IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No.23 of 1973

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN

TRACTORS MALAYSIA BERHAD Appellants

- and -

TIO CHEE HING Respondent

CASE FOR THE APPELLANTS

RECORD

1. This is an Appeal from a Judgment dated 20th November 1972 of the Federal Court of Malaysia (Appellate Jurisdiction) (Ismail Khan, Chief Justice, Borneo, Gill F.J., Pawan Ahmad J.) allowing the appeal of the Respondent from the decision of Lee Hun Hoe J. dated 6th July 1972 in Civil Suit No.199 of 1972 in the High Court of Borneo that the Writ of Summons and the service thereof and all subsequent proceedings be set aside with costs to be paid by the Respondent to the Appellants, and ordering that the Appellants pay the costs of the Respondent in the appeal and in the Court below to be taxed. P.81 P.52

2. The circumstances which gave rise to these proceedings and to this appeal are hereinafter in this Case set out.

3. At all material times the Respondent has been the Managing Director of Southern Estate Sendirian Berhad, a Company incorporated in Malaysia (hereinafter called "Southern"). The Respondent and his wife are the owners of the whole of the share capital of Southern. On 1st October 1967, Southern entered into 19 hire agreements with the Appellants, by each of which the Appellants agreed to let and Southern agreed to hire a tractor. Southern fell into arrears with payments under these agreements, and by 31st October 1968 owed the Appellants $2,298,617.75.

4. In November 1968, a meeting was held at the offices of the Appellants' Solicitors, Thomas Jayasuriya & Co.,

attended by Mr.Thomas Jayasuriya, the Appellants' representative Mr.J.S.Eakin and the Respondent, at which the Respondent was asked to assume, and agreed to assume, in return for the Appellants forbearing to sue Southern, liability for Southern's debt to the Appellants, which then stood at $ 2,251,064.67. Mr.Thomas Jayasuriya then drew up a draft agreement on the basis of the discussion at the meeting, and, following a further meeting at which amendments were discussed, a written agreement dated 21st November 1968 was signed by the Respondent and by Mr.Eakin on behalf of the Appellants. 10

P.22 to P.26

By that agreement it was recited (inter alia) that "[Southern] is indebted to [the Appellants] :-

(a) in the sum of $ 1,978,933.36 .... as shown by the respective amounts against the said Agreements in the Schedule hereto, which sum has become due and payable

(b) in the sum of $ 272,131.31 .... in respect of spare parts supplied and services rendered, which sum has also become due and payable...."

And that 20

"at the request of [the Respondent] [the Appellants] have agreed not to take legal proceedings for the recovery of the said sums from [Southern] for the time being."

By Clause 1 of the said agreement, it was provided that "in consideration of the aforesaid premises [the Respondent] hereby undertakes and guarantees as principal debtor the payment to [the Appellants] on demand the said sum of $ 1,978,933.36 and such additional sum as representing the costs of taking possession of the machinery and any other additional sums as may be due under the said Agreements as aforesaid (hereinafter collectively referred to as "the Debt")." 30

By Clause 2 of the said agreement it was provided that "no demand to [the Respondent] for the immediate full payment of the debt shall be made for so long as [he] complies with each and every one of the following conditions :-

(3) at the request of [the Appellants] [the Respondent] shall execute a charge or a second charge as the case may be in respect of all lands owned by [the Respondent] and shall cause Southern to execute a charge or a second charge as the case may be 40

in respect of all lands owned by [Southern]..... provided that the provisions of this paragraph shall not apply to the lands comprised in [the Respondent's] New Town Project in Lahad Datu.
....

(4) [the Respondent] shall pay monthly to [the Appellants] towards the discharge of the debt as aforesaid the sum of $ 50,000.00..... the first payment to be made on 15th day of March 1969 and thereafter on the first day of every succeeding month."

