

IN THE PRIVY COUNCIL

O N A P P E A L
 FROM THE SUPREME COURT OF HONG KONG
 (APPELLATE JURISDICTION)
 CIVIL APPEAL NO. 12 OF 1978

(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)

B E T W E E N :

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| 10 | DAVID NG PAL SHING MELVILLE EDWARD IVES HO CHAPMAN FERMAY COMPANY, LTD | <u>1st Appellant</u> <u>2nd Appellant</u> <u>3rd Appellant</u> <u>4th Appellant</u> | (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) |
| - and - | | | |
| 20 | LEE ING CHEE also known as LEE HAI HOCK | <u>1st Respondent</u> | (The Plaintiff in High Court Action No. 2459 of 1976) |
| | LEE KON WAH | <u>2nd Respondent</u> | (The Plaintiff in the High Court Miscellaneous Proceedings No. 155 of 1977) |
| 30 | MALAYSIA BORNEO FINANCE CORPORATION (M) BERHAD | <u>3rd Respondent</u> | (The Plaintiff in High Court Miscellaneous Proceedings No. 540 of 1977) |
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C A S E F O R T H E 1 S T A N D 2 N D R E S P O N D E N T S

Record

1. This is an appeal arising out of the decisions of the Supreme Court of the Colony of Hong Kong referred to in paragraphs 2 and 3 hereunder.

2. In the High Court, Mr. Justice Yang held in favour of the 1st Respondent, Lee Ing Chee, and the 2nd Respondent, Lee Kon Wah, and against:-

- (1) Choo Kim San also known as C.K. San, 1st Defendant.
- 40 (2) Asiatic Nominees, Ltd., (hereinafter 'Asiatic' 'Asiatic'), 2nd Defendant.
- (3) Triumphant Nominees Ltd., (hereinafter 'Triumphant'), 3rd Defendant.

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- (4) The present appellants who were respectively the 4th to 7th Defendants inclusive.
- (5) Chow Chaw-I (hereinafter 'Chow'), 8th Defendant.
- (6) Hwang Shang Pai, the wife of Chow (hereinafter 'Hwang'), 9th Defendant.
- (7) I.P.C. Nominees, Ltd., (hereinafter 'IPC'), a company whose entire issued share capital was beneficially owned by one James Coe, 10th Defendant. 10

The present appellants and IPC appealed to the Court of Appeal.

3. By the time the appeal was heard, James Coe had been added as a Defendant for the purposes of certain interlocutory relief not relevant to this appeal. He did not appeal. However, Rocky Enterprises Company Limited (hereinafter 'Rocky') and Siu King Cheung Hing Yip Co., Ltd., (hereinafter 'SKC') two companies controlled by James Coe, were added as appellants at the hearing of the appeal. The Court of Appeal upheld the appeal of IPC, Rocky and SKC (which was not resisted by any of the Respondents) but dismissed the appeal of the present appellants. 20

4. This appeal is concerned only with the position of the present appellants. It has nothing to do with James Coe, IPC, Rocky or SKC or with the reasons why the Court of Appeal found in favour of IPC, Rocky and SKC. The position of the present appellants is that, on the substantive question of whether or not Choo Kim San had sold them his beneficial interest in 15,000,000 shares in San Imperial Corporation, Limited (hereinafter 'San Imperial'), both Mr. Justice Yang and the Court of Appeal found against them. 30

History of the Proceedings

4. 5. Lee Ing Chee was the Plaintiff in High Court Action No. 2459 of 1976 in the High Court of Hong Kong. The Defendant was Choo Kim San. On 5th July, 1977, Lee Ing Chee signed judgment against Choo Kim San in default of appearance. That judgment was in the sum of M\$2,338,651.94 with interest thereon at the rate of 15 per centum per annum from 1st April, 1975, to 19th July, 1976, and thereafter at the rate of 6 per centum per annum until payment and together with costs in the sum of HK\$1,226. 40

6. Lee Kon Wah also took proceedings against Choo Kim San. Those proceedings were Civil Suit No. 2445 of 1976 in the High Court of Malaya at Kuala Lumpur. On 28th January, 1977, Lee Kon Wah signed judgment against Choo Kim San in default of appearance. That judgment was in the sum of M\$1,354,037.35 together with interest thereon at the rate of 12 per centum per annum from 1st October, 1976, until payment and together with costs in the sum of M\$120.00. This judgment was registered in the Supreme Court of Hong Kong under the provisions of s.4 of the Foreign Judgments (Reciprocal Enforcement) Ordinance, Cap. 319, on 31st March, 1977, in proceedings intituled High Court Miscellaneous Proceedings No. 155 of 1977.

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7. The 3rd Respondent, Malaysia Borneo Finance Corporation (M) Berhad (hereinafter 'MBF') also took proceedings against Choo Kim San. Those proceedings were Civil Suit No. 1631 of 1977 in the High Court of Malaya at Kuala Lumpur. MBF signed judgment against Choo Kim San in default of appearance. That judgment was in the sum of M\$9,036,831.58 together with interest thereon at the rate of 15 per centum per annum from 1st April, 1976, until payment and together with costs in the sum of M\$120.00. This judgment was also registered in the Supreme Court of Hong Kong under the provisions of s.4 of the Foreign Judgments (Reciprocal Enforcement) Ordinance, Cap. 319. It was registered on 19th August, 1977, in proceedings intituled High Court Miscellaneous Proceedings No. 540 of 1977.

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8. In the year 1976 Choo Kim San had been arrested in Hong Kong. He was arrested for and charged with various offences of fraud. On 28th October, 1976, he failed to answer to his bail. The 3 judgments mentioned above have not been satisfied. The Respondents have since attempted to execute their judgments upon assets of Choo Kim San in Hong Kong. Those assets included shares in San Imperial, registered in the names of Asiatic and Triumphant. San Imperial then had and still has an issued capital of 48,200,000 shares. This appeal is concerned only with 15,000,000 of those shares originally registered in the name of Asiatic (hereinafter 'the 15,000,000 shares'). These 15,000,000 shares were subsequently registered in the name of the 4th Appellant (hereinafter 'Fermay').

