of the bill who must prove affirmatively that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill, though not necessarily by himself: see *Tatam* v *Haslar.*[1] If he can do that, he will still win his action whatever the earlier history of the bill may be, unless he himself was a party to the fraud or illegality alleged. The holder who has been a party to the fraud or illegality can never succeed, though mere knowledge of it will not invalidate his title if he derives his title, not from a person whose own title is defective, but from one who is himself a holder in due course.

In the present case the defendant has admitted that he is the drawer of the said cheque and therefore the law presumes that the plaintiff is the holder of the said cheque in due course. The burden is therefore on the

defendant to prove that the said cheque was tainted with illegality or there was total failure of consideration. If he has satisfied the court that on a higher degree of probability there was the element of illegality or total failure of consideration then the presumption in favour of the plaintiff no longer holds good and it is thus for the plaintiff to prove that subsequent to the alleged illegality value has in good faith been given for the bill, though not necessarily by herself.

Having stated the law, I shall now consider the facts. The defendant is a businessman having a place of business at No 48, Prangin Road, Penang, under the firm's name of Chop Soo Seng. He was also connected with another business under Chop Guan Cheong of the same address. In 1956 he dealt in barter trade with Sumatra. The system in vogue then is as follows. He had to possess a licence from the Indonesian Consulate, Penang, in order to trade with Sumatra. When goods entered Penang, customs declarations had to be made. Payment for the goods were effected by 70 per cent cash payment through the bank and 30 per cent by way of barter trade. That evidence had not been challenged, and I accept it as it stands.

In 1958 there was unrest in Indonesia and goods were exported from that country through the good influence of military officers. Such goods freely entered our ports provided they were declared to the customs. Our Government did not permit remittances for such goods to Indonesia because of diplomatic severance. During this period businessmen sent their remittances either in cash or by goods through the black market in Singapore, and these clandestine payments were not known to our Government. Nonetheless these barter rights were very valuable because they fetched huge profits. They could also be assigned or sold to other people for huge profits. In 1960-1961 there was an acute shortage of goods in Sumatra and traders here saw good prospects of making such profits by exporting goods to that country. However, such goods could only be exported if they could obtain a permit from the office of the Controller of Foreign Exchange, Penang. The assistant controller in charge of foreign exchange in Penang at the time was one Mahalingam Ratnavale. He was assistant controller from 1st January 1958 (*vide* G N 1158/58) until 19th July 1960 (*vide* G N 3045/60). One Lee Yim Wah (DW2), a barter trader in Penang, saw the prospects of making huge profits. He had known Ratnavale in 1955 as a government employee in the Foreign Exchange Control Department, Penang. According to him, he discussed with Ratnavale the possibility of exporting goods to Indonesia and they came to an arrangement whereby on permission to export goods being granted through this good influence the owner of the barter rights would sell their rights to other traders and from the proceeds 25 per cent would go to the owners and 75 per cent to a syndicate consisting of Ratnavale, the staff of the Indonesian Consulate in Penang, and Lee Yim Wah.

Now, if this allegation is true, that would constitute an offence of criminal conspiracy within the ambit of section 120A of the Penal Code which reads as follows:

> When two or more persons agree to do, or cause to be done:
> (a) an illegal act,
> (b) an act, which is not illegal, by illegal means, such an agreement is designated a criminal conspiracy:
>
> Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

I am not here to give an exegesis of the law of criminal conspiracy beyond stating that it consists of the very agreement between two or more persons to commit a criminal offence irrespective of the further consideration whether or not these offences have been actually committed. It is perhaps sufficient in this connection to quote the words of Lord Tucker in *The Board of Trade* v *Owen:*[2]

> Accepting the above as the historical basis of the crime of conspiracy, it seems to me that the whole object of making such agreements punishable is to prevent the commission of the substantive offence before it has even reached the stage of an attempt and that it is all part and parcel of the preservation of the Queen's peace within the realm.

The agreement was between Lee Yim Wah, Ratnavale, and barter right owners to commit a crime under section 3(a) of the Prevention of Corruption Act 1961 which reads as follows:

> Any person who shall by himself, or by or in conjunction with any other person:
> (a) corruptly solicit or receive, or agree to receive for himself, or for any other person
>
> any gratification as an inducement to, or reward for, or otherwise on account of any member, officer or servant of a public body doing, or forbearing to do, or having done or forborne to do, anything in respect of any matter or transaction whatsoever, actual or proposed or likely to take place, in which the said public body is concerned, shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding ten thousand dollars, or to both such imprisonment and fine.

The fact that the crime was not committed or committed after the 'officer or servant' has ceased to have any influence in regard to his principal's affairs is immaterial and irrelevant. That officer or servant is not on trial in the instant case and it is not for this court to go into the merits. It is needless to stress the obvious fact that such agreement is illegal and void as being contrary to statute and public policy if its object, direct or indirect, is the commission of a crime. The law has been laid down by Baron Parke in *Cope* v *Rowlands,*[3] and I quote:

> It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect.

DW2 went to look for such traders who owned barter rights and found

eleven such people including the defendant. At that time the defendant had barter rights to the value of $1,400,000 in the name of his other business firm Chop Guan Cheong of No 48, Prangin Road, and such rights would fetch a profit of between $500,000 and $600,000. About February 1960 DW2 saw and negotiated with the defendant about the latter's barter rights. He told the defendant that he was Ratnavale's agent and that he could make the necessary arrangement to obtain the permit. The defendant believed him for, apart from knowing him for the last 20 years, he had bought such barter rights from him. The defendant handed all his customs declaration papers to DW2. In March 1960 DW2 saw Ratnavale in regard to the defendant's business. In July or August 1960 DW2 took the defendant to a house in Scotland Road, Penang, a government quarters, and there the defendant saw Ratnavale for the first time. They discussed the permit and the rate was ultimately fixed at 25 per cent, to the defendant and 75 per cent. to Ratnavale and his associates. The defendant agreed to consider the proposition. At that meeting it was also agreed that security in the sum of $50,000 be given to Ratnavale if the defendant should agree to that proposition. In January 1961 DW2 came to the defendant's shop. The defendant was anxious to get a permit as the barter rights then fetched considerable profits. He asked DW2 about it and the latter replied that it would be passed and asked him not to worry. The defendant then decided to accept Ratnavale's proposition and drew an undated cash cheque for $50,000 (Exh. P1) the subject matter of this suit.

DW3 Koay Teik Choon, stated in evidence that he prepared the body of the cheque on 19th January 1961 on the instructions of the defendant. He remembered the date because the cheque butt on which he wrote the date of the cheque was given to the police in the course of their investigations into this case. It was therefore not produced in evidence. No adverse presumption can be inferred from this omission because it was not deliberately withheld. In any case DW3 was not challenged in his evidence and there is no reason why his evidence should be rejected. I accept his evidence that he prepared the body of the cheque on 19th January 1961 and the cheque was not dated.

The defendant then signed the undated cheque and handed it to DW2 with instructions to hand it to Ratnavale. There was a stipulation that the said cheque was not to be negotiated or encashed until he had sold his barter rights and redeemed the cheque. The defendant denied handing the cheque to the plaintiff because he said that at that time he did not know the plaintiff. He said he first came to know her when her son Ratnavale came to negotiate on the renting of his house at No 33B Ayer Hitam some time towards the end of March 1961.

DW2 stated in evidence that he handed the cheque of Ratnavale at his house at Scotland Road in the presence of the plaintiff on 19th January 1961. He testified that he kept an account book of his barter right dealings sold and money given to Ratnavale and money retained by him. The account books were taken by the police who were investigating into this case. To my mind no adverse comment can be made on this point as there was no deliberate attempt to withhold the account books.

The defendant's barter rights were ultimately sold by DW2 in Singapore in July 1961 for $117,946.60 but he said he was paid only $57,525.30. In the meantime he said he had paid various sums totalling $20,500 to Ratnavale.

