10, 1982

A **In the Privy Council** *No. 20 of 1980*

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. 12 OF 1978

B (On appeal from High Court Action No. 2459 of 1976, High Court Miscellaneous Proceedings No. 155 of 1977 and High Court Miscellaneous Proceedings No. 540 of 1977)

BETWEEN

DAVID NG PAK SHING	*1st Appellant*	(The 4th, 5th, 6th and 7th Defendants in High Court Action No. 2459 of 1976, High Court Miscellaneous Proceedings No. 155 of 1977 and High Court Miscellaneous Proceedings No. 540 of 1977)
C MELVILLE EDWARD IVES	*2nd Appellant*	
HO CHAPMAN	*3rd Appellant*	
FERMAY COMPANY, LTD.	*4th Appellant*	

and

LEE ING CHEE also known as D LEE HAI HOCK	*1st Respondent*	(The Plaintiff in High Court Action No. 2459 of 1976)
LEE KON WAH	*2nd Respondent*	(The Plaintiff in High Court Miscellaneous Proceedings No. 155 of 1977)
MALAYSIA BORNEO FINANCE CORPORATION (M) BERHAD	*3rd Respondent*	(The Plaintiff in High Court Miscellaneous Proceedings No. 540 of 1977)

CASE FOR THE APPELLANTS

RECORD

E 1. This is an appeal from the judgment of the Court of Appeal of Hong Kong (Briggs, C.J., Huggins and Pickering, JJ.A.) given on the 22nd March 1979 whereby they dismissed an appeal by the Appellants (the 4th, 5th, 6th and 7th Defendants in the original proceedings) against a judgment dated 25th January 1978 of the High Court of Hong Kong (Yang, J.) which made absolute charging F orders nisi in respect of 15 million shares in San Imperial Corporation Limited (a public company) registered in the name of the Appellant Fermay Company

RECORD

Limited ("Fermay") and a garnishee order nisi relating to the sum of $2,813,300 (more particularly described hereafter). A

2. The case took the form of execution proceedings (in essence applications for garnishee and charging orders). The hearing occupied some 50 days before Mr. Justice Yang (the learned trial Judge, hereinafter respectfully referred to as "the Judge"). The proceedings arose out of a series of transactions involving the shares of one Choo Kim San (hereinafter called "Mr. San") in a public quoted company registered in the Crown Colony of Hong Kong carrying on business as hoteliers and called San Imperial Corporation Limited ("San Imperial"). Mr. San had many business interests including, at one time, the controlling interest in Malaysia Borneo Finance Corporation (M) Berhad ("MBF", a Malaysian finance company which is the 3rd Respondent herein). The Respondents Lee Ing Chee and Lee Kon Wah (who are not related to each other) were employed by MBF and are hereinafter referred to together as "the Lees". By Malaysian law MBF was not allowed to lend money to Mr. San, since he was a director of the company. To circumvent this prohibition, between about November 1973 and about March 1974, he engaged with the Lees in a device whereby the Lees allowed their names to be used as the apparent borrowers from MBF and passed the money over to Mr. San. B C D

3. In due course both Lee Ing Chee and Mr. San found themselves in trouble in other respects. Lee Ing Chee was charged in Thailand with offences involving fraudulent misappropriation of funds. He did not return to face trial there and has not been convicted. Mr. San was arrested in Hong Kong in June 1976 on 8 charges involving allegations of fraud in relation to various companies' but not in relation to San Imperial. He was released on bail until his trial which was fixed to be heard at the end of October 1976. He absconded before trial and at the times material to this case appears to have been in Taiwan where he was safe from extradition to Hong Kong. E F

4. The issued share capital of San Imperial was 48.2 million one dollar shares, of which Mr. San was beneficially entitled to more than 15 million held by nominee companies on his behalf namely, Triumphant Nominees Limited ("Triumphant") 2,050,000 shares, and Asiatic Nominees Limited ("Asiatic") 18,790,760 shares. Of these shares the Appellants were concerned at the trial with only 1,650,000 shares formerly registered in the name of Triumphant and 15,514,200 shares formerly registered in the name of Asiatic. The 15 million shares which were subsequently registered in the name of Fermay (referred to under paragraph 1 above) formed part of the 18,790,760 shares registered in the name of Asiatic. The balance of the shares with which the case is concerned namely 514,200 shares (formerly registered in the name of Asiatic) and 1,650,000 (formerly registered in the name of Triumphant) were previously purchased by the Appellant Ng from two persons in Taiwan named as Lee and Fong (These purchases form the subject of Appellant Ng's Supplemental Case). G H I

p. 1291

p. 1280

5. Mr. San was at all material times the effective controller of San Imperial. His shares were considered to be potentially valuable, particularly when combined with other parcels so as to give effective control of the Company. Such was the view

status or not. A

9. After Mr. Ng's return to Hong Kong it was decided by the Syndicate on the 2nd January 1977 that they should begin a programme of purchases of San Imperial shares in the stock-market while pursuing the negotiations to purchase the major parcel from Mr. San or the Chows. The Appellant Ives (the solicitor member of the Syndicate) thought it prudent to seek the advice of experienced junior B counsel in the United Kingdom as to whether it was lawful to deal with a fugitive. He accordingly telexed for advice to London and received prompt advice in reply which he and the Syndicate reasonably and correctly interpreted as entitling them in law to acquire the shares from Mr. San or his nominees.

p. 1210

p. 1211

10. After considerable bargaining during several trips by Mr. Ng to Taiwan the C deal was effectively concluded on the 23rd March 1977. The Syndicate were concerned, however, to avoid the risk of buying forged or defective share certificates. To overcome this problem it was decided to use a Hong Kong "shelf" company, Fermay Company Limited the 4th Appellant (the 7th Defendant at the original hearing). The essential mechanics underlying the use of Fermay were as follows: D

(1) Fermay would buy the 15 million San Imperial shares for a total of HK$9 million. (60¢ per share)

(2) Fermay would have a paid-up share capital of HK$9 million in one dollar shares.

(3) Fermay would acquire the shares and present the share certificates E together with duly executed transfers to San Imperial's Registrars for registration. If the share certificates were genuine and the transfers were found to have been duly executed Fermay would be registered as the owner of the shares and new share certificates would be issued to Fermay by San Imperial. F

(4) While the shares were being thus authenticated the Chows (who had been paid a deposit of HK$200,000) would hold all the Fermay shares.

