

IN THE PRIVY COUNCIL

No. 24 of 1977

O N A P P E A LFROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT
KUALA LUMPUR

IN THE MATTER of the ADVOCATES AND SOLICITORS
ORDINANCE 1947

- and -

IN THE MATTER of CHOE KUAN HIM, gentleman, one
of the Advocates and Solicitors
of the High Court

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B E T W E E N

T. DAMODARAN S/O P.V. RAMAN

Appellant

- and -

CHOE KUAN HIM

Respondent

CASE FOR THE APPELLANT

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1. This is an appeal by leave of the Federal Court of Malaysia at Alor Star from an Order dated the 20th August 1976 of the said Federal Court (Suffian, L.P., Ali, F.J., and Wan Suleiman, F.J.) dismissing an appeal by the Appellant from an Order dated the 14th July 1975 of the High Court sitting at Alor Star (Syed Agil Barakbah, J.) made in proceedings brought by the Appellant for the enforcement of a solicitors' undertaking given by the Respondents to the Appellant, and allowing a cross-appeal by the Respondent from the said Order of the High Court.

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2. The Appellant was at the date of the Agreement hereafter mentioned the owner of

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certain lands in the Mukim of Sungai Pasir in Sungai Petani, Kedah, Malaysia.

- P.39 3. By an Agreement dated the 2nd August 1973 and made between the Appellant of the one part and Andawan S/O Ayapen of the other part the Appellant agreed to sell and the said Andawan agreed to purchase the said lands therein specified at the price of \$369,768 subject to certain terms therein specified and a deposit of \$36,976 part of the said purchase price was paid by the said Andawan to the Appellant. 10
- P.42 4. By an Agreement dated the 6th March 1974 and made between the said Andawan of the one part and United Realty Sendirian Berhad of the other part the said Andawan assigned the benefit of the said Agreement to the said United Realty Sendirian Berhad.
- P.44 5. By a letter also dated the 6th March 1974 the Respondent, who acted as solicitor to the said United Realty Sendirian Berhad and as solicitor to the Appellant in respect of the said Agreement, wrote to the Appellant confirming that the sum of \$332,792, being the balance of the purchase price payable under the said Agreement had been deposited with the Respondent and undertaking that such sum would be released to the Appellant upon the transfer of the said lands being registered in the name of the Purchaser Syarikat Alor Merah Sdn. Bhd. or their nominee, nominees or assigns. 20
6. On the 16th April 1974 transfers of the said lands into the names of nominees of the said Syarikat Alor Merah Sdn. Bhd. were duly registered. 30
7. Thereafter, out of the balance of the said purchase price held by the Respondent he paid \$150,000 to a chargee of the said lands and delivered to the Appellant a cheque dated the 23rd April 1974 drawn by the Respondent on his firm's account in the United Malayan Banking Corporation for \$182,200 in respect of the said balance of the said purchase price. 40
- P.45 8. After delivery of the said cheque to the Appellant but before presentation of the same for payment the Respondent stopped payment thereof and refused to account to the Appellant in respect of the said sum of \$182,200, on the ground that it was a term of the said Agreement that the said lands should be free from all encumbrances and that in fact the said lands were encumbered by a lis pendens order

registered against them on the 22nd December 1973. P.
Such refusal to account for the said sum was
expressed in a letter dated the 8th May 1974
from the Respondent to the Appellant.

10 9. By an Originating Summons issued in the
High Court in Malaysia at Alor Star the Appellant
claimed against the Respondent payment pursuant
to the said undertaking given by the Respondent
in the said letter of the 6th March 1974 P.1
on the said sum of \$182,200 with interest thereon
at the rate of 12% per annum from the 16th April
1974 (the date on which the said transfers were
registered) until the date of payment.

20 10. The said Originating Summons was heard by
Syed Agil Barakbah, J. on the 5th October 1974
and on the 7th December 1974 the learned Judge
made an order for payment of the said sum of
\$182,200 and interest as sought in the said
Originating Summons and ordered the Respondent
to pay the costs of the application.

