

3, 1969

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN :

- 1. HO TONG CHEONG
2. HO SAN CHEONG
3. HO KOK CHEONG

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
- PART 10
25 RUSSELL SQUARE
LONDON, W.C.1.

10 all carrying on business under the firm name of KWONG KUM SUN CHAN (Defendants) Appellants

- and -

OVERSEA CHINESE BANKING CORPORATION LIMITED (Plaintiffs) Respondents

CASE FOR THE APPELLANTS

RECORD

1. This is an Appeal from a Judgment of the Federal Court of Malaysia (Wee Chong Jin, C.J., Singapore, Tan Ah Tah, F.J. and Buttrose, J.) dated the 6th April 1967 which, in the exercise of its Appellate Jurisdiction, dismissed an appeal against the Judgment of Chua, J. in the High Court of Singapore dated the 24th November 1966 whereby it was ordered and adjudged that the Respondents recover from the Appellants possession of the premises known as No. 23 South Bridge Road, Singapore (hereinafter referred to as the Premises) and that the Appellants deliver up possession of the Premises to the Respondents and that the sum of \$6,352.50 paid into Court by the Appellants be paid out to the Respondents for arrears of rent for the Premises for the period from the 1st February 1962 to the 31st October 1964 and that the Appellants pay to the Respondents mesne profits in respect of the Premises at the rate of \$192.50 per month

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for the period from the 1st November 1964 to the date of delivery up of possession of the Premises to the Respondents.

2. The issue raised by this Appeal is whether the Respondents are entitled to recover possession of the Premises from the Appellants. This in turn raises the issues whether the admitted breaches by the Appellants of the Municipal Ordinance (Chapter 133 of the Revised Edition of The Laws of Singapore, 1936):-

(a) were committed "knowingly" within the meaning of section 15(1)(h) of the Control of Rent Ordinance 1953 (Chapter 242 of the Revised Edition of The Laws of the Colony of Singapore, 1955);

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(b) "exposed" the Respondents as landlords to any penalty, fine or forfeiture at the time or times material to the proceedings.

pp.1-4

3. The action was commenced by the Respondents by a Specially Indorsed Writ of Summons dated the 1st March 1965.

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pp.2-4

4. By their Statement of Claim the Respondents averred that:

(A) Until the 31st October 1964 the Appellants held the Premises as monthly tenants of the Respondents at a monthly rent of \$192.50.

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(B) The said tenancy of the Appellants was duly determined by notice in writing to quit which expired on the 31st October 1964 and was served on the Appellants on or about the 21st September 1964.

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(C) The Respondents were not precluded by the Control of Rent Ordinance, 1953 from obtaining judgment for possession of the Premises because the Appellants had knowingly committed breaches of the Municipal Ordinance and of Building By-laws made thereunder affecting the Premises which exposed the Respondents to penalty or fine.

(D) The Appellants had broken the provisions of the said Municipal Ordinance and the said By-laws in certain particular respects the

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details of which are not material to the determination of this Appeal. In reliance on the facts and matters averred the Respondents claimed possession of the Premises and further claimed \$6,352.50 arrears of rent for the Premises for 33 months from the 1st February 1962 to 31st October 1964 and mesne profits at the rate of \$192.50 per month from the 1st November 1964 until Judgment or the delivery up of possession.

10 5. By their Statement of Defence dated the 24th March 1965 the Appellants admitted that they had held the Premises as monthly tenants of the Respondents at a monthly rent of \$192.50 until the 31st October 1964 and that the said tenancy was duly determined by notice to quit expiring on the 31st October 1964. The Appellants further admitted the arrears of rent claimed in the Statement of Claim, but averred that they had always been ready to pay these arrears but the Respondents had refused to accept the same each time they had been tendered. The Appellants further averred that they were entitled to the protection of the Control of Rent Ordinance, 1953.

p.5
p.56
pp.2-4

6. The following provisions of the Control of Rent Ordinance, 1953 are material to the issues arising on this Appeal:

30 Section 14. "No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the cases set out in this Part of this Ordinance".

