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INTRODUCTION

His Royal Highness the Sultan did not have the opportunity to decide on many cases on the law of contract. His Highness' contribution in this area of the law, however, should not be understated. In certain areas on the law of contract, His Royal Highness made some important decisions which have contributed to the development of the law of contract in Malaysia. His enunciation of certain principles of law of contract in these

cases are still accepted as authoratative of certain principles of the law of contract in Malaysia. In the area of collateral contract, promissory estoppel, time being essence of the contract and the scope of section 66 of the Contracts Act, the decisions of His Royal Highness have all been consistently followed in subsequent cases. In *Tan Swee Hoe Co Ltd* v *Ali Hussain Bros*[1] Raja Azlan Shah FJ (as he then was) took a bold step in recognising the existence of collateral contracts in Malaysia. His Lordship refused to be persuaded by the general reluctance of the Courts in many of the earlier cases of not recognising the existence of a collateral contract. The Courts, in these earlier cases have refused to recognise the existence of collateral contract for fear of admitting inadmissible evidence under the extrinsic evidence rule. As such, there were no reported cases in Malaysia, prior to the decision of His Royal Highness in *Tan Swee Hoe* where the application of collateral contracts in Malaysia was recognised. It is for this reason that the decision of His Royal Highness in the Federal Court in *Tan Swee Hoe* is significant. His Highness, by relying on certain leading English cases which had established the existence of collateral contracts, held that such contracts should be recognised under Malaysian law. This is a major contribution by His Royal Highness in that branch of the law of contract in Malaysia dealing with the admissibility of oral evidence to prove the existence of a separate contract which was meant to be collateral to the main contract.

In *Sim Siok Eng* v *Government of Malaysia*[2], Raja Azlan Shah FJ (as he then was) whilst agreeing with the judgment delivered by Lee Hun Hoe CJ (Borneo) pointed out that where a party (the Government of Malaysia in the instant case) had induced another (a contractor, in the instant case) into believing that certain essential building materials would be supplied to him and the second party relying on this promise or assurance, alters his position and his responsibilities to supply the said materials, the representor, could not sue the representee for breach of contract. The representor must first give reasonable notice to the representee before such promise or assurance may be withdrawn. His Lordship said:

> The appellant [the representee] wholly relied on the representation of the respondent that he would be supplied with essential building materials and it would be inequitable for the latter to go back on that representation unless adequate notice was given to revert to the *status quo*.[3]

The decision of the Federal Court in *Sim Siok Eng* is the leading case in Malaysia which establishes the rule that in certain cases the doctrine of promissory estoppel is applicable against the Government. In fact, in *Cheng Keng Hong* v *Government of the Federation of Malaya*[4] one of the earliest cases decided by His Royal Highness as a High Court Judge, Raja

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[1][1980] 2 MLJ 16 FC.

[2][1978] 1 MLJ 15 FC.

[3]At page 23

[4][1966] 2 MLJ 33 HC.

Azlan Shah J (as he then was) had to decide whether a letter written by an officer purportedly on behalf of the Chief Architect of the Ministry of Education to a contractor gave rise to an estoppel whereby the then Government of the Federation of Malaya was precluded from disputing the authority of the officer. In this letter the officer had informed the contractor that he would be paid for the extra work executed by the contractor. After a detailed analysis of the law as contained in the Contracts Act and certain Privy Council decisions, His Royal Highness arrived at the conclusion that the Government was estopped from disputing the authority of the officer.

Though the principles of contract law are embodied in the Contracts Act, these provisions have not been frequently relied upon either by lawyers or judges in many of the reported cases. Though the Contracts Act generally incorporates the English principles, certain provisions of the Act contain principles of law which are different to that under English law. One such provision is section 66 of the Contracts Act which provides as follows:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

The scope of the section has not been widely applied in many reported cases. One reason for this omission has been the fact that the section itself is shrouded with some uncertainty. It is for this reason that the decision of His Royal Highness in the Federal Court case of *Sigma Sawmill Co Sdn Bhd* v *Asian Holdings (Industrialised Buildings) Sdn Bhd*[5] is salutory. Though one may not necessarily agree entirely with His Lordship's interpretation of section 66, the detailed analysis of the section by His Lordship is illustrative of his extensive knowledge of the provisions of the Contracts Act.

The decision of His Royal Highness in *Wong Kup Sing* v *Jeram Rubber Estates Ltd*[6] established the principle that once the time for completion was allowed to pass in a contract for the sale of land and the parties continued with their negotiations, the time stipulated in the contract for completion will no longer be of the essence of the contract. In such a case, the party has to give reasonable notice if he intends to terminate the contract. In *Tan Bing Hock* v *Abu Samah,*[7] one of the earliest cases to be reported in Malaysia on the validity of an agreement to assign forest rights under a forest licence, Raja Azlan Shah J (as he then was) held the agreement to be illegal as contravening the Forest Rules (Pahang) 1930. His Lordship categorised such contracts to possess "the notorious badge of the 'Ali Baba' form of contracts", a phrase which ever

[5][1980] 1 MLJ 21 FC.

[6][1969] 1 MLJ 245 HC.

[7][1967] 2 MLJ 148 HC.

since has been commonly used to describe a contract whereby an interest or right conferred on a particular person is purportedly assigned or transferred to another who is not entitled to such rights or interest. His Royal Highness in this case also held that even though a contract which is illegal had been executed by both the parties to the contract, it did not prevent the defendant from raising the defence of illegality:

> In the present case the defendant is not the party who seeks to enforce the illegal contract. If he were the plaintiff he would be in the same position as in *Palaniappa Chettiar* v *Arunasalam Chettiar* case. He comes to court as a defendant, and my understanding of the law is that it is within the province of a defendant to set up the defence of illegality. If the law is otherwise, the result would be calamitous. It would mean that the court, contrary to precedents, will lend its aid to enforce an illegal act.[8]

The case of *Cheng Keng Hong* v *Government of The Federation of Malaya*[9] decided by His Royal Highness shortly upon his elevation as a High Court Judge, is clearly illustrative of the able manner in which he handled a number of related issues effectively in a case and to arrive at a reasoned, comprehensive and lucid judgment. On this occasion alone, Raja Azlan Shah J (as he then was) had to decide on issues relating to the law of arbitration, estoppel, agency, trade practice and usage, evidence and tender. On each of these issues, he, in Denning-style, stated the existing law with much clarity and applied the law to the facts before arriving at a carefully analysed decision. For example, on the question as to whether a particular trade usage could be incorporated into the contract, he said assertively:

> This so-called practice, more correctly in law called trade usage or custom, may possibly form part of a contract although not expressly incorporated in the written agreement. The incorporation of a trade usage is, however, subject to well defined principles of law and that is it must be reasonable and not so as to contradict the tenor of the contract as a whole.[10]

Again on the law of acceptance of a tender he said:

> The law with regard to acceptance of a tender is perfectly clear. The unconditional acceptance of a tender by the employer binds both parties, and a contract is thereby formed, the terms of which are ascertainable from the invitation to tender, the tender, the acceptance, and any other relevant documents.[11]

Finally, his mastery of language, for which he is well-known is illustrated

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[8]At page 150.

[9][1966] 2 MLJ 33 HC. See also *Lau Kee Ko & Anor* v *Paw Ngi Siu* [1974] 1 MLJ 21 FC, where HRH also dealt with three main issues relating to fraud, agency and a *quantum meruit* claim.

[10]At page 37.

[11]At page 37-38.

in the following passage when he held that no alleged trade usage could be implied into the contract.

> In my judgment the alleged custom was not only a blind confidence of the most unreasonable description but also repugnant to the terms and tenor of the contract and as such was not a trade custom but merely a long established irregularity.[12]

Similarly in *Lau Kee Ko and Anor* v *Paw Ngi Siu*[13] Raja Azlan Shah J (as he then was) sitting in the Federal Court dealt with three main issues: (a) whether the appellant had committed fraud in not revealing to the respondent that he was not the registered proprietor of the land but was only acting as an agent for the registered owner under a Power of Attorney; (b) the effect of a contract entered into by an agent who describes himself as the owner of the property; and (c) whether a party in breach can make a claim on *quantum meruit.*

On the question of fraud, His Lordship first pointed out that:

> It is a wholesome rule of our law that where a plaintiff alleges fraud, he must do more than establish the allegation on the basis of probabilities. While the degree of certainty applicable to a criminal case is not required, there must, in order to succeed, be a very high degree of probability in the allegation.[14]

He then pointed out that for the respondent to succeed on fraud, he had to satisfy the court that had he known that the appellant was not the registered owner of the land, he would not have entered into the contract with the appellant. In other words, only if the respondent was able to prove that the 'non-disclosure of the undisclosed principal' affected the very basis of the contract, would the non-disclosure by the appellant amount to fraud.

As to the effect of a contract entered into by an agent in his own name without disclosing the identity of the principal, Raja Azlan Shah J said:

> [A] power of attorney establishes the relationship of principal and agent as between the donor and donee, and is therefore affected by the law applicable to the law of agency. Now the general law of agency is that when an agent describes himself in the agreement as the owner of a piece of land and signs it in his own name without qualification, he is *prima facie* deemed to be contracting personally and thus personally liable. His principal may also be liable. The third party has to elect to sue both the principal and agent jointly or severally.[15]

Finally His Lordship held that a party who had breached a contract, is not entitled to a *quantum meruit* for the work which he had done.

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[12]At page 38.

[13][1974] 1 MLJ 21.

[14]At page 23.

[15]At page 23.

DECISIONS AND COMMENTS

ACCEPTANCE OF TENDER

Cheng Keng Hong
v
Government of The Federation of Malaya

[1966] 2 MLJ 33 High Court, Kuala Lumpur

Cases referred to:-
(1) *Attorney-General for Ceylon* v *AD De Silva* [1953] AC 461 at p 479.
(2) *Lakshmi Narainsingha Swami* v *Patta Sahuani* AIR (1957) Orissa 86.
(3) *Ramsden* v *Dyson* 14 WR 926 at p 933.
(4) *Ram Pertab* v *Marshall* (1899), ILR 26 Cal 701.
(5) *Tersons Ltd* v *Stevenage Development Corporation* [1965] 1 QB 37, 51.
(6) *London Export Corporation Ltd* v *Jubilee Coffee Roasting Co Ltd* [1958] 1 WLR 661.

RAJA AZLAN SHAH J: The award of the arbitrator, dated 26th July 1964, was stated in the form of a special case.

The Chief Architect to the Ministry of Education on behalf of the Government of the Federation of Malaya issued a notice inviting tenders for the erection and completion of Sekolah Lanjutan Kampong at Mukim of Sungei Pasir, District of Kuala Muda, Kedah. Copies of the contract agreement, drawings and specification could be seen at the place specified in the tender notice during office hours on any working day. The applicant tendered for the work and his tender was accepted. A contract designated as Contract No ME/AB 42 of 1962 was entered into between the applicant and the Government on 15th May 1962. The contract recites:

> WHEREAS the Government is desirous of erecting and completing Sekolah Lanjutan Kampong at Mukim of Sungei Pasir, District of Kuala Muda, Kedah and has caused drawings and a specification describing the work to be done to be prepared: AND WHEREAS the said drawings numbered (there are several of them included electrical layout drawings annexed) (hereinafter referred to as the contract drawings), and the specification schedule of rates, form of tender and letter of acceptance of tender have been signed by or on behalf of the parties hereto: ....

The relevant paragraphs of the said contract are clause (3) which defines the term 'contract' as 'the documents forming the tender and acceptance thereof, together with the documents referred to therein including the conditions annexed hereto, the specification, schedule of rates and drawings and all these documents taken together shall be deemed to form one contract and shall be complementary to one another', and clause (4) which defines 'superintending officer' as 'the Chief Architect, Ministry of Education, and his successors in office and also such person or persons as may be deputed by him in writing to act on his behalf for the purpose of this contract'.

The contract documents comprise the following:

(a) The contract form (PWD 203).
(b) Conditions of contract. The relevant clauses are: (4) The contractor shall provide everything necessary for the proper execution of the works according to the true intent and meaning of the drawings and specification taken together whether the same may or may not be particularly shown or described provided that the same is reasonably to be inferred therefrom and if the contractor finds any discrepancy therein he shall immediately and in writing refer the same to the superintending officer who shall decide which shall be followed..... and (40). Provided always that in case any dispute or difference.... The arbitrator shall have power to review and revise any certificate, opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given.

(c) Form of tender which reads *inter alia*: 'Tender for the erection and completion of Sekolah Lanjutan Kampong ... in accordance with drawings number (a list of contract drawings was annexed) and any other detail drawings supplied in application thereof'.

(d) Summary of tenders which gives the description of works in respect of each building including electrical installations. The preamble reads: 'All the drawings upon which this tender is to be based are listed on the 'form of contract' (PWD 203) included in the tender table documents. For full particulars of the works listed below the Tenderer should refer to the above drawings and the specifications. The tender will be deemed to include for everything shown or described therein including all ancillary works. Works described as including 'electrical installation' shall be deemed to include for all electric fittings shown on the electrical layout drawings and described in the specification for 'electric service'.

(e) Acceptance of tender which is 'subject to the conditions of contract, specification and/or bills of quantities, form of tender and this letter ...'
(f) Specification which 'should not be read wholly, but in conjunction with the drawings and appendices which are affixed to the basic specification'.

(g) Appendices eight in number to basic building specification.

(h) Electrical service clause (1) reads: 'The scope of work under this heading comprises the supply of all materials, fittings, labour, cartage, tools etc. necessary for the execution and completion of the electric light and power installations to all the buildings built under the contract in accordance with this specification, schedule, plans and agreement to the satisfaction of the Senior Architect'; clause (18), 'All light points, shown on plans, shall be fitted with ceiling roses, twin flexible coils, lampholders and 10" opal or white plastic shades and 60 watt frosted bulbs'; clause (19), 'Two 60' GEC ceiling fans complete with all accessories and connections shall be provided one in each headmaster's office. Two fan points (without fans) shall be provided one in each teacher's room and one in the clerks' section'.

(i) Contract drawings as defined in the recital to the contract.

The applicant discovered that the specification for electrical service, namely clauses 18 and 19, were at variance with the electrical layout drawings. Accordingly on 19th May 1962 he wrote to the Chief

Architect at Kuala Lumpur for clarification pursuant to clause 4 of the Conditions of Contract. It is pertinent to refer to the said letter which is as follows:

19th May, 1962,

Confidential.
The Chief Architect,
Ministry of Education,
Young Road,
Kuala Lumpur.

Sir,

Construction of Primary Schools at
Slim River, Perak, & Sekolah
Lanjutan Kampong at Mukim of
Sungei Pasir, District of Kuala
Muda, Kedah.

I beg to advise that in tendering for the above contracts I had based my estimate of tender on the specifications included in the tender table documents. I now find that the plans do not accord fully with the specifications in respect of electrical works.

Since these specifications are basic documents wherein the scope of a particular type of works is described and indicated and as my tenders have been based thereon I shall be grateful if you will confirm that the above contracts should be undertaken under the requirements of the specifications.

Yours faithfully,
(Sgd) Cheng Keng Hoong.

On 8th June 1962 the applicant received the following reply:

Ministry of Education,
Kuala Lumpur.
8th June, 1962.

Mr Cheng Keng Hoong,
125/7, Cowan Street,
Ipoh.

Technical Education, Perak.
Sekolah Lanjutan Kampong (Boys),
Sungei Patani

With reference to your letter dated the 19th May 1962, I confirm that only the electrical fittings described in the specification are included in the contract.

Please supply and fix the electrical fittings shown on the drawings. Any fittings, other than those mentioned in the specification, will be paid for as an extra amount shown in the contract.

(Sgd) R A Hewish, Arch (N).
for Chief Architect,
Ministry of Education.

In accordance with instructions (*supra*) the applicant executed the 'extra' work. In January 1963 all Ministry of Education contracts were taken over by the Public Works Department . The applicant duly

completed the contract on 6th May 1963 and in due course submitted a bill for $31,592.44 as representing the cost of extras supplied by way of electrical fittings. On 11th July 1963 Jurutera Negeri, Kedah & Perlis, on the instruction of the Director of Public Works wrote to the applicant 'that no extra payments' will be made for the electrical fittings in dispute'.

The matter was referred to arbitration on 20th October 1964 and the arbitrator gave his award on 26th November 1964. The arbitrator found the following facts: (i) The applicant noticed the discrepancy between the specification and the drawings at the time of tendering but put in an unqualified tender in the expectation that he would be paid extra for the electrical work shown in the drawings but not mentioned in the specification; (ii) After acceptance of his tender he wrote to the Chief Architect, Ministry of Education, on the 19th May 1962 drawing attention to the discrepancy and he received by way of reply the said letter of the 8th June 1962; (iii) Mr Hewish had the physical supervision of the contract so far as it had been performed up to the 8th June 1962, and continued so to supervise up to October 1962, and during this time wrote a number of letters on Government letter-head signed 'for Chief Architect, Ministry of Education'. The applicant was accordingly justified in looking to Mr Hewish and in assuming that Mr Hewish was the proper authority to give him instructions and to make decisions in connection with the work. Mr Hewish was held out by the Government in effect as their representative and agent in the performance of this contract; (iv) The applicant acted in bad faith in deliberately not qualifying his tender although he was aware of the discrepancy aforementioned. The applicant knew that on previous occasions in such tenders he and other contractors had received payment of extra on the basis now claimed; (v) In a tender of this nature (without bills of quantities) the extent of the work must be shown on the drawings to enable the tenderer to measure what is required and give details of preliminary items. A reading of the whole of the contract documents including the drawings shows quite clearly that the intention was that the applicant was to include in the contract price the whole of the electrical fittings shown on the drawings; (iv) Mr Hewish in writing the letter of the 8th June 1962 was wrong in agreeing to pay extra for electrical fittings shown on the drawings but not mentioned in the specification, and should have informed the applicant that he was obliged to install all electrical fittings shown on the drawings without extra payment.

The questions for the court are(i) whether the said letter of the 8th June 1962 signed by Mr R A Hewish is binding upon the respondents and/or it gives rise to an estoppel whereby the respondents are precluded from disputing the authority of Mr Hewish; (ii) in the event that question (i) above be answered in the affirmative, whether clause 40 of the conditions of contract entitled the arbitrator to review the letter itself and to hold that the decision contained in the said letter was wrong in principle and that no extra payment should be made to the applicant for the fittings in question.

Subject to the opinion of the court the arbitrator awarded (i) in the event the court deciding the first question of law in the affirmative and the second question in the negative, the applicant would be paid the sum of $31, 592.44 for electrical light fittings and ceiling fans as shown in Appendix 'A' of his statement of claim dated 23rd November 1963, the respondents would pay all costs in connection with this arbitration, and the respondents would pay the arbitrator's charges and expenses, of $1,375.69 plus $200.00 the cost of preparing this award, making a total of $1,575.69; (ii) in the event the court deciding the first question of law in the negative, or the first and second questions of law in the affirmative, the applicant would provide and fix electrical light fittings and ceiling fans as shown on the electrical layout drawings without any addition to his contract amount for so doing, the applicant would pay all costs in connection with this arbitration and the applicant would pay the arbitrator's charges and expenses of $1,375.69 plus $200.00 the cost of preparing this award, making a total of $1,575.69.