11. The Respondent then applied for the
adjournment of the matter into court for
further argument, which was heard in Open Court
on the 9th March 1975, following which judgment P.11
was delivered by Syed Agil Barakbah, J. on the
14th July 1975.

30 12. In his judgment the learned Judge found
that when the Respondent acted for United
Realty Sendirian Berhad in relation to the
said Assignment and when he gave the said
undertaking to the Appellant, the Respondent
was well aware of the said Agreement dated the
2nd August 1973 and of the registration of the
said lis pendens, and held that the Respondents'
reason for stopping payment of the said cheque
was that he was acting on the instruction of
his client, the said United Realty Sendirian P.15
Berhad. The learned Judge accordingly held
that the Respondent could not succeed on the
ground that his said undertaking was issued p.15
by mistake.

50 13. The learned Judge further held that the
Respondent gave the undertaking as a stakeholder
and not as agent on behalf of his client. He
said it was given by the Respondent as a
solicitor and in his professional capacity as
such and that it was not open to the Respondent
to say that in giving the undertaking he was
acting on the instructions of his client.
Accordingly the learned judge held that the

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- P.15 Respondent was bound by his undertaking.
- P.15 14. However the learned Judge went on to say that although he held that the Respondent was liable on the undertaking and in normal circumstances would order him to pay the purchase money to the Appellant as prayed, yet in view of the fact that there was a pending action in which one Vesudevan was claiming against the Appellant that he Vesudevan was entitled to a half undivided share in the said lands, which claim if established would cause an incumbrance on the said lands, he, the learned Judge had no alternative but to order the Respondent to deposit the sum involved into Court forthwith. 10
- P.15
- P.16 15. Accordingly by the Order made by the learned Judge on the 14th July 1975 it was ordered that the Respondent do pay forthwith the sum of \$182,200 together with interest thereon at the rate of 12% per annum from the 16th April 1974 to the date of payment into Court as deposit and that the costs of the said application of the Appellant be paid by the Respondent to the Appellant. 20
- P.19 16. By Notice of Appeal dated the 11th August 1975 the Appellant appealed to the Federal Court of Malaysia against that part only of the said Order as decided that the sum of \$182,200 and interest as aforesaid be deposited into Court by the Respondent instead of being paid to the Appellant. 30
- P.21 17. By Memorandum of Cross-Appeal dated the 16th September 1975 the Respondent appealed against the said Order of the High Court on the grounds that the learned Judge erred in law and on the facts in ordering the Respondent to pay interest on the amount to be deposited in Court from the 16th April 1974 until payment into Court, that instead the learned Judge ought to have held that interest at the rate of 6% per annum was only payable on the judgment from the date of the Order until payment into Court, and that the learned Judge erred in law and on the facts in exercising his discretion to award costs against the Respondent. 40
18. The said appeal and cross-appeal were heard by the Federal Court of Malaysia on the 7th February 1976, and judgment was delivered thereon the 20th August 1976. Suffian L.P. gave the first 50

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judgment and, after reciting the facts, said that in his opinion the law and practice relating to solicitors' undertakings in Malaysia is the same as that in England. The learned Lord President went on to say that the Respondent was an officer of the Court and that the Court should compel him to honour undertakings by him promptly to secure public trust and confidence in the legal profession. He held that the language used by the Respondent in his said undertaking was clear, unambiguous and unqualified, and that anyone reading it could not but get the impression that the Respondent undertook to release the money in his hands the moment the lands had been transferred into the name of the Syan Rat Alor Merah Sdn. Bhd. or its assignees.

