

No.23 of 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

C A S E FOR THE RESPONDENT

- | | | <u>Record</u> |
|----|---|---|
| 10 | 1. This is an appeal from the judgment of the Federal Court of Malaysia (Ismail Kham, C.J., Gill, F.J. and Pawan Ahmad, J.), dated the 20th November, 1972, which allowed the Respondent's appeal from a judgment of the High Court in Borneo (Lee Hun Hoe, J.), dated the 6th July, 1972, whereby it was ordered that the Writ of Summons herein, the service thereof and all subsequent proceedings herein be set aside on the grounds that (i) the Respondent was estopped by a judgment against him dated the 27th December, 1969, in Civil Suit No.190 of 1969 from commencing proceedings by the said Writ of Summons, and (ii) the said proceedings were frivolous or vexatious. | pp. 81-90

pp.52-61
p.61
pp.1-6
p.15 |
| 20 | 2. The Respondent is the managing director of Southern Estate Sendirian Berhad (hereinafter called "Southern") a company incorporated in Malaysia. On the 1st October, 1967, Southern entered into certain agreements with the Appellants for the hire of 19 tractors, Southern was unable to pay the sums due under the said agreements. On the 21st November, 1968, there being no guarantor of Southern's | p.3 11.1-6

p.3 11.8-13

p.3 11.14-17
p.3 11.27-33 |
| 30 | | |

Record

obligations, a meeting was held between the Respondent and the Appellants' representatives, J.S.Eakin, Edward Chan and Thomas Jayasuriya, at Jayasuriya's offices in Kota Kinabalu, to discuss Southern's debts to the Appellants of some ~~2~~2,298,617.75. At this meeting, the Respondent, according to his account, said that he would be prepared to ensure that Southern's debts were paid provided that all his lands comprised in the Lahad Datu New Town development projects (hereinafter called "the New Town lands") would under no circumstances be utilized in paying Southern's debts. At no time during the meeting was the question of proceedings against Southern discussed; Southern was insolvent and proceedings against Southern would have been futile. Immediately after the meeting, Jayasuriya, who was a partner in the firm of Thomas Jayasuriya and Co., Advocates for the Appellants, arranged for an agreement to be drawn up, and it was drawn up on the same morning. Before the Respondent signed this agreement, both Eakin and Jayasuriya assured him that the agreement contained only the terms which had been agreed as aforesaid, namely, (a) that the Respondent would ensure that Southern's debts were paid, and (b) that the New Town lands would under no circumstances be utilized in paying Southern's debts. The Respondent was not literate in English, and the agreement was not read over or translated to him before he sign it. In reliance on the said assurance, the Respondent signed the agreement.

3. These assurances, the Respondent alleged, were false and made fraudulently in that, as Eakin and Jayasuriya well knew, the Agreement contained the following terms:

(i) that the Appellants had "at the request of the (Respondent).....agreed not to take legal proceedings for the recovery of the legal sums from (Southern) for the time being"; and

(ii) that the Respondent guaranteed as principal debtor the payment of Southern's debts.

p.3 1.37-
p.4 1.4

10

p.3 11.21-24

p.4 11.8-11

20

p.4 11.12-16

p.4 11.11-12

p.4 11.16-17

p.4 11.17-19

30

40

p.4 11.19-35

Furthermore, the assurances were false and fraudulent because the Agreement did not contain any term that the New Town lands were not to be utilized in reducing Southern's indebtedness to the Appellants.

- 10 4. On the 23th October, 1969, the Appellants commenced proceedings against Southern in Civil Suit No.189 of 1969 and against the Respondent in Civil Suit No. 190 of 1969 under the said agreement for the sum of \$2,056,987.63. By his Defence, dated the 1st December, 1969, the Respondent admitted liability to the extent of \$718266.35, which sum was calculated after taking into account payments already made. On the 4th December 1969, the Appellants applied for leave to enter final judgment for the admitted sum. On the 27th December, 1969, such leave was obtained and judgment was entered for the admitted sum pursuant to R.S.C. (1957) Order 14 Rule 1 pp.43-44 p. 14 p.10 11.36-39 p.15
- 20 5. On the 26th January, 1970, the Appellants obtained a prohibitory order (a step in execution proceedings) in respect of 5 land titles which included certain of the New Town lands. Thereafter, between the 16th June, 1970 and the 8th January, 1972, the Appellants took various further steps to enforce the judgment of the 27th December, 1969, including further steps affecting the New Town lands. On the 6th January, 1972, on the Respondent's application, the High Court in Borneo granted a postponement of an auction sale of certain of the New Town lands for two months, to the 29th February, 1972. p.10 1.43 - p.11 1.2 p.11 1.10 - p.12 1.11 p.12 11.12-20
- 30 6. On the 6th March, 1972, the Respondent applied for an order that the judgment of the 27th December, 1969, be set aside and the Respondent be granted unconditional leave to defend. By an affidavit sworn on the 1st March, 1972, in support of the application, the Respondent deposed to the circumstances in which the agreement of the 21st November, 1963, had been obtained, although no allegations of fraud were made. The Respondent said that he had not opposed the application for summary judgment because, as a man of honour, he had not wished to go back on his word once given. He explained p.18-21 p.18 1.23 - p.20 1.4 p.20 11.40 - end
- 40