By Clause 3 of the said agreement it was provided that "nothing herein contained shall extinguish or reduce the Liability of [Southern] for the debt as aforesaid except to the extent of payments made by [the Respondent] and nothing herein contained shall preclude [the Appellants] from proceeding or taking legal proceedings against [Southern] for the recovery of the debt or balance thereof or part thereof upon the breach by [the Respondent] of any of the conditions of this Agreement, and for the avoidance of doubt it is hereby declared that the taking of such proceedings against [Southern] as aforesaid shall not relieve [the Respondent] of his liability and obligations under this Agreement and shall not preclude the taking of legal proceedings against [the Respondent] for the recovery of the debt or balance thereof or part thereof."

5. On the 1st May 1969 the Respondent was, in accordance with Clause 2 (3) of the agreement, required to, and did, execute a charge in respect of Country Leases 10786, 10793, 10795, 10797, 10800, 10801 and 10806, which were not part of his New Town Project at Lahad Datu.

6. The Respondent failed to make any of the payments which he had undertaken by the agreement, and Southern also failed to make any payment. Accordingly on 28th October 1969 the Appellants issued a Specially Indorsed Writ of Summons against the Respondent, in Civil Suit No.190 of 1969, claiming the sum of $ 2,056,987.68. Separate proceedings were commenced against Southern on the same day. The Writ was served personally on the Respondent. He had full notice of the Statement of Claim indorsed thereon, which expressly referred to the Agreement, to the Appellants' forbearance to sue Southern as the consideration for the Respondent's guarantee, to the fact that the Appellants did forbear to sue Southern, and to the failure of the Respondent and of Southern to make any payment. On 14th November 1969, the Respondent entered an appearance through his Advocates and on 1st December 1969 by those Advocates he entered a Defence admitting liability in the sum of $ 718,266.85 which he described (accurately) as the adjusted sum due to the Appellants. [The adjusted figure was in accordance with an agreement between the parties, after allowing deductions for certain rebates and payments made

P.43 to P.44

P.14

by Southern/. No issue was raised by the Respondent as to the terms or validity of the agreement dated 21st November 1968, and there was in particular no suggestion that the agreement falsely stated the consideration for the Respondent's guarantee, or that there was no consideration for that guarantee, or that the Respondent had not in fact agreed to give that guarantee, or that the Respondent's signature to the agreement had been procured by fraudulent misrepresentations, or that the agreement did not fully and accurately set out what had actually been agreed. 10

7. On the 4th December 1969, the Appellants made application for leave to enter final judgment against the Respondent in the said sum of $ 718,266.85. Leave was granted on 27th December 1969, and judgment entered. The Respondent was represented by his advocates at the hearing of the application, and they again admitted liability for the said sum. In paragraph 16 of an Affidavit sworn by the Respondent on 1st March 1972 in support of an application to set aside the said judgment, the Respondent stated: "When the /Appellants/ sought summary judgment as aforesaid I did not instruct my Solicitors, Messrs.Chung Thain Vun & Co. to oppose the application for only one reason i.e. being a man of honour I did not wish to go back on my word once given." In paragraph 13 of an Affidavit of the Respondent sworn on 27th June 1972 in these proceedings, the Respondent stated: "I did not inform my former solicitor Mr.Chung Thain Vun about the existence of the agreement at all, let alone consult him on the merits. At that time I felt morally obliged to pay my company's debts, I therefore instructed Mr.Chung Thain Vun not to defend the suits against my company and myself but to formally appear, admit my liability and consent to judgment on the reduced and agreed sum of $ 718,266.85. I strongly felt that as a gentleman, I would honour my word once given. I therefore had no thought of evading my responsibilities. That is why I did not instruct Mr.Chung to oppose any of the subsequent actions of the /Appellants/ as I knew that I could finally discharge my obligations ....." In paragraph 3 of the Affidavit of the said Mr.Chung Thain Vun sworn in these proceedings on 27th June 1972, Mr. Chung states "The /Respondent/ first came to see me in the month of November 1969, after he and /Southern/ had been served with several suits No.190 and No.189 of 1969 respectively. He informed me that he had personally agreed to pay the debt of Southern .... and that I was merely to enter formal appearances. He said that since he had given his word of honour as a gentleman, he and his company would not want to defend those actions..... Such being the stand taken by the /Respondent/ I proceeded to file appearance in suit No.190 of 1969, to admit on his behalf liability for the sum claimed which was reduced from $2,298,017.75 less payments, etc., to $ 718.266.85". In paragraph 6 of Mr.Chung's

