

No. 31 of 1968

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT
SINGAPORE (APPELLATE JURISDICTION)

B E T W E E N :

CHUNG KHLAW BANK LIMITED Appellants
(Plaintiffs)

- and -

UNITED OVERSEAS BANK LIMITED Respondents
(Applicants)

10 (in the matter of an application by Summons in
Chambers Entered No.2393 of 1967 in Originating
Summons No.239 of 1966 in the High Court in
Singapore at Singapore)

B E T W E E N :

CHUNG KHLAW BANK LIMITED Plaintiffs

- and -

TAY SOO TONG (trading as Twing
Bie Hang) Defendant

CASE FOR THE RESPONDENTS

RECORD

20 1. This is an Appeal from an Order of the
Federal Court of Malaysia (Appellate
Jurisdiction) in Singapore (the Honourable
Mr. Justice Wee Chong Jin, Chief Justice;
The Honourable Mr. Justice Tan Ah Tah; and
the Honourable Mr. Justice Chua) dated the
10th day of July, 1968, allowing with costs
the Appeal of United Overseas Bank Limited
against Chung Khiaw Bank Limited from the
Order of the Honourable Mr. Justice Winslow

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dated the 20th day of March, 1968 made upon an Application by United Overseas Bank by way of Summons in Chambers in the matter of Originating Summons No.239 of 1966 in the High Court of Singapore between Chung Khiaw Bank (the Plaintiffs to the Originating Summons) and Tay Soo Tong (the Defendant to the Originating Summons).

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2. The Appellants in this Appeal are Chung Khiaw Bank and the Respondents are United Overseas Bank. 10

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3. By his said Order Mr. Justice Winslow ordered :-

(a) that the Application by the Respondents should be dismissed; and

(b) that the costs of and occasioned by the Application should be paid by the Respondents.

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4. The Federal Court of Malaysia reversed the Order of Mr. Justice Winslow by ordering; 20

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(a) that the Order of Court dated the 14th day of November 1966 and made in the aforesaid Originating Summons be set aside;

(b) that the Registrar of Deed do rectify the Register of Deeds by cancelling the entry made on the 23rd day of January 1967 in the said Register whereby the said Order of Court dated the 14th day of November 1966 was registered; 30

(c) that the costs of the Appeal to the Federal Court of Malaysia and the costs of the Application before Mr. Justice Winslow be paid by the Appellants to the Respondents.

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5. The Federal Court of Malaysia further ordered that there should be a stay of execution of the Orders referred to in

10 Paragraph 4 (a) and (b) above for six weeks
from the 10th day of July 1968, or for three
months from the said date if the Appellants
made application to the Judicial Committee of
Her Britannic Majesty's Privy Council within
the said period of six weeks, that the Sheriff
of Singapore do forthwith proceed with the sale
of the properties attached under the Order of
Attachment dated the 27th day of October 1966
in Suit No. 2180 of 1965, that the proceeds
of sale be paid into an account at the usual
rate of interest with Overseas Chinese Banking
Corporation Limited in the joint names of
the Advocates and Solicitors in Singapore of
the Appellants and the Respondents, that such
sums were to remain in such account until
further Order, that the sum of \$500 lodged by
the Respondents in Court as security for the
costs of the Appeal to the Federal Court of
20 Malaysia be paid out to the Advocates and
Solicitors of the Respondents in Singapore, and
that both the Appellants and the Respondents
be at liberty to apply.

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6. The facts of this case may be summarised
as follows.

30 7. On 16th June 1966 the Respondents obtained
final judgment for \$378,267.31 in Suit No.2180
of 1965 against the Defendant in that suit,
Tay Soo Tong. On 27th October, 1966, by a Writ
of Seizure and Sale dated 25th October 1966,
the Respondents obtained an Order attaching
the interest of the Defendant in the immovable
properties in Singapore specified in the said
Order (hereinafter called "the properties").
On 28th October 1966 the said Order of
Attachment was registered in the Registry of
Deeds at Singapore.