In March 1961 Ratnavale told DW2 that his work was temporarily suspended and as a result he had to vacate his government quarters and had to rent a private house. DW2 took Ratnavale, his wife, and the plaintiff to see the defendant with a view to renting his house at No 33B Ayer Hitam, Penang. These people became close friends. Ratnavale and DW2 jointly put up a shipping business in May 1963 under the name of Sin Min Shipping Co with a registered place of business at No 241, Beach Street, Penang. By the end of the year Ratnavale, the plaintiff, and the defendant entered into the business of importing condensed milk under the name of Maha Syndicate. The defendant did many things and favours for Ratnavale. He permitted Ratnavale to withdraw money from his firm Chop Soo Seng. To fortify that view the defendant produced a bundle of documents (Exh P9) which represents bills of Ratnavale which the defendant's firm had paid for him. They consisted of telephone bills in respect of premises at No 19, Scotland Road, which is the plaintiff's residence, water, conservancy, and electricity bills in respect of No 19, Scotland Road, and No 16, Cheesman Road (where Ratnavale's second wife resided), and Ratnavale's personal account. As things went Ratnavale and the defendant had had differences of opinion which resulted in a series of legal proceedings between them. In June 1963 the plaintiff and Ratnavale filed Civil Suit No 123 of 1963 in respect of the partnership business. In July 1963 the plaintiff instituted the present case against the defendant. In October 1963 Ratnavale and the plaintiff instituted Originating Motion No 13 of 1963 in regard to the trade mark of Maha Syndicate. In December 1963 the defendant filed Civil Suit No 349 of 1963 against both the plaintiff and her son for infringement of his trade mark. With regard to the said cheque, the defendant stated that he had on five or six previous occasions orally demanded for its return but was not successful. As Ratnavale wanted to cash it, the defendant countermanded it on 22nd March 1963.

The plaintiff's counsel sought to discredit the defendant's version in more than one way. Firstly, it was contended that there was the utter impossibility of the event which the defendant said had occurred. It was alleged that the entire transaction as pleaded in paragraph 2 of the statement of defence took place in August 1960 whilst the evidence showed that the said cheque was alleged to have been handed to Ratnavale in January 1961. In my view, I cannot read the paragraph as disclosing a transaction that occurred on one single day. To succumb to that temptation would be to ignore reality. Secondly, it was said that the defendant's evidence was contradicted by his own affidavit. I am not going into detail on that proposition beyond stating that it is lacking in merit. Thirdly, it was said that the defendant's evidence was contradicted by that of Lee Yim Wah. To my mind the gist of his evidence on this point was that the sum of $20,500, which was another aspect of the same transaction, was not correlated with the said cheque. The money

was paid in 1960, part of which was given to Ratnavale through him and the balance direct to Ratnavale. If this aspect of the case is not overlooked,to my mind there is no contradiction between the two witnesses. The same reasoning would be accorded to the sum of $20,878.19. Fourthly, it was contended that Lee Yim Wah's evidence is contradicted by his own statutory declaration (Exh P10). I admitted the declaration as a previous statement. I am satisfied that he made the declaration before the commissioner for oaths at Penang. The *praecipe* confirms this. The commissioner is now dead, but it was proved to my satisfaction that the signature is his. In this court Lee Yim Wah has retracted the contents of his declaration at his own peril. However that may be, it should not invariably be a reason for rejecting an explanation. He explained that when the declaration was brought to him by Ratnavale it had already been prepared by him at his solicitor's office in Ipoh. Ratnavale told him that as he was always going to Jakarta his declaration would facilitate him to sue the defendant in the present case. In my view, that declaration was made in contemplation that he would not be made available as a witness in the present case. Since he was a witness in the present case his declaration may only be used as a previous statement. In the light of his explanation I have therefore to consider his whole evidence with caution. Fifthly, it was argued that in assessing the value of the evidence of both the defendant and Lee Yim Wah there is the circumstance that the barter rights were in the name of Chop Guan Cheong which was under the sole proprietorship of one Tan Guan Fatt. The account books of the firm were not produced to show that they possessed $1,400,000 worth of barter rights. Lee Yim Wah said, and I quote:

> I know Tan Guan Fatt. He is the sole proprietor of Chop Guan Cheong under the Business Regulations Ordinance but he is in partnership with the defendant.

The defendant said, and I quote:

> These rights were in the name of Chop Guan Cheong, another shop of mine.

In the eyes of the law, Tan Guan Fatt may be the sole proprietor, but as between their own private arrangement they were partners. So be it . With regard to the account books, no doubt they can in many cases be cogent and convincing, but the lack of them, however, should not be a criterion for not considering the defendant's evidence that he is a businessman dealing in barter trade with Indonesia and such barter trade had a large amount of profits. It is therefore highly probable to my mind that the barter rights of Chop Guan Cheong were worth $1,400.000. Sixthly, it was contended that if it was necessary to provide security that could have been done by Lee Yim Wah selling the barter rights and with the proceeds paying the defendant and Ratnavale their respective shares. Security in the form of a cheque would therefore be otiose. That argument is attractive, but it overlooks this fact: the said cheque was a condition precedent for getting the barter rights. For once

it had been granted and the barter rights sold there was no way to enforce payment should Lee Yim Wah in collaboration with the defendant refuse to pay Ratnavale as the transaction was tainted.I observe that this is an unusual transaction demanding unusual terms, and accordingly a request for a cheque as security is not altogether unreasonable. Lastly, it was strenuously urged that what Ratnavale had told DW2 and the defendant about the alleged conspiracy was not admissible as infringing the hearsay rule. I cannot accede to that proposition. What in fact happened according to the defendant's version was that at one stage DW2 conferred with Ratnavale about the prospects of making money. In the instant trial Ratnavale was not called as a witness for obvious reasons. DW2 gave evidence as to what had transpired between them. His evidence related to their conference and their ultimate decision to find persons with barter rights who were desirous of selling them and to share the profits between them. The omission on the part of Ratnavale to give evidence to support DW2's evidence would only affect the weight of the latter's evidence and no more. In estimating what weight to be attached to DW2's evidence, regard must be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of his evidence and in particular to the question whether or not he had any motive to conceal or misrepresent the facts.

The plaintiff's case is as follows. She is a widow aged 66 years. She stated that her late husband, a man of some wealth, died in March 1959 leaving her some property — estates in Tampin, Gemas, Penang and Kuala Lumpur. Her son Ratnavale was the assistant controller of foreign exchange, Penang, and lived at No 71, Scotland Road, which is a government quarters. When he left the government service he rented the defendant's house at No 33B Ayer Hitam. This was in December 1960. The plaintiff then came to know the defendant and they became close friends. About two or three weeks after Ratnavale had moved into his new house, she said that the defendant came with Ratnavale to her house at No 19, Scotland Road, and explained his difficulties to her and asked her for a loan. After consulting Ratnavale whether it was alright she gave him a cash cheque dated 27th December 1960 for $3,000 (Exh D4). In return the defendant gave her a cheque for a similar amount as security. That loan has been settled. The plaintiff stated that on 13th January 1961 the defendant came again with Ratnavale and asked her for another loan of $10,000. After consulting Ratnavale she gave him a cash cheque for $9,000 (Exh D5) and $1,000 in cash. In return the defendant gave her a cheque for $10,000 after telling her not to pay it into her bank since he would soon have the money to repay. At this period the plaintiff had a bank account in her own name with the Overseas Chinese Banking Corporation and another account with the Indian Overseas Bank. The account with the former bank was in the red but she said she had over-draft facilities to the amount of $80,000. In fact she said her Scotland Road house was mortgaged by Ratnavale to the bank to safeguard the amount in order to provide for her children's marriages, her children's studies abroad, maintaining the Scotland Road house and

the estates and financing Ratnavale in some petty business. Her account with the Indian Overseas Bank was started in 1959 with a modest sum. She had also another joint account with her children in another bank the name of which she said she could not remember. It was also a small account. When confronted with the question as to whether it would have been more convenient for her to draw a cheque for $10,000 in response to a request for a loan for that amount she replied that since she had ready cash of $1,000 she gave that amount to the defendant together with Exh D5. She explained that as her account with the Overseas Chinese Bank was in the red, any over-draft would carry interest. The plaintiff alleged that on 21st January 1961 the defendant came again with Ratnavale to her house and asked for yet another loan of $40,000. Again, after consulting Ratnavale, she gave the defendant a cash cheque for $25,000 (Exh D6) and told the defendant that he could have the balance of the money later if he urgently needed it. It was alleged by her that the defendant gave her a receipt for a similar amount. On 23rd January 1961 the defendant again came with Ratnavale and requested for another loan of $15,000. Again, after consulting Ratnavale, she agreed and did give him a cash cheque for this amount (Exh D7). She said that the defendant wanted to give her a receipt but she did not want it when the defendant told her that he would give her his cheque on the following day. On that day the defendant came and gave her a cash cheque for $50,000 (Exh P1), the subject matter of this suit. She then returned to him his cheque of $10,000 and his receipt. It is interesting to note that on each occasion it was alleged that a loan was given to the defendant, Ratnavale was always present and the plaintiff had to consult him before giving any loan. Her explanation was that she had to consult Ratnavale as she had no one else to consult. She now claimed that the loan had not been repaid despite repeated demands.

