13, 1982

IN THE PRIVY COUNCIL No. 55 of 1980

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

BETWEEN :

HARON BIN MOHD ZAID — (Defendant) Appellant

- and -

CENTRAL SECURITIES (HOLDINGS) BERHAD — (Third Party) Respondents

CASE FOR THE APPELLANT

RECORD

This is an Appeal by the above-named Appellant from:-

(1) An order dated the 27th day of February 1979 of the Federal Court of Malaysia (hereinafter called "the Federal Court") (Suffian L P Raja Azlan Shah, Ag. C.J. Malaysia, Wan Suleiman F.J.) dismissing a motion wherein the Appellant moved the Federal Court on the 27th February 1979 aforesaid that an Appeal brought by the Respondents from two orders made by Harun J. both dated the 28th June 1978, should be dismissed on the grounds that before bringing the said Appeal before the Federal Court, the Respondents had not obtained leave from a Judge of the High Court or from the Federal Court of Malaysia in compliance with the provisions of Section 68(2) of The Courts of Judicature Act 1964; and — p. 137; p. 138 l. 24; p. 134; p. 126; p. 102 l. 34 & l. 37; p. 134 l. 29

(2) An Order and judgment dated the 16th May 1979, of the Federal Court of Malaysia (Suffian L. P. Raja Azlan Shah, Ag. C.J. Malaysia, Wan Suleiman F.J.) allowing the said Appeal by the Respondents from the said Orders of Harun J. and: — p. 160; p. 139; p. 161 l. 9; p. 102 l. 34 & l. 37

(a) granting unconditional leave to the Respondents to defend Third Party proceedings brought by the Appellant — p. 161 l. 24; p. 9

(b) ordering that the said Third Party proceedings be — p. 161 l. 27

consolidated with proceedings brought by the Appellants against the Respondents in the Kuala Lumpar High Court Civil Suit number 2323 of 1976 (hereinafter called "Suit number 2323"), and

p. 161 (c) giving consequential directions.

THE ISSUES

2. The issues of this Appeal concern:-

p. 102 l. 34 & l. 37 (1) Whether the aforementioned two orders made by Harun J. being orders made under Order 16A, Rule 7(1)(a) of the Rules of the Supreme Court 1957, were final or interlocutory orders;

(2) Whether in determining if such orders were final or interlocutory the Federal Court should have applied the test used in the case of Bozson v Altrincham Urban District Council 1903 1 KB 547 (hereinafter called "the Bozson test") or that used in Salaman -v- Warner 1891 1 Q.B. 734, (hereinafter called "the Salaman test");

p. 126 (3) Whether the Respondents in their appeal to the Federal Court were under an obligation to obtain from a Judge of the High Court or the Federal Court leave to appeal pursuant to Section 68(2) of the Courts of Judicature Act 1964;

(4) The construction and application of Section 68 of the Court of Judicature Act 1964 and Order 54 Rules 22 and 22A of the Rules of The Supreme Court 1957;

(5) Whether the Respondents were entitled on appeal to rely upon entirely new and different grounds from the single ground which was abandoned on appeal relied upon before and presented to Harun J. by the Respondents on the 28th June 1978 to show that there was a "question proper to be tried";

(6) Whether if the Respondents were entitled to rely upon such new and different grounds they showed that there was a question proper to be tried.

RECORD

THE FACTS

3. The Appellant is and was at all material times a business man, residing at 16, Jalan Pandan, Johore Bahru. p. 5 l. 31

4. The Respondents are and were at all material times a public limited company incorporated in Malaysia having its registered office at the Penthouse, 10th Floor, Wisman Central, Jalan Ampang, Kuala Lumpur, and carrying on business, inter alia, as a securities holding company. p. 6 l. 28 p. 9. l. 20

5. By an agreement in writing (hereinafter called "the said agreement number 1") dated the 7th December 1974, between the Respondents and the Appellant, the Respondents agreed to sell to the Appellant 1,400,000 fully paid up Ordinary Shares of $1 each of a public company incorporated in Malaysia and known as United Holdings Berhad (hereinafter called "U. H. B. ") at $8 per share at a total purchase price of $11,200,000. The said amount was duly paid by the Appellant to the Respondents on or about the 22nd January 1975. p. 6 ll. 25-38

6. Upon payment of the said $11,200,000 the Respondents delivered to the Appellant certain share certificates, including a share certificate numbered 0227 for 532,278 fully paid up Ordinary Shares of $1 each (hereinafter called "the disputed shares") together with a document which purported to be a registerable Memorandum of Transfer, (hereinafter called "the said memorandum of Transfer") of the said 523,278 shares duly executed by the registered owner of the shares to enable the Appellant or his assigns to be registered as the owner of the shares. p. 6 ll. 39-52

7. By an agreement (hereinafter called "the said agreement number 2") dated the 12th March 1975 the Appellant agreed to sell to a company, incorporated in the States of Malaya and having their registered office at number 2, Jalan Ah Fook, Johore Bahru, known as Syarikat Seri Padu Sd. Bhd. (hereinafter called "Syarikat"), 560,000 fully paid up shares of $1 each of U. H. B. at the price of $8 per share at a total price of $4,480,000. p. 34 ll. 30-36 p. 34 l. 24

8. Pursuant to the said agreement number 2, Syarikat paid to the Appellant the sum of $4,480,000 and the Appellant delivered to Syarikat the Share Certificates and memorandum of Transfer delivered to him by the Respondents as aforesaid including the said share certificate for the said disputed shares and the said Memorandum of Transfer for the 523,278 shares. Thereafter the abovementioned transfer of shares was registered in favour of Syarikat by the staff of the registration department of the said U. H. B. p. 35 ll. 2-4 p. 7 l. 4 p. 7 l. 6 p. 73 l. 12

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p. 19
p. 20 ll. 11-17

9. On the 8th October 1976, the Appellant commenced Suit number 2323 against the Respondents claiming, inter alia, rescission of the said agreement number 1, made on the 7th December 1974, damages and the return of $11,200.000 on the grounds inter alia, that the Appellant had been induced to enter into the said agreement by false representations namely, that at the time of the said agreement number 1, the Respondents were the beneficial

p. 21 l. 32

owners of the said 1,400,000 shares of U.H.B., when they were only beneficial owners of 1,002,000 shares.