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40 8. On 14th November 1966, by an Originating
Summons dated 22nd September, 1966, the
Appellants obtained an Order against the
defendant to that Summons (who was the same
person as the Defendant to Suit No.2180 brought
by the Respondents) declaring that the
Appellants were (as the result of the deposit

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with them by the Defendant of the title deeds of the properties) the legal mortgagees of the properties, giving the Appellants liberty to sell the properties out of Court and directing that the net proceeds of sale be paid to the Appellants in satisfaction or part satisfaction of the amount due by the Defendant to the Appellants. The Order obtained by the Appellants as aforesaid was obtained in the absence of the Defendant, who had entered no appearance to the Originating Summons served upon him by way of substituted service and in the absence of the Respondents, who were not made parties to the Originating Summons. On 23rd January 1967 the Order obtained by the Appellants was registered in the Registry of Deeds in Singapore.

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9. Having been informed of the Order obtained by the Appellants as aforesaid the Respondents applied for and obtained, on 24th November, 1966, a lis pendens Order in respect of the properties. Thereafter and until March 1967 unsuccessful attempts were made to secure the agreement of the Appellants and the Respondents to the sale of the properties and by Summons in Chambers No.441 of 1967 the Sheriff of Singapore unsuccessfully attempted to obtain an Order of the High Court of Singapore directing the sale of the properties pursuant to the aforesaid Writ of Seizure and Sale and the determination of the question of priorities as between the Appellants and the Respondents.

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10. In view of the aforesaid unsuccessful attempt to resolve the situation, and the refusal of the said Sheriff to take any further action until the Order obtained by the Appellants was expunged and the lis pendens Order obtained by the Respondents withdrawn, the Respondents applied by Summons in Chambers No.2393 of 1967 dated 25th October, 1967 for the following orders, namely :-

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(1) that a copy of the Summons and copies of all affidavits in support thereof and copies of all exhibits to such affidavits be served on the Sheriff of Singapore;

(2) that the Sheriff of Singapore be made a party to these proceedings between the Appellants and the Respondents;

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(3) that the Order dated 14th November 1966 obtained by the Appellants be set aside;

10 (4) that the Registrar of Deeds do rectify the Register of Deeds by cancelling the entry made on 23rd January 1967 recording the Order obtained by the Appellants;

(5) that the Court make such further or other Order as it may deem necessary and that the Respondents and the said Sheriff be at liberty to apply; and

20 (6) that the costs and expenses incurred or to be incurred by the Respondents and the said Sheriff incidental and consequential to the Order to be made be provided for.

Copies of the summons and of all Affidavits filed by the Respondents were filed in the Registry.

30 11. Mr. Justice Winslow dismissed the aforesaid Application of the Respondents on the grounds that the Order obtained by the Appellants was not an Order made ex parte (notwithstanding that the Defendant to that Order did not appear on the application for the same) and that accordingly Order 53 Rule 4 (1) of the Rules of the High Court of Singapore (which empowers the Court to set aside any Order made ex parte upon the application of any person affected by such order) was of no assistance to the Respondents. The learned Judge further held that in any event the Respondents did not constitute a "person affected" within the meaning of the said Rule.

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40 12. The Federal Court of Malaysia (Appellate Jurisdiction) unanimously held that the Order

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obtained by the Appellants was made ex parte, that the Respondents did constitute a "person affected" by the aforesaid Order (having obtained priority over the rights of the Appellants in the properties by the registration of the aforesaid Order of Attachment on 28th October, 1966) and were essential parties to the application of the Appellants for such an Order, and that therefore the Order obtained by the Appellants should be set aside. The Federal Court of Malaysia accordingly reversed the Order of Mr. Justice Winslow by making the Orders referred to in Paragraph 4 and 5 above.

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13. Since the aforesaid Order of the Federal Court of Malaysia there have been developments in the case.