9. For convenience, the acquisition and disposition of shares (being choses in action) will hereinafter be referred to as the sale and purchase of shares. The 1st appellant

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| <u>Record</u> | (hereinafter 'David Ng'), the 2nd appellant | |
| 21 1.27-1.36 | (hereinafter 'Ives') and the 3rd appellant | |
| 22 1.1 -1.6 | (hereinafter 'Ho Chapman') claimed to have bought | |
| | or agreed to buy the 15,000,000 shares from Chow | |
| | and Hwang for a total consideration of | |
| 31 1.4 -1.20 | HK\$9,000,000 of which HK\$200,000 had been paid. | |
| | They (hereinafter 'the Syndicate') claimed also | |
| 30 1.29-1.36 | to have used Fermay and to have put the 15,000,000 | |
| 31 1.4-1.11 | shares into its name for the purposes of proving | 10 |
| | the validity of the certificates and of effecting | |
| | the sale and purchase. They claimed that they | |
| 24 1.20-1.39 | had sold the 15,000,000 shares to James Coe who | |
| 25 1.1-1.7 | had caused Rocky to enter into an agreement for | |
| 34 1.30-1.32 | that purpose (hereinafter 'the 12th May Agreement'). | |

10. On 15th July, 1977, in the actions of Lee Ing Chee and Lee Kon Wah (hereinafter collectively 'the Lees' save where reference is expressly only to one of them) Mr. Justice Li ordered, inter alia, that:-

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|---------|---|----|
| 5 - 7 | (1) The 15,000,000 shares do stand charged with | 20 |
| 12 - 14 | payment of the amounts of their judgments. | |
| | (2) The sum of \$8,800,000 allegedly due and | |
| | owing from the Syndicate to Chow and Hwang | |
| | but in fact due and owing to Choo Kim San | |
| | or so much thereof as sufficient to satisfy | |
| | those judgments be attached. | |

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|---------|--|----|
| 67 - 68 | These orders will respectively be referred to | |
| | hereinafter as the charging order nisi and the | |
| | garnishee order nisi. On 7th September, 1977, | |
| | Mr. Registrar Stapp made similar orders in MBF's | 30 |
| | action in relation to MBF's judgment. | |

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| 8 - 9 | 11. On 20th August, 1977, in the actions of the | |
| 15-16 | Lees, Mr. Justice Zimmern gave directions for the | |
| | trial of the issues between them on the one hand | |
| | and the Syndicate, Fermay and others on the other | |
| | hand. The issues were defined by Mr. Justice | |
| | Yang as follows:- | |

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| 1041 - 1042 | "The parties will agree that the real and | |
| | ultimate issues in this trial are:- | |
| | (1) whether on the dates that the charging | 40 |
| | orders nisi were made, C.K. San had | |
| | already divested himself of his | |
| | beneficial interests (if any) in any | |
| | or all of the San Imperial shares | |
| | referred to above, and | |
| | (2) if so, whether the purchase prices for | |
| | any of the shares were in fact payable | |
| | to C.K. San." | |

12. Those directions included, inter alia, the

following:-

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- (1) The Lees were to be the Plaintiffs.
- (2) The Statement of Claim was to be served on or before 23rd August, 1977.
- (3) The Defence and Counterclaim, if any, was to be served on or before 3rd September, 1977.
- (4) The Reply and Defence to Counterclaim, if any, was to be served on or before 8th September, 1977.
- (5) There was to be mutual discovery on oath on or before 22nd September, 1977.
- (6) The actions of the Lees were to be consolidated.

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On 23rd September, 1977, in the action of MBF Mr. Justice Yang gave similar directions and ordered that that action be heard together with the consolidated actions of the Lees.

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13. The pleadings in the consolidated actions were served as follows:-

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- (1) Consolidated Statement of Claim, 23rd August, 1977. 17 - 27
- (2) Defence and Counterclaim of the Syndicate and Fermay, 3rd September, 1977 and of IPC 5th September, 1977. 28 - 36
37 - 45
- (3) Reply and Defence to Counterclaim 12th September, 1977 46 - 48,
49 - 51
- (4) Rejoinder of the Syndicate and Fermay, 19th October, 1977, and of IPC, 20th October, 1977. 62
63
- (5) Surrejoinder, 20th October, 1977. 64

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14. The matter came on for hearing before Mr. Justice Yang on 10th October, 1977, and continued until 5th December, 1977. It is to be noted that the time allotted for the pleadings was very short. So, for instance, the consolidated Statement of Claim was to be served and was in fact served in 3 days. The Rejoinder of the Syndicate and Fermay was served on 19th October, 1977, that of IPC on 20th October, 1977 and the Surrejoinder on 20th October, 1977, which was 9, 10 and 10 days respectively after the commencement of the hearing before Mr. Justice

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Yang. Notwithstanding the order for discovery, the Syndicate and Fermay did not complete such discovery as they did make until well into the trial. For example:-

- (1) The Defendants' common bundle of documents (Yellow Files 1, 2 and 3) was not disclosed until leading Counsel for the Lees was half-way through his opening.
- 766 1.2
1035 1.10-1.12 (2) Yellow File 4 - the file of documents relating to the sale by San Imperial of Oceania Finance and Land Corporation Limited to SKC (whose Chairman and majority shareholder was James Coe) until at least 3 weeks after the commencement of the trial. 10
- 710 1.26
1007 1.9-1.12
1008 1.13-1.14
1035 1.11 (3) Certain relevant bank account statements and cheques were disclosed only 3 or 4 weeks after the commencement of the trial and only after persistent requests by leading Counsel for MBF.
- 734 - 736
1035 1.11-1.12
1123 1.25 -1.34 (4) The blue card and computer printouts relating to the holding of MAF Corporation (another company controlled by Choo Kim San by himself and his nominee, one Ho Chung Po) in San Imperial shares were not disclosed until even later despite repeated efforts by MBF's lawyers to have access to the same. 20

1035 1.8-1.16
1036 1.20-1.22
1042 1.27-1.30 The hearing was continually and severely hampered by the reluctance of the Syndicate and Fermay to make discovery and they never did make full discovery. In all of the circumstances it was agreed during the hearing that the parties should not be bound strictly by their pleadings provided that they kept within the broad concepts of them. 30

The nature of the proceedings and the issue before Mr. Justice Yang and the Court of Appeal.

18 1.22-1.23
19 1.12-1.14
1.28-1.33
22 1.7 - 1.8
23 1.10-1.17
651
1022 1.39-1.41
1041 1.10-1.18
1116 1.3-1.14
1118 1.43 -
1119 1.3
1121 1.1 -1.3 15. The case for the Lees was that the beneficial interest in the 15,000,000 shares remained in Choo Kim San at all material times. It was their case that Chow and Hwang were nominees of Choo Kim San and that the Syndicate was also a nominee of Choo Kim San which used Fermay simply as a further measure to mask that beneficial interest of Choo Kim San. It was therefore their case that the agreement by which the Syndicate had purported to purchase or agree to purchase the 15,000,000 shares from Chow and Hwang was a sham which gave no interest, beneficial or otherwise, to the Syndicate and that all the transactions involving Fermay were also sham. 40

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30 1.29-1.36
31 1.1 -1.20
33 1.2 -1.3

16. The case for the Syndicate was that they had purchased or agreed to purchase the 15,000,000 shares. They claimed that they had purchased or agreed to purchase them not from Choo Kim San but from Chow and Hwang in Taipei. It was therefore their case that the beneficial interest in the 15,000,000 shares was theirs. They claimed to have sold the 15,000,000 shares under the 12th May Agreement for their own benefit.