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P.18 to P.26

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P.34 to P.38

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P.39 to P.40

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said Affidavit, he states "[the Respondent] instructed me not to oppose the [Appellants'] subsequent actions to obtain prohibitory orders against his lands or any other actions since he said he had already consented to judgment and felt sure that he could pay."

P.54 L.40

8. On 26th January 1970, the Appellants obtained a prohibitory order in respect of 5 land titles which included 4 land titles comprised in the Lahad Datu New Town Project. No objection was taken to the application or the prohibitory order and no suggestion was made by or on behalf of the Respondent that the Appellants' application, so far as it related to those 4 titles, was contrary to the true agreement between the parties.

P.55 L.3

9. On the 16th June 1970, the Respondent was examined on a Judgment Debtor Summons at which he was also represented by his advocates. At the hearing of that Summons, he spoke of loans he hoped to raise to pay the debt. Between July 14th 1970 and July 15th 1971 the Respondent made 10 payments of $ 500 each, totalling $ 5,000.

P.55 L.7

10. On 28th August 1971, a further prohibitory order was obtained against Lease No.107809 which the Respondent asserts was part of the land comprised in the Lahad Datu New Town Project. The Respondent offered no opposition to this order and once again made no suggestion that it involved any breach of the true agreement between the parties.

P.55 L.10

11. On 18th September 1971, the Appellants obtained an order for sale of the land in Lease No.10789 by auction, the auction to take place on 16th October 1971. The Respondent offered no opposition to the order. The sale was postponed at the request of the Respondent, to enable him to raise funds to satisfy the judgment, and on 8th October 1971, the Appellants obtained an order for the postponed sale to take place on 30th October 1971. The sale was again postponed at the request of the Respondent, for the same reason, and on 1st November 1971, the Appellants obtained an order for the sale to take place on 27th November 1971. On 18th November 1971, Messrs.Shelley Yap acting for the Respondent wrote to Thomas Jayasuriya & Co. informing them that the Respondent was determined to sell by tender the 4 pieces of land comprised in the New Town Project, and asking them not to proceed with the auction on 27th November, but the Appellants did not agree to further postponement. However, the auction did not take place on 27th November 1971 as the Court Bailiff could not obtain a plane seat to Lahad Datu. On 30th November 1971, the Appellants obtained a new date for the auction, to take place on 8th January 1972. Various requests were made by the Respondent and his advocates

P.55 L.35

to Mr.Jayasuriya and to the Appellants for postponement. On 6th January 1972, on the application of the Respondent, the High Court in Borneo granted a postponement of the auction for 2 months, to the 29th February 1972, to enable the Respondent to raise funds. At no stage during any of these proceedings or events did the Respondent or anyone on his behalf suggest that there was any breach of the true agreement, or raise any of the issues now pleaded in his Writ of Summons.

P.55 L.39

12. On 6th March 1972 the Respondent applied to set aside the judgment in Civil Suit No.190 of 1969 on the grounds (referred to in paragraph 16 and 9 respectively of his Affidavit of March 1st 1972) that "the Guarantee which stated that the consideration was the forbearance of legal proceedings against Southern .... was in fact not given by the [Appellants]. The agreement is not enforceable" and that he agreed to "assume primary liability but made it clear that my lands comprised in the Lahad Datu New Town Projects should on no account be utilised in any way to discharge Southern's debts to the [Appellants] Mr.J.S.Eakin agreed." His application was dismissed on 13th March 1972. At the same time he applied for a further postponement of the auction sale, and a postponement of 4 months to 13th July 1972 was given to enable him to raise funds.