(5) After the San Imperial shares were registered in the name of Fermay, the Chows would sell Fermay's shares for HK$9 million and the G purchaser would obtain thereby the sole asset of Fermay, namely, the 15 million San Imperial shares.

p. 1150

On the 23rd March 1977 an agreement in writing was made between the Chows and Ng acting on behalf of the Syndicate to give effect to the foregoing ("the Fermay Agreement"). H

11. The 15 million San Imperial shares were in fact authenticated and Fermay was duly registered as holder thereof on the 28th March 1977 and the Syndicate thereupon became liable to pay the balance of the sum due for the said Fermay

RECORD

A shares, namely HK$8.8 million. Bought and Sold Notes in respect of the purchase of the San Imperial shares by Fermay were duly signed by the Appellant Ives on behalf of the vendors and on behalf of Fermay as purchasers. The Syndicate meanwhile was making arrangements to sell on to Mr. Coe's company. *pp. 1152 – 1154*

12. By an agreement in writing dated 30th March 1977 between MAF Cor-
B poration (HK) Limited ("MAFCORP") (who were the beneficial owners of the San Imperial shares registered in the name of MAF referred to in paragraph 6 above) and Mr. Ng (acting on behalf of the Syndicate) an option to purchase up to 6 million San Imperial shares at a price of 1.50¢ per share was granted to Mr. Ng. Although the Respondents made strenuous attempts to show that the shares were
C held by MAFCORP merely as nominee for Mr. San, the Judge rejected the suggestion and the Respondents' cross appeal against the Judge's finding was abandoned in the Court of Appeal. These shares were not found to have been Mr. San's or to have been subject to his control. *p. 1155*

13. In the meantime and some months before the Fermay Agreement was
D entered into and with the consent of the other members of the Syndicate, and because he had undertaken the burden of what was called "the leg work" in dealing for the Syndicate, Mr. Ng purchased on his own account 2,164,200 San Imperial shares from two persons in Taiwan named Lee and Fong referred to in para. 4 above. This purchase was for cash and took place some time before the Fermay
E Agreement was made. These shares (generally referred to as "the Lee and Fong shares") form the subject matter of Mr. Ng's separate representations. Mr. Ng had also purchased 2,609,000 shares for the Syndicate privately or on the Stock Exchanges and no impropriety has been alleged in this respect. The total cost of these purchases made by Mr. Ng for himself and the Syndicate was HK$1,576,464.40
F very near the price of 60¢ per share considered by Mr. Ho to be reasonable.

14. After negotiations had taken place between the Syndicate and several other potential purchasers, it was agreed by the 30th April 1977 between the Syndicate and Mr. Coe that he or his companies would purchase 23 million San Imperial shares from Fermay at a price of 1.50¢ per share (which by this date Mr.
G Coe considered sufficient to give effective control of San Imperial.). It was eventually agreed and confirmed in writing that the Syndicate would be paid a 'finders fee' of HK$3 million. A written agreement dated 30th April 1977 between Mr. Ng and one of Mr. Coe's companies, Rocky Enterprises Ltd. ("Rocky") recorded the agreement relating to the 23 million shares. *p. 1203* *p. 1170*

H 15. In connection with the financing of the transaction, inter alia, a loan agreement dated 30th April 1977 ("the Rocky Agreement") was made between Mr. Ng (for the Syndicate) and Rocky Enterprises Limited and cross-guarantees were given by Mr. Coe in respect of Rocky's performance and by the Appellant Mr. Ho (the businessman member of the Syndicate) in respect of Mr. Ng's perform-
I ance. Mr. Ho's guarantee involved a potential liability of HK$16,500,000. *p. 1175* *p. 1167* *p. 1169*

16. Arising out of the device (described in paragraph 2 above) whereby MBF advanced money to the Lees for the benefit of Mr. San, the following events occur-

red which were to have an effect on the Fermay share transaction described above but which had by that time been subject to full agreement:– A

p. 10

(a) On 31st March 1977 Lee Kon Wah caused to be registered in Hong Kong a judgment he had obtained in the Malaysian High Court against Mr. San for $1,354,037 plus interest and costs. There was no public notice of such judgment or its registration. B

p. 1161

(b) On 13th April 1977 Lee Ing Chee advertised a Notice in the South China Morning Post in the following terms:

"NOTICE

Shares in MAF Credit Ltd., San Imperial Corp. Ltd. registered under Asiatic Nominees Ltd. and Santromax Ltd. registered under the name of Choo Kim San C

NOTICE IS HEREBY GIVEN that I, Lee Ing Chee have filed proceedings in the High Court in Hong Kong against Choo Kim San and I have obtained an interim attachment in respect of shares owned by Choo Kim San and notice is also hereby given that the following shares cannot be disposed of by the nominees who are holding them on behalf of the said Choo Kim San: D

(1) 15,236,000 shares in MAF Credit Limited registered in the name of Asiatic Nominees Ltd.

(2) 16,500,000 shares in San Imperial Corp. Ltd. registered in the name of Asiatic Nominees Ltd. E

(3) 500,000 shares in Santromax Ltd.

LEE ING CHEE"

(c) On the 29th April 1977 MBF in different proceedings namely High Court Action No. 252 of 1977 obtained an ex parte interim injunction the effect of which was to restrain Mr. San from transferring or otherwise disposing of 17,421,960 San Imperial shares registered in the name of Asiatic. F

(d) As a result of (b) and (c) above and at the request of Mr. Coe it was agreed between him and the Syndicate that a new agreement should be entered into whereby 8 million shares (not the subject of any restraint orders) would be transferred to Mr. Coe or his nominees forthwith but that the 15 million shares (part of those the subject matter of the restraint referred to in (b) and (c) above) should be the subject of an obligation to purchase by another of Mr. Coe's Hong Kong nominee companies, namely IPC (Nominees) Limited G H

RECORD

A ("IPC"). The consideration for the option described below was the payment of HK$4 million. The "option" related to the manner in which the obligation to purchase was to be fulfilled that is to say by allowing IPC to choose either to buy the whole of the Fermay shares or alternatively to buy the San Imperial shares registered in
B the name of Fermay. Such choice or option was to be exercised upon the lifting of the aforesaid or any restraints. The Agreement was in writing dated the 12th May 1977 and is referred to as "the New Rocky Agreement". *p. 1186*

(e) Nearly two months later, that is to say on the 6th July 1977, Lee
C Ing Chee obtained judgment against Mr. San in the Supreme Court of Hong Kong for M$2,334,652 plus interest and costs.

(f) On 15th July 1977 the Lees obtained charging orders nisi over various *p. 12* parcels of shares including the 15 million San Imperial shares above referred to. They also obtained a garnishee order nisi against the Syndicate
D for the balance of the price due to the Chows i.e. $8.8 million. (Similar *p. 19* orders were obtained by MBF on 7th September 1977.)

(g) On 11th August 1977 MBF obtained judgment against Mr. San in Malaysia for M$9,036,831 plus interest and costs.

(h) On 14th September 1977 MBF obtained a garnishee order nisi against *p. 20*
E the Syndicate for the sum of $11,446,500 due to be paid by Mr. Coe for another parcel of shares (the 8 million San Imperial shares referred to in sub-paragraph (d) above).

The actions by the two groups of Plaintiffs were ordered to be tried *p. 15* concurrently.