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17. The proceedings between the Lees on the one hand and the Syndicate and Fermay on the other hand were therefore simply execution proceedings. They claimed to have made absolute the charging order nisi alternatively the garnishee order nisi made by Mr. Justice Li on 15th July, 1977. The Syndicate and Fermay resisted the making absolute of either of those orders in the hearing before Mr. Justice Yang and the making absolute of the charging order nisi before the Court of Appeal. In the Court of Appeal the Syndicate and Fermay no longer resisted the making absolute of the garnishee order nisi and did not contest whether Chow and Hwang had been acting as the nominees of Choo Kim San. The only issue in the Court of Appeal as between these parties was therefore whether or not the Syndicate and Fermay ever had the beneficial interest in the 15,000,000 shares.

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1119 1.19-1.23

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The issue in the present appeal.

18. The only issue in the present appeal as between the Lees on the one hand and the Syndicate and Fermay on the other hand is whether the Syndicate and Fermay ever had the beneficial interest in the 15,000,000 shares or whether they were acting as the nominees of Choo Kim San. The present appeal is concerned only with the question of whether or not the Court of Appeal was right in dismissing the appeal of the Syndicate and Fermay, that appeal being purely one of fact. The present appeal is not concerned with the upholding of the appeal of IPC, Rocky and SKC or the reasons therefor. For the reasons given in paragraphs 22 to 29 of the 3rd Respondent's case, the Court of Appeal's order may not correctly reflect the judgments of the Court of Appeal. The Lees adopt those paragraphs.

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The case for the Syndicate and Fermay.

19. With the exception that before Mr. Justice Yang the Syndicate and Fermay contested the making absolute of the garnishee order nisi and

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refused to accept that Chow and Hwang were acting as nominees of Choo Kim San, the case for the Syndicate and Fermay was the same in the Court of Appeal as it had been before Mr. Justice Yang. The following paragraphs namely paragraphs 20 to 40 summarise the case which the Syndicate and Fermay sought to make.

- 1043 1.34- 20. David Ng is a stockbroker. At the material
1044 1.1 time Ives was practising as a solicitor as a
1044 1.2-1.9 partner in the firm of Peter Mo & Co., solicitors. 10
1044 1.10-1.14 Ho Chapman was a semi-retired businessman. These
800 1.5-1.7 3 appellants formed themselves into a syndicate for
the purposes of acquiring a controlling interest
224 1.27-1.30 in San Imperial and selling it on for a profit.
David Ng was to do the 'legwork'. Ives was to
supply the legal expertise. Ho Chapman was to be
concerned with finance. It is not clear exactly
997 1.1-1.24 when the Syndicate was formed but it was at the
latest in December of 1976.
- 223 1.37-1.41 21. On 9th November, 1976, James Coe made an 20
approach to Ives and asked whether it would be
possible to obtain a controlling interest in San
223 1.43-1.46 Imperial. About a week later James Coe made a
224 similar approach to Ho Chapman. Thereafter but
224 1.34-1.40 before the Syndicate was formed and before it
met for the first time David Ng had made a search
of the register of San Imperial and had discovered
483 1.43 - that the largest shareholding was registered in
484 1.3 the name of Asiatic which he knew to be a nominee
company holding shares for Choo Kim San. 30
- 224 1.41 - 22. The Syndicate first met in December of 1976.
225 1.4 They had three problems, namely (1) the whereabouts
of Choo Kim San, (2) whether they could properly
deal with him, he being a fugitive from justice,
and (3) whether he had 'milked' San Imperial so
that the shares might be worthless. It was
225 1.15-1.21 decided at this meeting that since David Ng was
& 1.26 taking his family to Bangkok for a holiday over
484 1.26-1.28 Christmas he should take the opportunity to see
if Choo Kim San was there. Subsequently, David
484 1.5-1.19 Ng did go with his family to Bangkok but he was
unsuccessful in locating Choo Kim San there.
- 487 1.12-1.15 23. On 30th December, 1976, David Ng went to
& 1.34-1.38 Taipei to look for Choo Kim San. On the morning
487-489 1.24 of 31st December, 1976, he went to the coffee shop
1304-1305 of the President Hotel which is frequented by
visitors from Hong Kong and there he was
immediately fortunate enough to see Choo Kim San
who was with a woman introduced as his wife.
Choo Kim San told David Ng he had already sold 50
489 his San Imperial shares 'in about November' to
Chow. Choo Kim San's 'wife' then arranged for a
Miss Lau to attend. It was Miss Lau who had

introduced Chow and Hwang to Choo Kim San. Miss Lau then arranged an appointment with Chow for David Ng.

Record

- 10 24. The meeting between David Ng, Miss Lau, Chow and Hwang took place the same day. At that meeting Chow asked David Ng whether the shares in San Imperial were hotel shares! He also asked David Ng about the general situation of hotel business in Hong Kong. He said that he had '10 million odd shares' or 'about 15 million'. He asked David Ng what the price of the shares was. No agreement for the sale and purchase of the shares was concluded.
- 20 25. David Ng returned to Hong Kong on 1st January, 1977. On 3rd January, 1977, he telephoned Ives and said, 'Mr. Ives, I am back from Taiwan and I have located Mr. Choo Kim San. It is likely we are in business'. David Ng also spoke to Ho Chapman on the same day. A meeting of the Syndicate was arranged for the next day. After his telephone conversation with David Ng, Ives dictated a telex seeking advice from London Counsel. This telex was not despatched until 4.44 p.m. on 4th January, 1977. A reply was received from London by telex on 5th January, 1977.
- 30 26. At the meeting of the Syndicate on 4th January, 1977, David Ng reported, It was then decided by the Syndicate that they would also begin to buy San Imperial shares on the market to ensure that they could offer a controlling interest in that company.
- 40 27. On 9th January 1977, David Ng again went to Taipei, staying there until the 13th of that month. He went because Chow had telephoned him on the 7th of that month. In Taipei he saw Chow who asked for a price of 'over one dollar' per share. David Ng said that he would discuss it if the price was 40 cents. On this second visit to Taipei David Ng asked Chow to show him the share certificates. Chow showed him a bundle and David Ng saw that they were shares in San Imperial in the name of Asiatic. David Ng asked him 'Are these certificates genuine ones or sham ones.' Chow did not show him any instrument of transfer. Chow simply said that he had bought them like that and David Ng advised him to have them examined. David Ng was in earnest about whether the certificates were valid.
- 50 28. On his return to Hong Kong David Ng reported to the Syndicate. He mentioned the possibility that the share certificates might