The defendant admitted that Exh D6 was borrowed from the plaintiff and credited to his account. There is an entry in the credit column of the bank statement of Chop Soo Seng, Exh P1 1, to wit, 'January 23, PD — $25,000'. 'PD' means paid in deposits. But he denied that the said cheque, Exh P1, was given in consideration for cheques Exhs D5, D6 and D7 and cash $1,000. Lee Kim Seng, DW4, the defendant's former clerk and cashier testified that Ratnavale gave his cheques Exhs D5 and D7 on 13th January 1961 and 24th January 1961 respectively and asked him to cash them at the shop. As there was insufficient money at the shop, Ratnavale asked him to get them cashed at the bank. DW4 did that while Ratnavale waited at the shop. He then handed the cash to Ratnavale. Apart from the two cheques,Ratnavale had asked DW4 to cash several cheques ranging from $500 to several thousand dollars. Plaintiff's counsel to contradict this assertion. Firstly, it was contended that there was no reason why Ratnavale should have asked DW4 to cash the cheques for him at the bank. if he wanted to cash them he would have no difficulty in going to the bank himself. To my mind, to ask DW4 the cashier to a businessman dealing in barter trade to cash cheques involving large sums of money is not unreasonable for it would not

attract public attention. But for Ratnavale, an ex-government employee, to cash cheques within a space of ten days would attract such attention. It may be argued that since they were plaintiff's cheques no criticism would be made against Ratnavale if he had cashed the cheques himself. That may be so, but the plaintiff had said nothing on that point. What she alleged was that she handed those cheques to the defendant, but when we consider Koay Teik Choon's evidence (DW3), the probability that was so is no longer tenable. When asked by the plaintiff's counsel about the cheque for $3,000 dated 27th December 1960 (Exh D4), DW3 testified that Ratnavale gave him the said cheque and he encashed it at the bank and gave him the money. That part of his evidence was never challenged and to my mind it has a ring of probability. If it is probable that Ratnavale had given Exh D4 to DW3 to encash at the bank, it is not highly improbable that Ratnavale had asked DW 4 to cash Exhs D5 and D7 at the bank. Secondly, it was said that the bank statement (Exh P11) showed that on 13th January 1961 the account of Chop Soo Seng was credited with a sum of $10,000 cash and on 24th January 1961 with the sum of $16,800 cash. That being so, it was more probable that Exhs D5 and D7 were presented to the bank. That argument,though it has its attractions is, I think, too great a simplification of the matter and omits various considerations. If Exhs D5 and D7 were credited to the plaintiff's account, then the entry next to the date would bear the letters 'CH', meaning that the credit was made by cheque. Again, the entry of $10,000 cannot be tallied with the encashment of the cheque for $9,000 (Exh D5). If such entry consisted of the Exh. D5 and the sum of $1,000 in cash, then the entry would have been 'CH' for $9,000 and 'CS' for $1,000. To my mind, the said entry and Exh D5 bear no relation to one another. I would also make a similar observation on Exh D7. The entry of 'CS' for $16,800 on the credit column cannot arithmetically or mathematically be reconciled. However, a cogent piece of evidence in favour of the defendant is that, to my mind, it is a little strange for the plaintiff, who was enjoying overdraft facilities with her bank, to lend money to the defendant who was also enjoying similar over-draft facilities but for a bigger amount. In the light of this observation I have to consider the defendant's bank statement (Exh P11). On page 6, starting from 10th January 1961 to 16th January 1961, for a brief period of six days the amount paid in to the credit of the defendant was nearly $25,000. And on page 7 which covers the period 17th January 1961 to 24th January 1961, a brief period of a week, the payments received, excluding the cheque Exh D6 for $25,000 which is admitted, would be close to $40,000. An analysis of the credit items in pages 6 and 7 of the bank statement, apart from the two entries of $10,000 and $16,800 would show that for a period of 13 days close to $60,000 had been paid in to the credit of the defendant. This,in my view, swings the balance of probability in favour of the defendant that he never borrowed these monies from the plaintiff.

The above observation must then be construed in the light of the plaintiff's background, and when that is done I have no doubt in my mind that her evidence is not worth a moment's glance. She contended that her late

husband died possessed of some wealth. However, she was unable, and from her demeanour in the witness box she was unwilling, to divulge the extent of that wealth although she did give some indication of the property at four places. The best evidence available would be to furnish the petition for probate in respect of her late husband's estate. That was not done. At no time was she in business apart from being a sleeping partner in Maha Syndicate. The question that follows is how did she obtain all those monies which she claimed she loaned to the defendant. After anxious consideration I cannot but come to the inevitable conclusion that she did not lend any money because she had none. I base my conclusions on the following grounds. She contended that the $50,000 loan was made up by adding Exhs D5, D6 and D7, which make a total of $49,000. Arithmetically, $1,000 was missing, so she said she gave $1,000 in cash to the defendant. In view of my observations on the bank statement of Chop Soo Seng (Exh P11) and of the probability that a businessman like the defendant who enjoyed greater over-draft facilities would not borrow money from the plaintiff who enjoyed a lesser amount of overdraft facilities, her attempts to justify the $50,000 loan cannot stand. Secondly, the estates and wealth which she claimed she derived from her late husband were but a figment of her own imagination. No evidence was led to substantiate her averment. Thirdly, only ten days separate these three cheques (13th — 23rd January 1961) involving $49,000. Apart from the consideration of over-draft facilities, it is not in line with human conduct for a person to request for a series of loans within a short space of time for so large an amount, and it is also against human nature for a person to grant a series of loans within a short space of time for so large an amount. Such proposition as the plaintiff contended not only strikes the mind with utter amazement but also to the point of incredulity. If it is necessary to decide between the evidence of the defendant and that of the plaintiff, I have no hesitation in accepting that of the defendant. He gave his evidence in a straight-forward manner and I consider him to be a truthful witness. On the other hand, the plaintiff was speculative and at times evasive in her answers in cross-examination. The weight and character of her testimony can be gauged by the various wild statements she made in court such as the one that she was helping her son in a petty business; upon being pressed by defence counsel, the 'petty business' turned out to be the Maha Syndicate which she admitted as having a capital contribution by her son and herself totalling $1,161,000. How did she raise that large sum of money? She said she mortgaged her Scotland Road house to provide for that amount and with the same source of income she said she had to provide for her children's marriages, their education abroad, and maintaining her house and estates. Would that amount raised on the mortgage, alleged to be $80,000, be sufficient to provide capital for Maha Syndicate? The answer speaks for itself. However, in the next breath she claimed that the $1,161,000 was raised by mortgaging her Scotland Road house and her two other estates in Kuala Lumpur and Gemas which had since been redeemed, and overdrafts. On being asked for how much the estates were mortgaged she said she did not know.