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14. Firstly, on the 14th August, 1968, the Federal Court of Malaysia varied their aforesaid Order by ordering that the stay of execution ordered therein should be discharged in respect of each of the properties immediately after the sale of each such property and before the execution of the conveyance thereof.

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15. Secondly, by Order dated 16th September, 1968 made on the application of the Defendant to the aforesaid Suit No.2180 of 1965 that Defendant obtained (with the consent of the Appellants and the Respondents) the leave of the High Court of Singapore to sell certain of the properties by private contract for the price of \$470,000. By the said Order of 16th September 1968 the High Court of Singapore further directed that the registration of the Order of Attachment of the Respondents in respect of the remaining properties should be cancelled from the Register immediately upon completion of the said sale (the price thereof being sufficient to satisfy the judgment debt and costs and interest of the Respondents).

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16. Thirdly, pursuant to the Order dated 16th September 1968 the sale of certain of the properties was completed for the aforesaid price and at the request of the Respondents the

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registration of the Respondents' Order of attachment in respect of the remaining properties was cancelled from the Register.

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10 17. Fourthly, after the completion of the aforesaid sale the Respondents applied to the Federal Court of Malaysia for the payment to them of the amount of the judgment debt together with costs and interest due to them from the aforesaid Defendant out of the proceeds of the aforesaid sale which were in the possession of the Sheriff of Singapore. On 2nd December, 1968 the Federal Court of Malaysia ordered that :-

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20 "....upon the Appellants' United Counsel undertaking that if the result of decision of the Privy Council is that the Appellants United are required to pay any sum of money out of the proceeds of sale to the Respondents Chung then such sum shall carry interest at the rate of 6% per annum from the date of receipt of the said sum by the Appellants United from the Sheriff IT IS FURTHER ORDERED that the amount of the Judgment Debt of \$378,267.31 and the costs allowed under the Judgment of \$714.00 in Suit No.2180 of 1965 together with all interest on the said Judgment Debt of \$378,267.51 at the rate of 6% per annum from the 10th June, 1966 until payment of the said Judgment Debt to the Appellants be forthwith paid to the Appellants by the Sheriff of Singapore notwithstanding the Order of this Court dated the 10th day of July 1968....."

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40 18. Pursuant to the aforesaid Order of 2nd December, 1968, the Sheriff of Singapore has paid to the Respondents the amount of their said Judgment debt interest and costs out of the aforesaid proceeds of sale.

19. Finally, the lis pendens Order referred to in Paragraph 9 above was discharged on application p. 46

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by the Respondents by Order dated 4th November 1968.

20. The Respondents submit that the main issue which arises on this Appeal is the question of priority between the Appellants and the Respondents in respect of the properties.

21. For the following reasons the Respondents submit that as a matter of substantive law they were at all material times entitled to rank in priority to the Appellants in respect of the properties and accordingly the proceeds of sale thereof.

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22. By virtue of Section 14 (1) of the Courts Ordinance (Chapter 3 of the Laws of the Colony of Singapore, 1955) the Respondents were entitled to enforce their Judgment against the Defendant by the seizure of "all the property, movable or immovable, of whatever description", of the Defendant, save for certain exceptions not relevant to this case. Pursuant to this Section the Respondents obtained an Order attaching the interest of the Defendant in the properties and registered the same under the Registration of Deeds Ordinance (Chapter 255 of the Laws of the Colony of Singapore, 1955) as required by and pursuant to Order 41 of the Rules of the High Court of Singapore.

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23. Having so registered the Order of Attachment, the Respondents became entitled to priority in accordance with the aforesaid Registration of Deeds Ordinance. This Ordinance provides, inter alia, as follows :-

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"2. 'assurance' includes any conveyance, memorandum of charge or discharge.....
~~or~~ Order of Court...

'Order of Court' means any judgment, decree, writ of execution or adjudication in bankruptcy or other order or process of or issuing from the said

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court or other court of competent jurisdiction whereby any interest in land is or may be affected.