The first question I have to consider is whether the said letter of 8th June 1962 gives rise to an estoppel whereby the respondents are precluded from disputing the authority of Hewish.

In substance, the argument for the applicant was that acting on the faith of the representation of the said letter which was written on a Ministry of Education letter-head and signed for the Chief Architect he *bona fide* believed that Hewish had authority to sign it. It was further argued that Hewish had written similar letters on these letter-heads and had signed them for the Chief Architect. The respondents contended that Hewish was only an agent so far as supervision was concerned; there was no written letter deputising him as superintending officer as required under clause 4 of the contract. In the circumstances they said that the question of estoppel by representation did not arise. The arbitrator had found as a matter of fact the Hewish had supervision of the contract up to October 1962 and during that time had written a number of letters on Government letter-head and had signed for the Chief Architect. He accordingly found that the applicant was justified in assuming that Hewish had the authority and under the circumstances that he was held up by the Government as their representative and agent in the performance of the contract.

The general proposition of law on agency by 'holding out' was stated by the Privy Council in *Attorney-General for Ceylon* v *Silva:*[1]

> All 'ostensible' authority involves a representation by the principal as to the extent of the agent's authority. No representation by the agent as to the extent of his authority can amount to a 'holding out' by the principal.

This brings me to section 190 of the Contracts (Malay States) Ordinance, 1950, which enacts that where a principal induces a belief that the unauthorised acts of an agent are authorised he is bound by the consequences. The section reads:

> When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such

> acts or obligation if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

For the section to apply there must be an allegation or proof that the principal either by his words or conduct has induced a third person to believe that the acts done or obligations are within the scope of the agent's authority: *Lakshmi Narainsingha Swami* v *Patta Sahuani.*[2] The section enacts a rule of estoppel. Lord Cranworth observed in *Ramsden* v *Dyson:*[3]

> If, indeed the principal knows that persons dealing with his agent have so dealt in consequence of their believing that all statements made by him had been warranted by the principal and, knowing this, allows the person so dealing to spend money in the belief that the agent had an authority, which, in fact, he had not, it may be that in such a case a Court of Equity would not allow the principal afterwards to set up want of authority in the agent.

The Privy Council case of *Ram Pertab* v *Marshall*[4] which, however, was not decided with reference to the section, affords a guiding illustration. In that case the principal was held liable upon a contract entered into by his agent in excess of his authority, the evidence showing that the contracting party might honestly and reasonably have believed in the existence of the authority to the extent apparent to him.

Applying the law to the present case, I find that although Hewish had no authority to sign the said letter for the Chief Architect the respondents had by their conduct represented or permitted to be represented to the applicant that Hewish had the authority to act on their behalf and consequently the respondents are bound by his acts to the same extent as if he had the authority. In the circumstances the respondents are estopped from disputing the authority of Hewish.

With regard to the second question, two considerations arise: firstly, whether under clause 40 of the conditions of contract the arbitrator had power to review the said letter. It was argued on behalf of the applicant that in the absence of ambiguity the arbitrator had no power to review the said letter. It was submitted that the contents of the letter were not in dispute. The respondents contended that the arbitrator had power to decide as a matter of fact. In my view, an arbitrator derives his authority from the agreement between the parties and therefore his powers and duties are those that the parties have agreed to place upon him. It is therefore necessary to see what the agreement stipulates. Clause 40 *inter alia* state that 'in case of any dispute or difference the arbitrator shall have power to review amongst other things any opinion or decision'. It is perfectly clear that the submission covers any dispute or difference. Now the dispute in issue is the said letter which contains a decision. The applicant contended that Hewish could have written it as an agent whereby the respondents are estopped from disputing his authority; on the other hand the respondents claimed that Hewish had no authority to write the letter. That issue went for arbitration as a dispute or difference arising between the parties. Accordingly I hold

that the arbitrator had power under clause 40 to review that letter.

The second consideration is whether the arbitrator had power to go behind the said letter and to hold that the decision contained therein was wrong and that no extra payment should be paid to the applicant for the electrical fittings. Insofar as the question whether there was evidence upon which an arbitrator could reach a conclusion of fact is one of law. The court is not concerned with his finding of fact; the court is concerned only to see that there was evidence to support his finding: *per* Upjohn LJ in *Tersons Ltd* v *Stevenage Development Corporation.*[5] Re-stating the arbitrator's finding of fact, he said that the applicant knew of the discrepancy between the specification and the drawings at the time of tendering but put in an unqualified tender which was based on the hypothesis that in the past he and other contractors had been given additional payment in respect of Ministry of Education contracts under similar circumstances. He held that in a tender of this nature (without bills of quantities) the extent of the work must be borne on the drawings to enable the tenderer to measure what was required; the specification should state the quality and type of materials required and details of preliminary items should be given. He came to the conclusion that upon reading the contract documents as a whole it was the intention that the applicant was to include in the contract price the whole of the electrical fittings as shown in the drawings. The point to consider is whether there was sufficient evidence to support the arbitrator's finding.

Before doing so I wish to consider a point raised on behalf of the applicant. It was contended that contractors working for the Ministry of Education in the past had put in their tenders based on the specification and not on the drawings for the sole reason that they had to work their tenders on a very competitive basis and therefore they were obliged to work on the minimum which was conveyed in the specification and whatever work they put in in accordance with the drawings were paid as 'extras'. It is now claimed that this procedure was the accepted practice and on behalf of the applicant it was said that Hewish's letter of 8th June was tantamount to a confirmation of such practice. It was further suggested that the fact that a similar contract at about the same period was given to the applicant to put up a school in Slim River and had been paid 'extra' for the electrical fittings as shown in the drawings but not in the specification lends colour to such a proposition. That being so, it was contended that the said letter was not against the weight of evidence. Nothing could be more ingenious and able than the argument which I have heard in support of the case for the applicant. But that argument, ingenious and able as it appeared to be, has certainly not occasioned any doubt in my mind as to the conclusion which I shall reach, especially in the light of the authorities I am about to refer.

This so-called practice, more correctly in law called trade usage or custom, may possibly form part of a contract although not expressly incorporated in the written agreement. The incorporation of a trade usage is, however, subject to well defined principles of law and, that is, it must be reasonable and not so as to contradict the tenor of the contract

as a whole. Jenkins LJ in *London Export Corporation Ltd* v *Jubilee Coffee Roasting Co Ltd*[6] after exhaustively reviewing the authorities said at page 675:

> I do not think there are any other authorities to which I can usefully refer. It appears to me, when all have been looked at, that the relevant principle of law cannot be stated with any greater precision than this: that an alleged custom can only be incorporated into a contract if there is nothing in the express or necessarily implied terms of the contract to prevent such inclusion and, further, that a custom will only be imported into a contract where it can be so imported consistently with the tenor of the document as a whole.

Consistent with the above principles, proviso (e) of section 92 of the Evidence Ordinance, 1950, enacts that oral evidence is admissible to establish a trade usage to be annexed to the written contract, but as has been noted above, such usage must be consistent with the terms and tenor of the written contract.

I have now to consider whether the alleged custom can be annexed to the contract documents in which case the applicant would be entitled to succeed, or whether the contract documents as a whole contain upon their true construction sufficient indications to support the conclusion of the arbitrator. The law with regard to acceptance of a tender is perfectly clear. The unconditional acceptance of a tender by the employer binds both parties, and a contract is thereby formed, the terms of which are ascertainable from the invitation to tender, the tender, the acceptance and any other relevant documents: see 3 *Halsbury's Laws of England* (3rd ed) at page 423. In the instant case the contract documents as defined in clause 3 *(supra)* mean all documents forming the tender and acceptance together with the documents referred to therein, that is the drawings mentioned and annexed to the form of tender, the summary of tender including the tender table documents, the conditions of contract, the specification, schedule of rates and drawings, 'and all these documents taken together shall be deemed to form the contract and shall be complementary to one another'. The answer is therefore obvious even to the most indulgent eye. If I accede to the applicant's argument that the specification and the drawings must each be read separately and distinctly the answer would be inconsistent with the general tenor of the documents. The specification states that the contractor was to supply all materials, fittings etc, necessary for the execution and completion of the electric light and power installations. The installations are referred to in the summary of tender which describe 'to include for all electrical fittings shown on the electrical layout drawings and described in the specification for 'electrical service'. In the summary of tender, both the intent and meaning in the sense ascribed to them in clause 4 of the conditions of contract (*supra*) are clear, that is that the electrical installation as shown on the electrical layout drawings and described in the specification for electrical service is to be read into and form part of the contract. In the absence of any qualification as to electrical fittings it is not unreasonable to assume

that the applicant had priced his tender inclusive of the electrical installation as shown on the electrical layout drawings. To read the electrical layout drawings in the sense contended for by the applicant gives them viability which amounts to a violation of clause 3 of the contract. I am not impressed by the arguments of the applicant that the electrical layout drawings are specific provisions which exist independently of and separate from the rest of the contract documents. For all these reasons I think the arbitrator came to the correct conclusion based on the evidence. In my judgment the alleged custom was not only a blind confidence of the most unreasonable description but also repugnant to the terms and tenor of the contract and as such was not a trade custom but merely a long established irregularity.

I therefore answer both the arbitrator's questions in the affirmative and that means the second award must stand.

Questions answered in the affirmative.

Heng Cheng Swee for the Appellant.
Mrs Ng Mann Sau for the Respondent.

Notes

(i) As rightly pointed out by Raja Azlan J (as he then was) section 190 of the Contracts Act in providing for ostensible or apparent authority of an agent is an application of the principle of estoppel. Under English law, the position is also that only in cases where the agent of the Crown has acted within his ostensible authority will the Crown be estopped from going back on a representation which he has made. (See generally Aronson and Whitmore, *Public Torts and Contracts* (1982) Law Book Co Ltd (Australia) at pages 203-4)

(ii) For a recent decision on trade usage, see the Federal Court case of *Preston Corporation Sdn Bhd* v *Edward Leong & Ors* [1982] 2 MLJ 22, See also 12 *Halsbury's Laws of England,* (4th edn) para 445 - 487.

ORAL CONTRACTS

(a) Oral evidence to vary written contract

Leong Gan & Ors
v
Tan Chong Motor Co Ltd

[1969] 2 MLJ 8 High Court, Kuala Lumpur

Case referred to:-
(1) *Mark D'Cruz* v *Jitendra Nath Chattejee* (1919), ILR 46 Cal 1079.

RAJA AZLAN SHAH J: This is an application for leave to sign final

judgment under Order 14.

The applicants are undisputed owners of a piece of land held under Selangor Certificate of Title No. 8697 for Lot No. 492, Section 42, in the Town and District of Kuala Lumpur. By two memoranda of lease, i.e., Presentation No. 94747 dated 5th January, 1965, and Presentation No. 98822 dated 7th January 1966, (referred to herein as 'the first lease' and 'the second lease' respectively), both duly registered with the proper registering authority, they leased two separate portions of the said land to the respondents for a period of four years each which in terms expired on 30th September, 1968. Two clauses which are the same in both leases are material for our present purposes; clause 1(j) provides for quiet and peaceful delivery of vacant possession, and clause 3(b) provides for option for renewal, and I quote it in full:

> The lessee shall have no option for the renewal of this lease but if before three calendar months from the expiry of this lease the lessee shall in writing request the lessors to grant the lessee a renewal of this lease and if the lessors should agree to comply with the lessee's said request the lessors will renew this lease for a further period of four (4) years upon the same terms as in this lease contained save and except that the rent will be increased but not beyond a sum calculated at the rate of dollars seven thousand two hundred only ($7,200) per annum and save and except further that this clause will not be included in the renewal lease.

The respondents, in spite of repeated requests, have failed to deliver vacant possession. They opposed the application on two main grounds: (i) an oral agreement to the effect that the parties had agreed that the respondents would occupy the portion referred to in the first lease for a period of twelve years, which period would be split up and be subject to different leases from time to time of four years each, commencing with lease Presentation No 69169 dated 30th December, 1963, and renewed for a further period of four years, *vide* Presentation No 94747. The second lease, i.e., Presentation No 98822, was executed for the residue of the aforesaid period of twelve years but was in terms made terminable on 30th September, 1968; and (ii) clause 3(b) is in favour of the respondents upon its proper construction in law and that in the circumstances there is a triable issue and a *bona fide* counterclaim for damages.

Mr Richard Talalla for the applicants objected to ground (i), contending that it violates the provisions of section 92 of the Evidence Ordinance in that it tends to vary or modify the terms of the said leases. I agree with that contention. Without quoting any authorities, it is settled law that where the words of a written agreement are required by law to be registered extrinsic oral evidence is inadmissible to show that the registered lease was not meant what it purports to be, subject to the exceptions contained in the several provisos. No evidence was called forth to bring the case within any of those provisos. There is no doubt that the said two leases which are the contract in question were reduced to writing, and inasmuch as they were leases for a period of four years each, they were required by law to be reduced to writing and it was also

necessary to register them. Therefore if the alleged agreement, which is relied on by the respondents, amounted to a rescission or a modification of the said leases, evidence of that agreement could not be given in as much as the alleged agreement was made orally. In my judgment the respondents' first contention falls to the ground.

On the second ground it is established that a notice in writing of the lessee's intention to take a renewal was not given before three calendar months from the expiry of the said lease. Such a notice, in order to comply with the terms of clause 3(b), ought to have been given on 30th June, 1968, at the latest. It was not so given: see *Mark D'Cruz* v *Jitendra Nath Chattejee.*[1]

For these reasons I think that there is neither a triable issue nor a *bona fide* counterclaim.

The application therefore is allowed with costs.

Application allowed.

R Talalla for the Applicant.
Eugene Lye for the Respondents.

Notes

(i) As to the admissibility of oral evidence to vary a written contract, see sections 91 and 92 of the Evidence Act 1950, (Act 56).

(ii) As a general rule, courts will refuse to admit oral evidence if such admission would frustrate the true intention of the parties as expressed in the written agreement. (For further notes on this area of the law, see notes under the case of *Tan Swee Hoe Co Ltd* v *Ali Hussain Brothers,* below at page 427 and generally Sinnadurai,*Sale and Purchase of Real Property in Malaysia* (1984) at pages 24-31.

(b) Collateral contracts

Tan Swee Hoe Co Ltd
v
Ali Hussain Bros

[1980] 2 MLJ 16 Federal Court, Johore Bharu

Coram: Raja Azlan Shah CJ (Malaya), Wan Suleiman and Salleh Abas FJJ.

Cases referred to:-
(1) *Siew Soon Wah* v *Yong Tong Hong* [1973] 1 MLJ 133.
(2) *Heilbut Symons & Co* v *Buckleton* [1913] AC 30, 47.
(3) *City and Westminster Properties (1934) Ltd* v *Mudd* [1959] Ch 129.
(4) *Dick Bentley Productions Ltd* v *Harold Smith (Motors) Ltd* [1965] 2 All ER 65, 67.
(5) *Mendelssohn* v *Normand Ltd* [1970] 1 QB 177.
(6) *J Evans & Son* v *Andrea Merzario* [1976] 2 All ER 930.
(7) *Brikom Investments Ltd* v *Carr* [1979] 2 All ER 753.
(8) *De Lassalle* v *Guildford* [1901] 2 KB 215, 222.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): The appellants orally agreed to allow the respondents to occupy their premises for so long as they wished on payment of tea-money. Two written agreements were later executed, but did not refer to the appellants' promise. Sections 91 and 92 of the Evidence Act state that extrinsic evidence is not admissible to vary, add to or contradict the terms of a written agreement. Can the respondents enforce the promise in the light of the two sections of the Evidence Act? The learned judge answered in the affirmative. That sums up the question raised in the instant appeal.

The facts are as follows: In 1957 the respondents were looking for premises in Kluang, Johore, to carry on the business of an eating shop. They found one at No 11, Jalan Dato Teoh Siew Khor belonging to the appellants. But the premises was not suitable for their purpose as it was designed as a bank. Negotiation commenced with the appellants. The appellants wanted $14,000 tea-money to allow the respondents to occupy the premises. A reduction in the amount of tea-money was offered but rejected. As a result an oral agreement was reached between the parties whereby the respondents were to rent the said premises on payment of $14,000 tea-money and they could stay there for as long as they wished provided they paid rent regularly. Relying on that oral assurance the respondents went into occupation. They paid the tea-money and received the first month's receipt at the back of which were recited seven conditions viz: no sub-letting without the appellants' consent, no contraband goods to be stored in the premises, notice by the respondents to appellants on termination of tenancy, prohibition against cutting of firewood within the premises, payment of local council fees, premises to be kept clean and tidy and lastly, appellants' right to terminate tenancy on failure to observe any one of the above conditions. No receipt was given in respect of the tea-money. That we think is obvious. With the consent of the appellants, they expended a substantial sum of money to make the necessary alterations to the said premises so that it was fit to be used as an eating shop.

In 1961, the parties entered into a written agreement whereby the rent was increased from $200 to $220 per month. No mention was made of the earlier oral assurance.

In 1967 another written agreement was executed increasing the rent from $220 to $254 per month. It is in substance the same as the previous written agreement except one, that is clause 7 which is in the following terms:

> In the event of any increase in the Town Council assessment, quit rent and other taxes relevant to the premises the rental shall be increased proportionately in accordance with the increase levied by the Government or the Authorities.

At the end of 1968, there was a dispute regarding payment of rent. The appellants demanded an increase of $10 rent in view of the increase in assessment. The respondents did not agree to the increase. They pointed out that as the assessment had only been increased from $349.70 in

1968 to $403.50 in 1969, they said they would be willing to pay the difference, that is $53.80 per annum, which is equivalent to $4.50 per month. The appellants referred the respondents to clause 7 of the agreement and argued that nowhere was it stated that the rent was to be increased in the same proportion as the increase levied by the Government. They accordingly interpreted it as enabling them to increase rent twice or even ten times. There was exchange of correspondence. In December, 1969, the appellants wrote to the respondents suggesting an amicable settlement on payment of increase of rent in the sum of $55 per month. They wrote again at the end of the month offering a tenancy of 10 years instead of 20 years. In February, 1970, they gave the respondents notice to quit by end of March, 1970. The respondents did not do so. They paid rent for February and March 1970 which were accepted. They forwarded rent for April 1970 but that was refused in view of the notice to quit. They said that the notice was bad to terminate a tenancy which they argued was of an indefinite duration. The rents for April, 1970 and subsequent months are held in a trust account by their solicitors. In October 1970 the appellants issued a second notice to quit by end of November 1970.

The appellants filed their present claim in December 1970, praying for vacant premises, arrears of rent, mesne profits and damages.

The respondents by paragraph 7 of their defence aver that in consideration of the sum of $14,000 paid by them to the appellants on July 18, 1957, the appellants granted to them a contractual tenancy 'for as long as the defendant wished to do so and for so long as they paid rent regularly'. They counter claimed that the appellants execute a valid registrable lease for 30 years, alternatively the sum of $64,000 damages for breach of contract; that sum represents $14,000 tea-money, $4,000 for alteration to the said premises, $12,700 for purchase of refrigerator, cupboards and tables and $32,000 for cost of looking for alternative premises.