p. 23

On the 22nd October 1976 the Respondents entered a defence to the said Suit, number 2323. They denied the

p. 24 l. 2

Appellant's allegations and averred, inter alia, that the Appellant knew that they were not the beneficial owners of the said 1,400,000 shares, when he entered into the said agreement number 1.

p. 86 l. 23

10. In December 1976, in the course of police investigations arising out of a report made by the Appellant against the Respondents, one Koh Kim Chai (hereinafter called "Koh"), a director of U.H.B. was asked by the

p. 86 l. 27

police to produce the share certificates and Memorandum of Transfer referred to in paragraph 8 above. Examination of the said Memorandum of Transfer of the disputed shares showed that the same had been executed by one Doctor Chong Kim Choy, (hereinafter called "Chong") in favour of a limited company known as International Holdings (Pte) Limited (hereinafter called "I.H.P.L.") and not the

p. 86 l. 41

Respondents. The said Koh thereupon contacted the said Chong, who confirmed that he was the registered share-

p. 87 l. 12

holder of the said disputed shares, and that he had executed the said Memorandum of Transfer for the said disputed shares in favour of the said I.H.P.L. and not the Respondents. He also showed to the said Koh, two letters dated the 17th

p. 88-89

March 1975 and the 22nd April 1975, respectively, from one Yap Ping Kon, (hereinafter called "Yap") the then secretary of U.H.B., to the said Chong, and a reply thereto, wherein the said Chong had stated that he was unable to

p. 90

execute such a transfer as he had transferred the said disputed shares to the said I.H.P.L. and that the said

p. 90 l. 24

I.H.P.L. should be requested to execute the necessary Memorandum of Transfer. Consequently the said Koh made enquiries of the staff of the said U.H.B. and was

p. 87 ll. 17-27

informed by members of the staff, who had worked under the said Yap, that the said Yap had instructed the staff that they should register the said disputed shares in the name of Syarikat and that he would obtain a fresh Memorandum

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from the said Chong. Thereafter the said Chong refused to provide a fresh Memorandum of Transfer.

11. On the 13th December 1976, the then secretary of the said U.H.B., one John Chew Sin Key, (hereinafter called "Chew") wrote to the secretary of Syarikat notifying him that the said Memorandum of Transfer had not been duly and properly executed in accordance with the requirements of the Companies Act 1965, that the said U.H.B. was not therefore in a position to effect a transfer from the Appellant to Syarikat of the disputed shares, as the same could not be registered in Syarikat's name, and that accordingly he was returning the certificate number 0027 to Syarikat. Thereafter the said Chong was re-registered by the staff of the registration department of the said U.H.B. as the registered owner of the said 523,278 shares and included in the Annual Return for U.H.B. made on the 15th December 1977 as the person holding the said disputed shares in U.H.B. at that date.

p. 73 l. 17
p. 74
p. 74 l. 19

12. As a consequence of the abovementioned matters, Syarikat requested the Appellant to deliver to them 523,278 fully paid up shares. Likewise the Appellant through solicitors, by a letter dated the 15th December 1976, requested the Respondents to deliver a registrable Memorandum of Transfer within 14 days and by a further letter, dated the 30th January 1977, gave notice to the Respondents that unless they received a reply within seven days they would commence proceedings, but the Respondents failed or refused to deliver the same to the Appellant and no such document was forthcoming. Accordingly, the Appellant was unable to deliver a duly executed transfer for 523,278 shares in favour of Syarikat.

p. 35 ll. 21-32
p. 38
p. 39
p. 7 ll. 15-20

13. On the 21st May 1977, Syarikat issued proceedings against the Appellant claiming the sum of $4,186,224 representing the amount paid by Syarikat to the Appellant for the purported delivery of the said 523,278 Ordinary Shares of $1 each of the said U.H.B. on the grounds that there was a total failure of consideration as no valid delivery of shares had been effected, there being no proper registerable Memorandum of Transfer provided.

p. 1
p. 3 l. 44

14. On the 13th June 1977, the Appellant entered an Appearance and on the 21st June 1977 took out a Summons for Leave to issue and serve a Third Party Notice on the Respondents, supported by an Affidavit affirmed by the

p. 4
p. 5

Appellant on the 20th June 1977, which said leave was
p. 8 granted on the 18th July 1977. The said Notice was
p. 9 served on the Respondents on the 16th August 1977 claiming
p. 9 l. 25 a refund of the said sum of $4,186,224 paid by the Appellant to the Respondents in respect of the said shares purportedly delivered by the Respondents to the Appellant on the 23rd December aforesaid.

p. 12 15. On the 6th September 1977 the Respondents entered a conditional Appearance to the Third Party Notice and on the 30th September 1977, issued a Summons to set aside the
p. 14 Third Party Notice on the ground, inter alia, that there was no proper question to be tried as the said agreement number 1 had been duly performed by the Respondents, and supported
p. 16 the said Summons by an Affidavit affirmed by one Mah King Hock (hereinafter called "Hock") on the 24th September 1977,
p. 16 ll. 22-29 wherein he deposed that "in regard to Paragraph 2 of the Third Party Notice, (namely, that the Respondents had purported to deliver the relevant registerable Memorandum of Transfer), the Third Party (the Respondents), has duly delivered the share certificates ..... for 523,278 fully paid up ordinary shares of $1 each of U.H.B. and the relevant registerable Memorandum of Transfer, and the same have been duly received by the Defendants", (the Appellant).

p. 26 16. On the 3rd October 1977, the Appellant applied on
p. 26 l. 32 Summons for leave to enter final judgement against the
p. 27 l. 6 Respondents, or alternatively, for Third Party Directions, supported by an Affidavit affirmed by the Appellant on the
p. 28 27th October 1977, wherein the Appellant in answer to the
p. 16 affidavit affirmed by the said Hock, deposed to the fact that the said Memorandum of Transfer for the disputed
p. 29 ll. 1-9 shares was not "the relevant registerable Memorandum of Transfer" but was a transfer executed by the said Chong in favour of I.H.P.L., as set out aforesaid, and that he
p. 30 ll. 37-40 believed that there was no defence to his claim.

