

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT
KUALA LUMPUR (APPELLATE JURISDICTION)

B E T W E E N:-

HOE JOO SAWMILLS (sued as a firm) Appellant

- and -

SIGMA (AIR CONDITIONING) SDN BHD Respondent

C A S E FOR THE APPELLANT

10 1. This is an appeal from a judgement of the Federal Court of Malaysia holden at Kuala Lumpur (Lee Hun Hoe, C.J. Borneo, Raja Azlan Shah, F.J., Wan Suleiman, F.J.) dated the 3rd day of February 1979 dismissing the Appellant's motion for extension of time to serve the Notice of Appeal against an interlocutory judgement and order of the High Court in Malaya at Kuala Lumpur (Harun, J) dated the 13th day of April 1978 on the Respondent out of time.

The said High Court ordered:-

- 20 (a) that the Appellant and/or its servants or agents are carrying on business and/or residing on the said property without the Respondent's consent and licence and are therefore in wrongful possession thereof as trespassers; p.10-11
- (b) that the Appellant and all persons holding through or under it do forthwith quit and vacate the said property unlawfully occupied by them;
- (c) damages to be assessed and paid forthwith by the Appellant;
- (d) Costs to be taxed by the proper officer of the Court and when so taxed to be paid by the Appellant to the Respondent.

30 The Order included that the Appellant be given leave to appeal to the Federal Court against the whole of the decision.

2. The Appellant's Petition was presented in pursuance of an Order of the Federal Court, granting the Appellant Final Leave to Appeal to His Majesty The Yang di Pertuan Agong which was granted to the Appellant by the Order of the Federal Court p.36-37

dated the 19th day of September 1979 and it was further Ordered that the costs of and incidental to the Application be costs in the cause.

3. The facts briefly are as follows:-

- p.10-11 (i) This is a dispute over the service of Notice of Appeal against an interlocutory judgement of the High Court in Malaya at Kuala Lumpur (Harun, J.) dated the 13th day of April 1978. The Appellant was granted leave to appeal from the said interlocutory judgement on the same day and was required by Rules 7 and 13 of the Federal Court (Civil Appeals) (Transitional) Rules 1963 to file in the Registry of the Federal Court of Malaysia holden at Kuala Lumpur his notice of appeal within one month from the said interlocutory judgement and serve a copy of the same on the Respondent at the same time. 10
- p.13-14 (ii) Notice of Appeal was filed in the Registry of the said Federal Court on the 27th day of April 1978 but there is dispute over the service on the Respondent. 20
- p.15-16 (iii) In her affidavit dated the 29th day of May 1978 G. AMBIAVAGAR, the Appellant's Solicitor, affirmed that on the 5th day of May 1978 she had instructed her Chief Clerk to send by registered post the Notice of Appeal to the Respondent's Solicitor. G. AMBIAVAGAR also affirmed that it was not until the 17th day of May 1978 that she discovered the Notice of Appeal had not been received by the Respondent's Solicitor and that only upon checking with her Chief Clerk did she become aware that it had been sent by ordinary post instead of by registered post. G. AMBIAVAGAR further affirmed that on the 15th day of May 1978 she met the Respondent's Solicitor ANDREW HO and that he did not inform her that Notice of Appeal had not been received although on the same day he knew that she was applying for an Application for Stay of Execution of the said Order and Judgement of the High Court dated the 13th day of April 1978 to be heard within that week and that he in fact accompanied her when she made this request to the Learned Judge's Secretary. 30 40
- p.25-26 (iv) In her affidavit dated the 3rd day of August 1978 Miss SALLY LIM, Chief Clerk to the Appellant's Solicitor G. AMBIAVAGAR, affirmed that on the 5th day of May 1978 she had posted the said Notice of Appeal by ordinary post and had recorded 50

the fact of having posted the same in the firm's posted book (Exhibit A.1.)

(v) The Appellant applied by Notice of Motion dated 15th June 1978 in the said Federal Court of Malaysia for an Order that:

(i) the service of the notice of appeal on the Respondent/Plaintiff herein on 5th May 1978 be deemed as valid and effectual service of the same on the Respondent, or

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(ii) the time for service of the Notice of Appeal on the Respondent be extended and by amendment
be amended.

(iii) for special leave

PARTICULARS OF THE APPELLANT'S
APPLICATION

(a) The Respondent has not been put to any inconvenience or disadvantage even if the Respondent's solicitors had not received the Notice of Appeal as they were fully aware on receipt of the Application for Stay of Execution that Notice of Appeal had already been filed on behalf of the Appellant/Defendant.

p.16
para 9

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(b) The Respondent's Solicitor Mr. ANDREW HO of Messrs. Chor Pee & Hin Hiong had failed to inform the Appellant's Solicitor when they both met in connection with the Application for Stay of Execution relating to the same proceedings and by implication made her feel that the Appeal was on foot, on the 15th day of May 1978 and that Notice of Appeal had been received by them.