The learned judge dismissed the appellants' claim with costs. He allowed the respondents' counterclaim and ordered the appellants to register a lease in favour of the respondents for 28 years with effect from August 1, 1957 with the terms and conditions as set out in the 1967 agreement subject to the payment of all arrears of rent which he assessed at $293.40 per month in the light of increase in assessment.

The learned judge was satisfied that the respondents had paid $14,000 tea-money in consideration of which the appellants gave an oral undertaking that the respondents could occupy the premises for as long as they wished provided they paid rent regularly and that rent was to be increased proportionately with the increase in assessment. In so far as this part of the evidence is denied by the appellants, the learned judge preferred and accepted the evidence of the respondents. He pointed out to the overwhelming inference that the appellants acted in such a way as to lead the respondents to believe that they had the right to stay there for as long as they wished provided they paid rent regularly. We see no warrant in the evidence for taking a different view.

The learned judge further held that the correct monthly rent brought

about by the increase in assessment is $293.37. We reproduce his findings in full:

> I come now to the amount of monthly rent that should be paid with the proportionate increase of assessment...In Johor, unlike other States, the assessment is based on the improved value of the property. The present rate of assessment, I believe, is about 1.5% on the improved value. Under paragraph 1 of the 1967 agreement the rent is stated to be $254/- per mensem commencing from May 1, 1967. Paragraph 7 of 1967 agreement speaks of increase in 'assessment rate, quit rent and other taxes'. The increase of rent should therefore be based on the percentage of increase in assessment, quit rent and other taxes. It has been shown that there has been an increase in assessment but not other taxes. In 1968 when the assessment was $349.70, the rent was $254 per mensem. In 1969 the assessment was $403.50. The increase was, therefore, $53.80. In terms of percentage the increase of rent is 15.38%, say 15.5%. The increase should therefore be based on this percentage. I do not think that the defendants are correct in saying that the increase to the annual rent should be the same figure as the increase in the assessment as this would not be proportionate. Since the rent before the increase was $254 per mensem, 15.5% of this is $39.57. The correct monthly rent brought about by the increase in assessment is therefore $293.37 say/$293.40.

We agree with his conclusion and do not wish to say any more on the subject. In any event it was not adumbrated before us that that finding is erroneous. It was not pursued as a ground of appeal anyway.

The question that arises for determination is the effect to be given to the agreement 'that the respondents could stay for as long as they wished'.

After properly addressing his mind to the Privy Council decision in *Siew Soon Wah* v *Yong Tong Hong,*[1] the learned judge gave effect to the express intention of the parties as spelt out in the agreement by holding that it was one for the grant of as long a lease as the law allows which, under the provisions of section 221(3)(a) of the National Land Code is a maximum period of 99 years. However in determining the period of the lease he took into account the consideration that it must be proportionate to the value of the property in relation to the maximum period of 99 years. The value of the property was agreed at between $49,000 and $50,000 under a leasehold of 99 years. He simplified the matter by considering the value of the property as $50,000 and the leasehold the appellants have as 100 years and arrived at the conclusion that for $14,000 the period of the lease was 28 years.

We agree with the period of 28 year lease as that will do justice between the parties in the light of surrounding circumstances of the case. But before that proposition can be entertained, a pertinent question to be answered is the contention of counsel for the appellants whether the oral promise can contradict the written agreement of 1967 and be enforced. That question is tied to the salutory provisions of sections 91 and 92 of the Evidence Act, which briefly stated, enact that extrinsic evidence is not admissible to vary or qualify the terms of a written contract.

Although it is trite law that parol evidence is not admissible to add to, vary or contradict a written agreement, a technical way of overcoming the rule is by invoking the doctrine of collateral contract or collateral warranty. *Chitty on Contracts* (24th edition) (paragraph 674) puts it this way:

> An assurance given in the course of negotiation may therefore give rise to a contractual obligation, provided that an intention to be bound can be shown. The rules of evidence, however,frequently prevent such an assurance from being incorporated as part of a subsequent written agreement, since extrinsic evidence is as a general rule not admissible to vary or add to the terms of a written contract. As a result, the courts have been prepared in some circumstances to treat the assurance as a separate contract, collateral to the main transaction. In particular, they will do so where one party refuses to enter into the contract unless the other gives him an assurance on a certain point.

In our view there is a growing body of authority which supports the proposition that a collateral agreement can exist side by side with the main agreement which it contradicts. The classic statement on collateral contract was made by Lord Moulton in *Heilbut Symons & Co* v *Buckleton:*[2]

> It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds,' is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract.

The case of *City and Westminster Properties (1934) Ltd* v *Mudd*[3] and the subsequent applications of it has, in our opinion, fortified this not unfamiliar doctrine. We think Lord Denning MR summarised it in *Dick Bentley Productions, Ltd* v *Harold Smith (Motors), Ltd*[4]:

> Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is *prima facie* ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on.

In *Mudd's* case, *supra,* a tenant signed a lease containing a covenant to use the premises for business purposes only. He had in fact resided there for some time and was only induced to sign the lease by an oral assurance that the lessors would not object to his continuing to do so. In an action by the lessors to forfeit the lease for breach of the covenant it was held that the tenant could rely on the oral assurance as 'a clear contract acted upon by the defendant to his detriment from which the plaintiffs cannot be allowed to resile'. Yet the oral agreement clearly contradicted the lease.

Three recent decisions are worth mentioning, i.e., *Mendelsohn* v *Normand Ltd;*[5] *J Evans & Son* v *Andrea Merzario;*[6] *Brikom Investments Ltd* v *Carr.*[7]

In *Mendelssohn* v *Normand, supra,* the car owner left his car unlocked at a car park after he had been assured by the attendant that the car would be locked. His suitcase was later stolen from his unlocked car. The parking ticket by its terms protected the defendant. It was also specifically argued that the terms could not be varied by the oral assurance of the attendant. In spite of all that the Court of Appeal held that the assurance given by the attendant that the car would be kept locked overrode the written terms.

> The reason is because the oral promise or representation has a decisive influence on the transaction — it is the very thing which induces the other to contract — and it would be most unjust to allow the maker to go back on it. The printed condition is rejected because it is repugnant to the express oral promise or representation (*Per* Lord Denning at page 184).
>
> Phillimore LJ said at page 186:
>
> Whether you regard that promise as a representation or whether you regard it as a collateral term of the contract, or whether you regard the contract as being partly oral and partly in writting in the shape of the ticket it seems to me it can make no real difference.

In *J Evans & Son* v *Andrea Merzario, supra,* the defendant forwarding agents assured the plaintiff importers that containers in which the latter's goods were stored would be carried under deck. Prices were renegotiated but nothing was put in writing in relation to the containers being carried below deck. The goods were carried 'on the usual terms and conditions appearing on the form'. When a machine was lost due to the fact that a container was not stored below deck, the plaintiffs succeeded in the Court of Appeal in enforcing the oral assurance. Lord Denning MR considered that the assurance given by the defendant that the containers would be stored below deck was given in order to persuade the plaintiff to accept the use of containers. Because it so induced the plaintiffs, it ought to be binding:

> When a person gives a promise, or an assurance to another, intending that he should act on it by entering into a contract, and he does act on it by entering into the contract, we hold that it is binding: see *Dick Bentley Production Ltd* v *Harold Smith (Motors) Ltd, supra.*

In *Brikom Investments* v *Carr, supra,* a tenant, relying on the representation made to her by the landlords, that they would repair the roofs at their own expense refused to contribute to the costs of repairs. It was held, *inter alia,* that there was a perfectly good collateral contract between the landlords and her since she had given consideration for the landlords' promise regarding the repairs by entering into the lease in reliance on that promise:

> When two parties are about to enter into an agreement for a lease, a lease which imposes on the lessee a very burdensome obligation in respect to repairs, I can see no reason why one party cannot say to the other: 'In

> relation to those outstanding matters, whatever may be our legal position under the terms of the lease, we will not as landlords enforce that obligation against you'. I see no reason why effect should not be given to such a position. I think the evidence shows that that was the position here: there was a perfectly good collateral contract between these two parties. (*per* Roskill LJ at page 763).

In our view those cases are strong authority for the proposition that an oral promise, given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement.

So it seems to us, following the test of Lord Moulton in the *Heilbut Symons'* case (*supra,* at page 50) that after looking at the totality of the evidence in the present appeal and not from isolated answers given in it, the parties intended or must be taken to have intended that the oral promise was to form part of the basis of the contractual relations between them.The respondents were looking for a place to carry on their eating-shop business. The appellants were only willing to allow them to occupy their premises provided $14,000 tea-money was paid. The respondents would not have paid that substantial sum which is about half the value of the premises but for the promise that they would be allowed to stay there for as long as they wished. The appellants gave such a promise which to our mind against this background plainly amounted to an enforceable contractual promise. In those circumstances, it seems to us that the contract was this: 'If we give you $14,000 tea-money, you will ensure that we can stay for as long as we wish': and the appellants agreed that this would be so. Thus there was a breach of that contract by the appellants when they issued the notice to quit. We do not see how the appellants can escape from the bond of the oral promise which was given and which seems to us to have been given for perfectly good consideration. It may well be asked: why not put the oral promise into the written agreement if it is so important? The short answer is that often people do not behave in this way and the law should accommodate to the needs of ordinary people and not expect from them the responses of astute businessmen. This case seems to us to fall within the principle laid down by A L Smith M R in *De Lassalle* v *Guildford*[8]:

> The next question is: Was the warranty collateral to the lease so that it might be given in evidence and given effect to? It appears to me in this case clear that the lease did not cover the whole ground, and that it did not contain the whole of the contract between the parties. ....The present contract of warranty by the defendant was entirely independent of what was to happen during the tenancy.

We would dismiss the appeal with costs.

Appeal dismissed.

Tara Singh Sidhu for the Appellants.
SVK Singham for the Respondent.

Notes

(i) In cases where the courts have found difficulty in allowing any evidence to vary a written contract, the courts have held that any such assurance given by one party may amount to a collateral contract. Such a collateral contract will then have to be read together with the main written contract. In other words, where the courts have felt that the parties had intended an assurance given by one of them to be binding, the courts have treated such assurances as a separate contract: collateral to the main contract. Thought the courts have recognised the existence of collateral contracts, as early as the nineteenth century, they have been slow in applying this device. In cases where the courts have felt that the parties had *intended* the assurance to be binding, the courts have treated such assurance to be binding, the courts have treated such assurances as a separate contract, in other words, collateral to the main contract. Courts have usually found the existence of a collateral contract in situations where it is clear that one party enters into or refuses to enter into a contract unless the other party gives an assurance as to an important term of the contract.

(ii) The reluctance of the court generally to recognise the existence of a collateral contract has been the fear of admitting inadmissible evidence under the extrinsic evidence rule. In fact there has hardly been any case reported in Malaysia where the court have held the existence of a collateral contract. For this reason, the decision of Raja Azlan Shah FJ in *Tan Swee Hoe Co Ltd* v *Ali Hussain Bros* is important.

(iii) Reference to the concept of collateral contract was also made by the Federal Court in the very recent case of *Tan Chong & Sons Motor Co (Sdn) Bhd* v *Alan McKnight[1983] 1 MLJ 220.*

ESTOPPEL

Sim Siok Eng
v
Government of Malaysia

[1978] 1 MLJ 15 Federal Court, Kuching

Coram: Lee Hun Hoe CJ (Borneo), Raja Azlan Shah and Wan Suleiman FJJ.

Cases referred to:-

(1) *Hughes* v *Metropolitan Railaway Co* (1877), 2 App Cas 439, p 448.
(2) *Stead* v *Dawber* 113 ER 22.
(3) *Jorden* v *Money* (1854) 5 HLC 185; 10 ER 868.
(4) *Charles Rickards* v *Oppenhaim* [1950] 1 KB 616.

(5) *Leather Cloth Co* v *Hieronimus* (1875) LR 10 QB 140.

RAJA AZLAN SHAH FJ: I have read the judgment in draft of Chief Justice Borneo and agree with him with the result of this appeal and wish only to add the following.

The trial judge held that the oral agreement of October 9, 1970 did not amount to a legally binding agreement to vary clause 4 of the contract but nevertheless held that it was only a temporary arrangement to supply the essential building materials. I think he is right. In my opinion, it is only a waiver or forbearance which is not contractually binding. The distinction between a forbearance and a variation is sometimes said to depend on the intention of the parties : see *Stead* v *Dawber.*[2] It would appear that a statement is a forbearance if the party making it intends to reserve a power to retract; but it is a variation if he intends permanently to abandon his right under the contract. In the present case the respondent had clearly intended to grant only a temporary forbearance not to insist on their said contractual right with regard to the supply of waterproof plywood. That can be seen from their correspondence of March 30, 1971 and clause 6(c) of the contract. The leading case of *Hughes* v *Metropolitan Railway Company*[1] which was decided on equitable principles enunciates that if one party leads the other:

> to suppose that the strict rights arising under the contract will not be enforced, or will be left in suspense or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to expose them where it would be inequitable having regard to the dealings which have thus taken place between the parties: *per* Lord Cairns at page 448.

Thus the rule in *Hughes'* case depends on a representation of intention as distinguished from the doctrine of estoppel which is based on a representation of existing fact — see *Jorden* v *Money.*[10] The further striking difference between the two doctrines is that the effect of the doctrine in *Hughes'* case is only to suspend rights, while estoppel operates extinctively, if at all. I do not think here it can rightly be said that the doctrine of estoppel comes into play so as to be expressly pleaded.

The equitable doctrine of forbearance to insist upon the strict rights under the contract can be repudiated by the party granting it provided that he gives reasonable notice of his intention to do so to the other party for whose benefit it was originally granted. Thus, in *Charles Rickards Ltd* v *Oppenhaim*[4] a contract for the sale of a car provided for delivery in March 20. The car was not delivered on that day but the buyer continued to press for delivery and finally told the seller on June 29 that he must have the car by July 25 at the latest. It was held that the buyer could not have refused peremptorily to accept the car merely because the original delivery date had done by, as he had continued to press for delivery. But he could refuse on giving the seller notice to deliver within a reasonable time. Here the notice did give the seller a

reasonable time to deliver so that the buyer was justified in refusing to take the car after July 25. Of course, events may happen which make it impossible to retract a forbearance. In *Leather Cloth Co* v *Hieronimus*[5] the buyer could not have retracted his agreement to shipment via Rotterdam after the goods had been lost. A buyer of goods to be shipped *via* Ostend agreed to shipment *via* Rotterdam. He was held liable for the price, though the goods were lost, as he had assented to the altered mode of performance. In this case there is no variation of the contract, but only a variation of the mode of performance; or that there is no variation, but only a waiver or forbearance.

On the facts of the present case the learned judge considered and determined that no adequate notice to the appellant to revert to his original position had been given. With that proposition I fully agree. The appellant wholly relied on the representation of the respondent that he would be supplied with essential building materials and it would be inequitable for the latter to go back on that representation unless adequate notice was given to revert to the *status quo.* What is adequate notice is a question of fact and that is essentially a matter for the trial judge.

Appeal allowed. Cross-appeal dismissed.

Joseph Grimberg for the Appellant.
Saari Yusuf (Federal Counsel) for the Respondent.

Notes

(i) As to the application of the principle of promissory estoppel in the area of public law, see the decision of Abdoolcader FJ in the Federal Court decision of *Government of Negeri Sembilan & Anor* v *Yap Chong Lan* [1984] 2 MLJ 123. In that case, Abdoolcader FJ referred to the following cases: *Newbury District Council* v *Secretary of State for the Evironment* [1981]AC 578 (House of Lords); *Cudgen Rutile (No 2) Pty Ltd* v *Chalk* [1975] AC 520 (Privy Council, on appeal from Queensland) and *Western Fish Products Ltd* v *Penwith District Council & Anor* [1981] 2 All ER 204 (Court of Appeal), for the view that the courts are generally reluctant to extend the application of the principle of equitable estoppel in the area of public law. His Lordship, however agreed with the two exceptions spelt out by the Court of Appeal in *Western Fish Products Ltd, supra* for the application of the doctrine in public law. Abdoolcader FJ spelt out the exceptions in the following terms:

> One exception was where it had statutory power to delegate functions to its officers and there were special circumstances to justify the applicant in thinking that the officer thus had power to bind the authority by an irrevocable decision, and the other exception is where the authority waives a procedural requirement relating to some application made to it, whereupon it may be estopped from relying on the lack of formality.
>
> [At page 129]

(ii) It should be noted that the cases referred to in note (i) above all dealt with proprietary estoppel, whereas in *Sim Siok Eng's* case, Raja Azlan Shah J (as he then was) applied the principle of promissory estoppel. For the distinction between proprietary and promissory estoppel, see generally Treitel, *The Law of Contract* (6th edn) page 112.

EXEMPTION CLAUSES

Malayan Thread Co Sdn Bhd
v
Oyama Shipping Line Ltd & Anor

[1973] 1 MLJ 121 High Court, Kuala Lumpur

Cases referred to:-

(1) *Chartered Bank of India, Australia and China* v *British India Steam Navigation Co Ltd* [1901] AC 369.
(2) *Bontex Knitting Works Ltd* v *St John's Garage* [1943] 2 All ER 690.
(3) *Alexander* v *Railway Executive* [1951] 2 All ER 442.
(4) *Karsales (Harrow) Ltd* v *Wallis* [1956] 2 All ER 866.
(5) *Sze Hai Tong Bank Ltd* v *Rambler Cycle Co Ltd* [1959] MLJ 200, PC
(6) *Ashby* v *Tolhurst* [1937] 2 All ER 837.
(7) *Hollins* v *J Davy Ltd* [1963] 1 All ER 371.
(8) *Sharikat Lee Heng Seng Sdn Bhd* v *Port Swettenham Authority* [1971] 2 MLJ 27.
(9) *Williams* v *Carson Syndicate Ltd* (1919) 35 TLR 478.
(10) *Cheshire* v *Bailey* [1905] 1 KB 237.

RAJA AZLAN SHAH J: On September 18, 1968, 25 packages (10 cases 15 cartons) of cotton sewing thread were shipped on board the ship 'Nansei Maru' from Kobe, Japan, and were to be delivered at Port Swettenham, the port of discharge. The shipping company, the first defendants, issued a bill of lading dated September 18, 1968 in which they acknowledged that the goods were shipped to the order of the consignee. There was noted on the bill of lading a request: 'Notify party — The Malayan Thread Co Sendirian Berhad, P.O. Box 462, Kuala Lumpur'. They are the plaintiffs, the holders of the bill of lading.

On October 10, 1968 the ship *Nansei Maru* arrived at Port Swettenham. The shipowners had agents called East Season Trading Corporation. On the authority of these agents the goods were discharged from the ship and placed in Shed No 6 at North Port of the Port Swettenham Authority, the second defendants. This was done, no doubt, under clause 15 of the bill of lading 'at the risk and expense' of the shipper, which meaning includes the consignee (see clause 1, definition of 'shipper'). The plaintiffs delivered the bill of lading together with other shipping documents to their forwarding agents, Coast Shipping Agency, who forwarded them to the shipping agents. They in turn issued a delivery order on October 12, 1968. Armed with the delivery order, the

clerk of the forwarding agents, Mr Goh Kim Leng (PW4) went to shed No 6 the following day to locate the goods. He found 9 cases and 10 cartons. As it was a Sunday, no delivery could be made. He went again the next day (October 14, 1968) but this time he found only 9 cases. He took delivery of 9 cases. On October 16, 1968 he issued a tracer letter to the second defendants notifying short delivery of 1 case and 15 cartons.