p. 33 17. On the 28th October 1977 Syarikat issued an application for leave to enter final judgement against the Appellant, supported by an affidavit of the said Koh,
p. 34 affirmed on the 22nd October 1977, wherein he deposed to the fact, inter alia, that the Appellant had not delivered to
p. 35 l. 20 Syarikat 523,278 shares in breach of contract, or a proper registerable Memorandum of Transfer for such shares.
p. 36 A further affidavit affirmed by the said Koh on the 31st October 1977, was filed on behalf of the Appellant, wherein the said Koh confirmed, inter alia, that he had written the said letters to the Respondents on behalf of the Appellant
p. 37 ll. 25-30 dated the 15th December 1976 and the 30th January 1977, requesting the Respondents to deliver a duly executed Memorandum of Transfer.

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The Respondents, in reply, filed two affidavits affirmed by one Dato Hean Heong on the 31st December 1977, wherein he deposed that he had not received the said letters from the said Koh, referred to above, and by the said Hock, affirmed on the 31st December 1977, wherein the said Hock deposed that the said Memorandum of Transfer was indeed the Memorandum of Transfer that was delivered to the Appellant with the disputed shares but submitted that the shares were nevertheless transferred to Syarikat because Syarikat appeared in the Annual Return of U. H. B. for the 30th June 1975 as the registered shareholder of the disputed shares, whereas the said Chong appeared as the registered shareholder of the disputed shares in the Annual Return of U. H. B. for the 29th July 1974. He further submitted that the Appellant knew or was deemed to have knowledge that the disputed shares had been so transferred.

p. 40
p. 41 l. 1
p. 42 ll. 8-9
p. 42 ll. 18-19
p. 41 l. 37

Subsequently, an affidavit, affirmed by the said Chew on the 10th January 1978 was filed on behalf of the Appellant, deposing to the facts and matters set out in paragraph 11 above. In reply the Respondents filed an affidavit, affirmed by the said Hock on the 15th February 1978, wherein he deposed that he had been advised and believed that the members' register of U. H. B. could not be rectified by the deletion of a mistake, namely the re-instatement of the said Chong as the registered shareholder of the disputed shares, but that the registration of Syarikat as the shareholder of the disputed shares still stood, notwithstanding the abovementioned reinstatement.

p. 72
p. 85
p. 85 ll. 21-24

A final affidavit was filed on behalf of the Appellants, affirmed by the said Koh on the 18th February 1978, wherein he deposed to those facts and matters set out in paragraph 10 aforesaid. No further evidence was filed.

p. 86

18. On the 28th June 1978 all the above mentioned applications were heard by Harun J. He transferred the applications into Open Court without considering them in Chambers pursuant to Order 54 Rule 22 of the Rules of The Supreme Court 1957. He gave leave to Syarikat to enter final judgement against the Appellant upon the Appellant submitting to judgement. Thereafter, after hearing the submissions of Counsel and full argument in Open Court, the Learned Judge dismissed the Respondents' application to set aside the Appellants' Third Party Notice.

p. 91 l. 21
p. 101 l. 25
p. 102 l. 34

19. The Learned Judge then heard the Appellants' application for leave to enter final Judgement under Order 16 Rule 7(1)(a) of the R.S.C. 1957 against the Third Party, the Respondents herein. Counsel for
p. 94 the Appellant submitted, inter alia, that by failing to deliver a validly executed Memorandum of Transfer, in favour of the Appellant, the Respondents had not performed their obligations under the said agreement number 1, of the 7th December 1974, and that there
p. 95 was a total failure of consideration. The Respondents in their submissions in reply relied solely upon the ground that by delivering the said share certificate, which said certificate bore the number 0227 aforesaid, together with the said purported transfer form, they had duly delivered to the Appellant a share certificate for 523,278 Ordinary Shares together with a valid instrument of transfer, pursuant to their obligations under the said agreement number 1.

20. After hearing all submissions and arguments of both Counsel, Harun J. gave leave to the Appellant
p. 102 l. 37 to enter Judgement against the Respondents for the sum of $4,186,224 with interest of 6% from the 22nd
p. 103 l. 3 January 1975 and costs payable to Syarikat as taxed.

p. 106 21. On the 29th June, the Respondents Solicitors applied by letter to the Learned Judge, Harun J., purportedly pursuant to Order 54, Rule 22A of the R.S.C., for further argument on both Summonses in
p. 107 Open Court. On the 4th July 1978, the Learned Judge certified that he required no further argument in Open Court on the Summons taken out by the Appellant, dated the 3rd October 1977 for leave to enter final Judgement against the Respondents, or alternatively, for Third Party Directions. No certificate was issued by the Learned Judge in respect of the Summons taken out by the Respondents on the 30th September 1977 to set aside the Third Party Notice.

p. 126 22. On the 6th July 1978, the Respondents gave Notice of Appeal against the Order of Harun J. on both Summonses. No leave to appeal to the Federal Court pursuant to Section 68(2) of the Courts of Judicature Act 1964 was sought or obtained from either Harun J. or the Federal Court of Malaysia.

23. On the 12th July 1978, the Respondents applied for a Stay of Execution. At the hearing of the said application, the Respondents produced a new document, which purported to be a valid Memorandum of Transfer

in place of that previously produced and offered to deliver the same to Counsel acting for the Appellant. The said instrument of transfer was defective. Counsel for the Appellant, as he was entitled, rejected the said purported delivery contending that the said document was defective and in any event, that it was then too late for the Respondents to rectify their default.