p.21 11.1-11 that it was the Appellants' actions in persisting to ruin him financially which had led him to seek the advice of Messrs. Sharikat S.K. Lee, who advised him that the consideration for the agreement dated the 21st November, 1968, namely, forbearing to sue Southern, had not been given by the Appellants and that the said agreement was not enforceable. Accordingly, he asked for the said judgment of the 27th December, 1969 to be set aside. 10

p.21 11.11-19 and 11.28-32

pp.27-32 7. By his affidavit in reply, sworn on the 10th March, 1972, Jayasuriya deposed to his own account of the circumstances in which the agreement of the 21st November, 1968 had been obtained, and denied the Respondent's account. He denied that it was agreed that the New Town lands should on no account be utilized in any way to discharge Southern's debt. He further set out the history of the proceedings in the action, Civil Suit No.190 of 1969, from the 1st May, 1969 to the application to set aside dated the 6th March, 1972. He submitted that there were no merits in the Respondent's application, nor was it made bona fide. 20

p.27 1.22 - p.28 1.28

p.28 11.29-end

p.31 1.41 - p.32 1.17

p.33 8. On the 13th March, 1972, the said application was heard in the High Court in Borneo (Lee Hun Hoe, J.), and dismissed. On the same day, the High Court in Borneo heard the Respondent's application for a further postponement of the said auction sale for 6 months and ordered a postponement of 4 months from the date of the order. 30

p.12 11.29-35

pp.1-6 9. On the 16th May, 1972, the Respondent instituted the present proceedings by the Writ of Summons, claiming inter alia that the judgment of the 29th December, 1969 be set aside. In the Writ, the Respondent set out the facts relevant to his claim as set out in paragraphs 2 and 3 hereof. The Respondent contended that various steps taken by the Appellants to enforce the judgment against the New Town lands were contrary to the true agreement between the parties. The Respondent further claimed inter alia a declaration that the agreement of the 21st November, 1968, was unenforceable as no 40

p.3 1.1 - p.4 1.35

p.5 11.6-24

p.5 1.30- p.6 1.14

consideration therefor was given by the Appellants or alternatively, rectification of the agreement so as to include the agreed term that the New Town lands were not to be utilized in reducing Southern's indebtedness to the Appellants.

10. On the 22nd June, 1972, the present summons was taken out by the Appellants, applying for an order that the Writ of Summons herein be set aside on the grounds that the same was not indorsed in accordance with R.S.C. (1957) Order 3 rule 3, that the Respondent was estopped from taking the present proceedings and that the present proceedings were frivolous or vexatious. p. 7
11. On the 25th June, 1972, Jayasuriya swore an affidavit in support of the application to set aside the Writ. He alleged that the Writ was not properly indorsed under Order 3, as it contained an allegation of fraud, and he referred to Order 3 rules 3 and 6. He referred to the fact that the Respondent's application to set aside the judgment of the 27th December, 1969 had been dismissed, reiterated his account of the circumstances in which the agreement of the 21st November, 1968 was obtained, denied the Respondent's new allegations of fraud and set out the history of Civil Suit No.190 of 1969 from its institution on the 28th October, 1969, to the postponement for 4 months of the auction sale on the 13th March, 1972. He further contended that the allegations and issues raised in the said Writ were the same or substantially the same as those raised or which could have been raised in the earlier affidavits of the Respondent and Jayasuiya referred to in paragraphs 6 and 7 hereof. p.8-13
p.8 11.14-20
p.8 11.25-30
p.8 1.30 -
p.10 1.3
p.10 11.4-10
p.10 1.16 -
p.12 1.35
p.12 11.41 -
end
12. On the 27th June, 1972, the Respondent swore an affidavit in reply. He submitted that he was not estopped from taking the present action by reason of the dismissal of his application in Civil Suit No.190 of 1969 to set aside the judgment of the 27th December, 1969. He reiterated his account of the obtaining of the agreement of the 21st November, 1968; he deposed to the fact that the whole transaction was completed on the 21st November, 1968 and denied Jayasuriya's account that there were three meetings over several days (amendments to a draft agreement allegedly being discussed at the final meeting). The Respondent denied Jayasuriya's p.34-38
p.34 11.17-21
p.34 1.24 -
p.35
p.35 11.12 -
30