Section 15(1). "In the case of all premises such an order or judgment as is referred to in section 14 of this Ordinance may be made in any of the following cases, namely,

40 (h) where the tenant or any other person occupying the premises under him has knowingly committed a breach of any written law regulating any business carried on upon the premises or of any provision of the Municipal Ordinance or of any rule or by-law made thereunder affecting the premises which exposes the landlord to any penalty, fine or forfeiture;"

7. The following provisions of the Municipal Ordinance, referred to in the Statement of Claim

pp.2-4

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herein and in Section 15(1)(h) of the Control of Rent Ordinance hereinbefore referred to, are material to the issues arising on this Appeal:

Section 144(7) "No person shall commence any building operations involving the erection of a building or, in the case of any operations the progress whereof has been suspended for a period exceeding three months, resume any such building operations unless -

(a) he has given to the Commissioners four days' notice of his intention to commence or resume such operations with particulars of the intended works; and

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(b) a plan and specification of the building have been approved by the Commissioners or the President within one year before the date of the notice."

x x x x

(10) "Any person who -

(a) commences or resumes building operations in contravention of sub-section (7); or

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(c) executes any building operation in contravention of any of the provisions of this Ordinance or of any of the building by-laws; or

(d)

shall be liable to a fine not exceeding five hundred dollars and to a daily fine of twenty-five dollars for every day on which the offence is continued after conviction, and a Police Court may, on the application of the Commissioners, make a mandatory order requiring such person to alter in any way or demolish the building."

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(11) "For the purposes of this section and of sections 144B, 145 and 146 a person shall be deemed to erect a building who -

(b) adds to or alters any existing building in such a manner as to involve -

(ii) new or partly new or increased superstructure on existing foundations;

(g) infringes the provisions of this Ordinance as to buildings or of the building by-laws;

10 (h) renews or repairs any existing building in such a manner as to involve a renewal, reconstruction or erection of any portion of an outer or party wall to the extent of one storey in height whatever the material of such outer or party wall is:"

(12) "When any building operations are commenced or carried out in respect of any building, they shall be deemed to have been commenced or carried out by the owner of the land whereon such building is erected and he shall be liable therefor."

x x x x

20 Section 392. "Except in any case where by reason of the act or omission complained of an injury or danger to health subsists at the date of the complaint no person shall be liable to any fine or penalty under this Ordinance or under any rule or by-law made thereunder for any offence under this Ordinance unless the complaint respecting such offence is made within twelve months next after the commission of such offence."

30 8. The following facts relevant to the issue as to whether the Respondents were entitled to recover possession of the Premises from the Appellants were proved or admitted:-

(A) By their Answers to the Interrogatories served by the Respondents, the Appellants admitted that they had executed certain building works affecting the Premises in or about the month of July 1961. pp.66-67 pp.57-65

40 (B) By their said Answers the Appellants further admitted that no plans in respect of the works, the execution of which had been admitted, had been approved by the competent authority. pp.66-67

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- pp.8-11
pp.66-67
- (C) The Respondents' evidence was that the execution of the works admitted in the Appellants' Answers constituted breaches of section 144(7) of the Municipal Ordinance and of certain of the building by-laws referred to therein. This evidence was not challenged by the Appellants before Chua, J. or before the Federal Court of Malaysia. There was, however, no evidence that the Appellants knew of the existence of the Municipal Ordinance at the time the works on the Premises were executed. 10
- pp.7-8
- Exhibits "P.1",
"P.2" and "P.3"
in pocket.
pp.2-4
pp.57-65
pp.66-67
- (D) The Respondents' evidence was that the Appellants had submitted plans to the Chief Building Surveyor's Department in Singapore in November 1960 and in April 1961. These plans referred to certain building works in connection with the Premises but not referred to in the Respondents' Statement of Claim or Interrogatories or in the Appellants' Answers thereto.
- Exhibits "P.1",
"P.2" and
"P.3" in
pocket
- (E) The plans referred to in sub-paragraph (D) of this paragraph were submitted to the Chief Building Surveyor's Department in order that the Appellants might be authorised to execute the works specified therein under the Provisions of the Local Government Ordinance 1957 (Chapter 24 of 1957). There was no evidence that the aforementioned plans were submitted in order to obtain authorisation for the proposed works under the provisions of the Municipal Ordinance. There was no evidence that the Appellants were aware of the existence or of the provisions of the said Municipal Ordinance at the time when the plans were submitted or at the time the works specified therein were executed. 20
- p.8
Exhibits "P.1",
"P.2" and
"P.3" in
pocket.
- (F) There was evidence that the plans referred to in sub-paragraphs (D) and (E) of this paragraph were duly approved by the Chief Building Surveyor's Department and it was not contended by the Respondents that the Appellants had failed to execute the authorised works in accordance with the approval given. The Respondents admitted that the building works in respect of which the plans had been submitted and approved were not in issue in the action. 30
- p.8
- (G) There was evidence that the plans referred to in sub-paragraphs (D) and (E) of this paragraph were duly approved by the Chief Building Surveyor's Department and it was not contended by the Respondents that the Appellants had failed to execute the authorised works in accordance with the approval given. The Respondents admitted that the building works in respect of which the plans had been submitted and approved were not in issue in the action. 40
- p.6
9. At the trial before Chua, J. the issue argued was:-

Whether the Appellants have knowingly committed a breach of any provision of the Municipal Ordinance or of any by-law made thereunder affecting the Premises which exposes the Landlord to any penalty or fine, so that the Respondents might recover possession of the Premises under section 15(1)(h) of the Control of Rent Ordinance 1953.