The plaintiffs brought this action against both the defendants claiming damages for breach of contract or for conversion. The amount claimed was for $10,891.56 being the value of the goods short delivered.

It is perfectly clear law that the shipping company, the first defendants, are obliged under the contract to deliver the goods described in the bill of lading to the order of the plaintiffs. In this case there was proper delivery but the goods were short delivered. I am satisfied that all the goods *i.e.,* 10 cases and 15 cartons of cotton sewing thread were unloaded at the ship's side but that 1 case and 15 cartons were stolen by person or persons unknown sometime, somewhere between the ship's side and or in shed No 6. The first defendants are therefore liable for breach of contract and conversion unless there is some term in the bill of lading protecting them. In order to escape the consequences of the short delivery the first defendants say that they are protected by clauses 2 and 15 of the bill of lading. Clause 2 says that the shipping company shall not be responsible for any consequences arising or resulting from: (*inter alia*) loss by robberies, thefts or pilferages, by land or water, whether by persons in the employment or service of the company or otherwise.

In my view the correct approach in the present case is to consider whether on a proper construction of the exemption clauses, the act which caused the short delivery is covered by them. If so, then to consider whether such act is itself a breach of a fundamental term of the contract because no court can allow such a breach to pass unnoticed under the cloak of an exemption clause.

The exemption clauses, on the fact of it, could hardly be more comprehensive. In my view, they are wide enough to exonerate the first defendants from responsibility for the act of which the plaintiffs complain, that is, the short delivery of 1 case and 15 cartons of cotton sewing thread. In essence the goods were 'stolen' and the loss or short delivery was caused by 'theft'. Looked at from that angle, then, as a matter of construction, loss or short delivery is *prima facie* clearly within exemption clause 2. I would add that, if a businessman in the position of the plaintiffs had addressed his mind in reading clause 2, theft is one of the forms of loss or short delivery comtemplated by it. That is one of the risks which, on the true construction of the clause, the plaintiffs take. And it is no less *prima facie* within clause 15:

> In any case the company's liability shall cease as soon as the goods leave the ship's deck and/or tackle.

The words in that clause are very clear and adequate for the purpose and it must be held to be operative and effectual to protect the first defendants: see *Chartered Bank of India, Australia and China* v *British*

India Steam Navigation Co Ltd[1] In that case the exemption clause reads (*inter alia*):

> in all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle.

The goods were discharged at Penang and stored in a shed on the jetty and they were stolen by a servant of the landing agents. It was held that the fraudulent misappropriation by the servant of the landing agents was not treated as the fraudulent act of the shipping company, who were thereby protected by the exemption clause from any liability whatsoever.

Next I must consider the question whether the act which caused the short delivery was a fundamental breach. In the category of cases exemplified by *Bontex Knitting Works Ltd* v *St John's Garage*,[2] *Alexander* v *Railway Executive*,[3] *Karsales (Harrow) Ltd* v *Wallis*[4] and *Sze Hai Tong Bank Ltd* v *Rambler Cycle Co Ltd*[5] Lord Denning in the latter case said (page 202):

> There will be found in each case a breach which evinces a deliberate disregard of his bounden obligations. Thus in *Bontex Knitting Works* case, the lorry driver left the lorry unattended for an hour in breach of an express agreement for immediate delivery. In *Alexander's* case, the cloak room official allowed an unauthorised person to have access to the goods in breach of the regulations in that behalf. In *Karsales* case, the agent of the finance company delivered a car which could not go at all, in breach of its obligation to deliver one that could go. In each of these case it could reasonably be inferred that the servant or agent deliberately disregarded one of the prime obligations of the contract. He was entrusted by the principal with the performance of the contract on his behalf; and his action could properly be treated as the action of his principal. In each case it was held that the principal could not take advantage of the exemption clause.It might have been different if the servant or agent had been merely negligent or inadvertent.

In *Sze Hai Tong Bank's* case, the shipping agents released the goods against a banker's indemnity when they knew fully well that they ought not to do so except against the appropriate bills of lading.

Thus, where the servant or agent had deliberately flouted one of the bounden obligations of the contract, then that act is referable to the principal's act; in such circumstances, the principal cannot take refuge under an exemption clause. In the present case the loss or short delivery was caused by theft by some person or persons unknown. I would not consider the fraudulent act of such person or persons to be the act of the principal, the first defendants. In my view this case comes within the ambit of cases exemplified by *Chartered Bank of India, Australia and China* v *British India Steam Navigation Co Ltd, supra, Ashby* v *Tolhurst*,[6] and *Hollins* v *J Davy Ltd*[7].

I therefore hold that the first defendants have established that there has been both a loss by theft and cesser of liability covered by the two exemption clauses.

The Port Swettenham Authority, the second defendants in this case,

deny all liability. They say they are protected by Rule 91(1) of the Port Authority By-Laws, 1965 (LN 127/1965) which reads:

> The Authority shall not be liable for any loss, destruction or deterioration arising from delay in delivery or detention or misdelivery of goods or from any other cause, unless such loss, or destruction has been caused solely by the misconduct or negligence of the Authority or its officers or servants.

This places the onus on them to show some circumstance which negatives the idea of misconduct or negligence on their part. (See *Sharikat Lee Heng Sdn Bhd* v *Port Swettenham Authority*[8]). Negligence means nothing more than the doing of some act which a person of ordinary prudence would not do under the circumstances or the omission to do some act which a man of ordinary prudence would do under the circumstances. The test is that of a man of ordinary prudence would take of his own goods in similar circumstances: see section 104 of the Contracts (Malay States) Ordinance, 1950.

In essence the second defendants are bound to exercise as much care and diligence in keeping and preserving the goods entrusted to them on behalf of the plaintiffs as a custodian for reward would do under similar circumstances. That is all they are required to do. They are not supposed to do the impossible. If the goods are stolen by their servants, in the absence of negligence on their part, they cannot be held liable. In the absence of personal negligence on the part of the employer *e.g.,* negligence in selecting the servant whose act had occasioned the loss, (see *Williams* v *Curson Syndicate Ltd*[9]) the latter is not responsible for the fraudulent act of the servant, as the loss of the goods is not referable to the employer's negligence, and as the loss is caused by an act which is not within the scope of the servant's employment: see *Cheshire* v *Bailey*[10].

Now the facts. Evidence was adduced to the effect that goods were unloaded on the instructions of the shipping agents on to pallets at the ship's side. From there they were conveyed by forklifts operated by employees of the second defendants. They had to pass through a door of the godown and under the direction of the clerk-in-charge of the said godown the goods were stored. No record was kept by the second defendants. Instead outturn statements were issued. The godown, which was about 40 feet from the ship, was like any other jetty godown; it was made of corrugated iron sheets over a brick 4ft. wall from ground level.There were strategic doors manned by the second defendants' servants for the purpose of receiving and delivering goods at specific times. Four checks were made at all times — on forklifts, on delivery lorries, at delivery platform and at the entrance gate. Uniformed policeman guarded the area round the clock; plain clothes detectives were also employed. There had been a few attempts of theft but in most cases they were nipped in the bud. In 1967 a Study Committee was appointed to streamline the administration of the Port and as a result the second defendants abolished wharf tallying at the relevant period.

On the whole I find as a fact that the second defendants had exercised

due care and diligence in keeping and preserving the goods entrusted to them as any prudent custodian for reward would do under the circumstances. That was all they were required to do in law and that was done. It would be enhancing the burden of proof upon the second defendants to an absurd extent if they had to prove beyond and above that required of them under section 104 of the Contract (Malay States) Ordinance.

I am satisfied that they have discharged the onus that the loss of the goods in question is not due solely to their misconduct or negligence. The plaintiffs' case is dismissed with costs.

Claim dismissed.

Low Yong Suan for the Plaintiffs.
Joga Singh for the 1st Defendant.
J Puthucheary for the 2nd Defendant.

Notes

(i) For comments on this case, see Sinnadurai, (1973) 15 Mal LR 114, 117. See also Sinnadurai "Exemption Clauses v Inequality of Bargaining Power and Public Policy" (1978) 2 Malayan Law Journal, pg cxxx

(ii) There is a dearth of cases dealing with exemption clauses in consumer transactions in Malaysia and Singapore. The Malaysian and Singapore Courts are likely to follow English law when considering this aspect of the law.

(iii) The present common law position on exemption clauses has to be read in the light of the following House of Lords decisions: *Photo Production Ltd* v *Securicor Transport Ltd* [1980] AC 827; *Ailsa Craig Fishing Co Ltd* v *Malvern Fishing Co Ltd* [1983] 1 All ER 101 (commonly called the *Securicor* case) and *Geogre Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd* [1983] 2 AC 803.

(iv) The effect of these decisions of the House of Lords is that the law stated by the House of Lords in *Suisse Atlantique Societe' d' Armement Maritime SA* v *NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 has been reinforced. The House of Lords in these cases has now clearly stated that there is no rule of law under the common law which states that whenever there is a fundamental breach or a breach of a fundamental term, the party in breach of the contract cannot rely on the exemption clause. The House of Lords has now held that it is always a rule of construction as to whether the exemption clause is drafted wide enough to cover the said breach. Therefore whether a particular breach is covered by the exclusion clause would depend on the question:

> Whether in its context it 'the exclusion clause' is sufficiently clear and unambiguous to receive effect in limiting the liability of 'the party in breach'.
> [per Lord Fraser in *Ailsa Craig, supra* at page 107]

Lord Wilberforce stated the position as follows:

Whether a condition limiting liability is effective or not is a question of construction of that condition in the context of the contract as a whole. If it is to exclude liability for negligence, it must be most clearly and unambiguously expressed, and, in such a contract as this, must be construed *contra proferentem.*

[At page 102]

ILLEGAL CONTRACTS
(a) Contravention of a statute

Tan Bing Hock
v
Abu Samah

[1967] 2 MLJ 148 High Court, Raub

Cases referred to :
(1) *Leong Chek Pong & Anor* v *Lee Chick Yet* [1964] MLJ 209, FC.
(2) *Sarjan Singh* v *Sardara Ali* [1960] MLJ 52, PC.
(3) *Palaniappa Chettiar* v *Arunasalam Chettiar* [1962] MLJ 143, PC.

RAJA AZLAN SHAH J: The plaintiff brought this motion for an interim injunction to restrain the defendant from otherwise dealing, disposing, etc. of a forest area of 1,000 acres known as Block 19 in the District of Chegar, Perah, in the State of Pahang, and for a declaration that the defendant is liable to perform the covenants of an agreement entered between them and dated 30th August 1965.

At the outset it is necessary to say that on a motion like this it is usually undesirable to examine the evidence in detail because it so often happens that at the trial of the action when the witnesses go into the witness-box to give evidence and are cross-examined, the evidence appears in a different light from that in which it appears in cold print.

It is alleged by the plaintiff in the pleadings that there was an agreement entered into between him and the defendant to work the forest area. The official translation of the agreement reads:

> Agreement made this 30th day of August 1965 between the Managing Director of Sharikat Tenaga Perusahaan Balak Damak Berhad, Jerantut, Pahang, with the agreement of Inche Abu Samah bin Idris, the licence-holder of Kawasan Sudah Kerja Block No 19 in the District of Chegar Perah, hereinafter called the first party, and Inche Tan Bing Hock, Identity Card No 072508, of Radio Service, Jalan Lintang, Gemas, Negeri Sembilan, hereinafter called the second party.
>
> The contents of this agreement are given below, and both parties are bound by them.
>
> 1. The first party allows the second party to work and extract timber logs from the jungle area known as Block 19 containing an area of 1,000 acres in the District of Chegar Perah, as approved by the

District Forest Officer, Kuala Lipis, Pahang, *vide* (23) in PHD.L. 30/65, dated 18th May 1965

2. The second party agrees to pay the deposit of $2,000 (Two thousand dollars) to the Forest Department as required by that Department and this deposit will be returned to the second party on completion of the work on the area above-mentioned.
3. The second party agrees to pay a premium of $200 per mensem as required by the Forest Department in its letter of approval so long as work is in progress in the forest.
4. The second party will pay all taxes on all products which are connected with Government in respect of the area, as required from time to time.
5. The second party agrees to construct roads and provide transport for the removal of the timber logs.
6. The second party will pay all labourers' wages (salaries) and agrees to take out and pay workmens' compensation policies for the labourers.
7. The first party, being the licence-holder, will make arrangements with the Government concerning the area.
8. The second party agrees to pay to the first party reasonable incidental expenses incurred in his business with the Government whenever he is required to do so.
9. Whenever the timber logs have been removed and sold, the second party agrees to pay to the first party a sum of $2,000 (Two thousand dollars) by monthly instalments of $500 (Five hundred dollars). This amount is the total or lump sum in respect of the whole area mentioned above. The calculation of tons is not agreed upon. Payment shall be made at the end of every month until settlement has been made in full.
10. The second party has the right to arrange for the sale of timber logs extracted from the area.

This agreement will be binding upon the successors, heirs and administrators of both parties. We hereby affix our signatures below in the presence of witnesses.

(ABU SAMAH b IDRIS)
Signature of first party.
(TAN BING HOCK)
Signature of second party.

Witnessed by: (Sgd) ?
I/C No NS 178899.

Witnessed by: (Sgd) ?
I/C No 3076132.

Written by: (Sgd) ?
Public Clerk Licence No 4/65, Gemas.

Fee Received: $5.

The defence avers that the agreement was between a *sharikat* and the plaintiff. The defence also alleged illegality which was made to deceive the public administration in that the licence was not allowed to be transferred by power of attorney to another person or by subletting or by other means, and that the licence may not be the subject of sub-contracts or partnership without prior approval in writing from the

District Forest Officer.

The issue which both parties have conceded that I should determine is the question of illegality, for it is settled law that the court will not lend its aid by way of an injunction if the agreement in respect of which the breach has been committed is illegal.

Mr Devadason on behalf of the plaintiff strenuously urged that the agreement is not unlawful and based his argument on the proposition that to work the forest area does not constitute illegality. Reference was made to the Federal Court case of *Leong Chek Pong & Anor* v *Lee Chick Yet*[1] in which it was held that on the strict construction of the Mining Enactment (Cap 147) it would be highly irrational to define the expression 'work' to limit the licence-holder himself to do the physical work. In that case it was asked whether the expression 'work' would be lawful if the licence-holder does the physical work by his servants, and if so, must the servants work under his immediate direction or under the direction of a manager employed by the licence-holder, or must the land be worked by an agent or partner or as in that case by a person authorised by the licence-holder? The court was cautious not to give an exhaustive statement of the law for that would mean to re-write the law. In my view that case was decided upon the interpretation of the Mining Enactment, and I fail to see any substantial connection with the present case. I do not think one gets any assistance from the construction of other statutes passed at different times and in pursuance of different lines of thought.

In the present case the licence was issued to the defendant on 1st July 1965 and expired on 31st December 1965 under rules 2 and 18 of the Forest Rules, 1935. It is subject to additional conditions, in particular, no transfer by power of attorney to another person or by sub-letting or by other means and no sub-contracts or partnerships may be made in connection with the licence in question without prior approval in writing from the District Forest Officer.

In my view, the agreement executed by the parties has all the badges of a complete assignment of the rights in the licence to the plaintiff. It allows the plaintiff to work and extract timber logs in the whole of the area; the plaintiff agrees to pay the deposit and all other dues which are required by Government; the plaintiff agrees to construct roads and provide transport and to pay labourers' salaries and their workmen's compensation contributions. The defendant is the licence-holder to make arrangements with Government concerning the area, and the plaintiff agrees to compensate him for all expenses incurred thereby. The most important clause in the agreement provides for the payment of $2,000 as a lump sum or total payment in consideration for the logs extracted and sold by the plaintiff. The calculation of tons is not agreed upon, and lastly the arrangement of sale of timber logs belongs to the plaintiff. In short, the licence-holder, namely the defendant, merely sits still and gets a lump sum payment of $2,000 while the plaintiff works the area and fulfils all the obligations that are required under the Forest Enactment. To my mind, it possesses the notorious badge of the *'Ali Baba'* form of contract.

In my judgment the agreement is null and void and illegal as tending to contravene the provisions of rules 2 and 18 of the Forest Rules, 1935 which, as in the case of the Rubber Supervision Enactment, 1937, are intended to ensure the continuance of an industry on which the prosperity of this country is to some extent dependent.

Mr Devadason then argued that although the agreement between the parties was illegal, nevertheless it had been executed and carried out and on that account it was effective to pass the property in the licence to the plaintiff: see *Sarjan Singh* v *Sardara Ali*[2]. And on the authority of *Palaniappa Chettiar* v *Arunasalam Chettiar*[3] it was also said that the defendant was precluded from setting up the defence of illegality. In my view the two cases can be distinguished. In the former the plaintiff founded his claim on his right of property in the lorry and his possession of it. He did not have to found his claim by setting up the illegal or immoral act. In the latter case the father had to base his claim on his own fraud which was fully achieved and that the court would not lend its aid to such a man. In the present case the defendant is not the party who seeks to enforce the illegal contract. If he were the plaintiff he would be in the same position as in the *Chettiars'* case. He comes to court as a defendant, and my understanding of the law is that it is within the province of a defendant to set up the defence of illegality. If the law is otherwise, the result would be calamitous. It would mean that the court, contrary to precedents, will lend its aid to enforce an illegal act.

The application is therefore dismissed with costs.

Application dismissed.

DA Devadason for the Plaintiff.
Kam Woon Wah for the Defendant.

Notes

(i) The application before Raja Azlan Shah J (as he then was) in this case was for an interim injunction. The case was subsequently heard by Gill J who dismissed the plaintiff's action with costs, see [1968] 1 MLJ 221.

(ii) For other cases dealing with the transfer or assignment of forest licences, see *Lo Su Tsoon Timber Depot* v *Southern Estate Sdn Bhd* [1971] 2 MLJ 161 FC; *Sundang Timber Co Sdn Bhd* v *Kinabatangan Development Co Sdn Bhd*[1977] 2 MLJ 200 FC; *Leong Poh Chin* v *Chin Thin Sin* [1959] MLJ 246 HC; *Nam Seng Co* v *Wing Yew (Tawau) Co Sdn Bhd* [1978] 2 MLJ 198 FC; *Hashim bin Adam* v *Daya Utama Sdn Bhd* [1980] 1 MLJ 125 HC and *Yap Cheng Kim* v *Zahid Safian bin Tawaf* [1980] 1 MLJ 320.

(iii) The decision of Raja Azlan Shah J (as he then was) in *Tan Bing Hock's* case was relied upon in *Hashim bin Adam* v *Daya Utama Sdn Bhd, supra* and *Lo su Tsoon Timber Depot* v *Southern Estate Sdn Bhd, supra.*

(iv) Though section 66 of the Contract Act was not relied upon, the particular section would not, in any case have afforded the plaintiff

any relief as it is applicable only in cases where the parties are unaware of the illegality.