490 1.42-
1.43
491 1.14-1.16

648 1.27-1.31
492 1.17-1.19
648 1.34-1.36

493 1.7-1.31

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494 1.21 -
495 1.1

497 1.42
497 1.11-1.14
497 1.26-1.37
504 1.40-1.41
498 1.26-1.34

498 1.38
499 1.16
500 1.1-1.3

500 1.10-
1.18

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500 1.25-1.28 & 38 - not be genuine. Ives then suggested that the certificates might be taken to the registrars of San Imperial for examination. David Ng felt that
501 1.4 Chow would not give him a few certificates to
501 1.10-1.22 bring back to Hong Kong for examination. Ho Chapman then suggested that the shares could be tested by using them to obtain a bank loan.
501 1.24-1.25 David Ng claims that 'In stock business, actually this is the simplest way in examining share certificates'. The Syndicate then discussed the price. 10

501,503 29. David Ng made a third trip to Taipei between 23rd and 27th January, 1977. On this trip David
501 1.33-1.41 Ng accompanied Chow to both the First National City Bank and the Chase Manhattan Bank in Taipei to test the share certificates by trying to obtain a loan against them as security. The banks refused and Chow and David Ng were advised to try in Hong
649 1.37 Kong. On this trip also David Ng asked to see the transfer forms. He was shown them and took Xerox copies back to Hong Kong. On this trip Chow said that friends of his also had 515,000 shares which they wanted to sell. These were to be sold together with the 15,000,000. 20

505 1.10-1.11 & 1.31
649 1.40-1.41 30. David Ng reported to the Syndicate on his return from his third trip. He asked Ives to prepare a draft agreement for the purposes of discussion with Chow. Ives did so. The draft agreement provided for the sale and purchase of 15,515,000 shares at a price of 60 cents per share. 30
1279 Payment was to be in 9 instalments. Clause 4 of that draft agreement provided that:-

'On the signing of this agreement the Vendor shall deposit with Messrs. Peter Mo & Co. as stakeholders duly signed transfers in blank in respect of 15,515,000 shares together with the relevant share certificates pending completion of this transaction. Should the Purchasers fail to make payment of any instalment on due date the Vendor shall be entitled to call upon Peter Mo & Co. to return to the Vendor the transfers and certificates'. 40

506 1.37-1.41 31. David Ng then took a fourth trip to Taipei from 9th to 13th February, 1977, during which he discussed the draft agreement with Chow. Chow said that it was unreasonable and therefore no discussion was necessary. Chow was objecting to both the price and the terms of payment. 'Just about everything was wrong.' Chow asked for 80 cents a share but David Ng refused. On this visit David Ng agreed to buy the 515,000 shares of the friends of Chow, namely, Lee and Fong, at 20 cents a share. There were in fact only 514,200 50

| | | <u>Record</u> |
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| | shares but payment was to be on the basis of 515,000 with stamp duty and brokerage to be deducted from the purchase price. David Ng promised to pay the money on his next trip. David Ng was concerned about whether the certificates were genuine so it was agreed that the sale would be through Chow to whom David Ng could look for repayment if the certificates were not genuine. | 511 1.17-1.18 507 1.32-1.37 644 1.20-1.34 |
| 10 | 32. When David Ng returned to Hong Kong from his fourth trip he again reported to the Syndicate. It was agreed that the 515,000 shares were to be for David Ng's benefit and at his risk but they were to be sold together with the shares. At Ives' suggestion it was agreed that Chow should be asked to transfer the shares to a company to be formed in Hong Kong so that if the transfer were accepted by the registrars the certificates would have been proved to have been genuine. | 511 1.24-1.26 512 513 1.4-1.5 513 1.7-1.10 |
| 20 | 33. David Ng then made a fifth trip to Taipei between 27th February, 1977, and 2nd March, 1977. On this trip Chow agreed with the plan to use the Hong Kong Company. There was further discussion about the price of the shares. Chow demanded 80 cents per share and David Ng offered 60 cents. There was no conclusion. On this trip David Ng paid Chow for 515,000 shares and was given the transfers and certificates therefor. Chow said that his friends, Lee and Fong, had a further 1,650,000 San Imperial shares that they wished to sell. David Ng agreed to buy them at 20 cents per share with the stamp duty and brokerage to be deducted from the purchase price. Again, David Ng wanted the transaction to be done through Chow for the same reason as before. David Ng promised to pay for the 1,650,000 shares on his next trip. | 513 1.19-1.24 513 1.39-1.40 515 1.20-1.24 & 1.32-1.35 514 1.23-1.25 515 1.12-1.17 514 1.28-1.31 |
| 30 | | |
| 40 | 34. Upon David Ng's return to Hong Kong he again reported to the Syndicate and it was agreed that the 1,650,000 shares would be his. He reported that he had been unsuccessful in relation to the shares. On 5th March, 1977, Chow telephoned to David Ng to say that he would sell the shares at 60 cents each. David Ng reported to the Syndicate and preparations were made:- | 518 1.18- 1.20 519 1.18-1.25 |
| 50 | (1) On 8th March, 1977, Fermay was incorporated. | 519 1.34-1.35 |
| | (2) A further agreement for the purchase of the shares was drawn up. | 1150-1151 |

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- 520,1224,1225 (3) 2 blank instruments of transfer were obtained.
- 520 1.13-1.14 35. David Ng then made his sixth trip to Taipei
530 1.16-1.23 between 22nd and 26th March, 1977. He paid Chow
520 1.20-1.23 for the 1,650,000 shares. He met Chow and
explained to him that Fermay would be used for
522 1.34-1.39 the purposes of transferring the shares. He
explained that since Chow and Hwang were the
shareholders of Fermay they would still own the
525,1150-1151, shares when they were transferred to Fermay. 10
526 The agreement was then signed but the figures
347 1.8-1.10 therein were left blank. No copy was left with
529 1.9-1.13 Chow and Hwang at that stage. Chow and Hwang
1224, 1225 executed the 2 blank instruments of transfer and
529 1.17-1.19 handed them to David Ng. These were to be used
to transfer the shareholdings of Chow and Hwang in
Fermay to the Syndicate.
- 1144 36. In Hong Kong on 23rd March, 1977, the
original subscribers of Fermay appointed Chow and
1145, 1146 Hwang the first directors of Fermay and held an 20
extraordinary general meeting and resolved that
the issued capital be increased to \$9,000,000 by
the issue of 8,999,000 shares (in error for
8,999,998 shares) to be issued at such time or
times and on such terms and conditions as the
Board of Directors may think fit.
- 1147 37. In Taipei on the same day, 23rd March,
1977, Chow and Hwang held a meeting of the board
of directors of Fermay and resolved that:-
- (1) The company should purchase the 15,000,000 30
shares from its shareholders for a total
price of \$9,000,000.
- (2) The capital of the company be increased to
\$9,000,000.
- (3) The new shares to be allotted to the
shareholders and that the proceeds be
used to pay for the purchase by the
company of the shares.
- 1149 On the same day the new shares were allotted to 40
Chow and Hwang.
- 1148 38. At the same meeting of the board of
directors in Taipei, Chow and Hwang resolved
that:-
- '... Messrs. David Ng, Ho Chapman and
Melville Ives acting jointly or any one
or more of them acting singly shall be
authorised signatories of the Company for
the purposes of entering into any contract
or signing on behalf of the Company any

document receipt contract bought and sold note transfer or any other document of any nature whatsoever and the signature of any one of them shall be binding on the Company.'

