

No. 22 of 1979

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 :

TONG LEE HWA

Appellant

- and -

LEE YOKE SAN

Respondent

CASE FOR THE APPELLANT

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1. This is an appeal from the decision of the Federal Court of Malaysia (Lee Hun Hoe, C.J., Wan Suleiman F.J., Chang Min Tat, F.J.) dated 1st day of September, 1978, disallowing the Appellant's appeal from the Order of Abdul Hamid J., dated the 23rd May, 1977, in respect of the Respondent's Notice of Motion of the 10th December, 1976 for the Defences of the Appellant (First Defendant) and one Tong Young Fah (Second Defendant) to be struck out as disclosing no reasonable answer and being frivolous and vexatious and that the Respondent be at liberty to sign judgment against both Defendants, and whereby it was ordered that the said Defences be so struck out and that the Respondent be at liberty to sign judgment against the Appellant and the Second Defendant for the sum of \$35,964.25 with interest on \$34,464.25 at the rate of 6% per annum from the 12th October, 1971 to the date of payment and interest on \$1,500 at the rate of 6% per annum from the 9th March, 1972 to the date of payment and that the Appellant and the Second Defendant should pay the Respondent's taxed costs. The Grounds of Judgment of Abdul Hamid J., were delivered on the 28th July, 1977.

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This Appeal is made pursuant to an Order of the

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Federal Court of Appeal dated 14th December, 1978, granting leave to appeal to His Majesty the Yang di-Pertuan Agong.

- p. 3 2. The Respondent on 3rd day of January, 1973 made a claim against the Appellant and the said Tong Young Fah for services rendered in respect of the valuation of a company known as Chi Liung & Son Sdn. Berhad and its shares and claimed service fee and interest as follows :-
- (1) The sum of \$35,964.25;
  - (2) Interest at the rate of 6% on the sum of : 10
    - (a) \$33,878.75 and \$585.50 total \$34,464.25 from 12th October, 1971 to date of payment or realisation; alternatively from the date of judgment to date of payment or realisation;
    - (b) \$1,500/- from 9th March, 1972 to date of payment or realisation; alternatively from the date of Judgment to date of payment or realisation.
- p. 4-11 With the said Statement of Claim the Respondent attached bills addressed to M/s. Chi Liung & Son Sdn. Berhad. 20
- p. 12 3. On 30th day of January, 1973 the Appellant filed his Defence raising the contention, inter alia, that he was the Managing Director of M/s. Chi Liung & Son Sdn. Bhd. and the instruction was given in respect of an Order of Court made in Probate Suit No. 3 of 1969 and not in his personal capacity.
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- p. 13 4. On the 17th day of February, 1973 the Respondent by way of Summons-in-Chambers sought for final judgment on Affidavit evidence. The Appellant contended by way of Affidavit that he was not personally liable since the valuation was in respect of High Court Probate Suit No. 3 of 1969 involving the Company shares of M/s. Chi Liung & Son Sdn. Bhd. and the parties referred to in the said Probate Court's Order dated 15th December 1969, under Clause 5 and 12, were jointly liable towards payment of fees. 30
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5. On 26th day of March, 1973 Mr. Justice Mohd, Azmi

having heard the Summons-in-Chambers of the 17th February, 1973 ordered the Respondent to withdraw his application for final judgment and further ordered that the Respondent be at liberty to include other parties involved in Probate Suit No. 3/1969 as defendants. The said Order reads as follows :-

10           "UPON HEARING Mr. Ong of Counsel for the Plaintiff above-named and Mr. Tharu of Counsel for the Defendants above-named AND UPON READING the Summons in Chambers dated the 17th day of February, 1973, the Affidavit of Tong Lee Hwa affirmed on the 23rd day of March, 1973 and the Affidavit of T. Tharumagnanam affirmed on the 23rd day of March, 1973 and all filed herein IT IS ORDERED that the application herein be withdrawn with liberty to join the other parties involved in Probate Suit No. 3 of 1969 as Defendants AND IT IS ORDERED that no provision be made as to costs.