THE JUDGEMENT OF HARUN J. 11TH SEPTEMBER 1978

24. On the 11th September 1978, Harun J. delivered his "Grounds of Judgement". Firstly, the Learned Judge recited the brief facts and the nature of the claims made by the parties. Then he dealt with the Respondents' application to consolidate the proceedings in Suit number 2323 with the instant proceedings. He considered the Respondents' contentions that the said agreement number 1 had been performed because the share certificate number 0227 and the transfer form had been delivered to the Appellant and accepted by him. He referred to the Annual Returns of U. H. B. and found that the registration of the Plaintiffs as the holders of 523, 278 Ordinary Shares, referred to aforesaid, was an error. He concluded that he was satisfied that the Respondents had not performed their part of the agreement with the Appellant, as without a registerable Memorandum of Transfer, the Appellant could not effectively deal with the share certificate number 0227 or transfer to Syarikat.

p. 96
p. 96 l. 14
p. 97 l. 49
p. 98 l. 10
p. 98 ll. 29-32
p. 98 l. 32
p. 99 l. 15
p. 99 ll. 29-35

He HELD that in his view there was no justification for consolidating the two sets of proceedings and that the Respondents' application to set aside the Third Party Notice should be dismissed.

p. 98 ll. 25-28
p. 99 ll. 45-48

The Learned Judge then turned to the Appellants' application for leave to enter final Judgement against the Respondents. He noted that the Respondents contended that the physical delivery of the share certificate, number 0227, to the Appellant and the fact that it had been registered in the name of Syarikat in 1975, provided them with a good Defence to the Third Party Notice.

p. 99 l. 48
p. 100 l. 2

The Learned Judge then HELD that :-

(a) in so far as the registration of the shares in Syarikat's name was concerned, the registration was an error which had been thereafter rectified;

p. 100 ll. 2-3

(b) by section 103 of the Companies Act 1965, in

p. 100 ll. 4-7

order to make a valid transfer of shares, the Respondents were required to deliver a proper instrument of transfer and they had not fulfilled this requirement;

p. 100 ll. 8-11 (c) as the share certificate number 0227 was still registered in the name of Doctor Chong Kim Choy, neither Syarikat nor the Appellant could deal with it, and

p. 100 ll. 11-15 (d) as neither of them had a right of sale over the shares, there had been no effective sale by the Respondents to the Appellant. Accordingly, he decided that there was no issue to go to Trial.

p. 134 25. By a Notice of Motion dated the 13th October 1978, the Appellant applied to move the Federal Court for an Order that the Respondents said appeal, referred to in paragraph 22 hereof, be dismissed with costs on the grounds that it had been improperly and incompetently brought as no leave had been obtained from a Judge of the High Court or from the Federal Court in compliance with the provisions of Section 68(2) of the Courts of Judicature Act 1964, which said Notice of Motion was
p. 135 supported by an affidavit affirmed by the Appellant on the 13th October 1978, wherein the Appellant deposed
p. 136 l. 33 to the fact that no leave to appeal had been obtained.

26. The Motion was heard by the Federal Court (Suffian L.P., Raja Azlam Shah, Ag. C.J. Malaysia, Wan Suleiman F.J.) on the 26th February 1979. On the 27th February 1979, after hearing full argument,
p. 137 the Federal Court rejected the Appellant's Motion. No Judgement was delivered or reasons given.

27. The Federal Court then proceeded to hear the Respondents said Appeal between the 26th February 1979
p. 159 l. 31 and the 2nd March 1979. In the course of the hearing against Harun J.'s Order giving Judgment upon the Appellants Summons, dated the 3rd October 1977, the Respondents did not contend that the delivery of the said Memorandum of Transfer and the said share certificate number 0227 satisfied their obligations under the said agreement number 1, as contended by them before Harun
p. 174 ll. 4-11 J. on the 3rd October, but relied entirely upon fresh and different grounds from those presented before Harun J.
p. 133 l. 21 At Clause 11 of their grounds of appeal, the Respondents prayed that:- "the decision of the Learned Judge should be reversed now that the form of transfer fulfilling the

requirements of the defendant (the Appellant) has already been furnished by the Third Party (the Respondents)". In the course of the hearing of the said Appeal, Counsel for the Respondents was questioned by the Federal Court as to the said Clause 11. He conceded that the said new memorandum of Transfer, referred to at paragraph 22 herein, had only been offered to the Appellant on the said application for a Stay of Execution and that the same had been rejected by Counsel for the Appellant. The Federal Court then proceeded to question Counsel for the Respondents as to the reason why the said Memorandum of Transfer had not been delivered earlier, whereupon Counsel for the Respondents replied that the Respondents had not been in a position to effect the delivery of the said Memorandum of Transfer earlier as his clients could not obtain the same.

THE JUDGEMENT OF THE FEDERAL COURT - 16TH MAY 1979

28. On the 16th May 1979, the Judgement of the Federal Court was delivered by Raja Azlam Shah C.J. Malaysia. The Learned Judges first dealt with the facts, stating that "the facts in this case are fully stated in the judgement of Harun J." and summarised the course of the proceedings. They then referred to the Judgement of Harun J., and the submissions put forward by the Respondents. Having stated that the question before the Court was simply "whether at the hearing of the application for Third Party Directions, the Court is satisfied that there is a question proper to be tried between the Defendants (the Appellants) and the Third Party (the Respondents)", the Learned Judges considered the submissions put forward by both Counsel on behalf of the parties.

p. 139

p. 139 l. 27

p. 143 ll. 42-46

They HELD firstly that the weight of the authorities supported the view that the Respondents could deal with the shares pending registration. The Learned Judges then turned to the submissions put forward by the Respondents that the agreement to sell 1.4 million shares was a single and indivisible contract and that as they, the Respondents, had delivered 976,722 of 1.4 million shares, there had been part performance and that as the Appellant had derived some benefit for which he had bargained, he could not claim to recover the purchase money, or alternatively, as the Appellant had accepted a substantial part of the shares contracted for, but claimed a defect in title as to a small part, he was not entitled to maintain an action for recovery of the purchase price, or that, in any event, there was an issue of estoppel to be tried. The Learned Judge having referred to the authorities and the various issues raised by the above mentioned questions concluded

p. 145 l. 1

p. 145 ll. 11-25

p. 147 ll. 1-8

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p. 150 l. 41 — that there must be "a full investigation upon a witness action", and HELD secondly that "the decision to

p. 150 ll. 49-50 — give leave to the Defendants (the Appellant) to sign

+ p. 151 l. 1 — final Judgement against the Third Party (the Respondents) without Trial, was to say the least, wrong and unsupportable".