P.55 L.43

13. Before this period expired, the Respondent commenced the present proceedings by a Writ dated 16th May 1972 in Civil Suit No.199 of 1972 in the High Court of Borneo. As appears from his Statement of Claim he alleges that the agreement of November 21st 1968 did not truly set out what had been agreed, that it falsely stated that he guaranteed as principal debtor the payment of Southern's debts and the consideration for the guarantee, and also the term truly agreed as to his land comprised in the Lahad Datu New Town Projects, and that he had been induced to sign it by fraudulent misrepresentations as to its contents.He claimed (inter alia) to have the agreement rescinded or rectified, the setting aside of the judgment of December 27th 1969 and of the prohibitory orders, and damages for fraud and breach of contract.

P.1 to P.6

P.3 to P.6

P.7

14. On 22nd June 1972, the Appellants issued an application for an order that the Writ of Summons, the service thereof and all subsequent proceedings be set aside and the action dismissed on the grounds :

(a) That the Writ was not indorsed in accordance with the Rules of the Supreme Court 1957 Order 3 Rule 3;

(b) That the [Respondent] was estopped from bringing the proceedings; and

(c) That the action was frivolous or vexatious.

15. The summons was heard by the Honourable Mr. Justice Lee Hun Hoe, Senior Puisne Judge in Borneo, who gave judgment for the Appellants on 6th July 1972 on the second and third grounds raised in the summons. On the second ground, estoppel by res judicata, Lee Hun Hoe, J. said : — P.52 to P.61; P.58 L.9

"Mallal's Supreme Court Practice at p.261 on the subject of res judicata observes that :- "The object of the rule of res judicata is always put upon two grounds - the one of public policy, that it is in the interests of the State that there should be an end of litigation, and the other, the hardship of the individual, that he should be vexed twice for the same cause." So long as the Judgment stands no one who was a party in those proceedings can re-open the matter. See Hill v. Hill (1954) P.261; (1954) 1 All.E.R.491. That is what the Respondent is trying to do in this case. I can see no ground for his doing so since the Judgment was the result of his [illegible]ission. He was fully cognisant of the proceedings and clearly bound by estoppel from litigating the same matter in a different form or guise. A judgment by consent or by default operates as an estoppel between the parties and their privies; Shaik Schied Bin Abduliah Bajarie v. Mootoo Carpen Chitty."

On the third ground in the summons, that the proceedings were frivolous or vexatious, Lee Hun Hoe J. said as follows: — P.59 L.30

"Whether the proceedings are frivolous or vexatious is a matter for the exercise of judicial discretion.... the Court must not prevent a person from exercising his undoubted rights on any vague or indefinite principle. The Annual Practice, 1960 at p.577 contains this passage:

> "So, if a party seeks to raise anew a question which has already been decided between the parties by the Court of competent jurisdiction, this fact may be brought before the Court by affidavit and the Statement of Claim, although good on the face of it, may be struck out, and the action dismissed; even though a plea of res judicata might not strictly be an answer to the action; it is enough if substantially the same point has been decided in a prior proceeding."

At page 578 it is stated:

> "So, too, any action which the [Respondent] clearly cannot prove and which is without any solid basis, may be stayed under this inherent jurisdiction as frivolous and vexatious (Lawrance v. Lord Norris 15 App.

Cases 210: Willis v. Earl Howe (1893) 2 Ch.545).