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20           GIVEN under my hand and the Seal of the Court this 26th day of March, 1973."

6.       After a lapse of three years and nine months, on 10th December, 1976, the Respondent made another application to strike out the Defences and seeking for final judgment thus ignoring the earlier Order made by Mr. Justice Mohd. Azmi on 26th day of March, 1973 which order significantly directed the inclusion of the other parties to the Probate Suit No. 3 of 1969 as defendants in this case. The Plaintiff in defiance to the spirit of the said Order proceeded with the said second application for final judgment by way of Notice of Motion without inclusion of the said defendants.

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30           On 23rd day of May, 1977 Mr. Justice Abdul Hamid, J. heard the said Motion and ordered as follows :-

40           "UPON MOTION made unto this Court this day in the presence of Mr. S.D.K. Peddie of Counsel for the Plaintiff and Encik Adam Camille Rustum bin Mohd. Ibrahim of Counsel for the Defendants above-named AND UPON READING the Notice of Motion dated the 10th day of December, 1976, the Affidavit of Lee Yoke San affirmed on the 7th day of December, 1976,

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the Affidavit of Tong Lee Hwa affirmed on the 21st day of April, 1977 and the Affidavit of Adam Camille Rustum bin Mohd. Ibrahim affirmed on the 21st day of April, 1977 and all filed herein AND UPON HEARING the arguments of Counsel as aforesaid IT IS ORDERED that the Defences of the First and Second Defendants herein be and are hereby struck out as disclosing no reasonable answer and as being frivolous and vexatious AND IT IS ORDERED that the Plaintiff be and is hereby at liberty to sign judgment against the First and Second Defendants for the sum of \$35,964.25 with interest on \$34,464.25 at the rate of 6% per annum from the 12th day of October, 1971 to the date of payment and interest on \$1,500/- at the rate of 6% per annum from the 9th day of March, 1972 to the date of payment AND IT IS LASTLY ORDERED that the costs of this Application be taxed by the proper Officer of this Court and be paid by the First and Second Defendants to the Plaintiff.

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GIVEN under my hand and the Seal of the Court this 23rd day of May, 1977."

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7. The Appellant, inter alia, raised the issue of Res Judicata referring to the Order made by Justice Mohd. Azmi on 26th March, 1973 which was duly sealed and extracted and the Appellant further contended that the Respondent should have proceeded by way of appeal to set aside the Order made by Justice Mohd. Azmi, J. and not set aside the Order or tenor thereof by way of another application by a Judge of concurrent jurisdiction who is functus officio.

8. It is submitted that Mr. Justice Abdul Hamid, J. would not have proceeded to hear the second application if he had not laboured under a misapprehension as he proceeded on a very wrong presumption that the first application for final judgment was not heard and had in fact no knowledge of the Order made by Mr. Justice Mohd. Azmi. In his Grounds of Judgment he avers as follows :-

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"From the court file it would appear that the Summons-in-Chambers was issued on February 17, 1973 but there is nothing to show that the application was heard.

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In the circumstances I feel that it is not improper

for me to hear the application and decide on its merits."

The first application in fact was heard and an Order confirming the hearing of the said Application was duly extracted and sealed. p. 54  
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In the premises above the said Order made by Mr. Justice Abdul Hamid is in fact improper.

9. On the 20th day of June, 1977 the Appellant filed his Notice of Appeal to the Federal Court and a Memorandum of Appeal was filed on 6th day of September, 1977 as follows :- p. 49  
10 p. 64

(1) The learned judge misdirected himself in holding that there was no real defence raised by the Appellants.

(2) The learned judge failed to direct his mind to or to attach sufficient importance to the particulars pleaded by the Appellants and the documents produced by them.

20 (3) The learned judge, on finding that an earlier similar application had been issued on February 17, 1973, failed to have regard that the matter may in fact be res judicata as between the parties.

(4) The learned judge erred in law in holding that non-compliance with Order 64 rule 13 of the Rules of the Supreme Court, 1957 was an irregularity which could be cured applying Order 70 rule 1(1) of the same Rules.