10. In his written judgment Chua, J., in finding for the Respondents, held:- pp.16-22

10 (A) That the Appellants, in executing the building works referred to in the Statement of Claim and in the Interrogatories and the Answers thereto, had knowingly committed breaches of the Municipal Ordinance section 144(7) and of the building by-laws. p.22 pp.2-4 pp.57-65 pp.66-67

20 (B) That, further, the word "knowingly" in section 15(1)(h) of the Control of Rent Ordinance 1953 "qualifies the nature of the act and it merely means that a defendant knew what he was doing, that is, he did it consciously or intentionally". p.21

30 (C) That the building works executed by the Appellants in breach of the Municipal Ordinance section 144(7) and the by-laws were, by section 144(12) of the said Municipal Ordinance, deemed to have been commenced by the Respondents and that they were of such a nature as would, under section 144(10) of the same Ordinance, have rendered the Respondents liable to a fine or a mandatory order requiring them to alter or demolish the building. pp.16-17,22

(D) That, further, the breaches of the Municipal Ordinance and by-laws committed by the Appellants were of such a nature as to expose the Respondents to a penalty or fine within the meaning of section 15(1)(h) of the Control of Rent Ordinance 1953. pp.17-19,22

40 (E) That, further, the said breaches of the Municipal Ordinance and by-laws by the Appellants entitled the Respondents to recover possession of the Premises under section 15(1)(h) of the Control of Rent Ordinance 1953 notwithstanding that, both at the date the tenancy was determined by notice to quit and at the date of the trial, no proceedings against p.56

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the Respondents leading to the imposition of a penalty, fine or forfeiture in respect of the aforesaid breaches could have succeeded because no such proceedings had been commenced by a complaint made within twelve months of the commission of the offence within section 392 of the Municipal Ordinance, and because section 144 of the Municipal Ordinance had been repealed by section 185 of the Local Government Integration Ordinance 1963 (Chapter 18 of 1963).

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p.26
pp.27-28

11. On the 16th December 1966 the Appellants gave Notice of Appeal against the said judgment of Chua, J. By a Memorandum of Appeal dated the 25th January 1967 the Appellants gave as the grounds of their appeal that:-

(A) Chua, J. had erred in law in holding that the Appellants had knowingly committed breaches of the Municipal Ordinance in that there had been no or no sufficient evidence that any such breaches had been "knowingly" committed.

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(B) Chua, J. had been wrong in deciding that the breaches committed by the Appellants would have led to the imposition of a penalty or fine upon the Respondents because no proceedings against the Respondents had been commenced in accordance with section 392 of the Municipal Ordinance and section 144 of the Municipal Ordinance had been repealed.

(C) Chua, J. had erred in law in holding that the Respondents had made out a case for possession under section 15(1)(h) of the Control of Rent Ordinance 1953 because there had been no evidence to show that the Respondents had been exposed to any fine, penalty or forfeiture.

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(D) Chua, J. had erred in law in failing to exercise his discretion under section 15 of the Control of Rent Ordinance 1953 in the light of the provisions of the Local Government Ordinance 1957 and the Local Government Integration Ordinance 1963 and the circumstances of the case.

12. Before the Federal Court of Malaysia (Wee Chong Jin, C.J., Singapore, Tan Ah Tah, F.J. and Buttrose, J.) the issues argued were the issues raised by the

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Appellants' Memorandum of Appeal, the contents of which are outlined in paragraph 12 hereof. pp.27-28

13. The Federal Court of Malaysia dismissed the Appellants' appeal by Order dated the 6th April 1967. Buttrose, J., in his written judgment (with which judgment Wee Chong Jin, C.J. and Tan Ah Tah, F.J. concurred), upholding the judgment of Chua, J., decided:- p.36
pp.29-35
p.35
pp.16-22

10 (A) That, as regards the issue as to whether the Appellants had knowingly committed breaches of the Municipal Ordinance and the building by-laws, the matter was a clear issue of fact and Chua, J. had been justified in finding, as a fact, that the Appellants had knowingly committed the breaches. pp.30-31