(v) For an analysis of the various State Forest Legislation and the cases, see Sinnadurai and Koh, "Contracts in Contravention of the Forest and Moneylenders Legislation", (1986) *Essays in honour of Ahmad Ibrahim,*Malayan Law Journal.

(b) Recovery under section 66 of the Contracts Act

Singma Sawmill Co Sdn Bhd
v
Asian Holdings (Industralised Buildings) Sdn Bhd

[1980] 1 MLJ 21 Federal Court, Johore Bahru

Coram: Raja Azlan Shah Ag CJ (Malaya), Wan Suleiman & Salleh Abas F JJ.

Cases referred to:-

(1) *Goh Chong Hin* v *Consolidated Malay Rubber Estate Ltd* (1924) 5 FMSLR 86.
(2) *Crossley Brothers Ltd* v *Lee* [1908] 1 KB 86.
(3) *Ban Seng* v *Yap Pek Soo* [1967] 2 MLJ 156.
(4) *Fatimah* v *Moideen Kutty* [1969] 1 MLJ 72.
(5) *Kuju Collieries* v *Jharkhand Mines* AIR (1974) SC 1892.
(6) *Scott* v *Brown, Doering, McNab and Co* [1892] 2 QB 724, 728.
(7) *Gas Light & Coke Co* v *Turner* (1840) 133 ER 127.
(8) *Alexandar* v *Rayson* [1936] 1 KB 169.
(9) *Palaniappa Chettiar* v *Arunasalam Chettiar* [1962] AC 294; [1962] MLJ 143.
(10) *Arumugam* v *Somasundram* [1933-34] FMSLR 322.
(11) *Moti Chand* v *Ikram-Ullah* AIR (1916) PC 59.
(12) *Edward Ramia Ltd* v *African Woods Ltd* [1960] 1 WLR 86.
(13) *La Banque Jacques-Cartier* v *La Banqe Depargne De La Cite Et Du District De Montreal* (1887) 13 AC 111, 118.

RAJA AZLAN SHAH Ag CJ (MALAYA) (delivering the judgment of the Court): Singma Sawmill Co Sdn Bhd, the appellants to this appeal, are the applicants in Distress Suits No 1/77 and No 6/77. They applied for and obtained Warrants of Distress to be issued against Asian Holdings (Industrialised Buildings) Sdn Bhd, the respondents, for arrears of rent. As a result the Bailiff of the High Court, Johore Bahru executed Warrants of Distress on February 8,1977 and June 22, 1977, respectively.

On November 26, 1977 the respondents applied by way of motion to discharge the Warrants of Distress and to dismiss the actions on two principal grounds, namely, the use of the land is illegal, therefore the contract of tenancy is void or voidable, and, the machines are fixtures and therefore cannot be distrained.

The learned Judicial Commissioner allowed the respondents' applications. He held that the appellants are guilty of giving an illegal consideration to the said agreement, and as such, the contract is void under section 24 of the Contracts Act, 1950. We would at the outset express our respectful concurrence with that view. We think it is borne

out by the various authorities to which we will refer. Section 24 enacts thus:

> The consideration or object of an agreement is lawful, unless:
> (a) it is forbidden by a law;
> (b) it is of such a nature that , if permitted, it would defeat any law;
> (c) it is fraudulent;
> (d) it involves or implies injury to the person or property of another; or
> (e) the court regards it as immoral, or opposed to public policy.
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

He further held that the machines which are attached to the land by bolts and screws are fixtures within the meaning of the Distress Ordinance, 1951 and that being so, cannot be distrained.

The facts of the case are simple and straightforward. On March 18, 1975 the appellants let to the respondents a portion of their land together with a factory building erected thereon for 3 years at a monthly rental of $3,000 payable in advance, "solely for the purpose of operating a factory". The respondents are carrying on the industry of prefabricated houses and for that purpose they have erected in the factory heavy machinery which are affixed to concrete beds by means of screws and bolts and as such are sufficient in law to become fixtures. That is well illustrated by the case of *Crossley Brothers Ltd* v *Lee.*[2] They ceased to pay rent from June 1976 after they were warned by a representative of the Industrial Development Department of the Government of the State of Johore that they were operating the factory illegally and in breach of the express condition. They told the appellants of their discovery and requested them to rectify the situation but the latter took no heed and instead insisted the former to continue to pay rent. The appellants did not deny that they did not inform the respondents of the express condition when they signed the agreement but they averred that the latter had affirmed, alternatively had executed it. It was argued that there was acquiescence and waiver.

It is in such circumstances that the respondents claim that the relationship of landlord and tenant never existed and accordingly the appellants have no right to claim any rent from them.

The crisp issue for decision in this appeal is one of illegality. If the tenancy agreement is declared void *ab initio,* it follows that there is no right to recover rent under it and there can be no question of distress for rent. We will therefore confine ourselves to that issue.

It is not disputed that the said land is agricultural land (see section 52(1) of the National Land Code) and subject to an express condition that it is to be used for the cultivation of pineapple and rubber, and that being so, the condition runs with the land and binds the appellants and every person having or claiming any interest in it(section 104) unless there is a change in the category of land use. In 1974 the appellants were not successful in their application to change the category of land use from agriculture to industry. On July 25, 1976, the Collector exercised the powers conferred on him under section 128 and issued a

Form 7A notice on the appellants requiring them to remedy the breach and demolish the factory. As the appellants failed to comply with the said notice another notice in Form 7B under section 129 was issued. We have not been told whether the statutory inquiry under subsection (4) has already been held or is going to be held.

A sustained argument on behalf of the appellants was addressed to us to the effect that the tenancy agreement is not illegal in that it does not contravene any law. What has happened, it was argued, is connected with land use which is a matter between the appellants and the State Authority, and nothing to do with the respondents as their tenant. It was further said that assuming there is a breach of the express condition, it is for the State Authority to take necessary action to forfeit the said land and when that happens, the respondents will have the right to terminate the said agreement.

Two propositions were advanced to support the appellants' case. First, it was submitted that the respondents are estopped from denying the appellants' title. Section 116 of the Evidence Act, 1950 (Act 56) was relied upon to justify their case and the decision in *Ban Seng* v *Yap Pek Soo*[3] was cited as authority for such a proposition. The second proposition is based on the effect of section 66 of the Contracts Act, 1950 (Act 136) which embodies a well-known rule of equity that a person who has received any advantage under an agreement discovered to be void or under a contract which becomes void, must make compensation for it.

The respondents' case was argued in this way. The tenancy agreement is void *ab initio* in that it contravenes section 24(b) of the Contracts Act. That being so, there is no contract of tenancy in existence and there can be no question of the continuance of such tenancy so as to attract the provisions of section 116 of the Evidence Act. Since the contract is *void ab initio* and unenforceable, section 66 of the Contracts Act does not apply.

The case of *Ban Seng* v *Yap Pek Soo, supra,* is a good starting point. It is authority for the proposition that in an action to recover arrears of rent the tenant in possession is estopped from denying his landlord's title. In that case the landlord continued to let the premises built on TOL land issued to his brother after the licence had expired.

That case is in conflict with the decision of this court in *Fatimah* v *Moideen Kutty*[4] which held that notwithstannding the doctrine of estoppel a tenant may plead that the title of the landlord has come to an end. In that case the personal representive of a deceased temporary licence holder was seeking to enforce a warrant of distress to recover arrears of rent alleged to be payable by a tenant of the deceased in respect of a period after his death and it was held that whatever rights the deceased might have had over the land terminated on his death, and the personal representative did not at the material time have any right to distrain. That reasoning is in our view consistent with the rights of a temporary occupation licence holder which are personal in nature. Such rights cease on the death of the licence holder or by effluxion of time.

In our view, the relationship of landlord and tenant can be created only by a contract, valid according to the law subsisting at the time of its execution or can be created or continued by operation of law. Now section 116 of the Evidence Act enacts that no tenant of immovable property shall, during the continuance of the tenancy be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property. The words 'during the continuance of the tenancy' are important and make it clear that where there is no legal tenancy, the provisions of the section are not applicable. That being so, where the contract of tenancy has come to an end by effluxion of time, there is no legal contract of tenancy and therefore there can be no question of the continuance of such tenancy. The tenant in consequence can later challenge the status of the landlord, and he cannot be deemed to be estopped from denying that the title of the landlord has come to an end. We are of the view that the decision in *Ban Seng* v *Yap Pek Soo, supra,* is now no longer good law.

We now proceed to consider whether section 66 of the Contracts Act applies. The principle is well illustrated by the case of *Kuju Collieries* v *Jharkhand Mines.*[5] In that case a mining lease was granted to the plaintiffs who knew that it was contrary to the Mines and Minerals Act, 1948. They were already in the mining business and had the advantage of consulting their lawyers and solicitors. So there is no occasion for them to have been under any kind of ignorance of the law. They should have been aware of the illegality of the agreement when they entered into it. It was held that they were not entitled to claim refund of the money paid under the lease as the payment was not made lawfully. The facts showed that the contract was void *ab initio* and that it was not a case to which section 65 of the Indian Contract Act (section 66 of our Contracts Act) applied. The contract did not become void subsequently. Nor could it be said that the agreement was discovered to be void after it was entered into.

A principle gleaned from that case is to the effect that a contract which is not in accordance with statutory requirements is no contract at all, and therefore cannot be said to have been discovered to be void under section 66 of the Contracts Act. Nor is it a case of contract becoming void due to subsequent happenings. The section therefore enacts in statutory form that a contract that is illegal in itself is void and unenforceable by either party. It is contaminated by *turpis causa* and that rule has long been established that *ex turpis causa oritur non actio* — no person can claim any right or remedy whatsoever under an illegal transaction in which he has participated. The courts do not overlook the fact that they do not assist a person who comes with unclean hands. In the words of Lindley LJ in *Scott* v *Brown, Doering, McNab & Co*[6]:

> No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality.

Thus in the case of a lease known to the lessor to be illegal, he cannot sue for the recovery of rent, since to substantiate his claim he must necessarily rely upon the illegal transaction. In *Gas Light & Coke Co* v *Turner*[7] the plaintiffs had demised certain premises to the defendant to be used by him for an unlawful purpose. It was held that the plaintiffs were not entitled to sue the defendant upon the covenant for rent in the lease.

A landlord who lets premises with guilty intent cannot sue for rent. In *Alexander* v *Rayson,*[9] the plaintiffs let a service flat to the defendant for £1,200. The contract was drawn up in two documents. In the first, the defendant agreed to pay £450 for the flat and certain services; in the second, she agreed to pay £750 for the same services, plus the use of a refrigerator. The plaintiff's object in splitting up the contract in that way to defraud the rating authorities by showing them the first document only. It was held that the contract was illegal and that the plaintiff was not entitled to seek the assistance of the court to enforce the lease or the agreement. It was the formulation of the transaction in a particular way by means of the lease and agreement, and not the subject matter of the transaction, of which an illegal use was to be made.

The same principle was applied where a father transferred part of his rubber estate to his son, intending to keep full control of it, with the sole object of getting a larger production quota: see *Palaniappa Chettiar* v *Arunasalam Chettiar.*[9]

In *Scott* v *Brown, Doering, McNab & Co* (above) it was held that a contract to 'rig the market' by offering inflated prices for shares in a particular company was illegal as it was an indictable conspiracy and that the purchase money could not be recovered. It will be observed that there was no intention on the part of the plaintiffs to use the shares in an unlawful way. The intention was merely to make use of the existence of the share contract in order to defraud the public by inducing them to believe that it recorded a genuine transaction. It was the transaction of purchase on the market at a particular price and not the thing purchased, of which an illegal use was to be made.

We would like to refer to three cases which we think are also relevant. In *Arumugam* v *Somasundram,*[10] the driver and the owner of a private motor car used it for hire purposes contravening section 44 of the Motor Vehicles Enactment, 1928. It was held that both the parties were *in pari delicto* and that the driver could not claim any wages from the owner. There was nothing illegal in agreeing to drive a car for hire, but if the object of the agreement was to drive an unlicensed car for hire, then the agreement was unlawful as being forbidden by law, or of such a nature that if permitted it would defeat the provisions of the law.

In *Moti Chand* v *Ikram-Ullah,*[11] it was held that an agreement by a vendor to relinguish ex-proprietory rights in *Sir* lands was void and unenforceable as it would if permitted, defeat the policy of the Agra Tenancy Act, which is to secure and preserve such rights. The policy of the Act was not to be defeated by any ingenuous devices, arrangements or agreement of relinquishments by a vendor of such lands, or for a

reduction of purchase money on the vendor's failing or refusing to relinquish such lands.

In *Edward Ramia Ltd* v *African Woods Ltd*[12] it was held that any person desiring to obtain a concession in respect of land in Ashanti must comply with the essential and imperative requirements of the Concessions Ordinance of the Gold Coast which was designed to protect the grantor in the public interest and no waiver was possible of any of the requirements prescribed in the Ordinance. Thus, where the appellant company which had applied for and been granted a concession by the Stool of Bekwai relating to timber rights in land in Ashanti, had admittedly failed to comply with the provisions of the Ordinance, the concession was invalid and unenforceable. To accede to waiver of any of the requirements of the Ordinance would be entirely to ignore the intention of the legislature for the public good and to defeat one of the main purposes of the Concessions Ordinance.

That brings us to real crux of this appeal. Is the tenancy agreement void and unenforceable? Now, in the cases to which we have referred, there was an intention to use the subject-matter of the agreement for an unlawful purpose, and also an intention to make use of the lease or agreement for an unlawful purpose. The principles applicable to both cases are the same. In such cases any party to the agreement who has the unlawful intention is precluded from suing upon it. *Ex turpis causa non oritur actio.* The action does not lie, not for the sake of the defendant but because the court will not lend its assistance to such a plaintiff. It will look behind such cosmetic arrangements to see the real intention.

In the present case, the breach of the express condition is wilful, if not, contumacious. There is a clear intention on the part of the appellants to use the subject-matter of the agreement i.e., the land on which the factory was created, for an unlawful purpose. The object of the express condition is that the land must be cultivated with rubber and pineapple; the category of land use is agriculture, and any unilateral conversion to industry is not permitted. Indeed neither party had power to waive the express condition which inextricably runs with the land. If that is permitted it would be entirely to ignore the object of the express condition which is for the public good and to defeat the law relating to land use. The appellants are deemed to have been aware of the illegality of the agreement when they entered it and therefore section 66 of the Contracts Act cannot assist them.

Appellants' counsel further contended that respondents had acquiesced in the agreement. We think that this is too crude an argument. It overlooks the fact that the respondents were not aware of the express condition until they were warned by the Government Industrial Development Department of the breach. If a man acquiesces to something of which he knows nothing, it is of no real evidential value. 'Acquiescence must be founded on a full knowledge of the facts, and further it must be in relation to a transaction which may be valid in itself and not illegal and to which effect may be given as against the party by his acquiescence in and adoption of the transaction': see *La Banque Jacques-Cartier* v *La Banque Depargne De La Cite Et Du District De Montreal*[12].

It is unnecessary in the circumstances for us to deal with the respondents' case based on fraudulent misrepresentation and so we say nothing about that.

For these reasons, we are of the opinion that both the appeals ought to be dismissed with costs. The reasons which we have given do not differ in substance from the ground that commended itself to the learned Judicial Commissioner.

Appeals dismissed.

GS Nijar for the Applicants.
E Gunaratnam for the Respondents.

Note

It is submitted that the views expressed by Raja Azlan Shah Ag CJ in the above case is open to criticism. Though there were some doubts in the early Indian cases as to the application of section 65 of the Indian Contract Act (section 66 of the Malaysian Contracts Act) in situations where an agreement was found to be void *ab initio* under section 24 of the Contracts Act, it is now firmly established that restitutionary relief under section 66 may be obtained even when contracts are rendered illegal under section 24 of the Contracts Act. See the Federal Court decision of *Ahmad bin Udoh* v *Ng Aik Chong* [1970] 1 MLJ 82 (this case was not referred to in *Sigma Sawmill's* case); the Privy Council decision of *Menaka* v *Lum Kum Chum* [1977] 1 MLJ 91. See generally Sinnadurai, *Sale and Purchase of Real Property in Malaysia,* (1984) Butterworths at pages 156-164.

PERFORMANCE
(a) Time

Wong Kup Sing
v
Jeram Rubber Estates Ltd

[1969] 1 MLJ 245 High Court, Kuala Lumpur

Cases referred to:-
(1) *Barclay* v *Messenger* (1874), 30 LTR 354.
(2) *Kilmer* v *British Columbia Orchard Lands Ltd* [1913] AC 319, 322.
(3) *Webb* v *Hughes* (1870) LR 10 Eq 281, 286.
(4) *Stickney* v *Keeble* [1915] AC 386, 423.
(5) *Tilley* v *Thomas* LR 3 Ch D 61.
(6) *Ardeshir* v *Flora Sasson* AIR (1928) PC 523.

RAJA AZLAN SHAH J: The plaintiff claims specific performance of an agreement for sale of a rubber estate totalling 607.5 acres comprised in

Lease of State Land No 1468 for Lot 2813 situated in the Mukim of Sungei Buloh in the District of Kuala Lumpur, alternatively damages for breach of contract and in the further alternative rescission of the contract and payment of sums totalling $650,000.

By the said agreement dated 4th June 1966 the defendants, a limited liability company registered in the United Kingdom with Malayan Estate Agencies Group Limited as their agents (hereinafter referred to as the 'defendants' agents') agreed to sell and the plaintiff, a landed proprietor, agreed to buy the said land at the price of $950,000 on the terms and conditions set forth in the agreement.

The plaintiff as was required by clause 1 paid a sum of $95,000 i.e., 10% of the purchase price by way of forfeitable deposit, on or before the execution of the said agreement. The balance of the purchase price was to be paid on 30th November 1966, the date fixed for completion of the purchase (clause 2) and by clause 17, time wherever mentioned was expressly made of the essence of the contract.

At the request of the plaintiff the defendants consented to extension of time for completion on six separate occasions on the following terms and conditions:

(i) In consideration of a further forfeitable deposit of $95,000 (10% of the purchase price) making a total forfeitable deposit of 20%, the date of completion was extended to 31st January 1967 by an exchange of letters between the plaintiff's then solicitor and the defendants' solicitors dated 25th November 1966 and 1st December 1966 respectively.

(ii) In consideration of the payment of a further forfeitable deposit of $10,000 thereby making a total forfeitable deposit of $200,000 the date of completion was extended to 31st March 1967 by an exchange of letters between the plaintiff's then solicitor and the defendants' agents dated 20th February 1967 and 23rd February 1967 respectively.

(iii) In consideration of the payment of a further forfeitable deposit of $100,000 thereby making a total forfeitable deposit of $300,000, the date of completion was extended to 15th May 1967 by an exchange of letters between the plaintiff's then solicitor and the defendants' agents dated 31st March 1967 and 2nd May 1967 respectively.

(iv) The date of completion was later extended to 30th June 1967 vide the defendants' agents' letter dated 26th May 1967.