Record

This was resolved at David Ng's request.

525 1.3-1.6

39. On this sixth trip it was also agreed between David Ng and Chow that the Syndicate would pay a deposit of \$200,000. However, stamp duty and brokerage were to be deducted therefrom leaving a net sum of \$92,000 payable by the Syndicate to Chow and Hwang. This was paid and it was agreed that Chow would arrange for the certificates and the transfer forms of the shares to be delivered to the registrars of San Imperial.

528 1.13-1.14
& 1.25-1.26

529 1.2-1.7
536 1.23-1.26
647 1.10-1.11

40. Chow and Hwang also signed and gave to David Ng an undated letter addressed to Fermay and staing:-

570 1.28-1.39
571 1.1-1.10
1226

'We, the undersigned, hereby tender our resignations from the Board of Directors and should be grateful if you would kindly accept the same.'

On 20th May, 1977, in Taipei Chow and Hwang held a meeting of the board of directors of Fermay and resolved that:-

571 1.10-1.32
1194

'For the sake of convenience we appoint David Ng Pak Shing to be Managing Director of this company and delegate to him all authorities which we have as directors including authority to affix the seal of the company to documents as he shall think fit.'

41. The 15,000,000 shares were eventually delivered to the registrars of San Imperial (by means not disclosed to the Court). At that time the registrars were M.A.F. Corporation, (HK) Ltd. At the time that company was under the control and management of one Ho Chung Po (who was at all material times the servant and agent of Choo Kim San). On 26th March, 1977, David Ng telephoned the registrars to ask whether the certificates had been delivered and was told that they had not. Subsequently the registrars telephoned Ives who gave them the address of Fermay. The registrars sent to Ives the transfer forms in relation to the 15,000,000 shares and he inserted the particulars and returned the forms to the registrars.

375 1.3-1.16
536-537,647,652
744-746,750.
375 1.19
375 1.29 - 1.34
1064 1.2-1.7
536 1.31-1.32
233 1.21-1.30
375 1.5-1.10

Record

- 1170-1174 42. On these facts the Syndicate claimed that Chow and Hwang (as well as Lee and Fong) were acting on their own behalf and not on behalf of Choo Kim San, although this was not pursued in the Court of Appeal. They claimed that they were acting for themselves and not on behalf of Choo Kim San and they claimed that they had sold (on their own behalf) the 15,000,000 shares to James Coe under the 12th May Agreement.
- The Case for the Lees (1) that Chow and Hwang (and Lee and Fong) were not selling on their own behalf. 10
- 1058 1.21-1.27 43. It was the case of the Lees that Chow and Hwang (and Lee and Fong) were not selling on their own behalf but as the agents or nominees of Choo Kim San. It was also the case of the Lees that the Syndicate knew this. Mr. Justice Yang stated, inter alia, in his judgment that:-
- 'In my judgment the 23rd March 1977 agreement was, on creditability 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 remain in C.K. San.' 20
- 1150-1151 1121 1.26-1122 1.13 It was argued by the Syndicate in the Court of Appeal that Mr. Justice Yang had held that because Chow and Hwang acted as C.K. San's nominees and because the Syndicate knew them to be so acting the agreement by which the Syndicate bought from them was a sham. That was not correct. The correct interpretation of this passage of the judgment was given by Pickering, J.A., in the Court of Appeal. 40
- 1150-1151 44. It was never the case of the Lees that the agreement by which the Syndicate purchased from Chow and Hwang was a sham because the Syndicate knew that Chow and Hwang were acting as the nominees of Choo Kim San. Notwithstanding that in the Court of Appeal the Syndicate no longer maintained that Chow and Hwang were not acting as the nominees of Choo Kim San, it is important to note the overwhelming factors demonstrating that they were and that the Syndicate must have known that they were, notwithstanding their denials. 50
45. Those factors were as follows:-

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|----|-----|---|-------------------------|
| | (1) | It was never alleged that David Ng or any other member of the Syndicate had ever been shown any documentary evidence that Chow and Hwang had bought the 15,000,000 shares from Choo Kim San. | <u>Record</u> |
| | (2) | After their alleged purchase by Chow and Hwang the 15,000,000 shares remained registered in the name of Asiatic. | |
| 10 | (3) | According to the hearsay notices of the Syndicate and Fermay, it would be a violation of Central Bank regulations for an individual in Taipei to purchase shares in a Hong Kong company and the penalty for violation of foreign exchange control regulations is 'between not more than 7 years imprisonment or death.' | 1232 1230 |
| | (4) | Chow had never met Choo Kim San before purchasing the 15,000,000 shares. He was introduced to Choo Kim San for that purpose. | 113B, 1304 1.20-1.23 |
| 20 | (5) | Chow knew nothing about the shares, their value, San Imperial, or the hotel business in Hong Kong. He did not even know that they were shares in a hotel company. Thus he asked David Ng. | 491 1.7-1.30 |
| | (6) | They appear never to have tried to authenticate the certificates. | |
| | (7) | Although the 15,000,000 shares were in the name of Asiatic they never enquired whether or not Choo Kim San was the true owner. | |
| 30 | (8) | Chow told Lee Ing Chee that:- | 61, 1277-1278 |
| | | (a) He would have no money to buy shares. | |
| | | (b) He knew nothing of any transaction by which 15,000,000 shares in San Imperial or any of them had been purchased. All he knew was that a relative in the United States of America had told him that he (the relative) had bought or agreed to buy some shares and wished to use Chow's name. | |
| 40 | | (c) He did not know when any such sale had taken place nor the price per share. | |
| | | (d) He had never heard the name 'San Imperial'. | |
| | | (e) He had never met David Ng. | |

Record

(f) He had not signed any agreement for the sale and purchase of the shares although he had signed a document at the request of a relative without knowing the contents thereof.

(g) He claimed not to know through which bank any such transaction may have taken place.

(h) He had no knowledge of Fermay, its incorporation or how the capital thereof was paid. 10

(i) He had received nothing upon any alleged sale of Fermay by him and Hwang to David Ng, Ives and Ho Chapman.

(9) They never appear to have been in possession of all the certificates, nor do they ever appear to have been in possession of certificates and transfer forms at the same time.

(10) They did not appear in the proceedings and made no attempt to take part therein. 20

(11) They made no attempt to enforce payment of the money allegedly due to them or to recover the share certificates, despite the fact that the date of completion specified in the agreement had long passed (on 29th June, 1977).