F 17. MBF's case at the trial was that Mr. San was still the beneficial owner of the 15 million shares when the charging orders nisi of 15th July and 7th September *p. 12* 1977 were obtained. The basis of this contention was that the agreement between *p. 19* Mr. Ng and the Chows on the 23rd March 1977 (referred to in paragraph 10 above) was made in pursuance of a conspiracy to defraud Mr. San's creditors. This allega-
G tion of MBF (which the Judge rejected) is of such importance that the substantive paragraph (which was followed by some 15 typescript pages of particulars) is set *pp. 71 – 80* out here:

"CONSPIRACY

H For the purpose of and with the intent to avoid and/or defeat the execution of the Registered Judgement by the Plaintiffs as aforesaid and to defraud Choo Kim San's creditors generally the Defendants and each of them together with persons unknown from about October 1976 onwards conspired and combined amongst themselves in Hong Kong and elsewhere to sell or cause to be sold

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> on behalf of Choo Kim San the 15,000,000 shares in the name of Fermay and the 7,631,000 shares in the name of IPC and to obtain on behalf and for the benefit of Choo Kim San the proceeds of the sale of the same."

A

The Appellants emphatically denied the allegations and the Judge found that MBF had failed to prove the conspiracy alleged by them.

B

18. The Lees, on the other hand, at no time adopted the plea of conspiracy although at one stage counsel for the Lees indicated to the Court that they might seek leave to amend their pleadings to enable them to do so. The Lees' case was that Mr. San was still beneficially entitled to the said shares because at all material times (and in particular when entering into the 23rd March 1977 agreement and the Rocky and the New Rocky Agreements) the Chows, the Syndicate, Fermay and IPC were all the nominees of Mr. San and that the transfers to Fermay and IPC and the contractual documents were accordingly "shams". The Appellants and each of them (as well as IPC) emphatically denied that they were Mr. San's nominees and contended that their object was to purchase the shares in their own right in order to profit from their resale and that the transactions by which Fermay acquired the beneficial interest in the 15 million San Imperial shares and subsequently agreed to sell them were intended to have that effect. They relied strongly on the inherent improbability that they would have acted as they did, incurred actual and potential personal financial liabilities and taken such trouble as they had in order merely to lend their names to Mr. San as a fugitive and pretend to have acquired beneficial interests when it was intended that they should have none. Furthermore, had there been a conspiracy to protect Mr. San's assets from his creditors it is submitted that speed would have been essential; and it is virtually inconceivable that the shares would have been left registered in the names of Mr. San's known nominees for some six months and be therefore vulnerable to process by Mr. San's creditors. The Syndicate in fact did not enter into the agreement of 23rd March 1977 until they were reasonably sure they had a buyer for the shares, by which time nearly three months had elapsed. Furthermore, had there been a conspiracy and had Lee and Fong simply been Mr. San's nominees there would have been no point in Mr. San permitting a sale of the Lee and Fong shares for 20 cents a share when the price for the 15 million shares was 60 cents (based on the size of the parcel) and when the price on the open market was between 30 and 40 cents a share. The previous dealings or connection between Mr. Ives and Mr. Ng and Mr. San were slight and neither Mr. Ho nor Mr. Coe had ever dealt with Mr. San at all. Mr. Ho's only role in the Syndicate was as a businessman of very substantial means who was prepared if necessary to assist in financing the purchase from Mr. San. Had there been any such conspiracy as was alleged there would have been no need for Mr. Ho to have been a member of the Syndicate or involved in any way with the transactions in question, still less would he have given the guarantee involving up to HK$16,500,000 (referred to in paragraph 15 above). The Judge was of the view that the giving of guarantees was inconsistent with "sham" agreements and gave full effect to this view when finding that the agreements made with Mr. Coe's companies for the re-sale of the shares were not "sham" but he failed to apply a similar standard in regard to the Syndicate's purchase of the shares through Fermay or otherwise.

C D E F G H I J

p. 1169
p. 1193
p. 1066

RECORD

A 19. It was also alleged by MBF that the 23rd March 1977 agreement (referred to in paragraph 10 above) was not entered into bona fide at arms length and for full value without notice of any defect in the vendor's title. This allegation was likewise denied. The Judge was under the impression that this allegation (MBF's only alternative claim to that based on conspiracy) was the appropriate context in which to decide whether either or both of the Agreements of the 30th April 1977 (the Rocky Agreement) and the 12th May 1977 (the New Rocky Agreement) were sham agreements. *p. 1064* B

20. In relation to IPC and Mr. Coe MBF pleaded as follows by paragraph A(f)(ii) of the particulars to paragraph 7 of the Statement of Claim:

C "A(f)(ii) As James Coe is immaterial to the Plaintiffs in the Action herein save in relation to the relief claimed by the Plaintiffs no allegation is made against him as to whether or not he was a party to the conspiracy pleaded herein." *p. 73*

In the event the Judge rejected conspiracy.

D 21. On the 9th June 1977 (before any restraint was applied for or ordered in relation to the 8 million shares) completion of the New Rocky Agreement referred to in paragraph 16(d) above relating to the bulk of the 8 million shares took place. On that date in consideration of the payment of $13,200,000 there were transferred into the name of IPC 7,631,000 shares of which on the 15th June 1977 E IPC declared itself trustee of the shares for Rocky Enterprises Limited. On the 18th and 28th July two similar declarations of trust in relation to 368,000 and 1,000 respectively shares were declared, these shares having been registered in the name of MAF on Mr. Ng's behalf after the 9th June. The option to choose by which method the 15 million San Imperial shares granted by the New Rocky Agreement F should be purchased had not by the date of trial nor by the date of the Appeal been exercised. The Judge rejected the Plaintiffs' contentions that both the Rocky and the New Rocky Agreements were shams and those findings were not disturbed by the Court of Appeal.

22. At the conclusion of the original hearing the Judge adopted the suggestion G of the Plaintiffs' counsel that the parties should not be bound by their respective pleadings but agreed with counsel for the Defendants that the parties should "not go beyond the broad concepts" of their own pleadings. Judgment was reserved. *p. 1036 (20)* *p. 1042*

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A because the members of the Syndicate were the nominees of Mr. San, the Judge deliberated on his reserved judgment under the impression that "whilst maintaining that the Chows are C.K. San's nominees, the two Plaintiffs do not now maintain that Ng, Ho, Ives, Fermay and IPC are also C.K. San's nominees". The Judge should have reached the conclusion that those named were not Mr. San's nominees quite apart from what he believed (albeit in error) to have been the concession made for the Lees. *p. 1041* B *p. 1037*

(4) Having rejected MBF's allegations of conspiracy, and having approached the Lees' case (which did not adopt the allegation of conspiracy) on the footing that the Syndicate were not Mr. San's nominees there was no substance in law or justification in fact for the finding of "sham". C