They then proceeded to deal with the matters considered by Harun J. in the course of his Judgement.

p. 151 ll. 10-18 — Firstly, they HELD that the question of whether the act of registration of the shares by U. H. B. had been an error was a question that required to be "tested by evidence in all the circumstances of the case", having regard in particular to the correspondence between the Secretary of U. H. B. and Doctor Chong Kim Choy.

p. 153 l. 50 — Secondly, the Learned Judges HELD that there was some justification for the conclusion that the

p. 154 l. 6 — Appellant "had got some part of what he had contracted for", and that Harun J. had been wrong to hold that the issues regarding laches acquiescence and estoppel were not relevant.

p. 158 ll. 2-7 — Thirdly, they HELD that where there were serious disputes regarding title and an application for recitification, the issues could not be properly decided in summary proceedings under Section 162 of the Companies Act 1965.

p. 158 l. 27 — They therefore concluded that Harun J. was wrong to give summary judgement, that there was a question proper to be tried and that the Respondents

p. 161 — appeal should be allowed. The Federal Court then ordered, inter alia, that the Respondents be given unconditional leave to defend, gave Third Party Directions and ordered that Suit 2323 and the instant suit be consolidated.

p. 162 & p. 170 — 29. On the 26th September 1979, by two Notices of Motion, dated the 22nd August 1979, the Appellants moved the Federal Court (Raja Azlam Shah, Ag. L. P. Malaysia, Chang Min Tat F. J. and Ibrahim Manan F. J.) to grant conditional leave to appeal to His Majesty the Yang Di-Pertuan Agong against the decisions of the Federal Court given on the 27th February 1979 and the 16th May 1979 aforesaid, supported by two Affidavits affirmed by Counsel for

p. 164 — the Appellant on the 5th April 1979 and 18th June 1979,

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and two Affidavits affirmed by the Appellant on the 20th June 1979 and the 3rd September 1979. — p. 166, p. 172 & p. 176

THE JUDGEMENT OF THE FEDERAL COURT - 1ST NOVEMBER 1979

30. The Judgement of the Federal Court on the two Motions was delivered by Datuk Chang Min Tat F. J. on the 1st November 1979. The Learned Judge referred to the submission made by Counsel for the Appellant, firstly, that the Respondents said Appeal from the said Order of Harun J., giving judgement against them, was an Appeal against an Interlocutory Order, and that as the Respondents had not complied with the requirements of Section 68(2) of the Courts of Judicature Act 1964, by obtaining leave of the High Court Judge or the Federal Court, before commencing their appeal the appeal was not properly brought before the Federal Court. The Learned Judge then described the facts, and referred to Order 54 Rules 22 and 22A of the R.S.C. He then considered the Respondents written request to Harun J. dated the 29th June 1978, referred to in paragraph 20, for further argument in Open Court and HELD that leave was not required where a request or application for further argument had been made to the Judge pursuant to Order 54 Rule 22A. As a consequence of this finding the Federal Court concluded that they were not called upon to decide between "the conflicting decisions of Nagappa Rengasamy Pillai -v- Lim Le Chong 1968 2 MLJ 91 FC and T O Thomas -v- K C I Reddy and Anor 1974 2 MLJ 87 FC, "as the first limb of section 68(2) had been satisfied". The Learned Judge then considered the question of whether an Order made under Order 16 A Rule 7(1)(a) of the R.S.C. was final or Interlocutory. In determining this question, he considered the conflicting decisions of Bozson v Altrincham U.D.C. supra and Salaman -v- Warner (supra), and HELD that as the Federal Court in the case of Ratnam -v- Cumarasamy and Anor (1962) MLJ 330 and the subsequent cases of the Pennisular Land Development Sdn. Bhd. -v- K Ahmad No. 2 (1970) 1 MLJ 253 FC and Hong Kim Sui and Anor -v- Malayan Banking Berhad 1971 1 MLJ 289 FC, had approved the test laid down in Bozson, they were bound to follow these decisions and hold that "an Order giving leave to sign final Judgement is a final and not an Interlocutory judgement". The Learned Judge accordingly HELD that as the Order was a final Order, no leave was required pursuant to Section 68(2). The Learned Judge then recited a short history of the facts, referred to Affidavits, to the various contentions put forward by both parties before Harun J.

p. 182

p. 184 ll. 13-19

p. 185 l. 41

p. 186 l. 15
p. 186 l. 52

p. 187 ll. 10-30

p. 187 ll. 38-40

p. 188 l. 6
p. 187 l. 46
p. 190 l. 29

p. 190 l. 35
p. 190 l. 37

p. 190 l. 44

and to Harun J.'s Judgement. Having reviewed the various arguments, the Learned Judge concluded that in the circumstances shown in the Affidavits
p. 195 ll. 1-11 "the simple and uncomplicated view taken by Harun J. was not justified" and that "triable issues had been raised and a defence on the merits shown" entitling the Respondents "to defend unconditionally". The Federal Court then dismissed the Appellants
p. 195 l. 32 applications and refused leave to appeal.

THE APPELLANTS SUBMISSIONS

31. The Appellants respectfully submit that in rejecting the Appellants Motion of the 27th February 1979, the Federal Court erred:-

(1) In holding that an order made under Order 16 A Rule 7(1)(a) was a final and not an Interlocutory Order. In the Appellant's respectful submission the Order made by Harun J. under Order 16 A Rule 7(1)(a) being akin to an Order made under Order 14 of the R.S.C. 1957, was an Interlocutory Order within the meaning of Section 68(2) of the Courts of Judicature Act 1964:

(a) because practitioners have always regarded judgement under order 14 as Interlocutory, see Standard Discount Company -v- La Grange 1877 3 CPD 67, the Judgement of Lord Denning M.R. at page 601 A in Salter Rex and Company -v- Ghosh (1971) 2 Q.B. 597 and page 1045 C in Technistudy Limited -v- Kelland 1976 1 WLR 1042 and

(b) because under the principles laid down in Salaman an Order made under Order 14 is to be regarded as an Interlocutory Order

In support of (a) cited above the Appellant will rely upon Tampion -v- Anderson 1974 48 A.L.J.R. 11P,C. in which their Lordships approved the dictum of Lord Denning M.R. at page 601 in Salter Rex & Company -v- Ghosh (Supra), namely that "the only thing for practitioners to do is to look up the practice books".