(12) Choo Kim San habitually used nominees.

46. It is not believable that Chow and Hwang bought the 15,000,000 shares from Choo Kim San when they did not know him and when they knew nothing of San Imperial or its prospects at the risk of imprisonment if not death. If Chow was being truthful in what he told Lee Ing Chee as set out in paragraph 45(8) above, he was never concerned with the 15,000,000 shares. If he was being untruthful it is probable that he was protecting Choo Kim San. Mr. Justice Yang found as a fact that they were nominees of Choo Kim San. This was upheld by the Court of Appeal. 30

1058 1.22-1.25
1097 1.29-43
1119 1.8-1.21

1060 1.20-1.27
1062 1.41-1.43
1097 1.45-1.47
1111 1.3-1.6
511 1.10-1.23
515 1.9-1.39
657 1.9-
658 1.13
744 1.17-1.44
530 1.16-1.39
1212-1215

47. Insofar as Lee and Fong are concerned the same comments apply and the only evidence put forward by the Syndicate and Fermay was that they sold their shares at a price of 20 cents each less stamp duty and brokerage for cash. The 514,200 shares were registered in the name of Asiatic and the 1,650,000 shares were registered in the name of Triumphant. Despite the fact that David Ng had been warned that the certificates for these shares might have been forged, he did not get a receipt for the purchase 40

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price (which he paid in cash) nor did he try to authenticate at least some of these certificates as soon as he had brought them back from Taiwan; instead these shares were transferred into the name of M.A.F. Nominees, Ltd. on 29th March, 1977.

Record

The Case for the Lees (2) that the Syndicate knew that Chow and Hwang (and Lee and Fong) were nominees of Choo Kim San

- 10 48. The factors set out in paragraph 45 hereof are overwhelmingly to the effect that Chow and Hwang (and Lee and Fong) were nominees of Choo Kim San. It is not believable that a stockbroker, a solicitor and a semi-retired businessman could ever have thought otherwise. Yet at the hearing before Mr. Justice Yang Ives maintained that although at one stage he suspected that Chow and Hwang were nominees of Choo Kim San eventually he became satisfied that they were not.
- 20 49. The reasons advanced by Ives for being so satisfied were as follows:-
- (1) The negotiations were very protracted. If Choo Kim San had been 'behind the deal' he was sure that 'the works would have been oiled to facilitate those problems' for instance by putting the 15,000,000 shares into the name of a Hong Kong party other than Asiatic. 329 1.32-1.39
330
- 30 (2) Nothing concrete was given by Chow and Hwang to the Syndicate to satisfy them of the validity of the certificates. 330 1.8-1.9
- (3) Nothing was forthcoming as to the net worth of San Imperial. 330 1.16-1.17
- (4) There was co-operation by Chow and Hwang but no inspiration by them. 330 1.25-1.26
- 40 The negotiations would have been protracted if Chow and Hwang were nominees of Choo Kim San, for Choo Kim San would have wanted to get as much as he could. In fact the transfer of the 15,000,000 shares from Asiatic to Fermay took only 1 day whereas it usually would take a much longer time to effect a transfer. The fact that Chow and Hwang gave nothing concrete to satisfy the Syndicate of the validity of the certificates and came forward with nothing as to the net worth of San Imperial shows that they could not have bought the 15,000,000 shares. It therefore shows that they were acting as nominees for Choo Kim San. The reasons advanced by Ives should 23 1.28-1.35
375 1.8-1.16
665 1.21-666

Record

have convinced him that Chow and Hwang were the nominees of Choo Kim San.

1054 1.1-1.6 50. At one stage in the proceedings before Mr.
1099 1.28-1.32 Justice Yang, David Ng admitted that he was
1121 1.13- buying shares from nominees of Choo Kim San. It
1.15 may be that David Ng meant to refer to the San
Imperial shares sold to the Syndicate by M.A.F.
Corporation, (HK) Ltd., which was controlled by
Ho Chung Po, a known servant or agent of Choo
Kim San.

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575 1.37-1.43 51. In any event there can be no doubt that
David Ng knew that Lee and Fong were nominees of
Choo Kim San. David Ng was of humble origins,
having been brought up in an orphanage and
never having had any formal education. He
attended evening classes. He began his working
life at the age of 15 as an office boy. He was
576 1.4-1.5 42 years of age when he was cross-examined in
575 1.32 December of 1977. He estimated that after
working for 26 years up to late 1976 he was
worth about \$1,500,000.

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583 1.6-1.8 52. David Ng paid for a total of 2,165,000
shares from Lee and Fong being 515,000 on his
515 1.20- fifth visit (27th February to 2nd March, 1977),
1.24 and 1,650,000 on his sixth visit (22nd to 26th
530 1.16-1.21 March, 1977). At 20 cents per share he
therefore paid a total of \$433,000, a sum closer
to one third than one quarter of his accumulated
wealth after 26 years of work.

53. There is no evidence that David Ng knew
anything about Lee and Fong when he bought those
shares from them except that they were friends
of Chow. There is no evidence as to how and why
Lee and Fong should have bought those shares or
that David Ng ever enquired of them. If David
Ng's evidence is true at all he distrusted them
sufficiently to require that the sale should go
through Chow to whom he could look for his money
if the certificates proved not to be genuine.
But he had no reason to trust Chow any further,
having met him for the first time only on 31st
December, 1976. He had no more reason to assume
that the share certificates of Lee and Fong were
genuine than he had to assume that those of Chow
were genuine. Yet he risked nearly a third of
his accumulated wealth without making any
attempt whatsoever to test the genuineness of
the certificates. He did not even ask for a
receipt for the purchase price which he paid in
cash.

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655 1.47- 54. Not only did David Ng fail to take any
657 1.48 steps to test whether or not the share
certificates of Lee and Fong were genuine before