(5) Since the findings of the Judge on the issue of conspiracy and on the issue whether the members of the Syndicate were nominees of Mr. San were in favour of the Appellants, an analysis of his expressed reasoned judgment revealed that he reached the conclusion of "sham" because he had misdirected himself in law that the agreements with the Chows would be shams if the Syndicate (by Ng or otherwise) were aware that the Chows were nominees of Mr. San and not contracting in their own right. The Appellants contend that the misdirection is clear from the foregoing and, in addition from the following main indications in the Judge's reasons: D E

(a) Dealing with the 15 million shares registered in the name of Fermay the Judge said: *p. 1054*

"In my opinion most of the evidence of Ng, Ives and Ho on this aspect of the case is untrue. Ng however did make the admission that he knew he was purchasing shares from C.K. San's nominees. I accept this statement as representing the truth. And on the principle of imputed knowledge, since Ng knew, Ives and Ho also knew." F G

(b) "In my judgment the 23rd March 1977 agreement was, on credibility as well as probability, a complete sham and nullity. On the facts, I have also drawn the conclusions that (1) Chow and Hwang were acting as C.K. San's nominees at all material times, (2) the Syndicate must have known that Chow and Hwang were C.K. San's nominees, (3) all parties knew that the transaction between the Syndicate and Chow and Hwang were shams, and (4) accordingly, the beneficial interests in the shares still remained in C.K. San." *p. 1058* H

I Dealing with Mr. Ng's purchase from Messrs. Lee and Fong the Judge (who emphasised his findings by underlining his written judgment as shown in italic print in the Record) said:

RECORD

p. 1060 (c) "It will be recalled that Ng has admitted having purchased shares from C.K. San's nominees. The probabilities therefore are that Lee and Fong (if they did exist) were C.K. San's nominees." A

p. 1062 (d) "Ng in his evidence has conceded that he had purchased shares from C.K. San's nominees, so the probability is that Lee and Fong (if they ever existed) were acting as C.K. San's nominees." B

p. 1064 (e) "There is no evidence against Coe of any deceit or intention to mislead on his part" and that both the Rocky and the New Rocky Agreements were entered into innocently on 30th April and 12th May 1977 respectively.

Notwithstanding that the Judge then found that MBF had not made out a case of conspiracy as described in paragraph 7 of MBF's Statement of Claim he said: C

p. 1064 "I must nevertheless consider these two agreements in the context of the claims by the plaintiffs Lee Ing Chee and Lee Kon Wah, and in the context of MBF's alternative claim, and decide whether these were sham agreements." D

It is to be emphasised that the Lees' case was based on nomineeship (which the Judge reasonably thought was a case no longer being supported or maintained) and that MBF's case was based on conspiracy (which he rejected). The significance of these findings in the Appellants' favour was further emphasised in the Court of Appeal by Mr. Charles Ching, Q.C. (counsel for the Lees) who conceded and contended that in order to find "sham" the Judge had also to find that the members of the Syndicate were nominees of Mr. San, and Mr. Richard Yorke, Q.C. (counsel for MBF) conceded and contended that in order to find "sham" the Judge had also to find conspiracy proved (and Respondents' Notices were served to this end). Mr. Yorke submitted that in not finding conspiracy proved the Judge was simply motivated by "kindness to the Defendants". E F G

pp. 1087 – 1091

(f) It follows from (e) above that the Judge must have considered it was open to him to find "sham" despite his findings that neither nomineeship nor conspiracy had been established. He misdirected himself by approaching the matter on the footing that knowledge on the part of Mr. Ng for the Syndicate of the status of Mr. San's nominees as vendors and the motives for entering into the agreements were considerations relevant to "sham". H

(g) No authorities were cited on the subject and the constituent elements required to be proved by the Plaintiffs to establish I

RECORD

A 'sham' were neither brought to the Judge's attention nor did they appear to have been present to his mind. The Appellants will refer to paragraph 19 above as a further indication that the Judge misdirected himself as to the relevant constituent elements of "sham".

B (h) The Judge also made numerous findings of fact (including fundamental findings affecting the substantive facts of the case as well as the credibility of the Appellants) which were erroneous and unsustainable. The Court of Appeal rejected many of the Judge's findings. To the extent that in a few instances the factual C findings under attack on appeal were upheld, the findings of the Court of Appeal themselves proceeded on an erroneous basis. In particular both the Judge and Huggins, J.A. misinterpreted the true and reasonable effect of advice of counsel (the subject of telex from London) as to the legality of the proposed D dealing with Mr. San as a fugitive. The true interpretation of such advice was that it was lawful, an interpretation rejected *p. 1108* on different and mutually inconsistent grounds by the Judge and *p. 1055* Huggins, J.A. and not dealt with at all by Pickering, J.A. Indeed, Huggins, J.A. attributed to the Judge a reason which the Judge E did not give and which was suggested for the first time by Mr. Yorke in the Court of Appeal.

Even if (which is denied) the correct interpretation of the telex advice was that a purchase from Mr. San was or might be unlawful and that the Syndicate so interpreted the advice, it did F not follow that the Fermay Agreement was a sham. On the contrary, the Judge's finding that it was 'likely that Chow and Hwang, Lee and Fong and Fermay were used in the light of this *p. 1055* legal advice from London' is more consistent with a finding that the Syndicate was nevertheless determined to purchase the G shares from Mr. San but wished to minimise the risk of criticism which might follow if they purchased directly from him. Such a procedure did not in law or in fact render the transaction a sham. Furthermore, the very fact that the Syndicate sought advice from counsel in London in connection with the purchase H from Mr. San was inconsistent with the notion of sham. Both the Judge and Huggins, J.A. misdirected themselves as to the primary facts relating to the telex and as to the inferences to be drawn therefrom.

25. In the Court of Appeal the Appellants' counsel contended that, having I regard to the seriousness of the allegations, the errors of fact manifest in the Judgment below were sufficient in themselves to vitiate the judgment and to justify reversing the orders made or ordering a new trial. However, even on the basis that the adverse findings as to the Appellants' credibility were thought sustainable, it was submitted for, inter alia, the reasons appearing above that the conclusions of

the Judge could not be upheld and the orders he made were not justified in law. *A*
The Court of Appeal, while purporting to dismiss the appeals, nevertheless by paragraphs 1 and 10 of the Order reversed the Judge's orders absolute on the basis that there was no justification for the charging order absolute in relation to the 15 million shares. Accordingly there ceased to be any substratum for the Plaintiffs' case and the Appellants' appeal should in terms have been allowed. *B*

pp. 1127 – 1128

26. As appears above the mainspring of the Appellants' submission was that the rejection of the allegation of conspiracy made against the members of the Syndicate was inconsistent with the finding of sham and, further, the failure to find that the Syndicate were nominees of Mr. San was likewise fatal to a finding of sham. The judgment of Huggins, J.A. proceeded on the basis that the Judge in *C* not finding conspiracy was "merely emphasising a consequence of his findings that Rocky had entered into the two agreements innocently with the Syndicate on 30th April and 12th May 1977 respectively and that all the preceding transactions were shams." Huggins, J.A., read paragraph 7 of the Statement of Claim as alleging three different conspiracies (a suggestion not raised at any stage either in evidence or *D* argument at the trial or during the arguments in the Court of Appeal). On the contrary when, on the 23rd November 1978, at the conclusion of the argument of Mr. Richard Yorke, Q.C. (for MBF) Huggins, J.A. asked whether it was possible that because the Judge had found Mr. Coe not to have been party to any conspiracy, the allegation of conspiracy was rejected only in so far as it involved Mr. *E* Coe, Mr. Yorke replied: "No, the Judge was just being kind to the Defendants" (counsel thereby reiterated what he had said at the outset of his argument to the Court of Appeal on the 21st November 1978).