20 (B) That, further, such positive finding of fact, that the Appellants knowingly committed the breaches, rendered the statement of Chua, J. as to the precise meaning of the word "knowingly" in section 15(1)(h) of the Control of Rent Ordinance 1953 unnecessary to the decision of that learned Judge. p.31

(C) That, further, the said positive finding of fact rendered it unnecessary for the Federal Court to consider or pronounce upon the precise interpretation of the word "knowingly" in section 15 (1)(h) of the Control of Rent Ordinance 1953 and, consequently, the Federal Court of Malaysia did not necessarily accept the interpretation placed upon the word "knowingly" by the learned Judge. pp.31-32

30 (D) That, further, in arriving at his said positive finding of fact that the Appellants had committed the breaches "knowingly", Chua, J. had been entitled to take into account the operation of sections 107 and 115(g) of the Evidence Ordinance (Chapter 4 of the Revised Edition of the Laws of the Colony of Singapore, 1955). p.32

40 (E) That the learned Judge had been right in holding that the Respondents were entitled to possession of the Premises under section 15(1)(h) of the Control of Rent Ordinance 1953 notwithstanding that, at the date of the termination of the tenancy by notice to quit and at the date of the trial, no proceedings against the Respondents, under the penal provisions of the Municipal Ordinance, could have pp.33-34

succeeded, because the correct date at which the applicability of section 15(1)(h) of the Control of Rent Ordinance 1953 was to be assessed was the date of the commission of the breaches of the Municipal Ordinance by the Appellants.

pp.16-22

14. As to the provisions of the Evidence Ordinance referred to by Buttrose, J., section 107 was mentioned in argument before Chua, J., but section 115 and illustration (g) thereunder were not. Chua, J. did not refer to either section in his judgment, and did not say anything to suggest that he based any finding of fact on either section. The sections of the Evidence Ordinance which are material to the issues arising on this Appeal are:-

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Section 102 "(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

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Illustrations

.....

(b) A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts and B denies to be true.

A must prove the existence of those facts."

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Section 103 "The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."

x x x x

Section 107 "When any fact is especially within the knowledge of any person the burden of proving that fact is upon him.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is upon him."

x x x x

10 Section 115 "The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

Illustrations

.....

20 (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it....."

15. The Appellants respectfully submit:-

30 (A) That the interpretation placed upon the expression 'knowingly committed a breach of any written law or of any provision of the Municipal Ordinance' in section 15(1)(h) of the Control of Rent Ordinance 1953 by Chua, J. was necessary to his decision in favour of the Respondents and is wrong. This expression, not previously to be found in parallel Singapore legislation, was introduced by the Control of Rent Ordinance 1953, and it is submitted that "... the effect of adding the word "knowingly" appears to be that before a tenant is deprived of this protection [of the Control of Rent Ordinance] not only must he have committed a breach which exposes his landlord but also he must have known that he was committing a breach at the time of doing so" (Sarah Cashin v. Goh Kah Seng (1955), M.L.J. 52 at page 53, per Whitton, J.).

p.21

40 (B) That there was no evidence adduced at the trial on which a finding of fact, that the Appellants

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pp.7-8

knowingly broke the provisions of the Municipal Ordinance, could properly be based. The evidence summarised in paragraph 8 (D)(E)(F) of this Case was addressed solely to the submission of plans by the Appellants under the provisions of the Local Government Ordinance 1957. It cannot be deduced from that evidence that the Appellants were aware of the provisions, or even of the existence, of the Municipal Ordinance either at the dates when approval was sought or given under the Local Government Ordinance or at the time when the building operations in contravention of the Municipal Ordinance were undertaken. It follows, therefore, that Chua, J. misdirected himself as to the evidence and that the Federal Court of Malaysia was wrong in upholding the finding of that learned Judge.

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p.32

(C) That, further, if, and in so far as, Chua, J. relied upon the provisions of section 107 of the Evidence Ordinance in arriving at the finding that the Appellants knowingly committed breaches of the Municipal Ordinance, the learned Judge was wrong in so doing; and that, further, the Federal Court of Malaysia was wrong in deciding that Chua, J. had been entitled so to rely upon the said section 107 of the Evidence Ordinance. It is submitted that, if section 107 of the Evidence Ordinance can apply at all to an action brought under section 15(1)(h) of the Control of Rent Ordinance 1953, it can apply only in an action where there is sufficient evidence, adduced on behalf of the landlord, to support, prima facie, a finding that there has been a breach of the Municipal Ordinance committed knowingly by the tenant. The Appellants rely on sections 102 and 103 of the Evidence Ordinance. In the present action no such sufficient evidence was adduced by the Respondents.