30 (5) The learned judge failed to appreciate the true nature of the Appellants' defence that the work undertaken by the Plaintiff was done at the request of and on behalf of all the parties to the consent order to Probate Suit No. 3 of 1969 and not in his personal capacity.

(6) The learned judge erred in fact and in law.

(7) The learned judge should have dismissed the Respondent's application.

On 21st day of March, 1978 the said appeal was dismissed and the Grounds of Judgment of the Federal Court were delivered by Chang Min Tat, F.J. on 1st September, 1978 as follows: -

"At the appeal, counsel for the appellants elected deliberately to rely only on res judicata.

He had another ground of appeal. It was to the effect that the claim of the respondent against the appellants for work done at the request of the appellants should not be met by the appellants as it was one for and on behalf of a company known as Chi Liung & Son Sdn. Bhd. and also for and on behalf of the Estate of Chi Liung. The appointment of the respondent was by the appellants and though the former accepted the appointment as valuer for the Estate, there was nothing in the letter dated May 28, 1970 to indicate that the appointment was as such valuer. Having regard to the agreement between the beneficiaries of the Estate made on December 15, 1969 that the parties were to act in their personal capacities or their representative capacities or both, and the terms of the said letter, the appointment was more likely to be as valuer of and not for the Estate. 10  
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Undoubtedly, counsel for the appellants considered that the law was against him on this contention. He therefore chose to rely entirely on the application of the principle of res judicata. The contention was directed to an application by the plaintiff to sign final judgment, on which the order of the Court made on March 26, 1973 was that the application was withdrawn with liberty to join the other parties involved in the Probate Suit involving the Estate of Chi Liung. 30

The Respondent however did not avail himself of the liberty and instead made an application by notice of motion to strike out the defences of the appellants as disclosing no reasonable answer and as being frivolous and vexatious and to sign final judgment. At the hearing of the notice of motion, an order in terms was made. From that order, this appeal lay and it was said that the order of March 26, 1973 was a judgment in bar of the subsequent notice of motion. 40

10 At the hearing of the appeal, it was put to counsel for for the appellants that to constitute a res judicata, the earlier judgment must, in terms of the Privy Council decision in Kok Hoong v. Leong Cheong Kweng Mines Ltd. (1) "necessarily and with precision" determine the point in issue, and he was asked to indicate to the Court how the earlier judgment did necessarily and with precision determine the liability of the appellants to pay the respondent for work done for them at their request. He did not do so. We do not, with respect, see how he could succeed.

We did not feel any necessity to call on counsel for the respondent and we accordingly dismissed the appeal."

10. Against this Judgment the appellant filed Notice of Appeal to His Majesty the Yang di-Pertuan Agong and an Order granting Final Leave to appeal was made on the 14th day of December, 1978. p. 49

20 11. The Appellant respectfully submits that the Federal Court of Appeal was wrong in holding that he and his co-Appellant were solely liable to pay the fees as claimed when the issues before the court are triable issues.

The Federal Court in its judgment does not come to a conclusive finding of fact, quote -

"Having regard to the agreement between the beneficiaries of the Estate made on December 15, 1969 that the parties were to act in their personal capacities or their representative capacities or both, and the terms of the said letter, the appointment was more likely to be as valuer of and not for the Estate." p. 69

30 which suggests that the liability of the Appellant is one based on "likelihood".

The Federal Court ought to have allowed the Appeal and set aside the summary judgment of Mr. Justice Abdul Hamid, J. and ordered the case to proceed to trial for the reason that the Affidavit evidence is inadequate to establish the liability of the Appellant.

