

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN  
AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL No. 127 of 1977

MALAYA HIGH COURT SUIT NO. 3 of 1973

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B E T W E E N

1. TONG LEE HWA  
2. ~~TONG YOUNG FAH~~

Appellants

- and -

LEE YOKE SAN

Respondent

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CASE FOR THE RESPONDENT

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1. This is an Appeal from an Order and Judgment of the Federal Court of Malaysia (Appellate Jurisdiction) dated the 21st March 1978 dismissing an appeal by the Appellants from an Order of the High Court in Malaya dated the 23rd May, 1978.

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2. The Respondent was the Plaintiff in the action and the Respondent before the Federal Court and is in this Case referred to as the Plaintiff. The first named Appellant was the first named Defendant in the action and the first named Appellant before the Federal Court and is in this Case referred to as the first named Defendant. The second named Appellant was the second named Defendant in the action and the second named Appellant before the Federal Court and is in this Case referred to as the second named Defendant.

3. In the action the Plaintiff claimed professional fees of \$35,964.25 together with interest thereon for valuing a company known as Chi Liung & Sons Ltd and

RECORD

P.13 its shares. The Plaintiff claimed that he was entitled to this sum from the Defendants because he had been instructed to carry out the valuations for them by Solicitors Messrs. Richard Talalla & Co acting on their behalf. By a Summons-in-Chambers in the action dated the 17th February 1973 the Plaintiff applied for final judgment against the Defendants. The first named Defendant denied that he was liable to the Plaintiff for the fees and claimed that the Plaintiff had been appointed valuer under an agreement dated the 15th December 1969, that under the terms of the agreement other persons who were not parties to the action were liable in addition to the Defendants for the cost of the valuations and that the Court had no jurisdiction to hear the action because the agreement contained an arbitration clause under which all disputes relating to the agreement had to be referred to arbitration. The second named Defendant denied each and every allegation made by the Plaintiff and claimed that he was not a proper party to the suit. Upon hearing the said application of the Plaintiff on the 26th March 1973 the Honourable Mr Justice Mohammed Azmi ordered that the Plaintiff's application be withdrawn with liberty to join other parties. 10

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4. The Plaintiff did not join any other parties to the action pursuant to the Order dated the 26th March 1973 but on the 10th December 1976 applied by Notice of Motion in the action for an Order that the Defences of the Defendants be struck out as disclosing no reasonable answer and as being frivolous and vexatious and for an Order that the Plaintiff be at liberty to sign judgment against the Defendants. The Defendants opposed the action relying on the defences they had already raised and further claiming that the issue whether the Plaintiff should be given leave to sign final judgment against them was res judicata by reason of the Order made by the Honourable Mr. Justice Mohammed Azmi on the 26th March 1973. 20

P.22

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5. Upon the hearing of the Motion on the 23rd May 1977 the Honourable Mr Justice Abdul Hamid ordered that the Defences be struck out and that the Plaintiff be at liberty to sign judgment. He held (a) that there was nothing to show that the summons issued on the 17th February 1973 had ever been heard and determined and (b) that the circumstances showed that the Defences of both the Defendants were frivolous and vexatious and an abuse of the process of the Court. 30 40 50

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6. On appeal to the Federal Court the Defendants elected to rely solely on res judicata. The Federal Court dismissed the Appeals.

7. The principle question to be decided on this Appeal is whether the issue as to whether the Plaintiff should be given leave to sign final judgment against the Defendants is res judicata by reason of the Order by the Honourable Mr. Justice Mohammed Azmi made on the 26th March 1973.

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10 8. The Plaintiff commenced THE PRESENT SUIT by a Writ of Summons endorsed with a Statement of Claim issued on 3rd January 1973 claiming:

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(i) The sum of \$35,964.25.

(ii) Interest at the yearly rate of 6% on the sum of:

(a) \$33,878.75 and \$585.50, total \$34,464.25 from the 12th October 1971 to date of payment or realisation; alternatively from the date of judgment to date of payment or realisation;

20 (b) \$1500 from the 9th March 1972 to date of payment or realisation; alternatively from date of judgment to date of payment or realisation.

9. In his Statement of Claim the Plaintiff pleaded his qualifications as a chartered surveyor and a member of the Institution of Surveyors (Malaysia). By paragraph 2 he stated that he had been instructed in a letter dated the 28th May 1970 by the Defendants through

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30 their Solicitors Messrs. Talalla & Co to value a company known as Chi Liung & Sons Ltd. and also the value of its shares. By paragraph 3 the Plaintiff stated that he had accepted the instructions of the Defendants by a letter dated the 1st June 1970 and had carried out the valuations. By paragraph 4 he pleaded that it was an express term of the contract that he would be paid a fee in accordance with the scale of the Institution of Surveyors or alternatively a reasonable fee exclusive of out of pocket expenses. By paragraph 5 he pleaded that his fee in accordance with the scale of the Institution for the valuation of the Company was \$33,878.75 and in respect of the valuation of the shares was \$1500 and that his out of pocket expenses were \$585.00 making a total of \$35,964.25. Alternatively he pleaded that \$35,378.75 was a reasonable fee. Full particulars of the fees were contained in Bills numbered 215/71 and 107/72 copies of which were attached

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Pp.4-11

RECORD

to the Statement of Claim.