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para 10

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(c) The Respondent's Solicitors had knowledge of the fact that the Appellant's Solicitors had applied for the relevant documents from the High Court to compile the Appeal Record and for an extension of time to file the Petition of Appeal and that the Respondent's Solicitors had even consented to the said application for an extension of time to file the Petition of Appeal.

p.22
para 7

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(d) The Appellant contends that Rule 32(1) of The Federal Court (Civil Appeals) (Transitional) Rules 1963 is not mandatory because of the word "may" in the said rule and that service by ordinary post on the Respondent would be sufficient since there is evidence to show that the said Notice of Appeal had been posted by ordinary post on the 5th day of May 1978.

Exhibit A1
p.44

(e) It was further submitted that the Appeal filed against the Learned Judge's Order of the 13th day of April 1978 has merits namely, inter alia:

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para 8

(i) that the Appellant's Defence to the Respondent's

claim for vacant possession for an injunction to restrain the Appellant from remaining on or using or occupying the property known as C.T.1181 Lot 112 Section 83 Town and District of Kuala Lumpur and for damages was threefold, namely:

- (a) that the Respondent was aware of the Appellant's occupation of the said land and of the fact that in selling the said land to the Respondent Yee Wai Fong was acting in fraud of the Appellant's partners and/or in breach of an oral trust of the said land created by one LOW HOO STEW sometime on or around the 4th day of December 1971 and that the Appellant was therefore entitled to set aside the sale of the said land to the Respondent; 10
- (b) In the alternative that even if the said sale was held to be valid that the Appellant maintains that they were at all material times licensees of the said land and entitled to a reasonable time and reasonable compensation to vacate the said land in view especially of the fact that the Appellants occupied business premises and in these circumstances the Notice to Quit dated 19th November 1977 purportedly given by the Respondents to the Appellants was bad in law; and 20 30
- (c) Further and/or in the alternative a claim for indemnity from the said Yee Wai Fong and Hg Chee Cheong for such damages as the Appellants may be ordered to pay the Respondents, in the event that the Honourable Court order that vacant possession be given to the Respondent.
- (ii) The Learned Judge, however, struck off the Appellant's defence after having considered only the first point raised in the defence namely that the sale should be set aside. The Learned Judge, however, failed to take into consideration the other defences raised by the Appellant. 40
- (iii) Further, even in considering the defect that the sale should be set aside the Learned Judge erred in holding that it was unnecessary for him to consider the Affidavits of Low Chin Pan, Low Ding Hock and K. Mahendran sworn and filed therein on the 7th April 1978 (hereinafter referred to as "the said Affidavits") in making his decision on the Respondent's said application 50

to strike out the Defence and Counterclaim. The said three Affidavits were not in the court file on the hearing date although they had been filed on the 7th April 1978 and the Learned Judge declined to read the said Affidavits although the Appellant's Solicitor, G. Ambiavagar, handed him copies of the same.

10 (iv) The Learned Judge further erred in holding that the Appellant was precluded from adducing evidence which had not been adduced before the Honourable Court in an earlier proceeding regarding the said land in Originating Summons 620/76 wherein the said Low Chin Pan's claim as against the said Fee Wai Fong for an extension of a caveat lodged by him with respect to the said land was dismissed in spite of the fact that the Respondents herein had not pleaded either *res judicata* or *estoppel* in their Reply and Defence to Counterclaim.

20 (vi) In his judgement of 13th April 1978 the Learned Judge gave no reasons for coming to his decision that the Appellant and/or its servants or agents are carrying on business and/or residing on the said property without the Respondent's consent and licence and are therefore in wrongful possession thereof as trespassers and that the Appellant and all persons holding through or under it do forthwith quit and vacate the said property unlawfully occupied by them and that the Appellant do pay to the Respondent damages to be assessed and that the Appellant do also pay to the Respondent the cost of the suit to be taxed by a Proper Officer of the Court.

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p.11-12

40 (vii) The Appellant applied by Notice of Motion dated 15th June 1978 to the Federal Court of Malaysia to serve the Notice of Appeal against the Learned Judge's judgement and order of 13th April 1978 on the Respondent out of time. In dismissing the Appellant's Motion for Extension of time to serve Notice of Appeal on the 3rd February 1979 Raja Azlan Shah, Acting Chief Justice of Malaya, made *inter alia* the following findings:

p.17-18

50 (a) that the Appellant was unable to assert affirmatively the actual delivery and date of the delivery of Notice of Appeal on the Respondent

(b) that the proper person to make the affidavit would be the Clerk who posted the said Notice of Appeal but

if there was such a person, he or she did not affirm anything of this sort.