12. It is further submitted the Federal Court failed to consider adequately, among other issues, the facts as follows :-

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- a) The Respondent, right from the beginning, proceeded to claim him fees from M/s. Chi Liung & Son Sdn. Bhd. by directing his bills to M/s. Chi Liung & Son Sdn. Bhd. for payment.
- b) M/s. Richard Talalla & Co. have made it clear that the Respondent is to seek payment of fees from M/s. Chi Liung & Son Sdn. Bhd. the Respondent's letter on page 41 of the Record of Proceedings substantiates this fact.
- c) The Respondent further accepts appointment as valuer of estate in which M/s. Chi Liung & Son Sdn. is involved - see the Respondent's letter on page 36 of Record of Proceedings.

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In the premises above the Respondent has accepted M/s. Chi Liung & Son Sdn. Bhd. as a party liable to pay his fees and should be estopped from denying this fact.

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- d) At the time of appointment M/s. Richard Talalla & Co. attached a photocopy of an Order of Court dated 15th December, 1969, made in the above mentioned Probate action together with photostat copy of the Schedule to the said Order. Upon reading clauses 6 and 12 of the schedule, at pages 29 and 30 of the Record of Proceedings the express and implied condition is that the Respondent was appointed by the parties to the Probate Suit, and the Respondent cannot disavow knowledge of this fact. The covering letter of appointment should not be read out of context of accompanying enclosures attached therein.

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13. The Appellant respectfully submits that the Federal Court ought to have allowed the appeal and quashed the Order of Mr. Justice Abdul Hamid made upon a second application which application is an abuse of the process of the Court and the said Order was made under an erroneous belief that the Summons-in-Chambers made on 17th February, 1973 was never heard.

Furthermore, it is submitted that Mr. Justice Abdul Hamid has wrongfully exercised, as it would appear, the Appellate Jurisdiction so as to overrule the decision of

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Mr. Justice Mohd. Azmi.

The Appellant further submits that the Federal Court failed to consider the fact that the Application to strike out the Defences (which was apparently made under Order 25 rule 4 of R.S.C.) after a monumental delay of 3 years 9 months is contrary to rule of practice and law.

10 14. In the face of disputed facts and law the Federal Court ought to have allowed the Appeal and set aside the order of Mr. Justice Abdul Hamid, J. and directed the case to be tried in view of triable issues raised by the Appellant on the question of appointment and liability.

15. The Appellant respectfully submits that the failure to consider the grounds above-mentioned by the Federal Court has caused a grave miscarriage of justice and the Appellant submits respectfully that the Federal Court Judgment be set aside and/or in the alternative the case be referred to the trial court to be tried on merits.

And this Appeal be allowed for the following amongst other :-

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R E A S O N S

- (1) The appointment was made by the parties to the Probate Suit No. 3 of 1969 involving the interest of M/s. Chi Liung & Son Sdn. Bhd., and in the circumstances the Appellant cannot be made personally liable.
- 30 (2) The Respondent having pursued his claim against M/s. Chi Liung & Son Sdn. Bhd. ought to have sued the said Company for his fees, since the Respondent has directed all his bills and his claim to the said Company and should be estopped from pursuing his claim capriciously against the Appellant.
- (3) The second application was wrongfully made since the matter is res judicata and the Order for final judgment is irregular and void. The trial Judge, Mr. Justice Abdul Hamid, made the said Order under a misapprehension and exceeded his jurisdiction, Order 64 Rule 13 of R.S.C. being disregarded.

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- (4) The application for summary judgment ought to have been made promptly and not after an inordinate delay of 3 years 9 months after the close of Pleadings which is contrary to established rule of practice and law.
- (5) The fact whether the Appellant or M/s. Chi Liung & Son Sdn. Bhd. or the parties to the Probate Suit are liable to the Respondent is a triable issue, particularly without the material Affidavit of M/s. Richard Talalla & Co. this question could not be resolved and the onus of proof rests with Respondent and that was not discharged and the Federal Court finding of liability of the Appellant based merely on "likelihood" is inadequate. 10
- (6) The summary judgment was made on insufficient affidavit evidence and in the circumstances the finding of fact is not one based on oral evidence of witnesses or upon observation of demeanour of witnesses to test the credibility of the Respondent's case. 20

Therefore the question of concurrent finding of fact is not an issue.

G. T. RAJAN.