- P.12 10. In his Defence the first named Defendant stated that at all material times he was the Managing Director of M/s Chi Liung & Sons Ltd and contended that if any instructions were given to the Plaintiff to undertake the work it was done at the request of and on behalf of all the parties to the consent Order of Probate Suit No 3 of 1969 and not in his personal capacity. By paragraph 2 he denied that he could be held personally responsible for settlement of the sum of \$35,964.25 as the work was done on behalf of all the respective parties to the consent order and that for that reason the Statement of Claim was misconceived and bad in law. 10
- P.13 11. In his Defence the second named Defendant denied all knowledge of the facts pleaded in the Statement of Claim and denied each and every allegation therein. By paragraph 2 he denied that he was a proper party to the suit and claimed that the claim against him was misconceived and bad in law. 20
- P.13 12. By a Summons-in-Chambers dated the 17th February 1973 the Plaintiff applied for final judgment against the Defendants for the sum of \$35,964.25 interest and costs. To his affidavit affirmed on the 16th February 1973 in support of his application he exhibited the Defendants' Solicitors' letter dated the 28th May 1970 whereby he was instructed by the Defendants to carry out the valuations of the Company known as Chi Liung & Sons Ltd and its shares. 30
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- P.27
- PP.23 13. In his affidavit affirmed on the 23rd March 1973 opposing the Plaintiff's application dated the 17th February 1973 the first named Defendant stated that he had been the second named Defendant in the High Court Probate Suit No 3 wherein a consent order had been made by the Kuala Lumpur High Court on the 15th December 1969 together with a schedule of the terms of the consent Order both of which were exhibited to the affidavit. He stated that pursuant to the consent Order an agreement dated the 15th December 1969 had been executed by all the parties to the Probate Suit which incorporated the terms of the consent Order and schedule and he exhibited the agreement to the affidavit. He stated that the Plaintiff had been appointed a joint valuer pursuant to clauses 5 and 6 of the schedule and agreement to undertake certain valuation work for the purpose of determining the value of the 40

10 shares for their sale and purchase pursuant to Clause 5 of the schedule and agreement. He stated that one Tong Chong Fah and himself were the named purchasers and Madam Chin Ah Kwi and the second named Defendant in the present action were the named vendors of the shares under the agreement and that under clause 12 of the schedule and agreement the costs payable to the valuers were to be borne equally as to half by the vendors and half by the purchasers and that by reason thereof he could not be held individually liable for the sum of \$35,964.25. He further stated that he had been advised and verily believed that any dispute that arose in the Probate Suit had to be referred to arbitration and by reason thereof the Court had no jurisdiction to hear the application or the present action and referred to the judgment of the Honourable Justice Gill in the Federal Court Civil Appeal No 41 of 1970 in support of his proposition.

20 14. In his affidavit affirmed on the 23rd March 1973 the second named Defendant stated that although he had been a party to the Probate Suit he had been advised and verily believed that he was neither a purchaser nor a vendor of the shares pursuant to clause 5 of the schedule to the consent Order and that by reason thereof he could not be held responsible for the sum of \$35,964.25 or any part thereof claimed by the Plaintiff. PP.19

30 15. At the hearing of the Summons-in-Chambers on the 26th March 1973 the Honourable Mr. Justice Mohammed Azmi heard Counsel for the Plaintiff and the Defendants and read the Summons-in-Chambers and the Plaintiff's affidavit supporting his application and the Defendants' affidavits opposing the application and ordered that the application be withdrawn with liberty to join the other parties involved in the Probate Suit. P.21

40 16. Neither the Plaintiff nor the Defendants joined any other parties but by a Notice of Motion dated the 10th December 1976 the Plaintiff applied for an order that the Defences of the Defendants be struck out as disclosing no reasonable answer and as being frivolous and vexatious and that he be at liberty to sign judgment against the Defendants in terms of the prayers in the Statement of Claim. To his affidavit affirmed on the 7th December 1976 in support of the Motion the Plaintiff exhibited the Defendants' Solicitors' letter dated the 28th May 1970 containing his original instruction and copies of the Order of the Court dated the 15th December 1969 made in the Probate Suit and the Schedule PP.23 P.27