In support of (b), namely that the appropriate test

to be applied is that set out in Salaman, the Appellant respectfully submits that in Becker -v- Marion City Corporation 1976 2 WLR 728 P.C. their Lordships cited, without disapproving, a number of cases which had applied the Salaman test and at page 735, their Lordships held that Hogarth J. was correct when he said at p. 56 of his Judgement of the 23rd December 1974 in Becker -v- Marion City Corporation 1974 9 SASR 560: "which ever way the decision went it was a final decision as between the parties". Their Lordships also accepted that Mitchell J. correctly expressed the law when he said at page 566, "within its narrow confines the answer to that question, which ever way it went, necessarily determined the rights of the parties.....". The Appellant respectfully submits that the above-mentioned view applied the test laid down in Salaman -v- Warner in preference to that in Bozson -v- Altrincham U.D.C. It is the Appellant's respectful submission that since the case of Ratnam -v- Cumarasmy (Supra) the Federal Court has followed the Bozson test

(i) in the erroneous belief that the Court of Appeal in England has approved and followed the Bozson test in preference to the Salaman test, notwithstanding the cases of In re Page Hill -v- Fladgate 1910 1 Ch. 489, Arnot -v- Amber Chemical Company, The Times, May 20th 1953, Hunt -v- Allied Bakeries, 1956 1 W.L.R. 1326, and Anglo-Auto Finance (Commercial) Limited -v- Dick, December 4th 1967 CA Bar Library Transcript Number 320A. In Salter Rex and Company -v- Ghosh (Supra) Lord Denning M.R. specifically held at page 601A that the test in Salaman -v- Warner "has always been applied in practice"; and

(ii) since 1968 in the erroneous belief that the Privy Council approved and followed the Bozson test, in the case of Lopez -v- Velliapa Chettiar 1968 1 MLJ 224, when the Privy Council held that Ratnam -v- Cumarasamy (Supra) was decided on the right basis, (see in particular Pennisular Land Developments Sdn. Bhd. -v- K Ahmad (Number 2) (Supra). But although Ratnam -v- Cumarasmy was a case in which the Bozson test was applied, the question before the Privy Council in Lopez -v- Velliapa Chettiar was whether the Court had a discretion to refuse leave to appeal and not as to which test the Court had to apply to determine whether an Order was Interlocutory or final.

Their Lordships approved Ratnam -v- Cumarasamy only insofar as that case held that an appeal lay as of right, since there was no discretion to refuse leave to appeal in cases coming within Section 74(1)(a)(i) or (ii) of the Courts of Judicature Act 1964, and not otherwise.

(2) In allowing the Respondents to bring their appeal when they had failed to comply with the provisions of Section 68(2) of the Courts of Judicature Act 1964, in that no leave to appeal had been obtained, and with Rule 13 of the Federal Courts Transitional Rules 1963 in that no such leave had been obtained within one month of the order. The Appellants respectfully submit that the Order made by Harun J. on the 28th June 1978 was an Interlocutory Order, and that by Section 68(2) the Respondents were bound to apply for leave before an appeal could lie. In this respect, the Appellants respectfully submit, that once the Learned Judge, Harun J., had heard the application and full argument in Open Court, without hearing any argument in Chambers, pursuant to the provisions of Order 54 Rule 22 of the Rules of The Supreme Court, the first limb of Section 68(2), namely that "no appeal shall lie from an Interlocutory Order made by a Judge of the High Court in Chambers unless the Judge has certified, after application within four days after the making of the Order by any party for further argument in Court, that he requires no argument" did not apply. The question of obtaining a certificate did not arise as a certificate was not required where the Order was made in Open Court and not in Chambers. In support of this submission, the Appellant will rely upon the decision of the Federal Court in Sri Jaya Transport Company Limited -v- Fernandes (1970) 1 MLJ 87 (applied by the Federal Court in the unreported case of the Malayan Banking Berhad -v- Yap Seng Hock, 11th October 1980) and also the case of T O Thomas -v- K.C.I. Reddy and Anor 1974 2 MLJ 87 and the Judgement of Gill C.J. (Malaya) at page 91 D to E. The Appellant further submits that Order 54 Rule 22A did not apply because all

arguments had been exhausted in Open Court, (the Judge having adjourned into Open Court under Order 54 Rule 22) and therefore the question of reconsideration in Open Court under Order 54 Rule 22A did not arise. The Appellants will reply upon the authorities cited above in support of this submission.

32. The Appellant further submits that the Federal Court erred in allowing the Respondents on appeal to rely upon entirely new and different grounds from the single ground relied upon before and presented to Harun J., (namely that by delivering the said share certificate bearing the number 0227, together with the said transfer form, they had duly delivered to the Appellant a valid and proper share certificate for 523,278 Ordinary Shares together with a valid and proper instrument of transfer, pursuant to their obligations under the said agreement number 1 of the 7th December 1974, and that there was therefore an issue to be tried):

(i) when the Respondents by paragraph 11 of their Memorandum of Appeal had expressly or impliedly conceded that the ground upon which they had relied at the lower Court could no longer be supported, they having attempted to provide a new Memorandum of Transfer, as hereinbefore set out, and/or

(ii) when there were no exceptional circumstances in the case to justify the Federal Court from departing from the Rules laid down in Kalyan Das -v- Magbul Ahmad I.L.R. 40 All 497; A.I.R. 1918 P.C. 53, and applied by the Federal Court in Khoo Ah Yeow -v- The Overseas Union Bank Limited 1967 2 MLJ 22.