Having reviewed the evidence as a whole, I am satisfied that on the balance of probability as is required to be proved in a case of this nature, the defendant has substantiated his claim that the cheque was given to Ratnavale and that at the time it was given it was tainted with illegality and is therefore void. It is manifest that in the circumstances this court cannot entertain the plaintiff's claim. Here I pause to comment on counsel for the plaintiff's submission that once the defendant and DW2 have contradicted themselves there must be corroboration to support their evidence. In my view, the two witnesses have not materially contradicted themselves. No doubt, as I have indicated above, DW2's evidence must be treated with caution, but after observing his demeanour I accept his evidence. That, coupled with the defendant's evidence and other surrounding circumstances have led me to the conclusion at which I have arrived.

That being the case, it is now on the plaintiff to prove that subsequent to the illegality, value has in good faith been given for the bill. She has failed to do that, her assertion being that she received the said cheque direct from the defendant. In respect of that proposition, I have not the least hesitation in saying that is highly improbable. I therefore dismiss the case with cost.

Claim dismissed.

PP Dharmananda for the Plaintiff.
OC Lim for the Respondent.

Notes

(i) It is unclear as to why reference was made in this case to the English Bills of Exchange Act 1882 and not to the Bills of Exchange Ordinance 1949 (FM Ordinance 75 of 1949) which was extended to Penang on August 1, 1959. See now Bills of Exchange Act 1949, (Revised 1978; Act 204)

(ii) It should, however be pointed out that many of the provisions of the Malaysian Act is in *pari materia* to the English Act, 1882. Section 30(2) of both the statutes provides as follows:

> Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

See generally *Chitty on Contracts, Specific Contracts* (25th edn), para 2492 and 3627 and 4 *Halsbury's Laws of England* (4th edn) para 384-387.

(b) Effects of a wrongful dishonour of a cheque

The Chartered Bank
v
Yong Chan

[1974] 1 MLJ 157 Federal Court, Kota Kinabalu
Coram: Azmi LP, Ong Hock Sim and Raja Azlan Shah FJJ

See under Practice and Procedure at page 805 below.

Notes

(i) Raja Azlan Shah FJ (as he then was) emphasised the proper mode of drafting a statement of claim in actions based on a wrongful dishonour of a cheque by a bank. Though, generally the plaintiff has two main causes of actions against the bank, namely, one for breach of contract and the other for libel, it is important for the plaintiff to state the two causes of action clearly in his statement of claim.

(ii) As to, whether the words 'refer to drawer' may constitute libel in cases where a cheque presented by a third person is dishonoured by a bank, see the cases referred to in 3 *Halsbury's Laws of England,* (4th edn) para 62, note 4.

(iii) The Sabah Partnership Ordinance 1961 (Sabah Ordinance No 1 of 1961) referred to by Raja Azlan Shah FJ was extended to apply to all the States of Malaya by the Partnership (Amendment) Act 1974 (Act A240) which came into force on July 1, 1974.

MONEYLENDERS

(a) Non-compliance with section 16(3) of Moneylenders Ordinance

Overseas Union Finance Ltd
v
Lim Joo Chong

[1971] 2 MLJ 124 High Court, Kuala Lumpur

See under Land Law at page 634 below.

Note

(i) Since the decision of the Privy Council in *Menaka* v *Lum Kum Chum* [1977] 1 MLJ 91 it is now firmly established that non compliance with the provisions of the Moneylenders Ordinance will render the moneylending transaction unenforceable. See also the Federal Court cases of *Yeep Mooi* v *Chu Chin Chua & Ors* [1981] 1 MLJ 14 and *Wong Yoon Chai* v *Lee Ah Chin* [1981] 1 MLJ 219.

(ii) In *Menaka* v *Lum Kum Chum, supra* the Privy Council in holding that an agreement entered into by the parties to be illegal having been made in contravention of the Moneylenders Ordinance, held that relief could be granted under section 66 of the Contracts Act. As to the scope of section 66, see Sinnadurai, *The Law of Contract in Malaysia and Singapore* (1979) OUP, Chapter 8.

(iii) See further notes on this case in page 640 below.

(b) Admissibility of evidence to show moneylending business

Chellappah
v
Official Assignee

[1970] 1 MLJ 220 High Court, Kuala Lumpur

Cases referred to:-
(1) *Nash* v *Layton* [1911] 2 Ch 71.
(2) *Marshall* v *Goulston Discount (Northern) Ltd* [1967] Ch 72.

RAJA AZLAN SHAH J: The applicant as a creditor of a bankrupt lodged with the Official Assignee a proof of debt amounting to $1,565 against the bankrupt's estate. The claim is based on an 'on demand' note dated 3rd May 1956 for $1,000 bearing interest at 12% per annum. The Official Assignee rejected the said proof on the ground that the creditor was an unlicensed moneylender and therefore his claim was unenforceable under section 15 of the Moneylenders Ordinance. Subsequent investigations by the Official Assignee proved that the applicant had on two subsequent occasions made loans of $2,600 and $347 to two different persons at interest of 18% and 12% per annum respectively.

This is an application to set aside the decision of the Official Assignee. It is said on his behalf that the respondent erred in taking into consideration those two subsequent loans in order to prove the required regularity, continuity and system which is characteristic of carrying on a moneylending business.

It is established law that loans made during a reasonable period immediately preceding the transaction in question are relevant and

admissible: see *Nash* v *Layton*[1] It seems to me that there is nothing in *Nash* v *Layton* which prevents the court from taking into consideration loans made after the date of the relevant transaction in order to establish the required regularity, continuity and system in moneylending business. In fact that point was not argued or discussed in that case. There is the authority of *Marshall* v *Goulston Discount (Northern) Ltd*[2] for the proposition that evidence of subsequent loan is very material in order to show that a person was a moneylender at the time of a particular transaction. In the light of this authority, it was perfectly proper for the respondent to take into account those two subsequent loans to show that the applicant was an unlicensed moneylender on 3rd May 1956.

The application is dismissed with costs.

Application dismissed.

G Vadiveloo for the Applicant.
Chong Hee Choy for the Official Assignee.

(c) Compliance with section 21 of Moneylenders Ordinance

Gulwant Singh
v
Amar Kaur

[1968] 1 MLJ 107 High Court, Kuala Lumpur

Cases referred to :-
(1) *Arjan Singh* v *Hashim Angullia* [1941] MLJ 55.
(2) *Ramasamy Chettiar* v *Wong Poh Fatt* [1960] MLJ 43.
(3) *Teja Singh* v *Rattan Singh* [1961] MLJ 39.
(4) *Palaniappa Chettiar* v *Tan Jan* [1965] 1 MLJ 182.
(5) *Karuthan Chettiar* v *Parameswara Iyer* [1966] 2 MLJ 151, 153.
(6) *Lewis* v *Packer* [1960] 1 All ER 720.
(7) *In Re Hinchliffe* [1895] 1 Ch D 117, 120.
(8) *Grant Australian Gold Mining Co* v *Marlin* (1877), 5 Ch D 10.
(9) *Day* v *William Hill* [1949] 1 All ER 219, 221.

RAJA AZLAN SHAH J: This appeal brings in review the scope and effect of the provisions of sub-section (1) of section 21 of the Moneylenders Ordinance, 1951. The one vital question that arises is whether a statement of account which is attached to the statement of claim must be signed by the moneylender or his agent.

Shortly stated, the facts are as follows. The plaintiff, a licensed moneylender, filed his statement of claim against the defendant for the recovery of a loan under the Moneylenders Ordinance. Paragraph 4 thereof, which is the crux of this appeal, avers that the defendant has so far paid nothing towards account of interest and/or towards account of principal; a copy of the statement of account under the Moneylenders Ordinance, 1951, is attached and marked 'P2'. The statement of account

is in the form in the First Schedule to the Ordinance, but it was not signed by the plaintiff or his agent. At the trial before the learned magistrate a preliminary objection was taken to strike out the statement of claim on the ground that the statement of account was not signed by the moneylender or his agent as required by section 21(1) read with section 19(1). The learned magistrate upheld the objection and the plaintiff now appeals to this court.