Record

- p.36 1.45 -
p.37 1.8
- p.34 11.21-23
- pp.39-40
- pp.40-42
pp.40 11.24 -
end
- p.41 11.14-19
pp.43-44
p.42 11.7-19
- pp.45-52
pp.52-61
- pp.52-61
p.52 1.11 -
p.56 1.10
- assertion that the land to be sold in the said auction sale was not part of the New Town lands. The Respondent explained why he had consented to the judgment of the 27th December, 1969, by reiterating that he felt that he would honour his word once given, having no thought of evading his responsibility. He still intended to keep his word if the Appellants kept to their part of the bargain in relation to the New Town lands. Because in his present action he had valid grounds for legal and/or equitable redress, the Respondent submitted that the action was not frivolous or vexatious.
- 10
13. On the 27th June, 1972, by an affidavit, Chong Thain Vun, sole principal of the legal firm of Chong Thain Vun & Co., the Respondent's Advocates and Solicitors at the time of the judgment of the 27th December, 1969, confirmed, as the Respondent had deposed, that the Respondent had not informed him of the existence of the agreement of the 21st November, 1968. He further confirmed that the Respondent had simply instructed him not to defend the action or to oppose the Appellants' subsequent steps in execution of the judgment because he had given his word, would not go back on it, did not want to evade his responsibility to pay the debts of Southern and felt sure that he could pay.
- 20
14. On the 29th June, 1972, Jayasuriya swore a further affidavit. He referred to the Respondent's attacks upon his professional integrity as unwarranted and unjustified. He said that the history of the case showed that the Appellants had acted with restraint and reasonableness. He exhibited the Statement of Claim in Civil Suit No. 190 of 1969 and commented that the pleading set out in clear and plain language the basis of the Respondent's liability and the consideration of forbearance to sue which, he said, was further plainly set out in the last paragraph of the preamble to the agreement of the 21st November, 1968.
- 30
15. The Appellants' application to set aside the Writ herein was heard in the High Court in Borneo (Lee Hun Hoe, J.) and on the 6th July, 1972, judgment was given in the Appellants' favour.
- 40
16. In his judgment, Lee Hun Hoe, J. summarized certain of the facts and proceeded to deal with the first ground of the Appellants' application. In considering

Record

whether the said Writ was indorsed in accordance with Order 3 rule 3, the learned Judge set out Order 3 rules 3 and 6 (1) and concluded that the question depended upon whether the said Writ was a Specially Indorsed Writ or a General Writ. If it was a Specially Indorsed Writ, then the Appellants would succeed in their application on the first ground. The learned Judge held that the said Writ was a General Writ because it omitted a paragraph to be found in Form No.3 in the First Schedule to the Rules of the Supreme Court, 1957, which was always to be found in a Specially Indorsed Writ.

p.56 11.14-19
& 11.26-36

p.57 11.23-27

p.57 11.27-43

p.57 11.43 -
end.

17. The learned Judge then dealt with the second ground of the Appellants' application to set aside. He referred to his dismissal on the 13th March, 1972 of the Respondent's application in Civil Suit No.190 of 1969 to set aside the judgment of the 27th December, 1969, and to the fact that the Respondent did not appeal against that dismissal. The learned Judge said that instead of appealing against that dismissal the Respondent sought by the present Writ to have the judgment set aside. He said that he could see no ground for re-opening the judgment, since it was the result of the Respondent's admission. The Respondent was fully cognizant of the proceedings and, in the learned Judge's view, was clearly bound by estoppel from litigating the same matter in a different form or guise. The learned Judge said that the Respondent had tried to attack the professional integrity of Jayasuriya, which attack was, he thought, unwarranted and unjustified in the circumstances. The Respondent found himself in his present position because he had broken the agreement of the 21st November, 1968. He had raised for the first time in his affidavit the point that he did not understand English well, a matter which he could have raised in his Defence in the previous proceedings. The learned Judge then quoted from Chitty on Contracts, General Principles, 23rd Edition, on the question of a person signing a written agreement and being bound by it whether he had read the terms or not, and on the question of consideration.