10 4. From and after the commencement of this Ordinance and subject to this Ordinance and any rules made thereunder, all assurances thereafter or theretofore executed or made.....by which any land within the Colony is affected and which have not been registered under the Registration of Deeds Ordinance 1886, may be registered in such manner as is hereinafter directed, and unless and until registered shall not be admissible in any court as evidence of title to such land.

20 7. (1) Where any lien or charge on any lands is claimed in respect of any unpaid purchase money or by reason of any deposit of title deeds or otherwise, a memorandum of such lien or charge, signed by the person against whom such lien, or charge is claimed, may be provisionally registered on presentation by any person claiming to be interested therein.

30 (3) No such lien or charge shall have any effect or priority as against any assurance for valuable consideration unless and until a memorandum thereof has been registered in accordance with this Ordinance.

15. (1) Subject to this Ordinance, all instrumentsentitled to be registered under this Ordinance, shall have priority according to the date of registration thereof and not according to the date of such instruments or of the execution thereof.

40 (4) All priorities given by this Ordinance shall have full effect in all courts except in cases of actual fraud to which the person by or on whose behalf the registration is made is a party, and all persons claiming thereunder any legal or

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equitable interests shall be entitled to corresponding priorities, and no such person shall lose any such priority merely in consequence of his having been affected with actual or constructive notice except in cases of actual fraud to which he is a party."

24. The Respondents respectfully submit that the Federal Court of Malaysia was correct in holding that the Order obtained and registered by the Respondents was an "assurance for valuable consideration" within the meaning of Section 7(3) of the Registration of Deeds Ordinance (which is an Ordinance based upon the Yorkshire Registration Act 1884). This, the Respondents submit, has long been the law in Singapore, and is well supported by authority: see, for example, Fung Sin Wa v. Moi Chan Hen (1897) 4 S.S.L.R. 175; (1898) 5 S.S.L.R. 29; Ng Boo Bee v. Khaw Joo Choe (1916) 14 S.S.L.R. 90; and cf. Beavan v. Earl of Oxford 6 De G.M. & G. 507 at 526 per Knight Bruce L.J. In the Respondents' submission it follows that since the Appellants have never registered a memorandum of their charge by way of deposit of title deeds of the properties, this charge has no "effect or priority" as against the registered interest of the Respondents in the properties. 10 20

25. The Respondents submit that this conclusion follows whether or not the charge of the Appellants was accompanied by a memorandum, for the reasons stated in Fung Sin Wa v. Moi Chan Hen (op.cit.) and in Battison v. Hobson [1896] 2 Ch. 403. Furthermore, the Respondents submit that it is now beyond argument that the effect of the Registration of Deeds Ordinance is to give, in cases such as this, the judgment creditor priority over an unregistered mortgagee. The right now given to a judgment creditor under the Courts Ordinance is over all the property "of a judgment debtor" (Section 14 (1)) and there is no saving in that Ordinance for the rights of mortgagees etc. under mortgages etc. executed prior to the registration of a judgment creditor's rights. 30 40

Even when there was such a saving, the Courts in Singapore have held that the effect of the provisions in the Registration of Deeds Ordinance is to give the registered judgment creditor priority over the unregistered (but registrable) mortgagee: see Fung Sin Wa v. Moi Chan Hen (op.cit). The Respondents submit that by removing an express saving as to prior mortgages etc. when giving judgment creditors the right to seize and sell the land of judgment debtors, the legislature clearly intended to reinforce the foregoing decision, so as to put the matter beyond all doubt and to make clear beyond argument that unregistered charges such as those of the Appellants would rank in priority after the registered rights of judgment creditors.

26. The Respondents further submit that even if the Order registered by them does not constitute an "assurance for valuable consideration", they are still entitled to priority over the Appellants.