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p.32

(D) That, further, if, and in so far as, the Federal Court of Malaysia purported to justify the finding of Chua, J. that the Appellants had knowingly committed breaches of the Municipal Ordinance by reference to the application to the case of illustration (g) under section 115 of the Evidence Ordinance, the said Federal Court was wrong in so doing. Section 115, illustration (g) of the Evidence Ordinance is only an illustration of the principle set out in section 115 itself, and this section must be read in the light of sections

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102 and 103. The applicability of section 115 or illustration (g) thereunder to the present action was not argued by the Respondents or by the Appellants before Chua, J., and that learned Judge did not refer to the section or the illustration in his judgment. It is submitted that, as no prima facie case for possession was made out by the Respondents under section 15(1)(h) of the Control of Rent Ordinance 1953 (by reason of the lack of evidence in that behalf), it cannot have been incumbent upon the Appellants to adduce, at the trial, evidence of their ignorance of the provisions of the Municipal Ordinance and that, accordingly, the Federal Court of Malaysia erred in deciding that section 115 of the Evidence Ordinance or illustration (g) under that section had any application in the present action.

pp.16-22

p.32

(E) That Chua, J. and the Federal Court of Malaysia were wrong in holding that any such breaches of the Municipal Ordinance, as were committed by the Appellants, were such as to "expose" the Respondents to any penalty, fine or forfeiture within the meaning of section 15(1)(h) of the Control of Rent Ordinance 1953. It is submitted that, contrary to the view taken by Chua, J. and the Federal Court, the breaches of the Municipal Ordinance, which were committed by the Appellants, did not "expose" the Respondents as aforesaid within the meaning of section 15(1)(h) of the said Control of Rent Ordinance. By the said section 15(1)(h) an order for the recovery of possession of premises comprised in a tenancy may be given "..... when the tenant has knowingly committed a breach of the Municipal Ordinance which exposes the landlord to any penalty, fine or forfeiture." It is submitted that the wording of the section is clear in requiring a landlord to show that he is presently exposed to a penalty, fine or forfeiture at the time he seeks to recover possession under the section. In the present case, however, the Respondents did not prove that they were exposed to any penalty, fine or forfeiture either when they served notice to quit upon the Appellants or when the Writ in the action was issued; and, further, no subsequent proceedings in respect of the breaches of the Municipal Ordinance by the Appellants could have succeeded against the Respondents, because the limitation period under section 392 of the Municipal Ordinance had expired before notice to quit was served. No proceedings have in fact ever been taken against the Respondents.

pp.17-19,22
pp.33-34p.56
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p.36
p.25

16. The Appellants respectfully submit that this Appeal ought to be allowed, and the judgment of the Federal Court of Malaysia, which affirmed the judgment of Chua, J., was wrong and ought to be reversed, for the following (among other)

R E A S O N S

- (1) BECAUSE there was no, or no sufficient, evidence at the trial to establish that the Appellants knowingly committed a breach of the Municipal Ordinance within section 15(1)(h) of the Control of Rent Ordinance 1953: 10
- (2) BECAUSE Chua, J. was wrong in holding that the word "knowingly" in section 15(1)(h) of the Control of Rent Ordinance 1953 meant merely "consciously or intentionally":
- (3) BECAUSE the Federal Court of Malaysia was wrong in holding that either section 107 or section 115, illustration (g) of the Evidence Ordinance applied to the determination of the issue before Chua, J. or could properly have been relied upon by that learned Judge: 20
- (4) BECAUSE the Federal Court of Malaysia and Chua, J. were wrong in holding that the Respondents were exposed to a penalty, fine or forfeiture within the meaning of section 15(1)(h) of the Control of Rent Ordinance 1953:
- (5) BECAUSE the Respondents were not entitled to recover possession of the Premises under section 15(1)(h) of the Control of Rent Ordinance 1953. 30

J. G. Le QUESNE

ADRIAN HAMILTON.

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

1. HO TONG CHEONG
2. HO SAN CHEONG
3. HO KOK CHEONG
all carrying on business
under the firm name of
KWONG KUM SUN CHAN Appellants

- and -

OVERSEA CHINESE BANKING
CORPORATION LIMITED Respondents

CASE FOR THE APPELLANTS

PARKER, GARRETT & CO.,
St. Michael's Rectory,
Cornhill,
London, E.C.3.