p.58 1.1. -
p.59 1.29

p.58 11.1-7

p.58 11.7-9

p.58 11.22-24

p.58 11.24-27

p.58 11.32-36

p.58 11.36-42

p.58 11.43 -
end

p.59 11.3-10

p.59 11.20-29

18. Lee Hun Hoe, J. then considered the third and final ground of the Appellants' application to set aside, namely, that the present proceedings were

p.59 1.30 -
p.61 1.16

Record

p.59 11.30-34	frivolous or vexatious. He said that whether proceedings were frivolous or vexatious was a matter for the exercise of judicial discretion, for the Court should not prevent a person from exercising his undoubted rights on any vague or indefinite principle. He referred to the Respondent's consent to the judgment and to his instructions to Chong Thain Vun not to oppose the Appellants' various steps to execute the judgment against the New Town lands. He further referred to Jayasuriya's affirmation that there was no truth in the Respondent's allegation that he had made it clear that the New Town lands would under no circumstances be utilized to pay Southern's debt. He said that the forbearance to sue was clearly stated in the agreement of the 21st November, 1968. In the learned Judge's view, it was too late in the day to go into extrinsic evidence relating to that agreement. All the matters in the present action could have been raised by the Respondent in his Defence, but he had elected not to do so. There was no question of new evidence being discovered which could not have been obtained in the previous proceedings. In the learned Judge's view, the Writ was nothing but a new twist to overcome the Respondent's difficulty in raising funds to pay Southern's debts and to delay the execution of judgment against him. The Writ was, he considered, misconceived and an abuse of the process of the court. In the learned Judge's view, the Appellants succeeded in their application on the second and third grounds therein. Accordingly, he ordered that the Writ be set aside.	
p.60 11.17-22		
p.60 11.23-28		10
p.60 11.28-30		
p.60 11.34-39		
p.60 1.45 - p.61 1.1.		20
p.61 11.1-4		
p.61 11.4-7		
p.61 11.11-12		30
p.61 11.17-18		
p.61 11.19-20		
p.62		
pp.62-64	19. The Respondent appealed to the Federal Court of Malaysia. The appeal was heard by Ismail Khan, C.J., Gill, F.J. and Pawan Ahmad, J. on the 21st September, 1972, and judgment was given on the 20th November, 1972, allowing the Respondent's appeal.	40
pp.65-80		
pp.81-90		
p.81 1.20 -	20. In the judgment of the Federal Court, delivered by Gill, F.J., certain of the facts were summarized. The learned Judge referred to the observation made by Lee Hun Hoe, J. in his judgment that the Respondent did not appeal against the dismissal of his application in Civil Suit No.190 of 1969 for the judgment of the 27th December, 1969 to be set aside as there was no ground on which he could have justifiably succeeded. Gill, F.J. said that	
p.83 1.23		
p.83 11.26-32		
p.55 11.45-46		
p.83 11.33 -		
end.		

Record

he agreed, but only to the extent that the appeal would have failed solely on the ground that after a judgment has been passed and entered the Court cannot set it aside otherwise than in a fresh action brought for the purpose, (with certain immaterial exceptions). He agreed with counsel for the Respondent that the Writ was not res judicata merely because of the order dismissing the Respondent's application. The learned Judge then considered the question of estoppel. After citing a passage in Lee Hun Hoe, J's judgment at p.58 11.19 - 31 of the Record herein, ending with the following sentence, "A judgment by consent or by default operates as an estoppel between the parties and their privies", Gill, F.J. said that there were exceptions to the rule that a consent judgment operated as an estoppel. One exception was that a consent judgment might be set aside for the same reasons as those on which an agreement might be set aside. The learned Judge cited authorities establishing that where a judgment had been obtained fraudulently or by reason of mutual mistake of the parties regarding a material fact, the Court had power to set aside the judgment.

10

20

21. Concerning the third ground of the Appellants' application, that the said Writ was frivolous or vexatious, Gill, F.J. quoted Order 25 rule 4 of R.S.C. (1957). The Writ set out facts in support of the Respondent's case that he was entitled to have the agreement of the 21st November, 1968, rescinded or rectified on the ground of lack of consideration and fraudulent misrepresentation. Those facts, if proved, would entitle the Respondent to set aside the said agreement and, therefore, the Respondent would be entitled to have the judgment which was founded on the said agreement set aside as well. In the view of the learned Judge, the Writ raised triable issues which were prima facie sustainable. It could not therefore be said that it disclosed no reasonable cause of action.