p. 1097

27. Nevertheless in his judgment Huggins, J.A. said:

p. 1097

> "If one reads paragraph 7 as a whole, it becomes clear that what *F* was intended was to allege that all the transactions from first to last were a mere front to give the impression of a transfer of the beneficial interest when in truth the beneficial interest was intended to remain in Choo Kim San. A finding that there was no conspiracy of this third kind was not inconsistent with the other findings, because *G* they included a finding that the New Rocky Agreement was not a sham. Unless it can be shown that the meaning intended by the learned judge was necessarily one which would produce inconsistency, the argument based upon inconsistency must fail. I am not persuaded that the learned judge was guilty of such an inconsistency as Mr. *H* Sherrard has submitted. On the contrary, in the context I think the judge interpreted paragraph 7 strictly and was merely emphasising a consequence of his findings that Rocky had "entered into the two agreements innocently with the Syndicate on 30th April and 12th May 1977 respectively" and that all the preceding transactions were *I* shams. Once that is accepted, the suggested inconsistency disappears."

28. The Appellants were given no opportunity of meeting the fresh interpretations advanced by Huggins, J.A. in his judgment. Had they been postulated

RECORD

A during argument in the Court of Appeal and had not Mr. Yorke responded to Huggins, J.A. as he did, the Appellants would have submitted as follows:

(1) the Judge understood paragraph 7 of MBF's Statement of Claim as alleging a conspiracy involving Mr. San, the Chows and the members of the Syndicate to enter into a series of sham transactions with B intent to defraud Mr. San's creditors by selling the 15 million shares in the name of Fermay and the 7,631,000 (being part of the 8 million shares in the name of IPC) to Mr. Coe, (a bona fide purchaser in the context) with a view to obtaining ready cash for the benefit of Mr. San. The Judge's understanding is revealed in his C judgment:

> "MBF's case is based on conspiracy. By paragraph 7 of their Statement of Claim, they claim that for the purpose of avoiding and defeating the execution by MBF of their registered Malaysian judgment and to defraud C.K. San's creditors the defendants D and each of them together with persons unknown from about October 1976 onwards conspired and combined amongst themselves in Hong Kong and elsewhere to sell or cause to be sold on behalf of C.K. San the 15 million shares in the name of Fermay and the 7,631,000 shares (being part of the 8 million E shares) now registered in the name of IPC and to obtain on behalf and for the benefit of C.K. San the proceeds thereof. *p. 1041*
>
> MBF makes no allegation of conspiracy against Coe (see para. 7(A)(1)(f)(ii), at p. 7 of MBF's Statement of Claim)."
>
> "It has been noted that MBF makes no allegation of conspiracy F against Coe, and the implication of MBF's pleadings is that Rocky was an innocent purchaser. It follows, as far as MBF is concerned, that Rocky entered into the two agreements innocently with the Syndicate on 30th April and 12th May 1977 respectively. Moreover, there is no evidence against Coe of any G deceit or intention to mislead on his part." *p. 1064*

It follows, therefore, that when the Judge said:

> "On the evidence I am also of the view that MBF has not made out a case of conspiracy against the Syndicate, as described in para. 7 of their Statement of Claim."

H he was finding that MBF had not made out a case of conspiracy against the members of the Syndicate to enter into a series of sham transactions with a view to vesting the shares in Mr. Coe or his companies.

(2) If the Judge thought that the Syndicate had entered into the Fermay

RECORD

p. 1091

the Appellants Fermay and IPC were Mr. San's nominees. Further, Mr. Charles Ching, Q.C. (leading counsel for the Lees in the Court of Appeal) inevitably contended that this allegation was crucial to his case which rested on "sham" alone. A

30. The Judge in spite of what he understood to be the abandonment of the crucial allegation that the Appellants and Fermay were nominees of Mr. San found that the transactions were "sham". The Appellants contended before the Court of Appeal that the finding of "sham" was inconsistent both with the Judge's belief that the Appellants and Fermay were not Mr. San's nominees as well as the finding that conspiracy was not proved. It is submitted that the Judge having found that the Chows (certainly) and Lee and Fong (probably) were nominees of Mr. San misdirected himself in law by assuming that knowledge of their status as nominees on the part of Mr. Ng (which he underlined in his judgment and found was to be attributed in law to both Mr. Ho and Mr. Ives) rendered the transactions concluded with those person "shams". Huggins, J.A. did not deal with the Appellants' submission that the fundamental inconsistency in the Judge's judgment in the Lees' case that the Appellants were not nominees of Mr. San showed that he had misunderstood the concept of "sham". Huggins, J.A. did not adjudicate upon the Lees' contention as set out in their Respondents' Notice to the effect that a finding of "nomineeship" was essential if they were to succeed on the basis of sham. Huggins, J.A. merely outlined the possible meaning of the word "nominee" but held it immaterial "to the real issues in the case". Nevertheless Huggins, J.A. dealt in detail with the alleged nominee status of the Chows and Lee and Fong but made no findings thereon. B C D E

(p. 1054; p. 1098; p. 1110)

31. Pickering, J.A. said:

p. 1119

> "I have already indicated that in my view the learned judge's cry of "Sham!" in regard to the Agreement of 23rd March, 1977 was unassailable for nobody in his sense would have done what Chow and Hwang purported to do under that Agreement, that is, to part with all control over the issued capital of Fermay in return for a nett 1% of the stated purchase price thereof." F

The Appellants contend that such a finding applies the wrong test for "sham". Furthermore, it proceeds on the basis that the Chows were principals, but, on the true view of the judgment, Mr. San was the principal. It by no means follows that Mr. San would have taken leave of his senses (in his predicament) to have acted as suggested bearing in mind that he knew that Mr. Ives was a senior partner in a respected firm of solicitors in Hong Kong and that Mr. Ng was a stockbroker. Mr. San, of course, knew that the Registrars would authenticate the share certificates and he had no reason to distrust the members of the Syndicate. G H

p. 1120

32. Pickering, J.A. interpreted the Judge's finding as "a tacit finding of a conspiracy which did not extend to IPC". For the reasons set out herein such a finding was not made by the Judge and there was no justification for Pickering, J.A.'s assumption that the Judge had intended such a finding. I

RECORD

A 33. Pickering J.A. dealt with the Lees' case as to nomineeship in the following passage:

> "Were the members of the Syndicate the nominees of C.K. San? The learned judge was under the impression that at the end of the hearing in the court below it was no longer maintained by the Plaintiffs, the Lees, that Ng, Ives, Ho, Fermay and IPC were C.K. San's nominees though to be accepted on all sides that the allegation was never withdrawn in regard to any of the seven defendants above mentioned and that that was so is borne out by the note of Mr. Ching's junior. The questions are what would the learned judge's finding have been had he not been under the erroneous impression that the issue of the alleged nomineeship of Ng, Ives, Ho and Fermay was no longer live and would any such finding – one way or the other – have been inevitable? The learned judge had already found that the Agreement of 23rd March, 1977 was a sham; that Chow and Hwang were acting as C.K. San's nominees at all times; that the Syndicate was aware of this; and that the beneficial interest in the San Imperial shares still remained with C.K. San. In the light of those findings, and especially the last, Ng, Ives, Ho and Fermay could have had no other status except that of nominees of C.K. San. For the Syndicate held a vice-like grip upon Fermay which in turn owned the 15,000,000 San Imperial shares the equity of which still reposed in C.K. San – a fact which must have been known to the Syndicate since the judge had found that they knew that Chow and Hwang were merely the nominees of C.K. San. In agreeing to pay $9,000,000 (as to any claim for $8.8 million of which they had contrived to render unenforceable) for the share capital of a company the only asset of which was known by them to be beneficially owned by C.K. San, the Syndicate could only have been intending either to steal the 15,000,000 San Imperial shares from C.K. San – of which there is no suggestion – or acting as his nominees. In my view had the learned judge not been under the impression that it was not necessary for him to determine the issue he would have been driven inexorably, on his own findings, to the further finding that Ng, Ives, Ho and Fermay were all nominees of C.K. San holding the legal estate in Fermay, and hence in the 15,000,000 San Imperial shares, for his benefit.
>
> In forming that view I have placed reliance upon the judge's finding (inter alia) that the Agreement of 23rd March, 1977 was a sham".

pp. 1120 – 1121

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I The Appellants contend that Pickering, J.A. assumed the very question which had to be decided and failed to adjudicate on the appellate question whether the Judge's finding of sham was correct in law.

34. The Appellants contend that Pickering, J.A.'s attempted reconciliation of

the apparent inconsistency in the Judge's judgment was unjustified and was fundamental to the error underlying the judgment. A

35. The Appellants will contend that Pickering, J.A. misdirected himself as to the ingredients relevant to consideration of proof of sham. Pickering, J.A. appears to have taken the view that the burden on the Plaintiffs to prove their respective cases was in some way lessened because fraud was alleged against the Defendants. B The Appellants will refer in particular to the following passage in Pickering, J.A.'s judgment:

p. 1120 (20)

> "In my view had the learned judge not been under the impression that it was not necessary for him to determine the issue he would have been driven inexorably, on his own findings, to the C further finding that Ng, Ives, Ho and Fermay were all nominees of C.K. San holding the legal estate in Fermay, and hence in the 15,000,000 San Imperial shares, for his benefit.
>
> In forming that view I have placed reliance upon the judge's finding (inter alia) that the Agreement of 23rd March, 1977 was a D sham and this may be an appropriate place to deal with the suggestion that the judge was guilty of the elementary error of reaching that conclusion upon the basis that since the Syndicate were dealing with nominees whom they knew to be nominees therefore the Agreement was a sham. I acquit the learned judge of any such error. The E conclusion of sham flowed inevitably from the terms of the Agreement itself under which Chow and Hwang, in consideration of $200,000, parted with the share capital of Fermay and estopped themselves from ever enforcing their claim to the balance of the purchase price of $8,800,000. Clause 4 of the document meant, F on its face, that if Chow and Hwang should, by reason of their trust in the Syndicate, or even in error or for any other reason whatever hand over the share certificates with transfers signed in blank without receiving payment of their $8,800,000, the fact of delivery should be proof of payment of the $8,800,000 which payment Chow and G Hwang should be estopped from denying. That reeks of sham without the necessity for any extrinsic evidence though in fact we know that on Ives' own admission the Fermay shares were held not by Chow and Hwang but by him, that the Syndicate also held blank instruments of transfer intended to be used in relation to the Fermay H shares so that Chow and Hwang did not have control of their own shares in the company, their share holdings being, again on his own admission, "completely at (Ives') mercy. Although the document reeks for itself, such extrinsic evidence may, I apprehend, legitimately be looked at to ascertain the true nature of the transaction en- I visaged by the Agreement of 23rd March, 1977 the more so since the Lees and MBF were alleging fraud and maintaining that the object of the Agreement was unlawful as constituting a device to defraud C.K. San's creditors."

p. 1122 (2)

RECORD

A The findings fail to take into account the commercial realities of the situation and the common object of the parties, which was to provide only a token payment to the Chows while the mechanics of authenticating the share certificates of San Imperial was in progress. In any event it was and is submitted that Clause 4 of the Agreement of 23rd March, 1977 did not have the effect of preventing (by B estoppel or otherwise) the Chows from suing for the balance of the said purchase price. Clause 4 has no greater effect than a receipt for money contained in a document. It is trite law that between immediate parties notwithstanding a receipt clause evidence is admissible to prove non-payment in fact. (Halsbury's Laws of England 4th Edition Vol. 12 para. 1516).

C 36. The Appellants contend that Pickering, J.A.'s view that "the conclusion of sham flowed inevitably from the terms of the Agreement itself" is untenable in law and in fact. Likewise his finding that "I have said enough to emphasize that the content of the Agreement of the 23rd March 1977 and the history of Fermay from its incorporation pointed unequivocally to the spurious nature of the transaction between Chow and Hwang and the Syndicate". D

p. 1121

p. 1123

37. Pickering, J.A. in dealing with the purchase by Mr. Ng of the Lee and Fong shares misdirected himself as to the transaction being a sham and again assumed as proved the very matter in issue for decision when he said:

> "There was some suggestion during the course of the appeal that this deduction" (referring to the sum of HK$433,000 which Ng had already paid for the Lee and Fong shares)"should not have been made but in fact the learned Judge was right to make it. The $3,246,300 had been received by the Syndicate for the Lee and Fong shares the equitable interest in which the judge had found remained in C.K. San. The money was therefore due from the Syndicate to C.K. San: but the Syndicate had already paid $433,000 to Chow, who was C.K. San's nominee so that the Syndicate were entitled to set off that payment against the price which they received from Rocky for the Lee and Fong shares. The sale from Lee and Fong to the Syndicate being a spurious one in the sense that the equitable interest in the shares remained in C.K. San, there was of course no necessity for the Syndicate to have paid this advance sum of $433,000 and whether they paid it as a means of getting ready cash to C.K. San in Taiwan or for some other reason remains a mystery – but pay they did and the judge was right to have regard to that fact. The Syndicate's indebtedness to C.K. San was not $3,246,300 but $2,813,300 and that was all that could be the subject of the garnishee order absolute."

p. 1125 (28)

E F G H

38. Further, there was no evidence on which it could properly be held that I the Lee and Fong share transaction was a sham and the appeal should have been allowed and the garnishee order to the extent of HK$2,813,300 (after giving credit for the sum of HK$433,000 held to have been paid for the shares) should have been discharged.