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19. However the learned Lord President agreed with the learned Judge in the Court below that in the peculiar circumstances of this case the Respondent should be allowed to release the money concerned into Court and not to the Vendor Appellant, on the ground that the undertaking should be considered not in isolation but in the light of the sale agreement and the assignment, by which agreement the Appellant had promised to give a good title to the said lands free of all incumbrances, whereas he knew that there would have been some difficulty about him giving an incumbered title because of the said claim by the said Vesudevan. The Lord President went on to hold that it would not be fair to the Respondent that he would be left exposed to a claim by the purchaser's assignees in the event of Vesudevan's claim succeeding, so that the Purchaser's assignees would not have obtained an unincumbered title, notwithstanding that the Respondent knew of the incumbrance on the Appellant's title when he gave the undertaking, and could very well have so worded his undertaking as to make it clear that he would release the money only after the lis pendens order had been removed. The Respondent, said the Lord President, had by mistake expressed his undertaking in terms too wide, and the Court should not allow the Appellant to take account of the Respondent's mistake.

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20. Accordingly the learned Lord President said he would dismiss the Appellant's appeal, so

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- P.28 that the order that the Respondent should pay the money into Court should stand. As regards interest the Lord President decided that the Respondent should pay only the rate of 6 per cent. per annum and that such interest should run only from the date of judgment of the High Court instead of from the 16th April 1974 when the transfers of the said lands were registered.
- P.28 21. As regards costs the learned Lord President was of opinion that the Appellant should pay not only the costs of the appeal but also the costs in the Court below. 10
- P.29 22. Wan Suleiman F.J. concurred with the judgment of Suffian L.P.
- P.30 23. Ali F.J. delivered a dissenting judgment. After reciting the material facts he referred to Halsbury's Laws of England, 3rd Edition, Vol. 36 p. 195 para. 266 as stating the English Law on summary enforcement of solicitors' undertakings, and held that there was no difference between the law in England and Malaysia. The learned Federal Judge said that the only question raised by the Appellant was whether the judge in the Court below, having decided that the Respondent had given the said undertaking as a solicitor, and having found that the Respondent was in breach of that undertaking, was right in directing the money concerned to be deposited in Court rather than being paid to the Appellant in accordance with the undertaking, thereby depriving the Appellant of the immediate use of the money. 20 30
- P.32 24. As for the reasons for his decision given by the Judge in the Court below, Ali F.J. said that the action between Vasudevan and the Appellant had no relevance whatsoever to the issue in the present proceedings, which issue was whether the Respondent as a solicitor was liable for the breach of his undertaking. The undertaking was given on the Respondent's own initiative to assure the Appellant that on the transfer of the lands being completed he would be paid the balance of the purchase price, which was the logical thing to do as the balance had already been deposited with the Respondent. The argument that the lands might not be free from encumbrances, and that if the balance of the purchase price was to be paid to the Appellant the purchasers would stand to lose the money, had no relevance to the issue before the Court, which 40 50

was concerned only with the Respondent's misconduct and his liability to carry out the undertaking.

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10 25. Accordingly Ali F.J. was of opinion that on the facts and on the law applicable in these proceedings there was nothing to justify the order directing the money to be deposited into Court; that the Appellant had done nothing to be deprived of his right to payment pursuant to the undertaking; and that the Appellant's appeal should be allowed with costs and the sum of \$182,200 and all other sums of money which might be payable to the Appellant should be paid out to him forthwith with interest at 6 per cent. per annum.

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20 26. Accordingly by Order dated the 20th August 1976 the Federal Court dismissed the appeal of the Appellant and allowed the cross-appeal of the Respondent and ordered that the Respondent do pay forthwith the sum of \$182,200 together with interest at the rate of 6 per cent. per annum from the 14th July 1975 to the date of payment into Court as deposit And that the costs of the appeal to the Federal Court and of the proceedings in the High Court be taxed and paid by the Appellant.

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30 27. By Order dated the 4th April 1977 the Federal Court gave Final leave to the Appellant to appeal to His Majesty the Yang di-Pertuan Agong against the decision of the Federal Court given on the 20th August 1976 as aforesaid.

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40 28. The Appellant respectfully submits on this appeal that the judgment given in the Federal Court by Ali F.J. was correct in law except in relation to the award of interest on the sum to be paid by the Respondent and that Syed Agil Barakbah J., Suffian L.P. and Wan Suleiman F.J. erred in law in deciding that, although

- (a) the said undertaking was given by the Respondent in his capacity as a solicitor,
- (b) the only condition expressed in the undertaking (namely the transfer of the said lands being duly registered in the name of the purchaser) had been fulfilled, and
- (c) the Respondent was not acting under any mistake of fact in giving the said undertaking, nevertheless he should not be ordered to perform

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the undertaking according to its terms
by paying the sum of \$182,200 to the Appellant.