27. In the first place, the Respondents submit that no memorandum of lien or charge in respect of the properties complying with section 7 of the Registration of Deeds Ordinance was ever effected by the Appellants. In these circumstances the Appellants cannot rely upon the receipts exhibited to the Affidavit of Lee Chin Looe as "evidence of title" (Section 4) nor (by virtue of Sections 7(3) and 15) can they claim any priority over the instrument registered by the Respondents.

28. In the second place, the Respondents submit that if and to the extent that the Appellants rely upon, or are limited to, the Order obtained by them on 14th November, 1966, such Order, by virtue of Section 15 of the Registration of Deeds Ordinance, ranks in priority after the Order registered by the Respondents, because the latter was registered before the former.

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29. For the foregoing reasons the Respondents respectfully submit that at all material times they ranked in priority before the Appellants in respect of the properties.

30. The second issue which arises on this Appeal relates to the procedure to be adopted in order to resolve the apparent conflict between the Orders of Court respectively obtained by the Appellants and the Respondents.

p. 9 31. In the Courts below the Appellants raised 10 objections to the method adopted by the Respondents, namely their Application by way of Summons in Chambers to set aside the Order obtained by the Appellants against the Defendant and to rectify the Registry of Deeds by the deletion of the registration of that Order. These objections were summarised by Mr. Justice Winslow as follows :-

p. 22 (i) that the Respondents were total 20 strangers to the Originating Summons in question and accordingly were not parties to it and should therefore obtain the leave of the Court if they intended to intervene;

(ii) that the Respondents have no locus standi in the matter at all and should apply for leave to intervene on the principles laid down in Jacques v. Harrison (1884) 12 Q.B.D. 165 as to the modes open by which a stranger to an action who is injuriously affected through any judgment suffered by a 30 Defendant by default can set a judgment aside.

(iii) that the grounds for setting aside the Order of Court in question have not been set out in the summons itself as required by Order 63 Rule 3.

32. The Respondents respectfully submit that these objections are ill-founded.

33. In the first place, the Respondents respectfully adopt the reasoning of the Federal 40 Court of Malaysia, that the Order obtained by

10 the Appellants was an Order obtained ex parte
under Order 51 Rule 6, that the Respondents
were persons affected by such an Order within
the meaning of Order 53 Rule 4 (1), and that
because of the priority of the Respondents
over the Appellants in respect of the
properties, the Respondents were essential
parties to the Originating Summons, so that
the failure to make the Respondents parties
rendered those proceedings a nullity and
entitled the Respondents to have the same set
aside, ex debito justitiae.

20 34. In the second place the Respondents
submit that if the Order of Court obtained by
the Appellants was not obtained ex parte but
under Order 28 Rule 15, that Order of Court
should nevertheless be set aside and the
registration thereof expunged as ordered by the
Federal Court of Malaysia. The Appellants
appear to rely upon the decision in Jacques v.
30 Harrison (1883) 12 Q.B.D. 165 and argued in the
Courts below that the Respondents should have
applied to intervene in the proceedings under
the Originating Summons. However, the
Respondents have done precisely what was done
by the Applicant in Jacques v. Harrison (op.cit)
and though in that case the Court of Appeal
held that the Defendant (as well as the
Plaintiff) should have been served with the
40 application to set aside, it is clear that that
Court did not consider that the failure to
serve the Defendant was a bar to setting aside
the judgments, for the Court did set the
judgments aside upon the terms that the
Defendant should be served with the order
setting aside and be at liberty to apply to
vary or discharge that order. The Respondents
accordingly submit that even if the Appellants
are right in their argument that Jacques v.
40 Harrison (op.cit) is applicable to this case,
this does not provide them with grounds for
resisting the relief sought by the Respondents,
for any defect in the proceedings arising from
the fact that the Defendant was not served can
be cured in the way done in Jacques v. Harrison
(op.cit) or by the power given to the Court

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under Order 16, Rule 11.