It can no longer be said that the moneylender is being taken by surprise by a new technical defence. As long ago as 1941 it was perfectly clear to the moneylending community that the particulars in the statement of account as prescribed in section 7(1) of the Straits Settlements Moneylenders Ordinance (Cap 218) which is *in pari materia* with section 19(1) of our Moneylenders Ordinance should accompany the writ, and non-compliance with the statutory requirement is an irregularity which the court cannot waive and will entitle a defendant to have the writ set aside with costs: see *Arjan Singh* v *Hashim Angullia*.[1] In that case the action was commenced by a writ of summons. The principle in *Arjan Singh's* case has been extended to cover a case commenced by way of an originating summons: *Ramasamy Chettiar* v *Wong Poh Fatt*[2]. One year later, the Court of Appeal affirmed the principle laid down in both the earlier cases: see *Teja Singh* v *Rattan Singh*.[3] In my view, those cases do not go so far as to bear out the proposition that the statement of account which accompanies the writ of summons must be signed. That cannot be extracted from the judgments. My attention was drawn to the case of *Palaniappa Chettiar* v *Tan Jan*[4] in which the Federal Court held that an unsigned statement of account under section 21 of the Moneylenders Ordinance exhibited to an affidavit which supported the originating summons was part of the affidavit and the signature attached to the affidavit as a whole and to every part of it, and therefore the provisions of section 21 of the Moneylenders Ordinance has been complied with.

Counsel for the respondent places reliance on the other point canvassed before the court, and that was that by reason of the Schedule to the Moneylenders Ordinance, which sets out the form of the certificate under sections 19 and 21 and which contains no place for a signature, there was no necessity for the certificate under section 21 to be signed. The court took the view that a statement in the form set out in the Schedule "is a statement within the meaning of the word 'statement' as used in section 19, but it does not in any way dispense with the necessity for that statement having been drawn up in the form in the Schedule and then be signed".

The contention of counsel for the appellant to which I now turn derives from an observation of Gill J in *Karuthan Chettiar* v *Parameswara Iyer*[5] where the learned judge took the view that the statement of account exhibited to the statement of claim which was not signed by the plaintiff or his agent was not fatal to the plaintiff's case so long as 'the statement of account was produced by the moneylender or his money-lending agent or their solicitors, who must be treated as their agents for the purpose of production of the accounts'.

In my view, *Palaniappa Chettiar's* case can be explained in this way.It was a case commenced by way of originating summons supported by affidavit to which an unsigned statement of account was exhibited (RSC, O 55 r 5a). As the originating summons is not a statement of claim and therefore not a pleading: see *Lewis* v *Packer*[6], the statement of account does not form part and parcel of the summons and therefore the statement of account must be signed in accordance with section 21. That seems to be the *raison d'etre* underlying the second limb of the judgment in that case. But the matter does not rest there. In the circumstances of the case, the court went further to hold that on the authority of *In Re Hinchliffe*[7] an exhibit to an affidavit and therefore the unsigned statement of account referred to in the affidavit was part and parcel of the affidavit with the result that the said statement is in compliance with section 21.

The present case is different. It was commenced by a statement of claim signed by the moneylender's solicitors. The signature is a voucher that the case is not a mere fiction: *per* James LJ in *Grant Australian Gold Mining Co* v *Martin*[8]. The statement of claim is a pleading. Any document referred to in the pleading becomes part and parcel of the pleading: see *Day* v *William Hill*[9]. Therefore the statement of account becomes part and parcel of the statement of claim. In the circumstances I am in accord with the observation of Gill J in *Karuthan Chettiar* v *Parameswara Iyer, supra,* that as long as the statement of account is produced, that is, it is attached to the statement of claim, that is in compliance with the provisions of section 21 and it is immaterial whether it is produced by the moneylender himself or by his solicitors who must be deemed to be his agents for the purpose of instituting the proceedings.The present appeal is sufficient to dispel the specious doctrine that an unsigned statement of account attached to a statement of claim transgresses the provisions of section 21.

I will therefore allow the appeal with costs. As the learned magistrate has been posted elsewhere in a different capacity, this case should be tried before another magistrate.

Appeal allowed. Re-trial ordered.

KL Devaser for the Appellant.
J Nadchatiram for the Respondent.

EQUITABLE ASSIGNMENT AND EQUITABLE RIGHT TO LIENS

(a) Equitable assignment

Malayawata Steel Berhad
v
Government of Malaysia & Anor

[1977] 2 MLJ 215 Federal Court, Kuala Lumpur
Coram: Suffian LP, Raja Azlan Shah and Wan Suleiman FJJ

Cases referred to:-
(1) *Williams Brandt Sons & Co* v *Dunlop Rubber Co* [1905] AC 454,462.
(2) *Re McArdle's case* [1951] 1 All ER 905.
(3) *Durham Brothers* v *Robertson* [1898] 1 QB 765.
(4) *Tancred* v *Delagoa Bay and East African Railway* (1889) 23 QBD 239.
(5) *Ex parte Hall, In re Whitting* (1878) 10 Ch D 715.
(6) *Coulls* v *Bagot's Executor and Trustee Co Ltd* [1967] ALR 385.

RAJA AZLAN SHAH FJ: The appellants supplied steel bars to the builder, NKHC. The question on the appeal was whether the arrangement contained in the letters of July 20,1968, August 8 and 10, 1968 and September 13 and 18, 1968 made between NKHC, the appellants, and JKR ('the respondents') was a valid equitable assignment by NKHC to the appellants of all monies due to NKHC from the respondents. If it was not, that was the end of the matter. If it was, then a further question arises as to the quantity of steel bars supplied and their value.

The circumstances under which this litigation arose were as follows. NKHC had contracted with the respondents to construct a Radio House, two office towers and a large auditorium at Bukit Putri, Kuala Lumpur, for the sum of M$7,870,013.95. That contract was entered into in January 18, 1967. By exchange of letters dated June 25, July 2, and July 25, 1968 the appellants agreed to supply NKHC with steel bars and the terms of payment were by way of irrevocable 120 days letter of credit or by JKR guarantee. These terms, which was the issue in the present dispute, were subsequently modified by the parties *vide* the exchange of letters.

On July 20, 1968 NKHC wrote to appellants 'in respect of the term of payment for your above steel supply will be accepted if the PWD is authorised to deduct the amount from our interim payment and made direct to you instead of a JKR guarantee.'

On the same day NKHC wrote to JKR with a copy to appellants regarding the alternative arrangement of payment as agreed between NKHC and appellants; the letter reads, *inter alia:*

> In this connection, we hereby agree to authorize the PWD to deduct from our progress payment and make direct payment to Malayawata Steel Berhad on the amount of steel supplied for the above project. We would like to have your written confirmation with a copy to Malayawata Steel Berhad that the PWD can arrange the above.

JKR replied in August 8, 1968, *inter alia,* as follows:

> 2. Your request has been considered by the Treasury and has been approved. However, please note that for *purpose of progress payments,* the deformed steel bars (whether as unfixed materials on site or incorporated in the works) will be valued in accordance with the conditions of contract. To assist the Quantity Surveyor in assessing the quantities of steel brought on to the site, please arrange for copies of Malayawata's delivery notes of the steel to be sent to this office.

On August 10,1968 NKHC confirmed by letter to JKR that they were agreeable to the JKR's suggestion contained in para 2 above.

On September 13, 1968 NKHC again reminded the appellants of their new arrangement with regard to the method of payment. The final paragraph of the letter reads:

> We wish to draw your attention to the arrangement agreed between you and our Messrs Lim and Ooi for you to forward all your Invoices to us for checking and verification first and thereafter we will forward your invoices together with our recommendation for payment to Jabatan Kerja Raya. Please therefore note that in future you should not forward any Invoices to Jabatan Kerja Raya direct but will follow the procedure as stated above so as to avoid referring back and forth as the most important thing is that all tonnage received must be checked and confirmed by us first.

The appellants confirmed the new arrangement *vide* their letter of September 18, 1968 to NKHC which reads:

> We confirm we have agreed to this arrangement and are pleased to note that you have also promised to submit the duplicate invoices to the PWD as soon as you have completed the checking and will copy us the letter addressed to the PWD indicated therein the amount to be deducted from your progress payments.