30

40

22. The learned Judge then cited authorities dealing with the question of what constituted a frivolous or vexatious action. He said that counsel for the Appellants had conceded that a fresh action could be brought to set aside a final judgment in a previous action and that a consent judgment might be set aside on the grounds of mistake and fraud, but had argued that the Respondent's delay in bring the present action was fatal. The learned Judge could not

p.84 11.1-20
p.84 1.21 -
p.85 1.18
p.84 11.21-38
p.84 11.29 -
end
p.84 1.41 -
p.85 1.18
p.85 1.19 -
p.90 1.3
p.85 11.27-36
p.85 1.37 -
p.86 1.4 -
p.86 11.10-13
p.86 11.30-34
p.86 1.35 -
p.89 1.18
p.89 11.19.26
p.89 11.26-27

Record

p.89 11.26-27 accept that argument, for two reasons. First,
p.89 11.27-29 in his view there appeared to be a reasonable
p.89 11.29-31 explanation for the delay. Secondly, the
p.89 11.31-36 Respondent should be given an opportunity to
explain the delay at the Trial. The learned
p.89 11.36-42 Judge did not consider that it was open to the
Court to go into the merits of the case or to
look into the whole background of the litigation
at that stage. The fact that there was no
evidence apart from the Respondent's was, to 10
the learned Judge's mind, the strongest ground
for allowing the appeal, because the evidence
could only be produced at the trial.
p.90 11.4-6 Accordingly, the Federal Court allowed the
Respondent's appeal with costs both there
and in the Court below and set aside the judgment
p.91 of Lee Hun Hoe, J. dated the 6th July, 1972.

23. The Respondent respectfully submits that this
appeal ought to be dismissed, because the judgment²⁰
of the Federal Court was correct. Lee Hun Hoe, J.
was wrong in his view that the consent
judgment could not be re-opened because the
Respondent had elected not to raise in the
earlier action the allegations raised in the
present proceedings. At the time of his Defence
in the earlier action, the Respondent was
entitled, misled as he said he then was by the
Appellants' fraud, to admit liability in the
belief that the New Town lands would not be 30
utilized to pay Southern's debts. At that
time, the Respondent had no reason to suppose,
relying as he did upon the Appellants'
assurance in relation to the New Town lands,
that the Appellants would seek to execute
against the New Town lands. Even in the
absence of fraud, any mistake of this kind,
whether common or unilateral, would justify
the setting aside of the consent judgment.
Any question of election arose, not at the 40
time of the Defence or the consent judgment,
but for the first time when the Appellants
moved to execute against the New Town lands.

24. It is respectfully submitted that the
Respondent's failure to commence the present
proceedings as soon as the Appellants moved
to execute against the New Town lands is not
of itself fatal to these proceedings, does
not operate as an estoppel, and does not
render the proceedings frivolous or vexatious.

10 If by reason of the Appellants' fraud the Respondent was misled into a false position entitling him to re-open the consent judgment, then it is respectfully submitted that his delay in re-opening such judgment could only be fatal in the absence of explanation. The Respondent has put forward what appeared to the Federal Court to be a reasonable explanation for such delay. It is respectfully submitted that the Federal Court was correct in that view and in holding that the Respondent should be given an opportunity to explain the delay at the trial of the action.

24. The Respondent respectfully submits that the judgment of the Federal Court was right and ought to be affirmed and this appeal ought to be dismissed with costs for the following (among other)

R E A S O N S

1. BECAUSE the Respondent is not estopped from commencing the present proceedings:

20 2. BECAUSE the allegations raised in the present proceedings did not in all the circumstances properly belong to the Respondent's Defence in Civil Suit No. 190 of 1969:

3. BECAUSE the Respondent's consent to the Judgment in Civil Suit No.190 of 1969 was obtained by the fraud of the Appellants:

30 4. BECAUSE the Respondent's consent to the Judgment in Civil Suit No.190 of 1969 was the result of common mistake, or, alternatively, of unilateral mistake:

5. BECAUSE the Respondent was entitled to admit liability in his Defence in Civil Suit No.190 of 1969 on the basis that the Appellants would not utilize the New Town lands to pay Southern's debts.

6. BECAUSE the present proceedings are not frivolous or vexatious.

7. BECAUSE of the other reasons given in the judgment of the Federal Court.

40

J.G. LE QUESNE

STUART N. McKINNON

No.23 of 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

C A S E FOR THE RESPONDENT

COWARD CHANCE,
Royex House,
Aldermanbury Square,
London, EC2V 7LD
Solicitors for the Appellants

Respondent