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35. In the third place, as to the objection raised that the Respondents' Summons did not set out the grounds for setting aside, the Respondents submit that Order 63 Rule 3 does not apply, for it is clear that that Order does not affect applications to set aside Orders of the Court which are a nullity - see the notes and cases cited in Mallal's Supreme Court Practice (1961) Volume I at pp.1120 et seq. 10
Furthermore, even if the grounds should have been set out in the Summons, failure to do so does not and should not defeat the Respondents in the present case: the Appellants were served with a copy of the Affidavit supporting the Summons, which set out the facts relied upon by the Respondents, so that the Appellants were in no way affected by the omission (if such it was) to state the grounds in the Summons: in truth, the Appellants' objection is really that the 20 grounds should have been in the Summons and not in the Affidavit, which is an objection of such technicality that in the Respondents' submission it should not be grounds for dismissing the Respondents' Application -- Order 70 itself gives the Court power to cure any such irregularity (if such it was) in such manner and upon such terms as it thinks fit and it is noteworthy that Mr. Justice Winslow did not see fit to rely upon this ground of objection when dismiss- 30 ing the Respondents' Application. In the Respondents' submission, this objection has no real substance.

36. In summary the Respondents submit that under the Courts Ordinance, the Registration of Deeds Ordinance and Order 41, they became entitled to seize and sell (through the Sheriff of Singapore) the properties of the Defendant. After such seizure (which in this case took place on 28th October, 1966) the only alienation 40 of the properties permitted (other than by the Sheriff for the Respondents) was by the leave of the Court pursuant to Order 41 Rule 7. The Appellants did not inform the Court of the seizure by the Respondents, did not ask the Respondents for their consent to the orders they

sought, and did not join the Respondents to their Originating Summons which, in effect, requested the Court to make an alienation of the seized properties notwithstanding Order 41 Rule 7. The Respondents submit that the failure of the Appellants to join the Respondents in the Originating Summons or to inform the Court of the rights of the Respondents, was not only a breach of Order 52 Rule 4 (2), the Respondents being a person falling within that Rule, but also completely vitiated the Order made on the Originating Summons. Accordingly the Respondents submit that both under the Rules of the High Court of Singapore and under the Registration of Deeds Ordinance they were and are entitled to the relief sought and obtained from the Federal Court of Malaysia, or to such other relief as will give effect to the priority of the Respondents over the Appellants in respect of the properties. The Respondents therefore respectfully submit that this Appeal should be dismissed for the following (amongst other)

R E A S O N S

- (1) BECAUSE at all material times the Respondents have ranked in priority over the Appellants in respect of the properties.
- (2) BECAUSE the Order obtained by the Appellants is a nullity and/or ought to be set aside and the registration of such Order expunged.
- (3) BECAUSE the Order obtained by the Appellants was obtained ex parte and/or by default and the Respondents should have been parties to the Originating Summons under which such Order was obtained.
- (4) BECAUSE the Respondents were injuriously affected by the Order obtained by the Appellants.
- (5) BECAUSE the Appellants should have sought the leave of the Court under Order 41 Rule 7 of the Rules of the High Court of Singapore to sell the properties.

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(6) BECAUSE the Appellants should have informed the Court of the rights of the Respondents in the properties.

(7) BECAUSE the fact that the Defendant was not served with the Summons taken out by the Respondents does not vitiate such Summons and service can (if necessary) be made of the Order obtained thereunder with liberty to the Defendant to apply.

(8) BECAUSE the other objections of the Appellants to the relief sought by the Respondents are ill-founded.

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(9) BECAUSE the Order of the Federal Court of Malaysia is right and should be affirmed. .

R.A. MAC CRINDLE

MARK SAVILLE

No. 31 of 1968

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

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Plaintiffs
- and -
TAY SOO TONG (trading as Twing
Bie Hang) Defendant

CASE FOR THE RESPONDENTS

COWARD, CHANCE & CO.,
St. Swithins House,
Walbrook, London, E.C.4.