33. The Appellant further submits that the Federal Court in holding that there was a question proper to be tried and that the Respondents' appeal should be allowed erred:

(a) In determining that the weight of the authorities which were cited supported the view that the Third Party (the Respondents) could deal with the disputed shares pending registration and that accordingly the Appellant could transfer the share certificate numbered 0227 to Syarikat. This conclusion overlooked the following points:

(i) There was no evidence before Harun J. or the

Federal Court that the Respondents, who were the sellers of the 523,278 ordinary shares under the said Agreement number 1 ("the disputed shares"), had any beneficial interest in the said shares at the date of the said agreement number 1, or at any time thereafter. On the contrary there was evidence that the disputed shares at all material times belonged to Chong.

(ii) If the Respondents had no beneficial interest in the disputed shares at the date of the said agreement number 1, or at any time thereafter (the Respondents having failed to adduce any evidence to show that they had), no beneficial interest in the said shares could accordingly be passed to the Appellant by virtue only of the said agreement number 1.

(iii) No equitable ownership of the said shares could be passed on delivery by the Respondents to the Appellant of the purported Memorandum of Transfer and the share certificate number 0227, because the transferee named in the transfer was not the purchaser, or on the evidence, his nominee.

(iv) The authorities cited by the Respondents on this point, Re Paradise Motor Company Limited 1968 I.W.L.R. 1125; Fitch Lovell v I.R.C. 1962 I.W.L.R. 1325 and Hawks v McArthur 1951 1 A.E.R. 22, do not establish that a person who is not a beneficial owner can deal with shares pending registration.

(v) The general warning of Devlin J. in St. John Shipping Corporation v Joseph Rank Ltd 1957 1 Q.B. 267 cited by the Federal Court as incidental support for its approach to section 103, has no application to the position of the Respondents, having regard to the matters set out aforesaid.

(b) In not rejecting the Respondents' argument that the Appellant could not claim restitution, firstly, because he had derived some of the benefit which he had bargained for and secondly, because the

parties could not be restored to the situation in which they stood immediately before the time when the contract was made. The Federal Court sought to obtain support for the above view from four cases that were cited to it by the Respondents, but those cases were misapplied by the Federal Court for the following reasons:

(i) Hunt v Silk 1804 5 East 449 is not authority for the proposition that there cannot be restitution in a case where there has been a failure of part of the consideration and such consideration can be severed. Nor does it assist on the question of severability.

(ii) Taylor v Hare 1805 1 B. & P.N.R. 260 and Lawes v Purser 1856 6 E. & B. 930 are not applicable to a sale of shares where the purchaser has paid for but has not received any proper or valid title or the means of obtaining such title to the shares.

(iii) Clarke v Dickson 1858 E.B. & E. 148 has no application where on the principal of Rowland v Divall 1923 2 K.B. 500, the party who wishes to rescind has not received anything under the contract.

The Appellant's claim was not a claim for rescission of a contract, or part of a contract, but for the repayment of money on the ground of a total failure of consideration in respect of the disputed shares. The Appellant will rely on Fibrosa Spolka Akoyjna v Fairbairn Lawson Combe Barbour Ltd. 1943 A.C. 32, particularly the judgements of their Lordships at pp. 49, 52, 57, 60, 70 and 81 for the proposition that repayment may be made on the grounds of a total failure of consideration even though the contract is not rescinded ab initio. The Appellant further submits that the Federal Court failed to appreciate that where the consideration for the disputed shares could be severed from the rest of the contract price (as to which see (c) below) any question of any intermediate enjoyment of the shares purportedly purchased was to be judged solely in relation to the disputed shares, and that in the light of Rowland v Divall the above-mentioned cases provided no support for the Respondents in dealing with that question.

(c) In not rejecting the case put forward by Counsel for the Respondent in his submissions that the contract for the purchase of 1.4 million shares for $11,200,000 was a single and indivisible contract, The Federal Court

(i) failed to take into account the essential fact that the contract was for the sale of goods, because section 2 of the Sale of Goods (Malay States) Ordinance No 1 of 1957 (hereinafter called "the Sale of Goods Ordinance"), defines "goods" as including stock and shares. Where there is delivery by the seller of a quantity of goods less than he contracted to sell, the buyer is entitled to accept the goods delivered; if he does so, he must pay for them at the contract rate: See section 37 of the Sale of Goods Ordinance (which is the equivalent of section 30 of the Sale of Goods Act 1979, formerly section 30 of the Sale of Goods Act 1893). In such circumstances the consideration for the goods which have been delivered and accepted is thereupon severed from the consideration for the balance of the contract quantity, even if the original contract was entire: See Oxendale v Wetherall 1829 B. & C. 386. The partial performance of such an original contract does not by itself disentitle the buyer from claiming repayment of the price of the undelivered balance on the ground of total failure of consideration: See Whincup v Hughes 1871 L.R. 6 C.P. 78 per Bovill C.J. at p.81. Where the buyer has paid the price in advance, he is entitled to recover that part of the price attributable to the undelivered balance: Biggerstaff v Rowatt's Wharf Ltd 1896 2 Ch. 93.

(d) In not rejecting the argument of the Respondents based on section 13(2) of the Sale of Goods Ordinance and in stating that as the contract was not severable the only remedy of the defendant was to maintain an action for damages for breach of warranty. The Appellant submits that the contract was severable for the reasons set out aforesaid.

(e) In not rejecting the argument advanced by the Respondent that the Learned Judge had wholly overlooked another issue that fell to be determined, namely whether there was some conduct by way of estoppel on the part of the defendant, amounting to acceptance of performance of the contract. The Appellant submits that the Respondents had not relied upon this ground before Harun J. and that in any event there was no evidence before the Court on which the Respondents could argue that the Appellant had accepted that the Respondents had performed the contract in relation to the disputed shares.

(f) In not rejecting the argument advanced by the Respondents that the Learned Judge should have considered the equitable doctrine of laches. The Appellant submits that the doctrine of laches was not relevant (and nor was acquiescence), as the Appellant was not seeking an equitable remedy. In any event the Respondents did not raise the question of laches before Harun J. Moreover, no evidence was adduced by them before Harun J. to show that the Appellant had knowledge of the material facts and knowingly forebore to assert his rights.