RECORD

39. With regard to the position of Mr. Coe and I.P.C. Nominees 'Limited Clause 13 of the New Rocky Agreement provided, inter alia, that: *A*

p. 1190 (27)

> 'The option shall be exercisable by the Purchaser as soon as the injunctions in the High Court Action No. 252 of 1977 and the attachment order in High Court Action No. 2459 of 1976 and/or any other restrictions on dealing with the shares are lifted and discharged.' *B*

The Judge, on the basis of the case presented by counsel for the Lees held, inter alia, that IPC was not bound or at that stage entitled to exercise the option and that accordingly no beneficial interest in the 15 million shares had passed under the New Rocky Agreement. During the hearing of the appeal leading counsel for IPC Mr. John Vinelott, Q.C. (as he then was) successfully applied for Rocky Enterprises Limited (the named party to the New Rocky Agreement) and Siu King Cheung Hing Yip Company Limited ("SKC") to be joined as parties to the proceedings. Counsel for the Lees appeared to concede that the case he had invited the Judge to accept in regard to the construction of the 'option' was wrong and that Mr. Vinelott's construction (for which the Appellant Ives had contended in vain in evidence at the outset) was after all correct. Accordingly, the appeals of IPC, Rocky and SKC were allowed. The Court of Appeal unjustifiably, however, in effect ordered that the Syndicate should reimburse the Respondents the costs of IPC, Rocky and SKC which the Respondents had been ordered to pay. *C* *D* *E*

40. Although the learned President of the Court of Appeal (Sir Geoffrey Briggs, C.J.) did not deliver a separate judgment he concurred in the judgments of both Huggins and Pickering, J.A.

41. The Appellants submit that the judgment of the Court of Appeal should be reversed for the following among other *F*

REASONS

(1) That the Judge misdirected himself as to the law relating to sham and his finding of fact did not and could not justify his conclusion that the Respondents had established that the transactions entered into by the Appellants were sham. *G*

(2) That the Judge's finding of sham was inconsistent with his rejection of conspiracy and his finding that the Appellants were not the nominees of Choo Kim San.

(3) That on the findings of the Judge the Appellants were entitled to judgment and the charging orders nisi and garnishee orders nisi discharged on the ground that no case in nomineeship or conspiracy (which were fundamental to the case of the Lees and MBF respectively) had been proved. *H*

RECORD

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(4) That the finding of the Court of Appeal that the Judge intended to find conspiracy established or proved when he had said in terms that it had not been are unjustified and cannot be sustained in fact or in law.

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(5) That the Court of Appeal was wrong in law in finding that conspiracy had been proved and that the Appellants were nominees of Choo Kim San notwithstanding that the Judge did not find the allegation of conspiracy proved or that the Appellants were the nominees of Choo Kim San.

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(6) That in all the circumstances of the case the Appellants were at trial and on Appeal entitled to judgment in their favour.

MICHAEL D. SHERRARD

A **In the Privy Council** *No. 20 of 1980*

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. 12 OF 1978

B (On appeal from High Court Action No. 2459 of 1976, High Court Miscellaneous Proceedings No. 155 of 1977 and High Court Miscellaneous Proceedings No. 540 of 1977)

BETWEEN

DAVID NG PAK SHING	*1st Appellant*	(The 4th, 5th, 6th and 7th Defendants in High Court Action No. 2459 of 1976, High Court Miscellaneous Proceedings No. 155 of 1977 and High Court Miscellaneous Proceedings No. 540 of 1977)
C MELVILLE EDWARD IVES	*2nd Appellant*	
HO CHAPMAN	*3rd Appellant*	
FERMAY COMPANY, LTD.	*4th Appellant*	

and

LEE ING CHEE also known as D LEE HAI HOCK	*1st Respondent*	(The Plaintiff in High Court Action No. 2459 of 1976)
LEE KON WAH	*2nd Respondent*	(The Plaintiff in High Court Miscellaneous Proceedings No. 155 of 1977)
MALAYSIA BORNEO FINANCE CORPORATION (M) BERHAD	*3rd Respondent*	(The Plaintiff in High Court Miscellaneous Proceedings No. 540 of 1977)

CASE FOR THE APPELLANTS

Maxwell Batley & Co.
27 Chancery Lane
London WC2A 1PA.

RECORD

A of the 1st, 2nd and 3rd Appellants (a stockbroker, a solicitor and a businessman respectively). Among others interested in acquiring Mr. San's shares in San Imperial was one James Coe ("Mr. Coe") a businessman with interests in and directorships of several public companies in Hong Kong. Mr. Coe at first considered 24 million San Imperial shares to be required for control. Accordingly, at the end of 1976 B the 1st, 2nd and 3rd Appellants decided to form a syndicate ("the Syndicate") with a view to acquiring 24 million San Imperial shares and selling them on to the highest bidder at a profit. The highest bidder proved to be Mr. Coe. The Syndicate wished to deal in a way which involved them in the minimum outlay of capital and to this end sought to arrange their acquisition and the subsequent sale to Mr. Coe C or one of his companies in close sequence.

6. In order to ascertain the likely sources of San Imperial shares a search was made of the Company's register and it was discovered that a Hong Kong company called M.A.F. (Nominees) Limited ("MAF") was registered as the owner of a substantial parcel of the shares. The Syndicate decided that in order to acquire D a controlling interest they should seek to purchase the shares of Mr. San and, MAF and such other shares as they might be able to acquire from other sources including the Stock Exchanges on which the shares were quoted.

The principal target of the acquisition programme was the parcel of shares directly controlled by Mr. San.

E 7. There were, however, three main problems which, initially appeared to confront the Syndicate:

(1) where was Mr. San to be found?

(2) was it lawful to deal with a fugitive from justice?

(3) had Mr. San diminished or misappropriated San Imperial's assets?