NKHC were in financial difficulties and in October 8, 1969, the appellants sued them for a sum of $211,618.64 (inclusive of the present claim) being balance due in respect of steel bars supplied as at September 30, 1969 — *vide* KL High Court CS 1797/1969. Before the case got off the ground NKHC was made a bankrupt by Messrs Jardine Waugh (M) Sdn Bhd in 1970. As a consequence, the 2nd respondent was brought in as a second defendant so that the court could adjudicate finally and conclusively the dispute between the parties in one action.

The learned trial judge held that the assignment was conditional and not absolute and on the facts it was not enforceable. He therefore dismissed the claim. The appellants appealed on the ground that it was a valid equitable assignment.

The learned trial judge in a painstaking judgement analysed the evidence and arrived at the view that it was within the knowledge of all parties that the assignment was subject to certain conditions and was not intended to be absolute. The framework of the arrangement, so the judge held, was that JKR on behalf of NKHC would pay direct to appellants subject to the conditions, first, that for the purpose of computing progress payment, all steel bars would be valued in accordance with the conditions of contract between the government and NKHC, and, secondly, to assist the Government Quantity Surveyor in assessing the quantity of steel delivered at site, copies of appellants' delivery invoices should be sent to JKR. That would inevitably have involved reference to NKHC. This finding, the judge said, was substantiated by what was stated in the final paragraph of the letter of September 13, 1968 and confirmed by the appellants in their letter of September 18, 1968. He therefore held on the evidence that the parties acknowledged NKHC's right to give instruction to JKR and to determine the amount to be deducted and paid to appellants. If it was the intention

of the parties to make an absolute assignment, then there was no necessity to reserve to NKHC the power to direct JKR as to the amount to be deducted from each progress payment.

I am prepared to accept, for the purposes of this judgment, the view that if what was clear as evinced by the new arrangement was to assign, to make over all the progress payments completely and absolutely to the appellants, they are entitled to succeed. But it seems to me equally clear that whether the arrangement had that effect is a matter of the intention to be derived from that arrangement itself and the evidence of it. No rule can be laid down as to the form requisite for a valid equitable assignment. 'The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear': see *Williams Brandt Sons & Co* v *Dunlop Rubber Co.*[1]

The question therefore arises as to whether the arrangement which as the learned judge held was the framework of the assignment in the present case was absolute and not conditional. What is meant by a valid equitable assignment is well illustrated in the judgments delivered in *Re McArdle's*[2] case where the real issue was not the law of consideration but the construction of the instrument claimed to be an assignment. In that case the appellant failed because the document on which she relied was not complete. In the form in which it was drafted, the executors (the holder of the fund) 'would not have been obliged to pay that sum without taking proper steps to verify that the work... had... been done. That would inevitably have involved reference to assignors.' Because of the requirement of reference to the assignors the gift was not complete: they had a *locus poenitentiae.* In *Burham Bros* v *Robertson*[3] the assignment of a book debt was expressed to endure until, and only until, money lent by the assignee to the assignor was repaid. This was held to be a conditional assignment. It did not transfer the whole debt to the assignee unconditionally, but only until the advances were repaid. The debtor could not be sure that he was paying his debt to the right person without knowing the state of accounts between the assignor and the assignee. He would in the end have to investigate their state of accounts. But if the debtor knows and can find out by simply looking at his own books to whom he owes the debt the assignment is absolute and complete. The distinction between these cases can best be understood by looking at the situation from the point of view of the debtor and assuming he wants to pay the debt. Thus in *Tancred* v *Delagoa Bay and East Africa Railway*[4] a debt was assigned as security for a loan of money with the proviso that if the assignor repaid the loan, the debt should be reassigned to him. That was held to be an absolute assignment. Although the assignment was subject to a condition, the debtor was not prejudiced. Firstly, he would receive notice of the assignment; secondly, he would also receive notice of the reassignment, if one was made, so that he would always be in a position to know to whom he owed the debt by simply looking at his own books.

Applying these principles to the present case, I take the view that the judgment of the learned judge must be affirmed. To satisfy the appellants' claim they must be able to find in the new arrangement an

intention to assign the progress payments to them, so that the debtor (the respondents) might know how much they were justified in paying to the appellants. Looking at the arrangement as a whole, I think that it was not a clear and unconditional directive to pay the sum of money, but was conditional upon the need to refer the matter back to the assignor, i.e., the requirement that the respondents (the debtor) must ascertain from NKHC as to the state of accounts between NKHC and the appellants in order to verify the supply of steel that had been made. That being so, the arrangement was not absolute and therefore not a valid equitable assignment but merely a request to the respondents to pay the appellants. Such a request or authorisation did not give the appellants any rights against the respondents, and could be revoked by the creditor (NKHC). They had a *locus poenitentiae.* Thus in *Ex parte Hall, In re Whitting*[5] a landlord wrote to his tenant 'authorising and requesting' him to pay the rent to the landlord's bank 'to my credit for which I will accept their receipt as so much of your rent discharged'. This was not an assignment, but only an authority to the tenant to pay the bank. In *Coulls* v *Bagot's Executor and Trustee Co Ltd*[6] an agreement between *A* and *B* provided for payment of royalties by *B* to *A* and concluded: 'I *(A)* authorise ... *(B)* to pay all money connected with this agreement to my wife ... and myself ... as joint tenants'. The document was signed by *A, B* and *A's* wife. A majority of the High Court of Australia took the view that the agreement did not contain a promise by *B* to *A* to pay *A's* wife but only a *mandate* by *A* to *B* to pay *A's* wife. This mandate was revocable and had been revoked by *A's* death.

In the circumstances the learned judge was right when he said that the assignment was enforceable only on an *ad hoc* basis whenever the PWD was instructed by NKHC from time to time to make the payment direct and which was consistent with the fact that out of the fifteen progress payments due to NKHC, only five of them, namely, the fourth, eighth, tenth, eleventh and fifteenth progress payments were paid direct to the appellants on the instructions of NKHC. If it was the intention of the parties to make absolute assignment of all NKHC's rights to the appellants, then there was no necessity to reserve to NKHC the power to direct PWD as to the amount to be deducted from each progress payment. As matters stood, for every payment, the PWD must first obtain instruction from NKHC as to the amount to be released to the appellants.

For my part I will dismiss the appeal with costs.

Suffian LP and **Wan Suleiman FJ** concurred.

Appeal dismissed.

Chin Yew Meng for the Appellants.
Fong Seng Yee (Senior Federal Counsel) for the Respondents.

Notes

(i) On appeal to the Privy Council, the decision of the Federal Court was reversed: see [1980] 2 MLJ 103.

(ii) Assignments of contractual rights can either be by way of statutory assignment: section 4 of the Civil Law Act 1956 (Revised 1972, Act 67) or equitable assignment. One of the main difference between a statutory assignment and an equitable assignment is that written notice of the assignment must be given to the debtor in respect of a statutory assignment. No such notice need be given for an equitable assignment, though there are practical advantages in so doing: see *Chitty on Contracts, General Principles,* (25th edn) para 1280.

(iii) There are no formal requirements for an equitable assignment of a legal chose in action. In *Brandt's Sons & Co* v *Dunlop Rubber Co* [1905] AC 454, Lord Macnaghten said:

> An equitable assignment does not always take [a particular] form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain.

(iv) As was held by Raja Azlan Shah FJ (as he then was) in the *Malayawata Steel* case, it it not every instruction or authorisation by a person to his debtor to pay another that will amount to an assignment. In certain cases, it may be only a mere mandate. This distinction is pointed out by Meagher, Gummow and Lehane in their book, *Equity, Doctrines and Remedies* (2nd edn, 1984), Butterworths, Australia as follows:

> What must be plain is that A intended to divest himself of his right and vest them in B. If so, there is an assignment, if not, a mere revocable mandate or authority. [At para 684]

See the case of *Comptroller of Stamps (Vic)* v *Moward-Smith* (1936) 54 CLR 614.