Mr.Chung Thain Vun, who acted for the [Respondent] in Civil Suit No.190 of 1969, in his affidavit stated quite clearly that the [Respondent] had personally agreed to pay the debt of [Southern] and instructed him to enter formal appearance. He understood that the [Respondent] and [Southern] would not want to defend the action. Subsequently he proceeded to admit liability to the extent of $ 718,266.85. He also affirmed that the [Respondent] instructed him not to oppose the [Appellants'] subsequent actions to obtain prohibitory orders against his Lands or any other actions since he said he had already consented to judgment and felt sure he could pay..... It is too late in the day to go into the question of extrinsic evidence relating to the agreement which the [Respondent] attested willingly and without compulsion as he was confident of raising the necessary funds and thus saving his project. That has always been his attitude in the various proceedings particularly when applying for postponements of sale. The crux of the whole matter which compels him to initiate this action lies in his failure to raise the necessary funds to satisfy the judgment debt. All the matters in this action could have been raised by the [Respondent] previously in his Defence but he elected not to do so. There is no question of new evidence being discovered which could not have been obtained in the previous proceedings. This action is nothing but merely a new twist to overcome his difficulty in raising the loan and to delay the execution of judgment against him Every opportunity was given to him to save his Satellite Town project. No successful party should be deprived of the fruit of his victory by frivolous and vexatious proceedings. His action is misconceived and an abuse of the process of the Court. The Court will not allow itself to be used as a vehicle to defeat the course of justice in the hope of delaying the execution of a judgment and saving a grandiose project."

P.81 to P.90 — 16. The Respondent appealed to the Federal Court of Malaysia, and his appeal was allowed on 20th November 1972, the judgment of the Court being given by Gill, F.J., in whose Judgment Ismail Khan, C.J., Borneo and Pawan Ahmad, J. concurred. On the question of estoppel, Gill, F.J. held that there were (P.84 L.39) exceptions to the rule that a consent judgment operates as an estoppel, and referred to the dictum of Lopes, L.J. in (P.85 L.1.) Huddersfield Banking Co.Limited v. Henry Lister & Son Limited (1895) 2 Ch.273, 284 as follows:

"The law seems to be that a consent order may be set aside for the same reasons as those on which an agreement may be set aside." (P.85 L.6 to L.13) He held that where a judgment is given by

Record

consent, and is based upon and intended to carry out an agreement between the parties, it can be set aside on any such ground, and in particular where it is established that the judgment has been obtained fraudulently or by reason of a mutual mistake of the parties regarding a material fact. As to the Appellants' contention that the action should be struck out on the ground that it was frivolous or vexatious, Gill, F.J. held that the application to set aside the Writ was clearly made under Order 25 Rule 4, that since the facts alleged by the Respondent would, if proved, entitle him to set aside the agreement he would also be entitled to have the judgment which was founded on that agreement set aside; that the issues raised in the Statement of Claim could only be adjudicated upon at the trial of the action, and could not be decided on affidavits of the parties. He held that it was "not open to the Court to go into the merits of the case at this stage", that he was not entitled to look into the whole background of the litigation, and he relied on the proposition that "when there is an application made to strike out a pleading, and you have to go to extrinsic evidence to show that the pleading is bad, that rule does not apply. It is only when upon the face of it it is shown that the pleading discloses no cause of action or defence, or that it is frivolous and vexatious that the rule applies" (per A.L.Smith L.J. in Attorney-General of the Duchy of Lancaster v. London and North-West Railway (1892) 3 Ch.274 at p.278)

P.85 L.24
P.86 L.14
P.89 L.30 to L.31
P.89 L.36
P.87 L.12

17. On 16th March 1973 in the Federal Court of Malaysia (Azmi, Lord President, Malaysia, Ismail Khan, Chief Justice, Borneo, Raja Azaln Shah J.) the Appellants were granted conditional leave to appeal to Your Majesty in Council. P.92 to P.93

18. On 25th June 1973 in the Federal Court of Malaysia (Ong, Chief Justice, High Court Malaya, Suffian F.J., Ali F.J.) the Appellants were granted final leave to appeal to Your Majesty in Council. P.93

19. The Appellants respectfully submit:

On the issue of estoppel

(a) that the consent judgment of December 27th 1969 in Civil Suit No.190 of 1969 was conclusive against the Respondent not only as to his indebtedness in the agreed and adjusted sum, but as to all matters essential to the judgment, and as to all points which properly belonged to the litigation and which the Respondent, exercising reasonable diligence, might have brought forward at the time.