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| | be bought them but he took no steps thereafter until 29th March, 1977. Instead of taking them to the registrars of San Imperial as soon as possible he allowed an employee to put them in his office safe. He never enquired of his employee whether or not those shares had been transferred. One reason he gave was that he was waiting for the market price to fall to 20 cents before drawing up a bought and sold note. Another reason which he gave later was that he had 'overlooked' the matter. This notwithstanding that Lee and Fong were to pay stamp duty. | <u>Record</u> 744 1.17-1.44 1212-1215 |
| 10 | | 516-518 |
| | | 595 1.14-602 |
| | | 757 1.4-759 1.20 |
| | 55. In all of the circumstances, the explanation for David Ng not being concerned to test whether the certificates were genuine can only be that:- | |
| | (1) He knew the shares came from Choo Kim San. | |
| 20 | (2) He knew that Lee and Fong were nominees of Choo Kim San. | |
| | (3) He himself was a nominee of Choo Kim San. | |
| | There can be no other credible explanation. | |
| | 56. Both Ives and David Ng knew that Choo Kim San used nominees:- | |
| | (1) Ives admitted he knew Choo Kim San used nominees although he did not know why he used nominees. He agreed that it was possible that Choo Kim San used nominees in order to avoid execution. | 315 1.10-1.49 |
| 30 | (2) Ives had prepared a number of deeds of trust which were executed by Choo Kim San's nominees, including Ho Chung Po. | 317 1.32 319 1.11 |
| | (3) David Ng knew that Choo Kim San used nominees, both companies, such as Asiatic, and individuals, such as Ho Chung Po, to hold his assets. | 615 1.17-1.18 616 1.30 - 619 1.20 |
| | <u>The Case for the Lees (3) that the Syndicate was also acting as the nominee of Choo Kim San.</u> | |
| 40 | 57. There could be no legitimate reason for the Syndicate to deny that Chow and Hwang were or that they knew that they were acting as nominees of Choo Kim San. Ives received a telex advice from London on 5th January, 1977, to the effect that it would not be an offence for the Syndicate to buy the shares from Choo Kim San. The only credible explanation for the Syndicate to deny the fact or knowledge of the | 328 1.46-1.49 329 1.1-1.2 642 1.8 1211 |

Record

fact that Chow and Hwang were acting as nominees of Choo Kim San was that they were trying to protect the interest of Choo Kim San.

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| 352-353 | 58. If the agreement by which the Syndicate bought the 15,000,000 shares from Chow and Hwang had been a genuine one between principals there was no reason why the Syndicate should have resisted the making absolute of the garnishee order nisi. It should not have mattered to them whom they paid. Ives claimed that he felt the Syndicate had a duty to resist the order absolute notwithstanding that Chow and Hwang did not attempt to take any part in the proceedings before Mr. Justice Yang. Ives conceded that he was not concerned with any question of double jeopardy. The only credible explanation for the Syndicate resisting the making absolute of the garnishee order nisi was that they were trying to protect the interests of Choo Kim San by trying to ensure that the balance of the purchase price, \$8,800,000, under the agreement should reach Choo Kim San. | 10 |
| 353 1.36-1.40 | | |
| 1150 | | 20 |
| 1150-1151 | 59. Unless both Chow and Hwang and the Syndicate were acting as nominees of Choo Kim San there is no legitimate explanation for the terms of the agreement and the manner in which Fermay was used. Chow was said to have objected to the draft agreement. Clause 4 of that draft agreement. Clause 4 of that draft agreement would have placed both the certificates and signed transfers in blank in the hands of Peter Mo & Co., of which Ives was a partner, whom Chow had no reason to trust. Yet the agreement eventually entered and the manner in which Fermay was used provided no protection at all to Chow and Hwang. | 30 |
| 1279 | | |
| 649 1.43-1.49 | | |
| 650 1.1-1.4 | | |
| 1150-1151 | | |
| 1150 | 60. The agreement when signed had blank spaces for all the figures and Chow and Hwang were originally not even given a copy. According to David Ng those spaces were left blank because until the certificates and transfers had successfully gone through the registrars it could not be known how many of the certificates were genuine, how many shares would be sold and how much would be payable. By the time the certificates and transfers had gone through the registrars Chow and Hwang would have lost control of the certificates and would not have had physical custody of them. Choo Kim San would not have trusted purchasers in this way but he would have trusted his nominees. | 40 |
| 347 1.8-1.10 | | |
| & 1.47-1.49 | | |
| 526 1.12 - | | |
| 528 1.3 | | |
| 345 1.14-348 | | |
| 646 1.22-1.24 | | |
| 1056 1.34-1058 | | |
| 1.11 | | |
| 1109 1.27-1111 | | |
| 1.6 | | |
| 1120 1.24 - | | |
| 1122 1.13 | | 50 |
| 1150-1151 | 61. Clause 4 of the agreement as signed provided as follows:- | |

10 'Completion of the sale and purchase of the said shares shall take place within 90 days (hereinafter called "the day for completion") from the date of registration of the said San Imperial shares in the name of the company which shall be evidenced by production of the San Imperial shares so registered. On completion the Vendors shall deliver to the Purchaser all the necessary transfers duly signed by the Vendors in blank together with their respective certificates for the Fermay shares against payment of the balance of the purchase price. Delivery of the Fermay shares and transfers to the Purchaser shall be proof of payment of the balance of the purchase price and the Vendor shall be estopped from denying payment after delivery.'

20 'The Company' referred to was Fermay. 1057 1.37-
 Notwithstanding the provisions of this clause 1058 1.20
 the signed transfer forms in blank were handed 1110 1.39-
 to David Ng at or about the time when the 1111 1.6
 agreement was signed. No Fermay share 1121 1.31-
 certificates were ever actually issued. In the 1122 1.13

30 result, Chow and Hwang had no Fermay certificates and they handed to David Ng signed transfers in blank. These transfers were still in the hands of Ives at the time of the hearing before Mr. Justice Yang. Upon production by David Ng or the Syndicate of certificates and the transfer forms Chow and Hwang would have been estopped from denying that they had received the balance of the purchase price which they had not. No reasonable person would behave in this way. Choo Kim San would not have allowed Chow and Hwang to behave in this way unless the Syndicate were also his nominees. 350 1.40
 1121 1.40

40 62. By the manner in which Fermay was used, Chow and Hwang completely lost control of the 15,000,000 shares. The 15,000,000 shares were to be registered in the name of Fermay and Chow and Hwang were to be the only shareholders and the directors of Fermay. However:-

(1) They never had any Fermay certificates and they had handed over signed transfers in blank.

50 (2) By the resolution passed by Chow and Hwang as the only directors of Fermay on 23rd March, 1977, the Syndicate or any member thereof could bind Fermay. The Syndicate or any member thereof could therefore have disposed of the only asset of Fermay, namely, the 15,000,000 shares, without 1148

Record

reference to and without the consent or knowledge of Chow and Hwang.

- (3) At the same time Chow and Hwang would have been estopped from denying receipt of the entire purchase price of \$9,000,000 although even according to the Syndicate in truth and in fact they had only received \$92,000.
- (4) By their undated letters of resignation as directors of Fermay, handed to David Ng, Chow and Hwang had put it within the power of David Ng or the Syndicate to sever all real or apparent connection by Chow and Hwang with Fermay without further reference to them. 10
- (5) By the resolution of Chow and Hwang as directors of Fermay on 20th May, 1977, appointing David Ng managing director and delegating all of their powers as directors to him, Chow and Hwang had further put themselves at the mercy of David Ng and the Syndicate. 20

By reason of the manner in which Fermay was used, Chow and Hwang surrendered all control of the 15,000,000 shares without payment save for \$92,000 against their value of \$9,000,000. Chow and Hwang would not have done this unless (a) they were acting as nominees of Choo Kim San and (b) the Syndicate was acting as the nominee of Choo Kim San.