(b) Equitable right to liens

Mercantile Bank Ltd
v
The Official Assignee of the Property of How Han Teh

[1969] 2 MLJ 196 High Court, Kuala Lumpur

Cases referred to :-
(1) *Vallipuram Silvaguru* v *Palaniappa Chetty* [1937] MLJ 59.
(2) *Ex parte Hothausen* (1874), LR 9 Ch App 722 at p 727.
(3) *Shropshire Union Railway and Canal Co* v *The Queen* LR 7 HL 496, 507.
(4) *Loke Yew* v *Port Swettenham Rubber Co* [1913] AC 491.
(5) *Wilkins* v *Kannamal* [1951] MLJ 99.

RAJA AZLAN SHAH J: This is an application for an order to sell the lands held under EMR 877 lot No 817 and EMR 1479 lot No 1535 both in the Mukim of Penjom, in the District of Lipis, state of Pahang, by public auction and other incidental reliefs.

The facts in their choronological events are not disputed. In October 1964 How Han Teh deposited the documents of title over the said land with the applicants for the purpose of securing a loan. He failed to repay the loan and on 28th April 1966 judgment for the sum of $217,085.71 was entered against him. On 19th May 1966 a bankruptcy notice was issued against him and that was served on him on 9th June 1966. On 17th June 1966 he failed to pay up the monies and thus committed an act of bankruptcy. On 2nd August 1966 the applicants registered caveats against the titles deposited with them as security under the provisions of section 330 of the National Land Code. A petition was subsequently filed against him on 5th October 1966 and receiving and adjudication orders were made against him on 19th November 1966. The said How Han Teh died in April 1967, intestate. Since the date of judgment the applicants have received a sum of $30,683.63 to account. The principal sum now due is $186,401.72. The applicants are apparently the only creditors of the said How Han Teh and there are virtually no other assets of the bankrupt other than these lands which are valued at $18,000.

The application is opposed by the Official Assignee in pursuance of section 47 of the Bankruptcy Act, 1957 read with section 281 (1) of the National Land Code. Section 47(1) of the Bankruptcy Act provided that the bankruptcy shall relate back to and commence at the time of the act of bankruptcy being committed, upon which the order is made. Section 281 (1) of the National Land Code provides that the depositee of the issue document of title shall become entitled to a lien if he had registered a lien-holder's caveat under Chapter 1 of Part Nineteen of the Code.

It is settled law that when the said How Han Teh was adjudged a bankrupt on 19th November 1966, the Official Assignee stepped into his shoes, and the latter's title relates back to and commences at the time of the act of bankruptcy, that is, on 17th June 1966. At that time what is the nature of the bankrupt's property? There are the two pieces of land but the Official Assignee claims that the applicants are not the lien-holders on this property as at the time of the act of bankruptcy there is no caveat entered under the National Land Code.

For the applicants it is submitted that at the time when the act of bankruptcy was committed the applicants with whom the issue document of titles were deposited had equitable rights to a lien in contract. He relied on the case of *Vallipuram Silvaguru* v *Palaniappa Chetty, Official Administrator as Administrator of the Estate of Gan Inn, deceased.*[1] In that case the 1st defendant as depositee of the document of title acquired the first right to present a caveat and so entitled to create a lien under section 134(1) of the Land Code, as against the rights of a subsequent assignee who had lodged a caveat prior to the 1st defendant's. In my view that case is authority for the proposition that although no lien is created under the Land Code until the caveat is

registered, the court in the absence of express words in the statute is not preventing 'from doing justice between parties by giving effect to equitable rights by way of contract.' In other words, although failure to lodge a caveat does not entitle the depositee with whom the issue document of title is deposited, to a lien under the Code, he still possesses a right to it in equity. He can exercise that right by registering the caveat under section 134 at any time. In dealing with such equitable rights the courts in general act upon the principles which are applicable to equitable interests in land which are not subject to the statutes. In the case of two conflicting equities, the first in time prevails, all other things being equal.

Now, section 218(1) of the National Land Code is virtually identical to section 134(i) of the Land Code i.e., registration of the caveat is still an essential ingredient for a valid statutory lien and unless there are express words in the Act, this court is not precluded from giving effect to equitable rights existing between the parties. It therefore follows that at the time when the act of bankruptcy was committed the applicants had an equitable right to a lien and the trustee in bankruptcy who steps into the bankrupt's shoes, takes a title no better than him. He takes subject to the same equities as affected the property in the bankrupt's hands. In *Ex parte Hothausen*[2] a trustee was ordered to sell a house the title deeds of which had been deposited with a creditor by the bankrupt and to pay the proceeds to the creditor. In this case S & Co merchants in London and Shanghai deposited title deeds to a house in Shanghai for opening a credit of £5,000. No conveyances of memorandum of deposit were made at the British Consulate at Shan ghai. In Prussian law the contract was binding personally on S & Co but as the necessary formalities for prefecting the security had not been gone through the appellant had no mortgage or lien on the house. James LJ on page 727 observed:

> .... and I myself do not believe that there is any law in any civilised country in the world which says that any party to such a contract properly evidence is not bound by it. If that is so, the debtors were personally bound by the contract at the moment when their liquidation commenced. They ought to have fulfiled it; and that a bill could have been filed against them in this country to have compelled them to fulfil that contract is beyond all question. In this country, in an English bankruptcy the trustee stands exactly in the same position as the bankrupt himself stands in and therefore his trustee is bound to perform the contract in exactly the same way as he himself was bound to perform it.

and Mellish LJ concurred with this view (p 727) and added:

> .... and if it is personally binding then this court exercising the English law of bankruptcy where the bankruptcy takes place will say that that which is personally binding upon the debtor is also binding upon his trustee.

I therefore take the view that there must be an order in terms of the summons. It has not been shown that there are express words in the statutes which preclude me from enforcing the equitable rights of the

applicants. Under the bankruptcy law the trustee in bankruptcy is a statutory assignee who takes the bankrupt's property subject in the equities and liabilities which affect it in the bankrupt's hands at the time the bankruptcy was committed. See *Halsbury's* 3rd Edition Vol 2 at p 421 para 838; Das *The Torrens System in Malaya* at page 192.

Therefore, *prima facie* the applicants who are prior in time must succeed unless it can be shown that he had relied on something tangible and distinct having grave and strong effect to accomplish the purpose: see *Shropshre Union Railway and Canal Co* v *The Queen.*[3] In the present case the substantial complaint against the applicants is that they had failed to register the caveat before the act of bankruptcy was committed. That, as has been perceptively said in the *Shropshire Union* case is not conduct of a character 'which would operate and enure to forfeit and take away the pre-existing equitable title'. The applicants had not parted with the documents of title. They retained possession of them all the time and it is open to them to register the caveat at any time. In my judgment, they had done nothing to forfeit their priority.

The Official Assignee's view is not correct, *Vallipuram's* case is against him. He forgets that independent of our land legislation our courts have always recognised equitable and contractual interests in land: see *Loke Yew* v *Port Swettenham Rubber Co.*[4] See also section 206(3) of the National Land Code. The registration of the caveat does not confer priority nor does it create new right. It temporarily protects such rights in anticipation of legal proceedings. Taylor J in *Wilkins* v *Kannamal*[5] said:-

> The Torrens law is a system of conveyancing; it does now abrogate the principles of equity; is alters the application of particular rules of equity but only so far as is necessary to achieve its special objects.

See also Das *The Torrens System of Malaya* at pages 189-190, 196,303.

I will hear arguments as to costs.

Application allowed.

J Puthucheary for the Applicant.
M Rajendram (Assistant Official Assignee) for the Respondent.

Notes

(i) See also the case of *Zeno Ltd* v *Prefabricated Construction Co (M) Ltd & Anor* [1967] 2 MLJ 104 and comments on it in pages 350 and 365 below.

(ii) For further notes on this case, see comments in the Chapter on Land Law, below at page 653.

(iii) As to the application of equitable principles under the National Land Code and a discussion of the leading cases on the subject, see generally, Sinnadurai, *Sale and Purchase of Real Property in Malaysia,* (1984) at pages 206-211. See also the recent Privy Council decision in *United Malayan Banking Corporation Bhd* v *Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87 and the note

on the case in (1984) 11 JMCL 43-49).