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RECORD

- P.34 thereto and the agreement thereunder all of which had been supplied to him by the Defendants' Solicitors undercover of their letter dated the 28th May 1970. He also exhibited further letters containing additional instructions and a copy of his letter dated the 12th October 1971 to the Defendants' Solicitors enclosing 3 copies of his valuation of the company's properties and his bill 215/71 for the sum of \$34,636.25 and his letter dated the 9th March 1972 to the Defendants' Solicitors enclosing a copy of his valuation of the shares. Finally he exhibited a copy of his letter dated the 11th April 1972 to Chi Liung & Sons Ltd demanding payment. 10
- PP.42-44 17. In his affidavit affirmed on the 21st April 1977 in opposition to the Motion the first named Defendant stated that he had been advised and verily believed that the issue as to whether the Plaintiff should be given leave to sign final judgment was res judicata by virtue of the decision of the Honourable Mr. Justice Mohammed Azmi and exhibited a copy of the Plaintiff's Summons-in-Chambers dated the 17th February 1973 and referred to the court file wherein he claimed it would be shown that the application had been dismissed. He again relied on the defences which he had raised in his Defence dated the 30th January 1973 and his affidavit affirmed the 23rd March 1973. 20
- PP.44
- Pp.56-57 18. On the 21st April 1977 one Adam Camille Rustum Bin Mohammed Ibrahim affirmed an affidavit on behalf of the second named Defendant resisting the Plaintiff's application dated the 10th December 1976. He referred to the Defence of the second named Defendant as to res judicata as set out in the first named Defendants' affidavit affirmed on the 21st April 1977. 30
- P.21 19. At the hearing of the Motion on the 23rd May 1977 the Honourable Mr Justice Abdul Hamid heard Counsel for the Plaintiff and the Defendants and read the Notice of Motion, the affidavit of the Plaintiff affirmed on the 7th December 1976 and the affidavits on behalf of the Defendants each affirmed on the 21st April 1977. No copy of the Order of the Honourable Mr Justice Mohammed Azmi made on the 26th March 1973 on the hearing of the Plaintiff's Summons-in-Court dated the 17th February 1973 was produced to Mr Justice Abdul Hamid nor was there a copy on the Court file. 40
20. In his judgment the learned Judge said this:-

10 "In the affidavit in reply to the affidavit in support of the application the (first named Defendant) has stated that there was a Summons in Chambers filed by the Solicitors of the Plaintiff to sign final judgment against the (Defendants) in respect of the same matter. It is alleged that the application was dismissed and the Judge ordered the Civil Suit to be withdrawn with liberty to file afresh after other parties were added as co-defendants. From the Court file it would appear that the Summons in Chambers was issued on February 17th, 1973 but there is nothing to show that the application was heard.

In these circumstances I feel that it is not improper for me to hear the application and decide on its merits."

20 21. The learned Judge then stated that it was his view that the question of res judicata did not arise and went on to express his findings on the merits of the application before him in the following passage:

30 "the question that really calls for determination in this present case is whether the (Defendants) have shown any substantial defence. Insofar as the (second named Defendant) is concerned he has completely failed to raise any defence. And as for the (first named Defendant) I find that he has also failed to show any real and substantial defence. The letters produced by the (Plaintiff) in support of the application do show that the Plaintiff did carry out the works pursuant to the request by the Solicitors acting for both the (Defendants) and in this respect the (Defendants) have made no denial at all. The circumstances in the present case do show the Statement of the Defence of both the (first named and second named Defendants) to be frivolous and vexatious and an abuse of the process of the Court and I therefore see no reason whatever to disallow the application. For these reasons I hereby order the defence of both (Defendants) to be struck out and that final judgment be entered in terms in favour of the (Plaintiff) with costs".

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22. By a notice of Appeal to the Federal Court of Malaysia dated the 6th September 1977 the Defendants appealed against that decision on several grounds but at the hearing of appeal elected to rely only on res judicata.

50 23. The judgment of the Federal Court, with which Lee Hum Hoe C.J. Borneo, Wan Suliman F.J. agreed was delivered by Chan Min Tat F.J. The Court rejected, in the following passage, the argument of the Defendants that the issue of whether the Plaintiff was to have leave to sign final judgment was res judicata by virtue of the Order of the Court

RECORD

made on the 26th March 1973.

PP.70

'At the hearing of the appeal, it was put to counsel for the (Defendants) that to constitute a res judicata the earlier judgment must in terms of the Privy Council decision in Kok Hoong v Leon Cheong Kweng Mines Ltd., (1964) (A.C. 993), "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 (Defendants) to pay the (Plaintiffs) 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 (Plaintiff) and we accordingly dismissed the appeal'

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24. The Plaintiff respectfully submits that the Appeal should be dismissed with costs for the following among other

R E A S O N S

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- (i) THE Order made by the Honourable Mr. Justice Mohammed Azmi on the 26th March 1973 did not constitute a judicial decision in that it did not or did not necessarily involve a determination of any particular issue or question of fact or law.
- (ii) THE Order made on the 26th March 1973 was an interlocutory and not a final Order and as such could not found an estoppel by res judicata.
- (iii) THE Order made on the 26th March 1973 did not necessarily and with precision determine any issue in the case.

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ROBERT PRYOR



No. 22 of 1979

IN THE JUDICIAL COMMITTEE OF THE PRIVY  
COUNCIL

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CASE FOR THE RESPONDENT

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STEPHENSON HARWOOD  
Saddlers' Hall  
Gutter Lane  
London EC2V 6BS