63. The use of Fermay in the manner in which it was used was unnecessarily complicated. It allegedly arose from the need of the Syndicate to authenticate the certificates. So also the other methods allegedly thought of by the Syndicate to authenticate the certificates such as obtaining a bank loan. When David Ng said in his evidence that in the stockbroking business the simplest way to authenticate certificates was to obtain a bank loan on them he must have known that that was untrue. The simplest way of authenticating the certificating the certificates would have been to effect a transfer of them. Thus, they could have sent the certificates to the registrars for transfer into their own names and they could have asked that the new certificates be sent to Messrs. Peter Mo & Co. In this way the certificates would have been authenticated and any further transfer would have required their signatures. They would have been protected. David Ng agreed that this could have been done. There was therefore no reason to use Fermay the way it was used. Fermay could only have been used the way that it was used (a) to neutralise Chow and Hwang once they had served the purpose of being vendors in their own right, (b) to obscure the true position 30 40 50

499-501

667 1.3-1.21

as to the beneficial ownership of the shares and (c) to allow the Syndicate on behalf of Choo Kim San to assume control of the shares in fact while giving the appearance that they were purchasing on their own behalf.

Record

10 64. Ives drafted the telex to seek the advice of London Counsel on 3rd January, 1977. At that time according to his evidence David Ng had checked and had discovered only the shareholdings in the name of Asiatic. In other words Ives knew nothing of the shares in the name of Triumphant. Yet in the telex he referred to XXX Ltd. and YYY Ltd. holding shares in the name of the fugitive. In his evidence he accepted that XXX Ltd. and YYY. Ltd. referred to Asiatic and Triumphant. The reference to Triumphant was never satisfactorily explained by Ives. The only credible explanation is that the Syndicate already knew the extent of Choo Kim San's holdings in San Imperial and the names under which they were held. The evidence concerning the reason for the formation of the Syndicate was therefore untrue and the only credible explanation for Ives knowing of the shareholding in Triumphant's name is that he had had previous information from or on behalf of Choo Kim San. He would only have had that previous information as a nominee of Choo Kim San.

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30 65. According to the evidence of Ives and David Ng the Syndicate went into the market to buy other San Imperial shares after their meeting on 4th January, 1977. In fact, David Ng's records showed that they went into the market the day before on 3rd January 1977. They would only have done so if they were sure of obtaining the 15,000,000 shares. If they were sure of obtaining the 15,000,000 shares, all of David Ng's evidence concerning the negotiations in Taipei was untrue. If they were sure of obtaining the 15,000,000 shares it can only be because they were the nominees of Choo Kim San.

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50 66. In June of 1977 David Ng had become the Chairman of the board of San Imperial. On 29th June, 1977, San Imperial issued proceedings against Choo Kim San being High Court Action No. 1674 of 1977. On 29th June, 1977, David Ng made an affirmation in those proceedings. In that affirmation he confirmed the truth of paragraph 11 of an affidavit of Lee Ing Chee part of which read:-

'Soon after the takeover of Asiatic Nominees, Ltd., the Defendant transferred

Record

his holdings in San Imperial Corporation, Ltd. and other companies to Asiatic Nominees Ltd., but was and still is the beneficial owner of the said 17,421,960 shares in San Imperial.'

'The Defendant' there referred to was Choo Kim San. David Ng therefore deposed to the fact on 29th June, 1977, well after he had allegedly bought the shares from Chow and Hwang, that Choo Kim San was still the beneficial owner of 17,421,960 shares in San Imperial registered in the name of Asiatic. Asiatic was not the registered owner of that number of shares at that time but was the registered owner of the shares. David Ng deposed to the truth: Choo Kim San was still the beneficial owner of the shares because the beneficial ownership of the shares had not passed to Chow and Hwang or to the Syndicate or to any member thereof.

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67. It was never explained why or how the registrars of San Imperial should have known that Ives was involved in the purchase of the 15,000,000 shares. Yet those registrars, namely M.A.F. Corporation (HK) Ltd. under the control of Choo Kim San's nominee Ho Chung Po telephoned Ives to ask for the details of Fermay and sent transfer forms to him for the insertion of details.

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Conclusion

68. It was the case of MBF that the Syndicate had conspired with Choo Kim San to defraud his creditors. In the judgment of Pickering, J.A., in the Court of Appeal he held that the Syndicate was acting as a nominee for Choo Kim San and that therefore they necessarily conspired with him. The Lees do not dissent from that finding but they need not go so far: It is enough for the purposes of this appeal that the Syndicate was acting as a nominee for Choo Kim San. Chow and Hwang were found by the Court of Appeal to be nominees of Choo Kim San and they therefore never had any beneficial interest in the shares. The Syndicate was acting as a nominee for Choo Kim San. They also therefore never had any beneficial interest in the shares and the agreement by which they purported to purchase was a sham. Fermay was simply the creature of the Syndicate and Chow and Hwang and therefore also never had any beneficial interest in the shares.

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69. The Lees therefore humbly pray that this appeal should be dismissed because:-

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REASONS

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- (1) Chow and Hwang were at all material times nominees of Choo Kim San. They therefore had no beneficial interest in the 15,000,000 shares.
- (2) The Syndicate was a nominee of Choo Kim San and never had any beneficial interest in the 15,000,000 shares.
- (3) The agreement by which the Syndicate purported to purchase the 15,000,000 shares from Choo Kim San was a sham and passed no beneficial interest.
- (4) Fermay was a creature of the Syndicate and Chow and Hwang and never received any beneficial interest.
- (5) This is an appeal purely on fact and the Privy Council ought not to disturb concurrent findings of fact.
- (6) Of the other reasons contained in the judgments of Mr. Justice Yang and in the Court of Appeal.

20

CHARLES CHING Q.C.

PATRICK FUNG

Civil Appeal No. 12 of 1978

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT
OF HONG KONG (APPELLANT
JURISDICTION)

(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)

B E T W E E N :

| | |
|---------------------|----------------------|
| DAVID NG PAK CHING | <u>1st Appellant</u> |
| MELVILLE EDWARD | |
| IVES | <u>2nd Appellant</u> |
| HO CHAPMAN | <u>3rd Appellant</u> |
| FERMAY COMPANY LTD. | <u>4th Appellant</u> |

- and -

| | |
|-------------------------|-----------------------|
| LEE ING CHEE also known | |
| as LEE HAI HOCK | <u>1st Respondent</u> |
| LEE KON WAH | <u>2nd Respondent</u> |
| MALAYSIA BORNEO FINANCE | |
| CORPN. (M) BERHAD | <u>3rd Respondent</u> |

CASE FOR THE 1ST AND 2ND
RESPONDENTS

LOVELL, WHITE & KING,
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London EC1A 2DY.

London Agents for

DEACONS,
Solicitors for the
1st and 2nd Respondents.