F 8. It was the Appellants' case that the Appellant Ng (the stockbroker member of the Syndicate) eventually found Mr. San in Taiwan on the 31st December 1976 only to be told by Mr. San that he had already sold 15 million of his shares to a Taiwanese couple (named in the proceedings as the 8th and 9th Defendants respectively as Chow Chaw-I and Hwang Shang Pai but hereinafter called "the G Chows"). Following his introduction to the Chows on the 31st December 1976 Mr. Ng says he dealt with them in respect of the said shares. Much time was taken up at the original hearing with the question whether the Chows (who did not appear at the hearing) were acting as principals or, as the Judge found, merely as nominees for Mr. San. The Judge appeared to have formed the view (in the Appel- H lants' submission wrongly) that Mr. Ng's knowledge that the Chows were nominees was of fundamental significance in deciding whether the agreement subsequently reached with them was "a sham". The appeal to the Court of Appeal proceeded and the case for the Appellants here proceeds on the footing that the Chows should, for the purposes of the case, be treated as if they were at all material times Mr. I San's nominees and that it did not affect the position whether Mr. Ng knew their

RECORD
p. 1038

23. On the 25th January 1978 the Judge delivered a reasoned judgment at the conclusion of which he made orders the effect of which is as follows:

p. 1079

Charging Orders Nisi San Imperial shares	Orders made on trial
(15 July – 7 Sept. 77)	
422,560 (Asiatic)	Absolute
400,000 (Triumphant)	Absolute
	The Appellants were not concerned with and had no interest in either of these two parcels of shares
15,000,000 (Fermay)	Absolute
7,631,000 (IPC)	Discharged
Garnishee Orders Nisi	
HK$ 8,800,000 (7 Sept. 77)	Discharged
HK$11,446,500 (14 Sept. 77)	Discharged as to HK$8,633,200 (Absolute as to only HK$2,813,300)

24. The principal contentions of the Appellants in regard to the Judge's reasons were as follows:

(1) Without explaining what he understood by the doctrine of "sham" he found the Fermay Agreement to be a sham. However, the case of MBF was that the Fermay Agreement was a sham because it was entered into pursuant to the conspiracy pleaded and particularised in paragraph 7 of their Statement of Claim, which the Judge found had not been proved against the Syndicate or Mr. Coe, (a finding made necessary as far as Mr. Coe was concerned because by the end of the trial it was clear, contrary to the pleading referred to at paragraph 21 above, that it was being alleged in effect that Mr. Coe was party to the alleged conspiracy). The Appellants contended that the rejection of the allegation of conspiracy, which was fundamental to MBF's case of sham, was inconsistent with the finding that the Fermay Agreement was a sham when the concept of "sham" is properly understood.

pp. 1096 – 1098
p. 1118

(2) The general effect of the Appellants' arguments in regard to MBF's case on conspiracy is succinctly set out in the judgment of Huggins, J.A. and in the judgment of Pickering, J.A. in the Court of Appeal.

(3) As to the Lees' case that the Fermay Agreement was a "sham"

transaction pursuant to any such conspiracy he would have found it proved against the Syndicate and it would have been his duty to have said so in his considered Judgment which could not properly have remained silent on the subject. The Judge's considered view was expressly to the contrary. It was much more likely in the circumstances that the Judge misdirected himself as to the constituent elements of 'sham' than that he misunderstood the constituent elements of conspiracy. (The Appellants would have emphasised still further the observations of Turner, J. in Paintin and Nottingham Ltd. v. Miller Gale and Winter (1971) NZLR 164 conveniently set out in the judgment of Pickering, J.A. at p. 1122.)

p. 1064
p. 1122

(3) Huggins, J.A. was of the view that it would have been inconsistent to find that there was no conspiracy to procure a final transfer to a third party which was to be legally binding preceded by a number of sham transactions (which were to have had the appearance of transfers but which were not intended to convey the beneficial interest) and at the same time to have found sham. Huggins, J.A. was of the view that in not finding conspiracy as described in paragraph 7 of MBF's Statement of Claim against the Syndicate the Judge was simply repeating his earlier finding that there was no conspiracy between the members of the Syndicate and Mr. Coe. The Appellants submit that such a conclusion and interpretation of the Judge's judgment is wrong. It was in the appreciation and application of the doctrine of "sham" that the Judge fell into error.

(4) The Judge nowhere suggested still less found that some other conspiracy (not described or covered by the broad terms of paragraph 7 of the Statement of Claim) had been made out. The Appellants will rely on the fact that the Judge was invited by counsel not to hold the parties strictly bound by their pleadings but to deal with the case within the 'broad concepts' of the pleadings (see paragraph 22 hereof). It is inconceivable in relation to the allegation of conspiracy that the Judge adopted a restricted or strictly literal view of the allegation of conspiracy. Likewise is it inconceivable that the Judge intended to find part of the conspiracy proved without saying so or that he intended so to find (as the Court of Appeal held) without expressing his view or giving reasons therefor.

(5) The Judge's problem in deciding the case was not simply that the Lees had not relied on conspiracy but that MBF did not rely on the allegation of "nomineeship". Indeed, at the conclusion of the arguments at the trial the Judge was under the impression from counsel's answers to his questions (albeit he misunderstood or misheard them) that neither group of Plaintiffs was relying on "nomineeship". The Judge recorded his understanding as follows:

p. 1037

"Q8: If sham agreements – does not necessarily follow from

RECORD

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that that the Syndicate are nominees of the First Defendant (Mr. San)?

A: Not now relying on nominees."

The Judge found in terms that whilst maintaining that the Chows were Mr. San's nominees the two Plaintiffs were no longer maintaining that the Syndicate, or Fermay or IPC were Mr. San's nominees. p. 1041

B

(6) Huggins, J.A.'s construction of the Judge's reasons involves the proposition that the Judge intended to articulate a rejection of a limited aspect of the conspiracy alleged (that is to say, in so far as it may have included Mr. Coe) but that he intended to find in other, more significant respects, that the Appellants were guilty of conspiracy. Had he so intended he would have said so in plain terms. The whole tenor of the Judge's reasons showed that he did not intend to mince words or be mealy mouthed in expressing his views of the Appellants and others.

C

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(7) The structure and pattern of the Judge's judgment is inconsistent with what the Court of Appeal attributed to him in that when dealing with MBF's case in conspiracy at page 8 of the Judgment he showed that he correctly understood MBF to have made no allegation of conspiracy against James Coe and that in the context of the conspiracy pleaded in paragraph 7 both James Coe and Rocky were "innocent persons". There was, therefore, no substance in the suggestion that the elaborate finding on the allegation of conspiracy was directed at exonerating Mr. Coe and Rocky, for such had been conceded by MBF.

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(8) The Appellants contend that it is not right that an Appellate Tribunal reviewing the considered reasons of a Judge in relation to grave charges should attribute to him an intention to find proved that which he had said was not. Had the Judge merely intended to find that Mr. Coe was not party to a conspiracy but that the Appellants were he would and should have said so. The Appellants will rely on the principle that where a party has been acquitted of a serious charge the decision should not be displaced on appeal except on the clearest grounds. There were none here.

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29. Further, Huggins, J.A. failed to adjudicate upon the Appellants' fundamental submissions in relation to the Lees' case that the Judge thought that they no longer maintained that the members of the Syndicate, Fermay or IPC were nominees of Mr. San. (It is common ground that the Judge was wrong in his understanding of what leading counsel for the Lees as opposed to what counsel for MBF had said). A Respondent's Notice for the Lees dated the 29th April 1978 complained of the Judge's misunderstanding and sought to affirm the judgment on the ground that

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