(v) The date of completion was further extended to 30th September 1967 by an exchange of letters between the plaintiff's then solicitor and the defendants' agents dated 30th August 1967 and 12th September 1967 respectively.

(vi) The date of completion was finally extended to 15th November 1967 by an exchange of letters dated 30th September 1967 and 2nd October 1967 whereby the balance of the purchase price amounting to $650,000 was to be paid by four instalments of $100,000 on 30th September 1967, $100,000 on 13th October 1967, $150,000 on 30th October 1967 and $300,000 on 15th November respectively.

The plaintiff paid the first three instalments amounting to $350,000 by post-dated cheques which were honoured. We now come to the crux of the matter i.e., the final instalment to complete the purchase. This was also by a post dated cheque of the above-stated date. On 13th November

1967 the plaintiff's then solicitor made proposals to the defendants' 'agents for extension of time up to 31st December 1967 to complete the purchase. The defendants' agents consulted their principals in the United Kingdom and on 15th November 1967 they wrote to the plaintiff's then solicitor informing him that their principals were not willing to grant the plaintiff any further extension of time and insisted that the purchase be completed by noon of that day or the agreement be terminated and his deposits forfeited. On the same day the plaintiff's then solicitor wrote to the defendants' agents proposing a settlement of the final payment by giving the plaintiff time till 31st December 1967 on payment of the normal bank interest till that date or on the date of earlier payment and the defendants taking a mortgage of the said lands for the balance on such term and such rate of interest as shall be mutually agreed upon on the transfer of the property to the plaintiff and further drawing their attention to their letter of 4th July 1967 whereby they had agreed to offer an extension of the date of completion to 31st December 1967 provided the forfeitable deposit was in the sum of $350,000 and the balance of $300,000 to be paid on or before 31st December 1967. It is of significance to note that the said offer was rejected by the plaintiff by their letters of 17th July 1967 and 27th July 1967. The defendants' agents replied on the same day (15th November 1967). They returned the plaintiff's post-dated cheque for $300,000 as the plaintiff had telephoned them asking them not to pay it into their principal's bank account as there were insufficient funds to meet it and added 'It is now 12.30 pm and as your client has not completed the purchase, we are now treating the agreement as terminated'. On 23rd November 1967 the defendants' solicitors by letter refunded the sum of $350,000 (by cheque) being part of the monies received by the defendants to account of the purchase price which is not forfeitable, but retained the sum of $300,000 being the total of forfeitable deposits paid.

On 11th December 1967 the plaintiff engaged his present solicitors who reviewed the legal position and on 23rd December 1967 they wrote to the defendants' solicitors, *inter alia* :

> 4. On our instructions our client has not banked the $300,000 cheque sent with your letter of the 23rd November 1967.
> 5. Under the circumstances we have instructed Mr WH Sault to call upon you on the 29th or 30th to suit your conveniences and to tender a bankers draft for $300,000, being the balance of the purchase price and to return your clients' cheque of $350,000. We request you to produce for his inspection all the relevant title deeds and on being satisfied Mr. Sault will deliver to you the relevant Memorandum of Transfer of the land for your clients' signature and return.
>
> Kindly let us hear from you by return either by express letter or telephone so as to enable our client to purchase the banker's draft and hand it over to Mr Sault in time.

Mr Sault did call at the defendants' solicitors' office on 30th December 1967. The letter from the plaintiff's solicitors dated 4th January 1968 confirmed this:

> We confirm Mr Sault's call upon you on Saturday 30th ultimo, when your Mr Barrington Baker informed him that he had instructions to accept the draft for $300,000 without prejudice, and to await instructions from London whether or not they should complete.
> 3. Mr Sault stressed that the purchaser did not require further time, receiving a letter from you stating that the vendor would complete, the $300,000 would be paid forthwith.

The situation on the 15th November 1967 was the defendants' solicitors considered the agreement was at an end and the discussions which took place between the parties' solicitors constituted a completely new offer to negotiate without prejudice to the defendants' rights under the terms and conditions of the original agreement.

The question to be considered is, was time originally of the essence of the contract? There can be no doubt that it was. I do not know how it could have been more strongly expressed than this: 'Clause 17. Time wherever mentioned in this agreement shall be of the essence of the contract'. But that had been waived by the conduct of the defendants. The correspondence and dealings between the parties down to and including 15th November 1967 confirm this view. Time then was no longer of the essence of the contract. If I may recapitulate the words of Sir George Jessel in *Barclay* v *Messenger*[1]:

> It appears to me plain that a mere extension of time, and nothing more, is only waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time.

In that case the purchases were obliged to pay the balance of the purchase price on 31st July in default all previous payments would be forfeited and the agreement considered null and void. It was submitted on their behalf that the letter of the 16th August written by the vendors to them constituted waiver. The terms of that letter were either commencing works as promised or paying the balance of the purchase money. The purchasers neither commenced works nor paid the money. Sir George Jessel expressed the view that it was a qualified waiver, that is, a waiver if the terms were complied with. In our case it was an extension of time and something more, that is the forfeitable deposit made from time to time was increased to the extent of $300,000 as compared with $95,000 as stipulated in the original agreement. It is also of significance to note that in all the six extensions negotiations were continued after the extended dates fixed for completion and this conduct on the part of the defendants justified the plaintiff in assuming that he would have some indulgence in making his payments: *Kilmer* v *British Columbia Orchard Lands Ltd*[2]. Now two days prior to 15th November 1967 the plaintiff put in new proposals to extend the date to 31st December 1967. That was not acceptable to the defendants who on 15th November 1967 made their final stand and abandoned the contract when the plaintiff failed to pay the balance of the purchase money. There were no doubt further negotiations after 15th November 1967 but they were entered into without prejudice to the defendants' rights under the original agreement.

Once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and the defendants must give a reasonable notice of their intention to abandon the contract if the balance of the purchase money was not paid: *Webb* v *Hughes*[3], *Stickney* v *Keeble*[4]. If the defendants had on the very day of 30th November 1966 i.e., the original date for completion, made their stand, their decision would have been that time was of the essence and it would have been proper for them to give notice on the day fixed for completion that they would abandon the contract; but after going on negotiating they should have given a reasonable notice: *Tilley* v *Thomas*[5].

In my opinion since time was no longer of the essence, the notice of abandonement dated 15th November 1967 was not a reasonable notice. The net result is that the contract was never terminated and it would follow that the plaintiff was not in default.

Has the plaintiff made out a case for specific performance? I say he has. It must be remembered that the ground upon which a court of equity enforces specific performance of a contract affecting land is that it acts upon the equities arising out of the changed position caused by the acts of the parties done in execution of the contract and not upon the contract itself. The defendants by their indulgence in extending the date for completion on not less than six occasions have lulled the plaintiff into a sense of false security and have justified him in assuming that he would be given reasonable time to complete the contract. It would therefore be inequitable, in view of the dealings which had taken place between the parties, to allow the defendants to enforce his strict legal rights against the plaintiff which he had been led to believe would not be enforced against him. Another factor in his favour is that he has averred and proved a continuous readiness and willingness to perform the contract from the date of the contract to the time of hearing: *Ardeshir* v *Flora Sasson*[6]. This is confirmed by the negotiations between the parties down to and including 30th December 1967. Mr Sault from the Bar did say on the date of hearing that his client was ever ready, and willing to deposit the balance of the purchase money into court on any day specified. In my view this further confirms the plaintiff's continuous readiness and willingness to perform the contract.

In the circumstances I will order specific performance.

Specific performance ordered.

WH Sault for the Plaintiff.
DG Rawson for the Defendant.

Notes

(i) The decision of Raja Azlan Shah J (as he then was) was relied upon by Mohamed Azmi J in *Sharikat Eastern Plastics Industry* v *Sharikat Lam Seng Trading* [1972] 1 MLJ 21.

(ii) In *Siah Kwee Mow & Anor* v *Kulim Rubber Plantations Ltd* [1979] 2

MLJ 190, *Wong Kup Seng* was distinguished by Abdoolcader J.

(iii) As to the provisions dealing with time of performance see section 56 of the Contracts Act 1950 and the case of *Jamshed K Irani* v *Burjorji* (1915) LR 43 IA 26 (Privy Council, on appeal from India).

(iv) For a detailed discussion on time of performance in contracts for the sale of land, see Sinnadurai, *Sale and Purchase of Real Property in Malaysia* (1984) at pages 393—403.

(b) Distinction between entire and divisible contracts

Yong Mok Hin
v
United Malay States Sugar Industries Ltd

[1966] 2 MLJ 286 High Court, Kuala Lumpur

Cases referred to:-
(1) *Thorn* v *London Corporation* (1876), 1 App Cas 120 at p 127.
(2) *Appelby* v *Myers* (1867), LR 2 CP 651 at p 659-660.
(3) *Mersey Steel and Iron Co* v *Naylor Benzon & Co* (1884), 9 App Cas 434.
(4) *Withers* v *Reynolds* (1831), 1 LJKB 30.
(5) *Freeth* v *Burr* (1874), LR 9 CP 208.
(6) *Heyman* v *Darwins* [1942] AC 356.
(7) *Hadley* v *Baxendale* (1854), 9 Ex 341.
(8) *Hirt* v *Hahn* (1876), 61 Missouri 496.
(9) *Mertens* v *Home Freeholds Co* [1921] 2 KB 526 at p 535.
(10) *Milwaukee City* v *Shailer* (1898), 84 Fed Rep 106.
(11) *Hick* v *Raymond and Reid* [1893] AC 32.
(12) *Hydraulic Engineering Co* v *McHaffie* (1878) 4 QBD 670.
(13) *Hanak* v *Green* [1958] 2 WLR 755.

RAJA AZLAN SHAH J: The plaintiff is a building contractor carrying on business under the name of Yong Mok Hin Construction, Kuala Lumpur. The defendants are a limited company hereinafter referred to as the defendant company. The plaintiff claims $13,800 representing materials used and damaged by the defendant company while erecting their machinery in the factory; $40,785 for the alteration of the two original stores to three stores at $13,595 each; $36,000 as representing the fifth progress payment; and interest at 6 per cent, per annum from 24th December 1964 to date of realisation,and costs. Items (d), (e) and (f) have been abandoned.

The defendant company denied liability. They alleged that the work done must be taken to be work done under the contract, that is, for the contract price of $187,500, and that the amount sued must be taken to be the balance due under the said contract. They further alleged that they never agreed or otherwise became liable to pay for the said work or any part thereof on the grounds following:

(a) The said works were not done or completed by 8.2.1964 which was

a condition precedent as time was of the essence of the contract.
(b) The plaintiff had abandoned work in about November 1964.
(c) The Government had not given a certificate of fitness of occupation.
(d) The work was defective and done in a non-workmanlike manner.

The defendant company counter-claimed for damages for breach of contract, expenses incurred or to be incurred to remedy defective work and complete the whole project and damages for delay and consequential loss.

The circumstances giving rise to the claim are as follows. On 8th August 1963 the plaintiff entered into a contract with the defendant company for the construction of a one-storey office building for $82,500 and two zinc wall stores for $105,000. The contract (Exh. P1) *inter alia* stipulates that time was of the essence and that the time for completion of the whole project was six months from the above date. It was accepted by both parties that advances on the contract price were to be made towards the progress of construction on the certification by the architect and the balance on a certificate of fitness of occupation being granted to the defendant company by the Government. The plaintiff was responsible for the performance of the work under the direct supervision of the defendant's architect. There was a schedule of works and a plan (Exh. P22) but no specification was provided. It is a lamentable fact that the said work, which in reality was not precisely defined and planned, was put out to tender by the defendant company or their architect without using a schedule form of contract, thus relying on their powers to vary the work and issue working drawings for the supply of the actual design during the currency of the work, when they would be far better off to recognise the reality and use a schedule form of contract thereby avoiding the probability of large claims of uncertain amounts by both sides. That is my observation on the evidence. To proceed with the case, it was the understanding of both parties that on each occasion when progress payment was to be made, the defendant company would issue to the plaintiff shares for that amount. At the time of the execution of the agreement the plaintiff agreed and was allotted a total of $150,000 worth of shares in the defendant company (Exh. D11). In due course the plaintiff commenced work and he received in all four progress payments the last of which was on 6th May 1964. On that date he had received in respect of progress payments a sum of $34,500 in cash and $130,000 worth of shares, making a total of $164,500.

I shall now proceed to consider the plaintiff's claim. With regard to his first claim, the plaintiff testified that the defendant company had used his timbers which were already on the site in connection with the erection of their machinery and therefore had incurred loss in the region of $2,600. That has not been challenged. He also testified that the defendant company intended to construct a third store and in order to do so he had to do some levelling of the ground which he estimated would cost him $11,200. To my mind, the second limb of his claim under this item is in actual fact a variation in the sense that on a true construction of the contract it is not included in the contract price. The

contract work was, to my mind, so greatly altered that the work actually done cannot be regarded as done under it at all. Lord Cairns said in *Thorn* v *London Corporation:*[1]

> If it is the kind of additional work contemplated by the contract, the contractor must be paid for it and will be paid for it according to the prices regulated by the contract .... If the additional or varied work is so peculiar, so unexpected and so different from what any person reckoned or calculated upon, it may not be within the contract at all, and he could either refuse to go on or claim to be paid a *quantum meruit.*

The plaintiff commenced work on the third store after the managing director (PW2) had authorised it to be carried out at the price quoted by the plaintiff — vide Exh P5. The defendant company led no evidence to rebut the plaintiff's claim. In the circumstances I am satisfied that the plaintiff's claim under this item has been substantiated.

With regard to the plaintiff's claim under the second item, that is, with regard to the alteration of zinc walls to 9" brick walls, in about December 1963 and January 1964, that is during the progress of the work, there was a proposal to alter the original plan to the effect that the two stores had to be replaced by three stores and that the original zinc walls were to be replaced by $4^1/_2$" brick walls. In pursuance of that proposal the plaintiff wrote to the defendant company and gave his quotation (Exh. P2 dated 6th December 1963):

> Regarding to the construction of two additional stores according to the old plan at the lowest price @ $86,000 this is also agreed by you and according to managing director and vice chairman Mr Tan Hian Tsin instruction for the demolition of the originally zinc wall stores and re-construction of brick wall store, I submit herewith my quotation for your approval as below:
>
> | | |
> |---|---|
> | (a) Originally hard wood poles, replaced of 6" x 6" R.C. concrete poles approx. = 55 pcs. | $1,375.00 |
> | (b) Originally zinc wall, replaced of $4^1/_2$" brick wall — approx. 2,000 cu. ft. | 10,000.00 |
> | (c) Plaster works approx. of 2,500 cu. ft. | 7,500.00 |
> | (d) Extra 9" x 6" stones approx. 150 cu.ft. | 2,700.00 |
> | | $21,575.00 |
> | Less originally zinc wall | 7,980.00 |
> | | $13,595.00 |
>
> I hope this quotation will meet with your kind approval, and if any further alteration amendment other than the above, shall be discuss in detail.
>
> Yours faithfully,
> Yong Mok Hin.
>
> We accepted.
>
> (Sgd) Thian Seu Ling.
> Managing Director.
> United Malay States Sugar
> Industries Limited.

That price was in respect of one store The work was authorised by the managing director (PW2). On 2nd January 1964 the architect wrote to the plaintiff as follows:

> This is to inform you that the $44^1/_2$" brick wall constructed for the store to be pulled down immediately and reconstruct it with 9" brick wall with strong cement mortar.

There was a plan for the variation in the form of Exh. P8 which was signed by two directors of the company and their secretaries. The plaintiff had carried out 90 per cent of the work under the supervision of the architect. Door frames, iron doors, roof and tiles had yet to be completed although they were at the site.

The defendant company contended that the sum claimed was not due because the plaintiff had failed to perform or carry out the said alterations. I must remind myself that this particular claim was in connection with the erection of a 9" brick wall only. The architect testified that the plaintiff had put up the zinc walls in respect of store A according to the plan. He had then demolished that wall and had put up the $4^1/_2$" brick walls. This is confirmed by the evidence of DW3. PW2, the managing director, testified that he had seen and checked the work with regard to Exh. P7 and was satisfied that the work was carried out and agreed that the plaintiff would be entitled three times $13,595. Between the two, I would prefer the evidence of the architect who, to my mind, would be the best person to testify on the matter. In the circumstances I will allow the full amount of $13,595 for store *A*,but in respect of stores *B* and *C* I will allow the amount specified for the zinc wall, that is, $7,980 each, making a total of $15,960. Therefore, under this item the plaintiff is entitled to a sum of $29,555.

With regard the plaintiff's third claim, he alleged that when he demanded for his fifth progress payment the architect refused to put up his certificate in view of the plaintiff's letter dated 6th May 1964 (Exh P3) which reads as follows:

> I, Yong Mok Hin, I/C 2179101, have agreed with the administrator of United Malay States Sugar Industries Limited, Raja Nong Chik bin Raja Ishak and the chief engineer Mr Li Ching Yee that I will not receive any more progress payment after the fourth progress payment has been paid amounting to $36,000 (thirty six thousand only) and the balance of the payment to be made to me after the completion of the whole work as stated above.

The plaintiff then went to Ipoh and saw the chairman of the defendant company, Dato' Lau Pak Kwan, who gave the authorisation to pay. On returning to Kuala Lumpur the plaintiff saw the architect and told him that he had the necessary authorisation to be paid. The architect asked his assistant to verify, and that was confirmed. Accordingly the architect prepared the certificate (Exh P2 dated 24th July 1964). The architect certified the cost of the work on the office building at $70,000, and in respect of the three stores at $145,000. After deducting 10 per cent for retention fund and debiting the plaintiff with $164,500 as detailed above,he certified that the amount due to the plaintiff was

$36,000.

The question to be posed is whether the plaintiff entitled to that sum of money. That,to my mind, depends on the question whether the contract is an entire contract, and that in its turn depends on its construction in the light of all the circumstances. It is settled law that in an entire contract complete performance by one party is a condition precedent to the liability of the other; in such a contract the consideration is usually a lump sum which is payable only upon complete performance by the other party: see Vol 1 *Chitty on Contracts,* 22nd ed. at p 458. and 8 *Halsbury's Laws of England,* 3rd ed at p 166. To my mind, the present case is not an entire or lump sum contract. The contract (Exh P1) gives an express right to payment by advances on account of the contract price as the work proceeds, and so the question of an entire contract does not arise. No doubt the rule as to entire contract may still apply to the last instalment or to any individual instalment if the work is abandoned before the instalment is completely earned. This envisages a type of contract under which the consideration is apportionable and accrues due as the work proceeds so that at any time the contractor can claim on a *quantum meruit* for what he had done. Thus Blackburn J said in *Appelby* v *Myers:*[2]

> Bricks built into a wall become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair become part of the coat or the ship; and therefore, generally, and in the absence of something to show a contrary intention, the bricklayer, or tailor, or shipwright is to be paid for the work and materials he has done and provided, although the whole work is not complete. It is not material whether in such a case the non-completion is because the shipwright did not choose to go on with the work ....