(g) In not holding that the Appellant was entitled to the return of the purchase price of the disputed shares on the authority of Rowland v Divall 1923 2 K. B. 500. The Appellant submits that the instant case falls squarely within the principals set out in Rowland v Divall.

(h) In determining that the present case was based on the representation that the Third Party was the beneficial owner of 1, 4 million United Holdings shares. The writ, statement of claim and third party notice in the instant case do not aver or even mention any such representation. It appears that the Federal Court confused the instant case with civil suit No. 2323 mentioned at p. 28E of the Judgment.

(i) In holding that the Appellant ran the risk of losing the right to riscind if with knowledge of his right to do so he requested the other party to remedy the default, without the Federal Court going on to consider

the crucial question of the response to such request. The right to avoid a contract is only lost if the request is complied with; otherwise the unremedied default can still be treated by the innocent party as a breach entitling him to terminate the contract. A party does not affirm a contract unless he knows of the default by the other party and by his conduct elects to go on with the contract despite it. In the instant case the default remained unremedied until after the commencement of proceedings, and still remains unremedied. The Respondents adduce no evidence to support any contention that the Appellant elected to affirm the contract after learning of the default in relation to the disputed shares and failed to discharge the onus on them of establishing a triable issue on the question of affirmation.

(j) In holding that the Learned Judge's finding that the registration of the disputed shares was an error could not be sustained and that the question "whether the first act of registration" was an error ought "necessarily to be tested by evidence" and cross-examination. The Appellant submits that the Respondent had failed to adduce any evidence to show that the registration was not made in error. Moreover, there was no evidence before the Federal Court or Harun J. from which the Federal Court could infer either that the Secretary of U. H. B., must have advised Syarikat that the said Memorandum of Transfer was defective or that the Secretary "had clear knowledge that it was wrong" to register the transfer in the name of Syarikat. There was no evidence before the court to contradict the evidence of John Chew Sun Hey, the secretary of U. H. B., affirmed in his affidavit of the 10th January 1978, that the registration was made in error.

(k) In holding in any event that the identity and motives of any persons under whose orders the registration of the 31st March 1975 might have been effected (notwithstanding the absence of a valid Memorandum of Transfer in favour of the person to be registered) were matters which it was necessary to determine for a proper and final adjudication of the claim. Such registration, whatever the circumstances in which it was effected, had no effect whatever on the

contractual position as between the Appellant and the Respondents. The registration did not cure the fundamental defect in the Memorandum of Transfer and did not give Syarikat legal ownership, because the register is not conclusive: 7 Halsbury's Laws of England 4th edn., para. 302. The Respondents were in breach of contract in failing to deliver a valid Memorandum of Transfer which could support the right of the Appellant to be registered: Hichens, Harrison, Woolston & Co. v Jackson & Sons 1943 A.C. 266. In relation to the disputed shares, until the Respondents had remedied their default and delivered a valid Memorandum of Transfer in favour of the Appellant (or such persons as the Appellant might have directed) the Appellant would have received nothing under the contract. Whatever the propriety or impropriety of the registration it was not and could not reasonably have been regarded as being an election by the Appellant to go on with the contract and allow the Respondents to retain the purchase price of the disputed shares regardless of whether or not the Respondents ever produced a Memorandum of Transfer enabling the Appellant or Syarikat to acquire a valid title to the disputed shares.

(1) In holding that the question of rectification of the register of shareholders had any relevance at all to the matters which were the subject of the appeal to the Federal Court. The Appellant submits that the Federal Court was in error in saying that United Holdings had chosen to put upon the register persons (i.e. Syarikat, the plaintiffs) having a perfectly good equitable title to be there. On the evidence neither Syarikat nor the Appellant ever had an equitable title to the disputed shares. The registration of Syarikat was therefore plainly wrong. Accordingly, the whole passage in the Federal Court judgement from "a point deserving consideration" down to "having been in time" was misconceived and therefore irrelevant to the issues in the case. The register of members of United Holdings had been rectified without application to the court in circumstances where it was obvious that there had not been a valid transfer of the disputed shares to the plaintiffs. There was no serious dispute regarding title. Moreover, the Federal Court

misapplied the observation of McCardie J. in First National Reinsurance Co. v Greenfield 1921 2 K.B. 260, 279 because they confused a disputed right to registration with a disputed right to rectification. In the instant case, United Holdings, having discovered the error did not dispute the right to rectification: it quite rightly thought that rectification should be made as a matter of course.

(m) In the premises the Appellant respectfully submits that the Federal Court erred in concluding that there was "a question proper to be tried between the parties" by reason of the aforegoing matters.

34. On the 8th May 1980, the Right Honourable Lords of the Judicial Committee of the Privy Council by virtue of the Malaysia (Appeals to the Privy Council) Orders 1958 to 1969, having taken the Appellant's Petition for special leave into consideration and having heard Counsel on behalf of the Appellant, agreed to report to the Head of Malaysia that special leave ought to be granted to the Appellant to appeal against the said Judgments of the Federal Court.

CONCLUSION

35. In the premises, the Appellant respectfully submits that the Judgements of the Federal Court were wrong and ought to be reversed and this appeal ought to be allowed with costs, for the following:

R E A S O N S

(i) BECAUSE the Orders made by Harun J. were Interlocutory Orders from which leave to appeal under Section 68(2) was required;

(ii) BECAUSE the Respondents, having failed to obtain leave to appeal pursuant to Section 68(2) of the Court of Judicature Act 1964 were not entitled to bring their appeal and the same should have been dismissed;

(iii) BECAUSE the Respondents abandoned the single ground upon which they had elected to rely to obtain leave to defend before Harun J. and put forward entirely new and different grounds, when they should have been prevented from so doing.

(iv) BECAUSE the Respondents did not establish or show that there was any question proper to be tried or proper grounds for obtaining leave to defend.

KEITH HORNBY

NICHOLAS STEWART

IN THE PRIVY COUNCIL No. 55 of 1980

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

BETWEEN:

HARON BIN MOHD ZAID	(Defendant) Appellant
- and -	
CENTRAL SECURITIES (HOLDINGS) BERHAD	(Third Party) Respondent

CASE FOR THE APPELLANT

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