- (c) that the Appellant could not advance other grounds that the Court could properly regard as deserving its special leave to serve Notice of Appeal on the Respondent out of time.

4. The issues which arise in this appeal are as follows:-

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- (i) Whether the service of the Notice of Appeal on the Respondent on 5th May 1978 could be deemed as valid and effectual service of the same on the Respondent.
- (ii) Whether there are grounds in favour of the Appellant being granted special leave to serve Notice of Appeal on the Respondent out of time.
- (iii) Whether the Learned Acting Chief Justice of Malaya Raja Azlan Shah had adequately or at all considered all the evidence before him in coming to the findings referred to in paragraph 3(vii) above.

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5. The Rules that are relevant to the case of the Appellant are the undermentioned Federal Court (Civil Appeals) (Transitional) Rules 1963:

"6(1). Appeals to the Court shall be by way of re-hearing and shall be brought by giving notice of appeal.

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7. Notice of appeal shall be served on all parties directly affected by the appeal or their solicitors respectively at the time of filing the notice of appeal. It shall not be necessary to serve parties not so affected.

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13. No appeal shall, except by special leave of the full court be brought after the expiration of one month -

(a)

(b) in the case of an appeal against the refusal of an application, from the date of such refusal;

- (c) in all other cases, from the date on which the judgment or order appealed against was pronounced:

.....

32.(1) Service of any document under these Rules may be effected by:

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(a) Handing the document to the solicitor for the party to be served or to any person employed by the said solicitor or, where the party has no solicitor, to the said party in question; or

(b) Posting the document by prepaid registered post addressed to the solicitor for the party or where the party has no solicitor to the party at the address for service of the party furnished under rule 31 of these Rules.

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(2) Notwithstanding the provisions of the preceding sub-rule the Court or the Registrar may direct that any document may be served personally on any party. Such personal service shall be effected in accordance with the rules for the time being in force of the High Court within the territorial jurisdiction of which the party to be served is resident.

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(3) Where personal service of any document is directed and it is made to appear to the Court that prompt personal service cannot be effected the Court may revoke any such direction for personal service or make such order for substituted service by public advertisement or otherwise as may be just. "

6. The Appellant respectfully submits that the Learned Acting Chief Justice erred in coming to the findings referred to in paragraph 3(vii) above in that:-

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(i) There is evidence to show that Notice of Appeal had been posted by ordinary post on the 5th day of May 1978.

Exhibit A1
p.44

(ii) The Clerk referred to in the Learned Acting Chief Justice's judgement of 3rd February 1979 did make an affidavit dated 3rd August 1978 and affirmed that she had posted the Notice of Appeal by ordinary post on the 5th day of May 1978.

p.25-26

(iii) There are other grounds in favour of the Appellant being granted special leave to serve Notice of Appeal on the Respondent

p.15-17
p.21-24

out of time which were submitted by the Appellant's Solicitor in her affidavits of 29th May 1978 and 4th July 1978.

p.23-24
para 8

7. The Appellant further submits that the appeal filed against the Learned Judge's Order of the 13th day of April 1978 has merits as mentioned in paragraph 3(v)(e) above.

8. The Appellant therefore respectfully submits that this appeal should be allowed with costs and that the judgement of the Federal Court should be set aside.

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R E A S O N S

(i) Because the Federal Court wrongly concluded that the Appellant had not served Notice of Appeal within one month of the judgement of the High Court on the 13th day of April 1978.

(ii) BECAUSE the Federal Court failed to adequately or at all consider the merits of the Appellant's appeal against the said judgement of the High Court.

(iii) BECAUSE the Federal Court had wrongly concluded that there were no other grounds in favour of the Appellant being granted special leave.

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(iv) BECAUSE the Appellant should not be prejudiced for any irregularity in the conduct of his Solicitors serving Notice of Appeal on the Respondent within the specified time.

(v) BECAUSE the Appellant should be allowed to ventilate his case against the High Court Judgement in the Federal Court.

(vi) BECAUSE of the other reasons in the Judgement of the Learned Acting Chief Justice of Malaya, Raja Azlan Shah.

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Sir Charles Fletcher-Cooke, Q.C.

K.S. Nathan

No. 15 of 1980

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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B E T W E E N:-

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Appellant

- and -

SIGMA AIR (CONDITIONING) SDN BHD
Respondent

CASE FOR THE APPELLANT

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