In cases where the ascertainment of the instalment depends upon the certificate of the architect, such terms will create a debt due in respect of each instalment: see 9th edition of *Hudson's Building and Engineering Contracts,* p 430. Where the contractor has become entitled to an instalment, he will not normally forfeit his right to such payment by a subsequent abandonment or repudiation of the contract, but will be entitled to sue for any unpaid instalment, subject of course to the employer's right to counter-claim for damages for breach of contract. In my view, Exh. P2 is a debt due to the plaintiff. It was said that the plaintiff could not claim payment because he had signed Exh P3. I cannot accede to that proposition for two reasons. In the first place, there is evidence that the plaintiff was paid $34,500 cash in respect of one progress payment. In the second place, the defendant company's chairman had authorised payment in respect of the fifth progress payment and consequently Exh P2 was issued by the architect. These facts lend colour to the probability that the parties by their conduct had altered their original positions with regard to payment of subsequent instalments. As this amounts to a waiver by the defendant company of their right under the contract, they are estopped from relying on Exh P3 to prevent payment. The work was well earned before abandonment, and in the circumstances the plaintiff's claim under this head must

succeed.

The plaintiff also claimed interest at 6 per cent, per annum from 24th December 1964 to date of realisation. I allow this claim under section 11 of the Civil Law Ordinance, 1956.

The counter-claim falls under three heads; damages for breach of contract, expenses incurred or to be incurred to remedy defective work and complete the whole project, and damages for delay and loss of use of the premises.

I shall deal with the first two claims together. There is clear evidence which substantiates the defendant company's claim that the plaintiff abandoned work in November 1964. The plaintiff admitted that he did not complete the work on the due date but argued that it was the fault of the defendant company in refusing to pay him the fifth progress payment and therefore he contended that it was the defendant company who had repudiated the contract. In my judgment that is not a good defence. The general principle with regard to the sale of goods can by analogy be applied to the present case. *Hudson* at page 244 states:

> The tendency has been to hold that mere non-payment of an instalment due in respect of goods does not constitute a repudiation, *Mersey Steel & Iron Co* v *Naylor Benzon & Co*[3] while a general refusal to pay instalments on the due date will do so, *Withers* v *Reynolds*.[4]

In the former case, the Earl of Selborne at pages 348-349 remarked:

> I am content to take the rule as stated by Lord Coleridge in *Freeth* v *Burr*[5] which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here.

Looking at the conduct of the defendant company, I am of the view that by refusing to pay for the fifth progress payment they did not intend to repudiate the contract. That is evidenced by their letter dated 8th May 1964 (Exh. D20) to the plaintiff that 'the company intends to use the office building before the middle of June 1964. Will you please complete the work'. Having considered this aspect of the case I am satisfied that it was the plaintiff who repudiated the contract by abandoning the work.

The exact nature of the right to treat a contract as repudiated gives the defendant company an option to accept the repudiation and sue for damages or to treat the contract as subsisting and ask for specific performance. A similar situation was considered by the House of Lords in *Heyman* v *Darwins*.[6] It was there stated that, just as in the case of anticipatory breach, in the case of a breach while contract was partly performed, a party could either accept the repudiation and sue for

damages, or could treat the contract as subsisting and continue to call for performance. Acceptance of the repudiation only means that the party doing so is relieved of his obligation to perform it any further. It does not bring the contract to an end in any theoretical sense, and provisions in the contract — for instance regulating the state of accounts between the parties, controlling damages, or providing for the handling of disputes by arbitration or otherwise — continue to have effect.

In respect of defective work alleged by the defendant company, the architect has testified that in September 1964 he inspected the work and gave his opinion as follows (Exh D23):

> *Office Building*
> This is no sign of bad workmanship or inferior materials used, generally the structure is perfect in every respect except slight crack on the plaster of some roof beams. As these cracks are very fine and on the underside of the beams, penetration of crack is at the plaster surfaces and these will not affect the strength of the main structure.

With regard to the three stores his opinion was as follows:

> *Godown*
> This building is in a very bad state as cracks are along the brick wall vertically from top to the base. This is due to sinking of the foundation which was built on newly filled ground. Underpinning is required to spread and strengthen the foundation is recommended.

DW3, a civil and structural engineer, who inspected the work at the end of the same year also testified about the defective work as enumerated in para 7 of the statement of defence. The plaintiff sought to argue that the architect has supervised the work and had issued the certificate Exh P2, had signed in the plaintiff's pass book, and lastly the defendant company had by their letter stated that the work was satisfactory. In my judgment such certificate or letter only represents the approximate value of the work done or materials used. It is not conclusive on the parties as an expression of satisfaction with the quality of the work or materials. That is subject to readjustment upon the issue of the final certificate. Having considered the evidence, I am satisfied that the work was defective and was due to bad workmanship.

The defendant company opted to accept repudiation and sue for damages for incomplete and defective work. The law with regard to the measure of damages is adequately stated at page 442 of the 9th edition of *Hudson's Building and Engineering Contracts.*

> .... the direct measure of damage will be the difference between the reasonable cost to the employer of repairing the defects or completing the work, together with any sums paid by or due from him under the contract, and the sums which would have been payable by him under the contract if it had been properly carried out. (Where the former does not exceed the latter, only nominal damages would be recoverable). Such damages are clearly recoverable within the first branch of the rule in *Hadley* v *Baxendale*[7] as likely to arise in the usual course of things from the breach.

The editor cited several authorities and I think it would be sufficient if I only cite the case of *Hirt* v *Hahn*:[8]

> *B* agreed to erect a house for the plaintiff according to plans by a certain day. The defendants were *B*'s sureties. After partly completing, *B* ceased work, and the plaintiff, after giving notice to the sureties, entered and completed and sued the sureties. Held, that the measure of damages was what it cost the plaintiff to complete the house substantially as it was originally intended, and in a reasonable manner, less any amount that would have been due and payable to B by the plaintiff had B completed the house at the time agreed by the terms of his contract.

That is an American case but the principle enunciated was approved by the Court of Appeal in *Mertens* v *Home Freeholds Co*[9] where Lord Sterndale said:

> It is true that that is an American case. Though I cannot put my finger on them for the moment I feel satisfied that there are English cases which fix the same measure of damages. At any rate for the purpose of this case it is sufficient to say we all consider that the proper measures of damages for the breach of a building contract such as this.

However, the cost of completing means the cost of completing the contract work, but not different work. Thus in *Milwaukee City* v *Shailer,*[10] another American case, Shailer contracted to construct a tunnel for the city. The contract provided that in case of default, the city should be entitled to complete the work at Shailer's expense. On Shailer's default the city constructed a tunnel which was essentially different in plan and cost of construction from that contemplated by the contract. It was held that the city was not entitled to recover damages from Shailer.

Mr McDonald, a quantity surveyor, testified that a total sum of $377,221.92 would be the cost of remedying defective work and completing the project from where the plaintiff had left it. He based his valuation on the current and appropriate building rates for this quality of work pertaining to this part of Malaysia. It must be borne in mind that the original contract price was $187,500, and the figure quoted by DW.6 would therefore include the cost for the variation and remedying defective work. The cost of putting right defective work, he stated, was $21,095.75. Therefore, arithmetically, $168,720 would be the cost of the extra work. In this connection the cost of extra work must be considered in the light of all the surrounding circumstances. Thus an employer may have deliberately chosen a small-time contractor with limited resources of capital, plant and labour to do the work in the hope of getting a cheaper job. The plaintiff is a class 'E' PWD contractor with a ceiling of $50,000. As no fixed amount was agreed upon in respect of extra work, and considering that work was to be done by a contractor of the same class as the plaintiff, and in view of the principle enunciated in *Milwaukee City* v *Shailer, supra,* I would consider a sum of $126,540 (75 percent of $168,720) as reasonable. In the circumtances, the amount that would cost the defendant company to complete the work and remedy defects would be $335,135.75

As against that amount must be deducted the contract price as varied that would represent the costs which the plaintiff would have expended on the whole project as varied. I assess that figure in the following manner:

Original contract price	$187,500.00
Extra work	74,000.00
	$261,500.00

($74,000 is made up of $24,000, the cost of alteration from zinc walls to 9" brick walls; $40,000 for a third store; and $10,000 for labour and miscellaneous expenses). From the amount of $261,500 must be deducted the sum of $36,000 as representing the fifth progress payment. Therefore the amount which would be due to the plaintiff would be $225,500.

The measure of damages would be the difference between the reasonable costs of completing the work as varied and the amount that would have been due to the plaintiff had he completed the work as varied, and that is $109,635.75.

I now proceed to consider the counter-claim in respect of damages for delay and consequential loss.

Under the contract time was of the essence and the work was to be completed by 8th February 1964. However, the original plan, Exh P22, was altered to accommodate three stores instead of two stores, and the zinc walls were to be altered to $4^1/_2$" brick walls and ultimately to 9" brick walls. As I have stated earlier, the extra work was so substantially altered that it cannot be regarded to be done under the contract. In the circumstances of the case the plaintiff cannot reasonably be expected to perform the whole project as required within the stipulated time in view of the new situation. To my mind, the specified time under the contract has ceased to be applicable. This is a question of fact which depends upon the circumstances which might be expected to affect the progress of the work. Be that as it may, where the specified time has ceased to be applicable and the contract is silent as to time there is an obligation on the part of the plaintiff to complete the work as altered within a reasonable time. As Lord Watson said in *Hick* v *Raymond & Reid*:[11]

> When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application, and is not confined to contracts for the carriage of goods by sea.

What is a reasonable time depends on the circumstances of the particular case. Where a contract was to be performed 'within a reasonable time' the Court of Appeal in *Hydraulic Engineering Co* v *McHaffie*[12] held that:

> The reasonableness was to be measured, not by the particular existing staff and appliances of the contractor's business, but by the time which a reasonable diligent manufacturer of the same class as the contractor

would take to carry out the contract.

Lord Watson when dealing with 'what is a reasonable time' said in *Hick* v *Raymond & Reid, supra,* that it:

> .... has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably.

Considering the present case, I am of the view that the plaintiff has failed to carry out the work as altered within a reasonable time. Damages for delay and consequential loss in the instant case are recoverable within the first branch of the rule in *Hadley* v *Baxendale, supra,* as arising naturally and in the usual course of things from the breach. The natural and probable result of such breach is that they are prevented from using the premises as a factory on a reasonable date. No figures have been adduced to show the extent of their loss and, giving the best consideration I can in the circumstances, I award a sum of $10,000.

In the circumstances the defendant company is entitled to $119,635.75 on their counter-claim. A sum of $14,500 as representing the value of materials on the site must be deducted. That leaves a sum of $105,135.75 in their favour. This is a set-off against the plaintiff's claim of $79,355. Where the employer sets out a defence of an equitable set-off to a claim by the contractor for price of work done, the latter's claim will be treated as having failed if the amount to be set-off exceeds the amount claimed. *Hanak* v *Green*[13] is authority for that proposition. Accordingly the plaintiff's claim is dismissed with costs. The defendant company's counter-claim is upheld. They are therefore entitled to a sum of $25,780.75 and costs of the counter-claim.

Plaintiff's claim dismissed.
Defendant's counter-claim upheld.

Dato' RPS Rajasooria for the Plaintiff.
Ronald Khoo for the Defendant.

Notes

The plaintiff appealed to the Federal Court against the decision of Raja Azlan Shah J. The defendants cross-appealed against the same decision. Though the Federal Court, see [1967] 2 MLJ 9, agreed with certain of the findings of Raja Azlan Shah J, the Federal Court held that the appellant was entitled to claim from the respondent $63,395 whilst the respondent were only entitled to a sum of $5,001 from the appellants on their counterclaim. The Federal Court allowed the appeal and dismissed the cross appeal.

The Federal Court also held the contract to be a lump sum or entire contract. Reference was also made by the Federal Court to sections 40 and 65 of the Contracts Act and also to the Privy Council decision in

Muralidhar Chatterjee v *International Film Co Ltd* AIR (1943) PC 34.
See generally, Sinnadurai, *The Law of Contract in Malaysia and Singapore*, (1979) OUP Chapter 12.

REMEDIES
(a) Distinction between liquidated damages and penalties

Government of Malaysia
v
Thelma Fernandez & Anor

[1967] 1 MLJ 194 High Court, Kuala Lumpur

Cases referred to:
(1) *Public Works Commissioner* v *Hills* [1906] AC 368, 375.
(2) *Dunlop Pnuematic Tyre Co* v *New Garage & Motor Co* [1915] AC 79.
(3) *Clydebank Engineering & Shipbuilding Co* v *Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6 at p 11.
(4) *Gore* v *Gore* [1964] MLJ 184.

RAJA AZLAN SHAH J : This is an application by way of summons-in-chambers for judgment under RSC O 32 r 6.

It is common ground that one James Fernandez (hereinafter referred to as the student) entered into an agreement with the plaintiff, the Government of Malaysia, on 5th November, 1960, with the two defendants as sureties whereby the student agreed to and in fact pursued a course of training at the Malayan Teachers Training College, Penang, for two years and completed the said course some time in 1962. The agreement *inter alia* provides that should the student refuse to serve, or refuse to continue to serve, or resign, or leave the service of the plaintiff without their consent, the student and the sureties shall be jointly and severally liable to refund to the plaintiff on demand all monies which have been paid by the plaintiff in respect of the student's course of training. On completion of the said course the student was posted for practical teaching to the Dungun English School, Dungun, in January 1963. Some time in June 1965, after having served the plaintiff for about $2^1/_2$ years the student, for reasons which shall be shown below, left the service of the plaintiff. The defendants in their pleadings admitted entering into the said agreement with the plaintiff as sureties and as shown in paragraphs 4 and 5 all they say is they 'will refer to the said agreement at the trial for its full terms and effect thereof'. Furthermore, the defendants at paragraph 7 of the defence deny that the student had committed breach of the agreement, and at paragraph 10 they aver that the student was compelled to resign under the circumstances as outlined in paragrsphs 8 and 9 which are as follows:

8. The defendants further state that after teaching in the said school for

> $2^1/_2$ years, the student arranged by mutual consent with a colleague for transfer to the Banting Secondary School, Selangor, and with the approval of the headmaster of the Banting Secondary School, Selangor, and the Dungun English School respectively. The Chief Education Officer, Selangor, refused to approve the transfer with the result that the student was first sent back to Dungun English School and finally posted to the Sultan Ismail Primary School in Trengganu which post was not commensurate with the education and training he had received.
>
> 9. The student subsequently requested the Minister of Education for a temporary suspension of his contract so that he could pursue a University course or alternatively a transfer to a secondary school and as a last resort a transfer out of the State of Trengganu.

It is apparent from the pleadings that the student had no intention for reasons best known to himself of continuing his service at the Dungun English School and contrived a transfer to the Banting Secondary School, failing which he endeavoured through other devious means as shown in paragraph 9 of getting out of the State of Trengganu, none of which the Ministry of Education acceded to. Finally, to justify the breach of the agreement the defendants contended at paragraph 11 'that as the student was forced to resign under such untenable circumstances, he had not committed a breach of the agreement'.

One of the terms of the agreement is set out in clause 1(d)(i) and the relevant portion reads as follows:

> .... he/she will if required to do so by the Government.... serve the Government as a teacher in any post consistent with the qualifications obtained by the student to which he/she may be appointed for a period of not less than five years from the date of his/her appointment upon the terms and conditions for the time being usually applicable to such post and at a salary in accordance with the scales of salaries for the time being in force relating thereto. Provided that the student may be required by the Government to enter and shall enter as a teacher into the service of any person or persons engaged in the management or government of assisted schools instead of entering into the service of the Government and in any such case any reference in this agreement to Government service or the service of Government shall be deemed to include a reference to such service as a teacher in assisted schools.

The terms are explicitly clear and need no further elucidation. The contention of the defendants that the post the student held was not commensurate with the education he had received is not valid. If the defendants are alleging that the student should be posted to a secondary instead of a primary school then, in the light of the aforesaid terms of the agreement, I am of the view that their contention does not hold water. Having tried various means to discharge himself which failed, the student left the plaintiff's service without their approval or consent.

Finally, the defendants contended that the clause in their agreement providing for the 'refund of all monies which have been paid by the plaintiffs in respect of the student's course of training' is a penalty and therefore not enforceable.

When parties enter into a contract they may expressly stipulate not

only their primary obligations and rights under the contract, namely, those which are discharged by their performance of the contract, but also their incidental obligations and rights, namely, those which arise as a result of non-performance of any primary obligation by one of the parties to the said contract. Of these incidental obligations and rights, the commonest is the obligation of the non-performer to make to the other party and the corresponding right of such other party to claim from the non-performer reparation in money for any loss sustained by the other party which results from the failure of the non-performer to perform his primary obligation. The right of such parties to make such a stipulation is subject, however, to the rule of public policy that the court will not enforce it if it is satisfied that the stipulated sum was not a genuine estimate of the loss likely to be sustained by the party not in breach but was fixed *in terrorem* or unconscionable and extravagant and was therefore in the nature of a penalty. Where the court refuses to enforce the 'penalty clause' of this nature, the party aggrieved is relegated to his right to claim a reasonable sum not exceeding the sum so stipulated under the provisions of section 75 of the Contract (Malay States) Ordinance, 1950.

The onus of showing that a stipulation is a 'penalty clause' lies on the person who is sued on it and the test to be applied is the observation of Lord Dunedin in *Public Works Commissioner* v *Hills*[1]:

> .... the criterion of whether a sum — be it called penalty or damages — is truly liquidated damages, and as such not to be interfered with by the court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or cannot be regarded as a 'genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation'. The indicia of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made.

Sometimes the terms of the clause may themselves be sufficient to give rise to the inference that it is a penalty. It is an inference only and may be rebutted. Lord Dunedin in his speech in *Dunlop Pneumatic Tyre Co* v *New Garage & Motor Co*[2] had found occasion to discuss the terms which give rise to such an inference. He referred to the illustration given by Lord Halsbury in *Clydebank Engineering & Shipbuilding Co* v *Don Jose Ramos Yzquierdo u Castaneda*[3] and suggested as one of the various tests that:

> It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach'. On the other hand, 'It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that preestimated damage was the true bargain between the parties.

To my mind, the stipulated sum which is said to give rise to the inference that it is a penalty is not extravagantly or unconscionably greater than the loss which is liable to result from the breach. It is not like the case of the builder who was required to build a house for £50 and who had to pay a million for his breach. That extravagance would at once be apparent:

> A great deal must depend on the nature of the transaction — the thing to be done, the loss likely to accrue to the person who is endeavouring to enforce the performance of the contract, and so forth. It is not necessary to enter into a minute disquisition upon that subject, because the thing speaks for itself: *[Per* Lord Halsbury in the *Clydebank* case at p 10].