BANKRUPTCY

(a) Personal liability of executor of estate for debts of his testator's business

Re Wong Tee Lian

[1969] 2 MLJ 217 High Court, Kuala Lumpur.

Cases referred to:-
(a) *In Re Fisher & Sons* [1912] 2 KB 491.
(2) *Labouchere* v *Tupper* (1857) 34 ER 670; 11 Moore 198.
(3) *Re Evans* (1887), 34 Ch D 597.
(4) *Ex parte Garland* (1804), 32 ER 786; 10 Ves Jun 110.

RAJA AZLAN SHAH J : The question that is raised in this petition is whether an executor can be adjudged bankrupt in his personal capacity for the debts of his testator's business incurred after his death.

Goh Joon Hoe, deceased, was trading in the name of Malacca Precast Concrete Works. He died in 1965. Under his will he appointed three persons to be his executors and trustees. After his death the executors continued to carry on their testator's business in his trade name. They contracted debts in the sum of $11,418.50 from Malayan Cement Berhad. The latter sued them in the trade name. No appearance was entered. On 30th October 1968 they obtained judgment by default against the firm. On 24th February 1969, Malayan Cement Berhad presented a petition against one of the executors, the present respondent, the act of bankruptcy being his non-compliance with a bankruptcy notice based on the said judgment. The present petition is brought against the respondent in his personal capacity. The respondent thinking that he is not personally indebted to the petitioning creditors opposed the petition.

The case *In Re Fisher & Sons*(1) does not help the petitioner. In that case there were three executors who were empowered under the will to continue with the testator's business in his firm name. A creditor sued them in the firm name on the distinct bills of exchange. They entered appearance in their representative capacity and judgments were accordingly entered against them. A receiving order was subsequently made against the firm, the act of bankruptcy being non-compliance with a bankruptcy notice which was served on one of the partners on the two judgments. Later an application was made that the three executors constituting the said firm be adjudged bankrupt. It was held that where executors carried on their testator's business under the powers of his will in his firm name, they were not 'partners' within the meaning of section 115 of the English Bankruptcy Act, 1853 (now

section 115 of the Bankruptcy Act 1914) which is *in pari materia* with our Bankruptcy Act, 1967, section 103, nor liable to be adjudicated as partners under a receiving order made on a petition presented in the firm name, but may be individually proceeded against as joint debtors.

In order to adjudge an executor bankrupt for the trade debts incurred after the testator's death, he must in the first place be sued in his personal capacity. The reason being that in such circumstances he is personally liable, whether or not he was authorised to do so under the will: *Labouchere* v *Tupper*[2] and not the estate of the deceased: *Re Evans.*[3] He may then be proceeded against as a bankrupt: *ex parte Garland*[4].

The answer to the question is therefore this. An executor can be adjudged bankrupt in his personal capacity for the trade debts of the testator incurred after his death, provided he was in the first place sued in his personal capacity.

For the above reasons the petition is dismissed with costs.

Petition dismissed.

KC Choo for the Petitioning Creditor.
G Vadivelu for the Judgment Debtor.

SALE OF SHARES

Central Securities (Holdings) Bhd
v
Haron Bin Mohamed Zaid

[1979] 2 MLJ 244 Federal Court, Kuala Lumpur
Coram: Suffian LP, Raja Azlan CJ (Malaya) and Wan Suleiman FJ

See under Company Law at page 335 below.

Note

See under Company Law at page 348 below.

PARTNERSHIP

Keow Seng & Company
v
Trustees of Leong San Tong Khoo Kongsi (Penang) Registered

[1983] 2 MLJ 103 Federal Court, Penang
Coram: Raja Azlan Shah LP, Mohamed Azmi and Abdoolcader FJJ

Cases referred to:-
(1) *Alagappa Chettiar* v *Coliseum Cafe* [1962] MLJ 111, 113 &115.
(2) *Re Leong Cheong & Co Ex parte Marrisons, Banker & Co Ltd* [1930] SSLR 155.
(3) *Malay Women's Welfare Association* v *Tan Ek Joo Realty Co Ltd* (1957) 3 MC 101.
(4) *Ang Bock Chwee* v *Lim Huan Hee & Ors* [1982] 1 MLJ 174.
(5) *Sadler* v *Whiteman* [1910] 1 KB 868, 889.
(6) *Western National Bank of City of New York* v *Perez, Triana & Co* [1891] 1 QB 304, 314.
(7) *Eng Chuan & Co & Ors* v *Four Seas Communication Bank Ltd* [1982] 2 MLJ 81,82.

RAJA AZLAN SHAH LP (delivering the judgment of the Court): The only question of importance in this appeal is whether a notice to quit addressed to a firm and not the individual partners who make up the firm is good in law.

The learned judge who heard this case as a preliminary issue held that it was good in law provided that it indicated, in substance and with reasonable clearness and certainty, an intention on the part of the person giving it, to determine the existing tenancy of the firm at a certain time. With the latter proposition we agree. We have always treated a notice to quit with strictness. We find support for this view from a passage in *Hill & Redman's Law of Landlord and Tenant* (17th Edn) at page 483:

> Subject to any term of the tenancy, and to any statutory requirements the form of notice is immaterial provided that it indicates, in substance and with reasonable clearness and certainty, an intention on the part of the person giving it, to determine the existing tenancy at a certain time, and that the party to whom it is given could not be misled as to the intention of the giver, though the language is ambiguous and lame. The notice need not be addressed to the tenant by name, provided it is properly served on him.... Errors in the description of the premises, or as to the christian name of the tenant, will not invalidate

We now address ourselves to the point in issue, that is, is the notice to quit addressed to a firm good in law? We start with the premise that a partnership firm is not a legal entity in law: see *Alagappa Chettiar* v *Coliseum Cafe*(1) and as such cannot hold a tenancy. This characteristic is peculiar to the common law concept of an unincorporated entity and had caused difficulties in the past. Some of these difficulties mainly those of a procedural nature have been met by rules of court. The Rules of the High Court, 1980 (Order 77) provide for the commencement of legal proceedings by and against partnership firms in the firm name which is merely a convenient method of encapsulating the individual partners who constitute the partnership firm. The firm name is not in itself the name of any person other than the partners because in the words of Farewell LJ in *Sadler* v *Whiteman*(5):

> The fallacy is to say that a partner in a firm does not, but the firm does, carry on business. In English law a firm as such has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity, although for convenience under Order XLVIII. A it may

used for the sake of suing and being sued.

A plaintiff who sues such partners in their firm name sues them individually just as much as if he had set out all their names. Lindley L J said of this in *Western National Bank of City of New York* v *Perez, Triana & Co:*

> When a firm's name is used, it is only a convenient method for denoting those persons who compose the firm at the time when that name is used, and a plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he had set out all their names.

A fortiori when a plaintiff serves a notice to quit on the individual partners in their firm name, he serves them individually just as much as if he had set out all their names. We find further support of this view in the following passage from the speech of Lord Diplock in recent Privy Council case of *Eng Chuan & Co & Ors* v *Four Seas Communications Bank Ltd.*[7]:

> The notice to quit dated January 29, 1976, addressed by solicitors on behalf of the Bank to 'Eng Chuan & Co' acknowledge the existence of a tenancy in the person or persons to whom that description properly applies,since it requires them to 'quit and deliver up' possession of the Premises 'on February 29, 1976 (or at the expiration of the month of your tenancy which will expire next after the end of one calender month from the time of the service of this Notice)'. The only persons to whom that description properly applied, and had done so ever since December 31, 1953, were the three personal appellants whose names had appeared in the Register of Business Names as constituting the Firm of Eng Chuan and Company from December 31, 1953 until it ceased trading in 1971. In their Lordship's view, if the Bank sought to rely upon the monthly tenancy being vested in someone other than the personal appellants as tenant under that description, the onus lay upon the Bank to prove it.

We accordingly endorse the learned Judge's conclusion on the issue presented and dismiss this appeal with costs. The deposit lodged in court will be paid out to the respondent to account of costs.

Appeal dismissed.

Tan Beng Hong for the Plaintiffs.
N Chandran for the Defendants.