(b) that while it is respectfully conceded that a consent judgment or order may be set aside on the grounds that it was obtained by fraud or by reason of a mutual mistake of the parties regarding a material fact:

(i) the Respondent has neither alleged, nor adduced any evidence to support the allegation, that any fraud or mistake operated on his mind when he consented to the judgment of December 27th 1969.

(ii) the Respondent as Plaintiff in an action to set aside a judgment on the ground of fraud, must produce evidence of facts discovered since the former judgment which raise a reasonable probability of the action succeeding; he has neither alleged, nor adduced any evidence to support the allegation, that he discovered any of the matters on which he now seeks to rely only after the judgment of December 27th 1969. 10

(iii) that on the evidence adduced by the Respondent, and the uncontradicted facts, it is clear that the Respondent with full knowledge of all material facts affirmed the agreement of November 21st 1968 by agreeing his liability in the reduced sum of $ 718,266.85 and by instructing his advocates to consent to the judgment of December 27th 1969; and further affirmed that judgment itself by instructing his advocates to consent to or not to oppose the steps taken by the Appellants to enforce that judgment by way of prohibitory orders, judgment debtor summons and an order for the sale of land, and by seeking from both the Court and the Appellants postponements of the sale of land by auction. 20

(c) that accordingly the Respondent was estopped, both by the consent judgment and by his subsequent conduct, from raising in the present proceedings the allegations that there was no consideration for the agreement of November 21st 1968, that the same did not set out the true agreement between the parties, that he signed the same in reliance on false and fraudulent assurances, or any other of the matters alleged in paragraphs 9, 10, 11, 12, 15, 16 or 17 of the Statement of Claim 30

P. 3 to P.6

(d) that the Federal Court held that if the Respondent alleged facts which, if proved, would entitle him to set aside the agreement of November 21st 1968 he would also be entitled to have the judgment which was founded on that agreement set aside: and that for the reasons set out above it erred in so holding. 40

<u>On the issue of dismissal as frivolous and vexatious</u>

(e) that the application to the Court was made, and Mr. Justice Lee Hun Hoe correctly treated it as being made and acted, under the inherent jurisdiction of the Court; and evidence was

accordingly receivable (and was in fact received both at first instance and in the Federal Court on Appeal) on behalf of the Appellants and the Respondent.

(f) that the Court was accordingly not only entitled but bound to consider all the circumstances and background of the litigation, and not merely the pleadings alone, in order to decide whether the action should be dismissed as frivolous or vexatious, and the Federal Court erred in refusing to consider the same.

(g) that on the facts before the Court, and for the reasons given by the Learned Judge at first instance and those set out above, the Learned Judge was right to dismiss the action as being frivolous and vexatious.

20. the Appellants humbly submit that the said Judgment of the Federal Court of Malaysia (Appellate Jurisdiction) was wrong and ought to be reversed for the following amongst other

REASONS

(i) BECAUSE the Respondent was estopped by the consent judgment of December 27th 1969 in Civil Suit No.190 of 1969 in the High Court in Borneo from raising the allegations relied on in his present proceedings.

(ii) BECAUSE the Respondent is further estopped from raising the said allegations by reason of his conduct in affirming with knowledge of all material facts both the said judgment and the agreement of November 21st 1968 which founded the said judgment.

(iii) BECAUSE the Court in the exercise of its inherent jurisdiction was entitled, and bound, to consider and take into account all the circumstances and background of the litigation, and having done so ought to have dismissed the action as frivolous and vexatious.

(iv) BECAUSE the Judgment and Order of Mr.Justice Lee Hun Hoe were correct and ought to be affirmed.

SAMUEL STAMLER Q.C.

NICHOLAS STRAUSS

23 1973

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N

TRACTORS MALAYSIA BERHAD Appellants

- and -

TIO CHEE HING Respondent

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