In the present case the plaintiffs obtained no undue advantage. They wanted to train qualified teachers in order to implement their policy in providing education for the ever-growing population in post-Merdeka Malaysia. It is a notorious fact that the plaintiffs were and still are short of qualified teachers. Therefore, the parties envisaged, when they entered into the contract, the possibility of its premature determination on the student's breach and they therefore took steps to avoid the uncertainty, the difficulty, and the expense fo proving in a court of law the actual loss sustained in that event by agreeing in advance on an ascertainable sum to be paid by the student which represents a portionable estimate of the probable or possible loss which the plaintiffs would incur. What in effect they have agreed to is this: 'The Government wants to train the student to be a qualified teacher but if, after graduation but before the expiry of the minimum five-year period he were to leave the service without approval, he would have to pay back the expenses incurred in training him so that the Government can find another suitable person to be trained as a qualified teacher'. That, in my view, is not an extravagant or unconscionable sum compared with the greatest loss that could conceivably be proved to have followed from the breach. On the other hand, it is the plaintiffs who have to suffer a great deal more and the damage they are likely to suffer is far greater than the stipulated sum agreed upon, not to mention that they would lose a qualified teacher and the time factor to train another one. The criterion here is the failure to implement the Government's education policy. That, in my view, far out-weighed any suggestion that it is a penalty. If it is argued, that 'what would one qualified teacher do for the purpose?', then the answer would be that very thing that it is intended to avoid is this kind of uncertainty, the difficulty and expense which would be necessary if one were to attempt to prove the damage caused. That was the sort of argument counsel in the *Clydebank* case had put forward, 'what would one torpedo-boat do for that purpose', but that argument did not find favour with their Lordships.

As I have said, the substantial question in this case is whether the stipulated sum is a penalty or otherwise. That is a question of law. I have determined that question of law. If I were to hear this case at the proper hearing it would require no further evidence and no further argument. All that is necessary to decide is already included in the present application. There is no serious question of law involved: see *Gore* v *Gore*[4].

In the circumstances I allow the application with costs.

Application allowed.

Au Ah Wah (Senior Federal Counsel) for the Plaintiff.
Miss Loo Sin Soo for the Defendant.

Notes

(i) The question as to whether a sum stipulated in a scholarship agreement entered into between a scholar and the Government is liquidated damages or penalty does not arise under the present law. The Contracts (Amendment) Act 1976 (Act A 329) now provides that if a sum is named in a contract, the scholar is liable to pay the said sum whether or not actual damage or loss has been caused by the breach.

(ii) The question as to the capacity of the defendant to enter into a valid contract was not raised in this case as it was in *Government of Malaysia* v *Gurcharan Singh and Ors* [1971] 1 MLJ 211. The facts of the case do not in fact indicate whether the defendant was a minor or not.

(iii) In *Government of Malaysia* v *Gurcharan Singh, supra,* Chang Min Tat J held that the scholar (who was a minor) was only liable to pay damages for his breach for the outstanding period he had failed to serve the Government as a teacher. Chang Min Tat J pointed out that since the case of *Campbell Discount Co Ltd* v *Bridge* [1962] AC 600 was not submitted for the consideration of Raja Azlan Shah J in *Thelma Fernandez,* and since when *Thelma Fernandez* went on appeal to the Federal Court, the claim was settled on a comprise between the Government and the scholar, 'the *Thelma Fernandez* case must I believe, be now seen to be no more good law'.
It is submitted that this observation by Chang Min Tat J of *Thelma Fernandez* is wrong. Unlike the case of *Gurcharan Singh* which dealt with a minor's contract, there is no suggestion in *Thelma Fernandez* that the defendant was also a minor. A minor's liability is not on contract but rather on quasi-contract. The liability on quasi-contract is for a reasonable sum and not for damages. In *Thelma Fernandez* , Raja Azlan Shah J based the liability of the defendant on a valid contract.

(iv) The legislature in introducing the amendment to the Contracts Act clearly intended to overrule the decision of Chang Min Tat J in

Gurcharan Singh and to a large extent affirm the decision of Raja Azlan Shah J in *Thelma Fernandez.*

(b) *Quantum meruit* claims

Lau Kee Ko & Anor
v
Paw Ngi Siu

[1974] 1 MLJ 21 Federal Court, Kuching
Coram: Azmi LP, Ismail Khan CJ (Borneo) and Raja Azlan Shah J

Cases referred to:-
(1) *Derry* v *Peck* (1889) 14 App Cas 337.
(2) *Smith* v *Wheatcroft* (1878) 9 Ch 223, 230.
(3) *Nash* v *Dix* (1898) 78 LT 445, 448, 449.
(4) *Gordon* v *Street* [1899] 2 QB 641, 647.
(5) *Said* v *Butt* [1920] 3 KB 497,501.
(6) *Haji Hassan* v *Tan Ah Kian* [1963] MLJ 175.
(7) *Roberts* v *Bary Improvement Commissioners* (1870) LR 5 CP 310, 326.

RAJA AZLAN SHAH J: Sibu Lease of State Land No 57132 is registered in the name of Law Chung Cheong, the son of appellant No 1 (hereinafter referred to as the son). Appellant No 2 is the registered owner of Sibu Lease of State Land No 57133. Her husband is the younger brother of appellant No 1.

Prior to his departure for studies in Taiwan, the son gave his father, full power and authority, vide power of attorney L. 72000/66 dated 28 December 1966 'to manage and sell or mortgage' his land.

Both the father and appellant No2 were desirous of developing the land. So on 17 October 1968 they entered into a written agreement with the respondent, a building contractor of over 10 years standing to construct and complete six units of terrace houses on the two plots of land 'within a period of 12 months'. The agreement was prepared by a petition-writer. Perhaps unfortunately for the appellants he was not called as a witness. In the agreement appellant No 1 described himself as the owner of Sibu Lease of State Land No 57132. Now, clause 1 of the agreement states that the contractor must complete... within 12 months.

There is no clause to express that time was of the essence. The consideration was that, on completion the appellants undertook to transfer to the respondent four of the said terrace houses together with a cash payment of $6,000. The remaining two units of the terrace houses would be retained by the appellants.

Subsequent to the execution of the said agreement the appellants alleged that they entered into contracts with Tiong Nong Moi (f) and Law Cheng Soon to sell the remaining two units at a price of $26,000 and $25,500 respectively and that they had received $6,000 and $5,500

by way of deposits.

It is common gound that the respondent did not complete constructing the six terrace houses within the time stipulated. That is apparent from the exchange of letters between them. On 26 November 1969 the appellants wrote to the respondent — 'We have no alternative but to take over and carry on the above-named work for ourselves'. By letter of 16 December 1969 the appellants' solicitors formally terminated the said agreement. It is interesting to note two passages in that letter:

> Our clients instruct us that you had completely stopped working on the said land six (6) months ago and that you had only with the financial assistance of our clients completed the piling work on the said land. Our clients had to buy their own mangrove piles for the two units and they had to provide wages for the labourers working on the four (4) units. It is pointed out that on the 26th day of November, 1969 our clients had already written a letter notifying you to the effect that they would carry out the required work themselves and hold you responsible for all the damages. Astonishingly, you totally ignored their warning.

The respondent did not rebut the allegation contained in the letter of 16 December 1969. He indicated in his letter of 6 January 1970 to the appellants' solicitors that he would continue with the work. He said thus:

> If weather permits I shall continue on erecting the barrack type of house of Messrs Lau Kee Ko and another.
> Subject to your clients' decision I shall give up erection of the said type of house but in that case I would furnish your clients with a statement of accounts relating to materials and expenses incurred but however I do hope that your clients will still have confidence on me allowing me to complete the said construction of the house.
> In passing, I would say that your clients will appreciate with me in view of the present depression as this type of house is not saleable.

To that letter the appellants' solicitors replied on 12 January 1970 'that they had already terminated the above agreement and there is no turning back'.

On 11 September 1970 the respondent served a writ on the appellants claiming $10,236.60 for work done and materials supplied, alternatively damages for fraudulent misrepresentation and/or for breach of the said contract, and costs. The appellants in their defence denied fraud. They contended that the respondent 'at all material times knew and still knows' that appellant No 1 was holding a power of attorney on behalf of his son. They further alleged that by June, 1969 the respondent had ceased and had abandoned the work in spite of repeated requests by them to continue with the work, that more than reasonable time was given to him to resume work but all came to nothing, and that thereby he had committed a fundamental breach which went to the root of the whole matter. They counterclaimed for a sum of $11,500 representing compensation to Tiong Nong Moi(f) and Law Cheng Soon, and general damages.

The trial judge found that fraud was established. He did not make a

finding with regard to the alternative claim for work done and materials supplied. He directed his mind to the leading case of *Derry* v *Peek*[1] and held that the respondent had been induced to enter into the agreement by the silence of appellant No 1 concerning the ownership of the land. The trial judge further held (a) that the respondent had no knowledge that appellant No 1 was holding a power of attorney on behalf of his son because the title deeds and the power of attorney were neither produced to the respondent for his inspection nor to the petition-writer for the latter to prepare the agreement; and (b) that before the completion date (16 October 1969) appellant No 1 had taken away the building plans from the respondent (before October 1969) without which he could not proceed with the work, and consequently appellant No 1, and through him, the appellants were already in breach when they terminated the agreement on November 26, 1969. However, he reserved the questions of damages and costs pending the outcome of this appeal.

He dismissed the counterclaim because he was satisfied that the appellants had failed to prove that the two sums of money had been given to them by way of compensation.

The appellants appealed. The pivotal point of this appeal is whether fraud was proved. In the course of the lengthy argument before us we have had the benefit of an abundant citation of authority. But I find it unnecessary to refer to more than one or two of the cases cited for the propositions on which the parties relied are in truth elementary.

It is our province now to consider those facts as found by the trial judge and to conclude as a matter of law that fraud was proved. There is inevitably in a case like the present a direct conflict of evidence with regard to the claim. The respondent claimed that the title deeds and the power of attorney were never produced to him for his inspection or to the petition-writer to enable him to prepare the agreement and that the building plans were taken away by appellant No 1 before completion date. The appellants of course denied it. The learned trial judge who heard and saw the case develop and had the opportunity denied to us of judging the weight of the oral evidence given by the witnesses had no hesitation in preferring the respondent's version and he did not believe the appellants' where they differed from the respondent's.

Assuming the facts arrived at by the learned judge are correct, is that enough to justify a finding of fraud? It is evident from the record that appellant No 1 had entered into a contract in his own name without disclosing th existence or identity of the principal. In my mind the contract entered into by an agent in similar circumstances is valid. I say this because a power of attorney establishes the relationship of principal and agent as between the donor and donee, and is therefore affected by the law applicable to the law of agency. Now the general law of agency is that when an agent describes himself in the agreement as the owner of a piece of land and signs it in his own name without qualification, he is *prima facie* deemed to be contracting personally and thus personally liable. His principal may also be liable. The third party has to elect to sue both the principal and agent jointly or severally.

If that is the true effect of the law, is there anything to entitle the respondent to avoid a contract made with the appellants? Can it now be said that on those facts alone — those facts relied on by the trial judge — there was fraud. It is a wholesome rule of our law that where a plaintiff alleges fraud, he must do more than establish the allegation on the basis of probabilities. While the degree of certainty applicable to a criminal case is not required, there must, in order to succeed, be a very high degree of probability in the allegation.

In my opinion what is important in a case like the present is whether consideration of the person with whom the respondent was contracting formed a material element of the contract. If the answer is 'yes' then, non-disclosure of the undisclosed principal annuls the contract. That may amount to fraud. The law is laid down by Fry J (as he then was) in *Smith* v *Wheatcroft*[2] where he quotes and approves Pothier, *Traite des Obligations* where he says:

> Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent, and consequently annuls the contract.... On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand.

That passage has been applied to cases analogous to the present viz, by North J in *Nash* v *Dix;*[3] by Smith LJ in *Gordon* v *Street*[4] and by McCardie J in *Said* v *Butt.*[5]

In the present case the misrepresentation alleged is that the respondent was led to think that he was contracting with the owner when in point of fact he was contracting with the agent. Is that a material element of the contract? I ask myself here whether the respondent has shown that any personal considerations entered into the contract? Has he shown the court that he would have been unwilling to enter into the contract in the same terms with anybody else. I say distinctly that he has failed to produce such an effect on my mind. In my opinion he did not care a straw who he was contracting with, and whether a contract has been made in the name of the appellant No 1 or of the principal, would not have made the slightest difference to him. Under those circumstances it is all but certain that no personal consideration had entered as an element in the formation of the contract. Speaking for myself, I very gravely doubt whether all those matters, when added together, in the circumstances of this case, amounted to fraud. To put at its highest, the allegation of fraud was of the most tenuous kind.

That is not the end of the matter. Although the trial judge arrived at the view that the respondent did not complete the work in time, he held that appellant No 1 committed the breach first by taking away the plans from the respondent before the completion date when they purported to terminate the agreement on November 26, 1969. That he concluded

would entitle the respondent to damages against the appellants. With respect to the trial judge I think he was wrong. The facts as found by him do not warrant such a conclusion. The trial judge after 'having regard to the meagre evidence' found as a fact that the respondent took away the plans before October 1969. Now before October 1969 would only mean during or before September 1969. But in September 1969 the trial judge found that:

> After becoming aware of this fraudulent misrepresentation he carried out minor works at the site; that he tried even to invite Lau Pang Yu to take part in this business venture.

Lau Pang Yu had even gone to the extent of asking appellant No 1 for the plans. That was also in September 1969. If that is so, it is idle to say now that the appellant No 1 was in breach. In my opinion, the respondent with full knowledge of the facts, made it clear by words and acts, that he had waived the breach, the effect of which is that he had preserved the status quo.

Was the respondent himself in breach by not completing the work in time? It is quite obvious that time was not of the essence of the contract. No inference can be drawn that time was of the essence: see *Haji Hassan* v *Tan Ah Kian.*[6] The appellants thought fit that the respondent was in breach, so they terminated the agreement by their letter of November 26, 1969, which was followed by another letter of December 16, 1969. The respondent pleaded for leniency too late (see his letter of January 6, 1970 indicating willingness to continue work). The appellants replied "there is no turning back". That was the *coup de grace.*

In the course of the argument it was submitted on behalf of the respondent that if we allow the appeal we should also consider the respondent's claim for work done based on *quantum meruit.* The trial judge has thought fit not to express any opinion on the matter as he has held that the claim of fraud was substantiated. I now proceed to consider this aspect of the claim.

It is axiomatic that one of the conditions to justify a claim based on *quantum meruit* is that the plaintiff must not be at fault. This is what the learned author of *Anson's Law of Contract,* 23rd Edn., says at page 529:

> Secondly, the claim must be brought by the party not in default. The party who breaks the contract, even though he may have partially performed some part of his obligation, is not entitled to a quantum meruit for the work which he has done.

It will be sufficient to add one short passage from the well known case of *Roberts* v *The Bury Improvement Commissioners.*[7] That was also a case of a building contract. Blackburn J says:

> It is a principle very well established at common law, that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself; see Com Dig Condition (L); and also that he cannot sue for a breach of contract occasioned by his own breach of contract, so that any damage he would otherwise have been entitled to for the breach of the contract to him would immediately be recoverable

> back as damages arising from his own breach of contract.

That in my opinion is sufficient to dispose of the claim on *quantum meruit* against the respondent.

I now come to the appeal on the counterclaim. The trial judge was not able to rely on the evidence adduced by the appellants. He has rejected the evidence of all the witnesses examined by them to prove the fact of deposit and compensation. He further held that the alleged agreements of sale and purchase were not in existence before 1969, otherwise some mention of it would be made in the exchange of letters between the parties in 1969 or early 1970. That conclusion has been criticised. It is said that this finding is not relevant to the issue whether the respondent was liable to pay special damages. Another criticism levelled against the finding of the trial judge was that he had considered matters that were never pleaded. Counsel insisted that beyond flatly denying knowledge of or liability under the two agreements, the appellants did not plead that those agreements were fabricated and not in existence or entered into by them on the two dates.

Now in paragraph 5 of the reply and defence to the counterclaim, the respondent says that he:

> Does not admit and has no knowledge whatsoever of the alleged two agreements mentioned in the counterclaim until receipt of the defence and counterclaim.

In the face of this averment it cannot be denied that they had pleaded that the agreements were not in existence on those two dates and therefore were a sham. The trial judge doubted the genuineness of the date of execution of the two agreements. That in my opinion is a relevant factor in determining whether the agreements were a sham and consequently whether special damages were proved. A reasonable and prudent man would have mentioned it in the exchange of letters bringing notice to the respondent to complete the contract in time because they had committed themselves to sell the remaining two terrace houses to third parties. In the matter of assessing oral evidence this court as a general rule attaches great value to the opinion formed by the trial judge unless there are special reasons for not doing so. On an assessment of the entire evidence in the case I am in complete agreement with the trial judge that the counterclaim has not been satisfactorily proved.

I would therefore allow the appeal and dismiss the appeal on the counterclaim.

I think with regard to the appeal it must be allowed with costs here and in the court below. Similarly with regard to the counterclaim it must be dismissed with costs here and in the court below.

Azmi LP and **Ismail Khan CJ (Borneo)** concurred.

Appeal allowed.

DCC Tiong for the Appellants.
Chong Siew Chiang for the Respondent.

Notes

(i) The facts of *Lau Kee Ko* are rather peculiar. In most cases, the third party will either allege that he intended to deal with the agent alone and no one else (in which case, the undisclosed principal cannot intervene) or the third party may attempt to avoid the contract on the grounds that the agent had expressly said that he was *not* acting for the principal (in which case the third party may avoid the contract for fraud). The allegation of fraud by a third party is also commonly raised as a defence. In *Lau Kee Ko,* the third party (the plaintiff-respondent) not only alleged fraud on the part of the agent (defendant-appellant) for non-disclosure of the undisclosed principal but also based his cause of action on the alleged fraud. (See generally Treitel, *The Law of Contract,* (6th edn) at pages 544-546).

(ii) It is interesting to note in this case that Raja Azlan Shah J relied on a passage from the work of Pothier, the eighteenth-century French jurist. This passage has also been cited with approval by the English Courts in a number of cases on mistake as a identity of a person: See for example *Philips* v *Brooks* [1919] 2 KB 243; *Lake* v *Simmons* [1927] AC 487 and *Sowler* v *Potter* [1940] 1 KB 271.

(iii) The plaintiff (the respondent) in *Lau Kee Ko* , did not raise the argument that the contract entered into between himself and the defendant (the appellants) was void on the grounds of mistake as to identity of the person with whom the contract was made. (See any standard book on the law of contract and also section 23 of the Contracts Act).

(iv) Though generally it is true to say that a party in default is not entitled to a *quantum meruit* for work which he has already done, there is, however, one important exception to this rule. The party in default may be entitled to a *quantum meruit* if the innocent party has had an option and accepts the work done by the party in default: see *Sumpter* v *Hedges* [1898] 1 QB 673. Usually it is only in cases where the contract is divisible that a party in breach will be entitled to a *quantum meruit* claim: See generally *Chitty* on *Contracts,* (25th edn) para 2047-2052 and 9 *Halsbury's Laws of England* (4th edn) para 697.

In Malaysia the party in breach may be entitled to be recompensed for any benefit which he may have conferred on the innocent party. Sir George Rankin in the Privy Council case of *Muralidhar Chatterjee* v *International Filem Company Limited* AIR 1943 PC 34 held that when a party rescinds a contract under section 40 of the Contracts Act, such a party must necessarily restore to the guilty party any benefit received by the innocent party under the contract. The guilty party is entitled to such restitution under section

64 of the Contracts Act.

(v) The case of *Lau Kee Ko* was decided before the extension of the Contracts Act to Sarawak in 1974.