29. In reliance on the said undertaking being
complied with the Appellant concurred in the
said transfer of the said lands to the purchaser 10
being registered, and it is submitted that the
power and duty of the Court under its jurisdiction
summarily to enforce undertakings given by a
solicitor (which, as was rightly accepted by all
the learned judges in the Courts below is clearly
established by such cases as United Mining
& Finance Corporation Ltd. v. Belcher [1910]
2 K.B. 296 and Re A Solicitor [1966] 3 All
E.R. 52) was to enforce compliance by the 20
Respondent with that undertaking according to its
terms by payment to the Appellant and not by
payment into Court or in any other manner not
contemplated by the undertaking.

30. The Appellant respectfully submits that Ali
F.J. was correct in his view that the possibility
of a claim by the purchaser under the said
agreement for sale of the said lands or its
assignee against the Appellant or the Respondent
in respect of the existence of the said lis
pendens registered against the said lands 30
in nihil ad rem in relation to the rights of
the Appellant against the Respondent to secure
performance of the said undertaking given by the
Respondent personally as a solicitor and not on
behalf of the said purchaser.

31. The Appellant further submits that the
learned Judge at first instance was correct in his
decision that the Respondent should pay interest 40
on the said sum of \$182,200 as from the date on
which payment of such sum ought to have been
made pursuant to the said undertaking, namely
the 16th April 1974, and that the Federal
Court was wrong in principle in limiting the
Appellant's claim to interest to the period
from the date of the Order of the High Court.
The only reason given by Suffian L.P. for so
limiting the claim to interest was that until
the decision of the High Court the Respondent
was not sure to whom he should pay. It is the 50
Appellant's contention that this reason is
unsound since the basis of the Appellant's
claim is that the Respondent was bound to make
payment to him on the 16th April 1974 pursuant
to his undertaking, and the Respondent knew this

or ought to have known it.

10 32. The Appellant submits that the Order of the Federal Court dated the 20th August 1976 should be reversed and that instead it should be ordered that the Respondent do pay to the Appellant forthwith the sum of \$182,200 with interest thereon at the rate of 6 per cent. per annum from the 16th April 1974 until the date of payment and that the Respondent should be ordered to pay the Appellant's costs of this Appeal and of the proceedings in the Federal Court and in the High Court for the following amongst other

R E A S O N S

20 (1) The Respondent in his capacity of Solicitor undertook to pay the said sum to the Appellant upon the transfer of the said lands being duly registered in the name of Syarikat Alor Merah Sdn. Bhd. or their nominee, nominees or assigns. Such transfer was registered on the 16th April 1974 and the Respondent thereupon became liable to make the said payment to the Appellant according to the terms of the said undertaking, which payment he has failed to make.

(2) The Court in exercise of its jurisdiction summarily to enforce undertakings given by solicitors as such ought to enforce the said undertaking by the Respondent according to its terms.

30 (3) The possibility (which the Appellant does not admits) of a claim by the said Syarikat Alor Merah Sdn. Bhd. against the Appellant or the Respondent in respect of the terms of the said agreement for sale of the said lands is no proper reason for the Court not enforcing the said undertaking as between the Appellant and the Respondent according to its clear terms

DONALD RATTEE

No. 24 of 1977

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
HOLDEN AT KUALA LUMPUR

RE THE ADVOCATES AND SOLICITORS
ORDINANCE 1947

RE CHOE KUAN HIM

B E T W E E N:

T. DAMODARAN S/O
P.V. RAMAN Appellant

- and -

CHOE KUAN HIM Respondent

CASE FOR THE APPELLANT

STEPHENSON HARWOOD,
Gutter Lane,
Cheapside,
London EC2V 6BS.

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